

REPORTS OF CASES
DECIDED IN THE
APPELLATE DIVISION
OF THE
SUPREME COURT
OF THE
STATE OF NEW YORK

WILLIAM J. HOOKS

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¹ A retired Justice of the Supreme Court designated to serve as temporary or additional Justice of the Appellate Division (NY Const, art VI, § 25 [b], as amended eff Jan. 1, 1967).

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CASES DECIDED

IN THE

APPELLATE DIVISION

OF THE

SUPREME COURT

OF THE

STATE OF NEW YORK

[989 NYS2d 838]

In the Matter of JASON V. OBTEN, a Suspended Attorney, Respondent. DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, July 3, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on July 24, 2000 at a term of the Appellate Division of the Supreme Court in the First Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Disbarment

Inasmuch as more than six months had elapsed since respondent attorney was suspended from the practice of law based on his failure to cooperate with the Departmental Disciplinary Committee's investigation of allegations that he neglected a client matter and his failure to register, and he neither appeared nor applied in writing for a hearing or reinstatement during that time period, respondent was disbarred pursuant to 22 NYCRR 603.4 (g).

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 37, 53, 66, 107, 113.

CARMODY-WAIT 2d, Officers of Court §§ 3:255, 3:256, 3:281, 3:282, 3:325–3:327, 3:337.

22 NYCRR 603.4 (g).

NY JUR 2d, Attorneys at Law §§ 360, 361, 383, 466, 467, 470, 476, 478, 480.

ANNOTATION REFERENCE

Failure to cooperate with or obey disciplinary authorities as ground for disciplining attorney—modern cases. 37 ALR4th 646.

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Database: NY-ORCS

Query: disbarred & six /2 month /s suspension & fail! /3 cooperate & neglect! & fail! /3 register

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (Orlando Reyes of counsel), for petitioner.

No appearance for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Jason V. Obten was admitted to the practice of law in the State of New York by the First Judicial Department on July 24, 2000. Although respondent's last known business address, listed with the Office of Court Administration in 2008, is in New Mexico, this Court has jurisdiction over him based upon his admission by this Court (*see* Rules of App Div, 1st Dept [22 NYCRR] § 603.1 [a]).

The Departmental Disciplinary Committee seeks an order disbarring respondent pursuant to 22 NYCRR 603.4 (g) because he was suspended under 22 NYCRR 603.4 (e) (1) (i) and (iii), and did not appear or apply in writing to the Committee or this Court for a hearing or reinstatement within six months from the date of the order of suspension (Sept. 17, 2013).

Respondent was suspended because he threatened the public interest by failing to cooperate with the Committee's investigation of a complaint alleging that he neglected a client matter (*see* 22 NYCRR 603.4 [e] [1] [i]), and by failing to register as required by Judiciary Law § 468-a (*see* 22 NYCRR 603.4 [e] [1] [iii]).

On September 18, 2013, the Committee served respondent with a notice of entry of the Court's suspension order by mail-

ing the notice and order to four different addresses in three different states by first-class mail and certified mail, return receipt requested. A receipt from a California address, with a signature which does not appear to be respondent's, was returned to the Committee; the other mailings were returned unsigned.

The Committee's previous application for immediate suspension contained the following notice to respondent:

"PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR 603.4 (g), an attorney who is suspended and who has not appeared, or applied in writing to the Committee or this Court for a hearing or reinstatement, for six months from the date of the order of suspension, may be disbarred without further notice."

More than six months have passed since this Court's September 17, 2013 suspension order but respondent has not sought a hearing or reinstatement (*see Matter of Bruzdziak*, 111 AD3d 118 [1st Dept 2013]; *Matter of Mainiero*, 109 AD3d 133 [1st Dept 2013]; *Matter of Reis*, 105 AD3d 62 [1st Dept 2013]; *Matter of Claffey*, 99 AD3d 201 [1st Dept 2012]).

Accordingly, the Committee's motion for an order disbarring respondent in accordance with 22 NYCRR 603.4 (g) should be granted and respondent's name stricken from the roll of attorneys in the State of New York, effective immediately.

RENWICK, J.P., DeGRASSE, FREEDMAN, RICHTER and MANZANET-DANIELS, JJ., concur.

Respondent disbarred, and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof.

[987 NYS2d 865]

In the Matter of MIGUEL A. TERC, an Attorney, Respondent.
GRIEVANCE COMMITTEE FOR THE SECOND, ELEVENTH, AND
THIRTEENTH JUDICIAL DISTRICTS, Petitioner.

Second Department, July 2, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts. Respondent was admitted to the bar on June 7, 2004 at a term of the Appellate Division of the Supreme Court in the First Judicial Department. By decision and order on application of this Court dated December 13, 2011, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against the respondent and the issues raised were referred to the Honorable James G. Starkey, as Special Referee, to hear and report.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Public Censure

Respondent attorney aided a nonlawyer in the unauthorized practice of law in violation of former Code of Professional Responsibility DR 3-101 (a) and DR 1-102 (a) (4), (5) and (7) (22 NYCRR 1200.16 [a]; 1200.3 [a] [4], [5], [7]), failed to safeguard funds entrusted to him as a fiduciary in violation of former Code of Professional Responsibility DR 9-102 (b) (1) and DR 1-102 (a) (5) and (7) (22 NYCRR 1200.46 [b] [1]; 1200.3 [a] [5], [7]) and engaged in conduct that was deceptive and misleading to the public and clients. Under the totality of circumstances, including respondent's lack of a prior disciplinary history, his lack of intent to deceive, his due diligence inasmuch as he did research the rules governing legal consultants in an effort to comply with the rules, his cooperation with the Grievance Committee's investigation, his contributions to the military as a member of the National Guard, the commendation he received upon being honorably discharged, his hard work, the award he received as a distinguished student from the American Bar Association, and his current provision of legal services to low-income Spanish speaking clients, respondent was publicly censured.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 44, 54, 62, 65, 70, 113.
CARMODY-WAIT 2d, Officers of Court §§ 3:257, 3:279, 3:289,
3:326, 3:328, 3:332.
22 NYCRR 1200.3 (a) (4), (5), (7); 1200.16 (a); 1200.46 (b)
(1).
NY JUR 2d, Attorneys at Law §§ 351, 407–410, 476, 478,
480, 483, 489.

ANNOTATION REFERENCE

Disciplinary action against attorney for aiding or assisting another person in unauthorized practice of law. 41 ALR4th 361.

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Database: NY-ORCS

Query: censured & aid! /s unauthorized /2 practice & fail!
/3 safeguard

APPEARANCES OF COUNSEL

Diana Maxfield Kearse, Brooklyn (*Thomas Graham Amon* of counsel), for petitioner.

Richard E. Grayson, White Plains, for respondent.

OPINION OF THE COURT

Per Curiam.

The respondent was admitted to the bar at a term of the Appellate Division of the Supreme Court in the First Judicial Department on June 7, 2004.

The Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts served the respondent with a petition dated June 14, 2011, containing two charges of professional misconduct. After a preliminary conference on July 31, 2012, and a hearing conducted on January 23, 2013, the Special Referee issued a report sustaining the charges. The Grievance Committee now moves to confirm the Special Referee's report and impose such discipline upon the respondent as the Court deems just and proper. The respondent has submitted a reply, wherein he, in effect, cross-moves to disaffirm the findings of the Special Referee and to dismiss the charges. In the event the Court sustains the charges, the respondent requests that the discipline imposed be a public censure.

Charge one alleges that the respondent aided a nonlawyer in the unauthorized practice of law, in violation of former Code of Professional Responsibility DR 3-101 (a) and DR 1-102 (a) (4), (5) and (7) (22 NYCRR 1200.16 [a]; 1200.3 [a] [4], [5], [7]). On or about June 21, 2006, Hernan Raul Vasquez Alzamora (hereinafter Mr. Vasquez), a Peruvian attorney, was licensed as a legal consultant by this Court, pursuant to 22 NYCRR part 692 and 22 NYCRR 521.3. In or about the spring of 2007, the respondent and Mr. Vasquez, who had returned to Peru, formed "Hernan Vasquez A. and Associates" (hereinafter the Vasquez

firm) for the purpose of engaging in the practice of law in New York. Clients of the Vasquez firm were represented by the respondent or a per diem attorney retained by the respondent. When court appearances were required, the respondent or the per diem attorney would file a notice of appearance in the name of the Vasquez firm.

The respondent created a retainer agreement for the Vasquez firm, and all legal fees were paid to the Vasquez firm. The respondent knew that Mr. Vasquez received \$300 from those legal fees on a monthly basis. The respondent helped create a website describing the Vasquez firm as a “law firm” engaged in the practice of law in New York, specifically in the areas of immigration, divorce, domestic relations, criminal law, and real estate. The website provided legal advice on various legal topics. The respondent also created business cards that represented that the Vasquez firm engaged in the practice of law in New York, specifically, in the areas of bankruptcy, criminal law, family law, and divorce law.

The respondent knew that Mr. Vasquez was not an attorney admitted to the practice of law in New York. He knew, or should have known, that, pursuant to 22 NYCRR 521.3 (f), Mr. Vasquez, as a legal consultant, was prohibited from holding himself out as an attorney.

Charge two alleges that the respondent failed to safeguard funds entrusted to him as a fiduciary, in violation of former Code of Professional Responsibility DR 9-102 (b) (1) and DR 1-102 (a) (5) and (7) (22 NYCRR 1200.46 [b] [1]; 1200.3 [a] [5], [7]). In or about 2008, the respondent appeared for the Vasquez firm and represented a party in a matrimonial action in the Supreme Court, Queens County. During the course of that proceeding, the justice directed the respondent to hold certain funds in escrow. The respondent caused those funds to be deposited into an escrow account entitled, “Hernan Vasquez A. & Associates,” to which the respondent was not a signatory and with respect to which the respondent had no control.

Based on the evidence adduced and the respondent’s admissions, the Special Referee properly sustained the charges. We find no merit to the respondent’s contention that Mr. Vasquez did not hold himself out as an attorney or did not practice law because Mr. Vasquez was in Peru during the relevant time period. The evidence demonstrated that Mr. Vasquez never disclosed his status as a foreign legal consultant on the firm’s website, retainer agreement, or business card/flyer. Hence, the

respondent engaged in conduct that was deceptive and misleading to the public and clients. We note that Mr. Vasquez resigned as a legal consultant, and in submitting his resignation to this Court, Mr. Vasquez acknowledged that he exceeded his scope of practice as a legal consultant (*see Matter of Alzamora*, 81 AD3d 22 [2011]). Accordingly, the Grievance Committee's motion to confirm the report of the Special Referee is granted.

In determining the appropriate measure of discipline to impose, the respondent asks the Court to consider, in mitigation, the following factors: the lack of intent on his part to deceive, the lack of a prior disciplinary history, his due diligence inasmuch as he did research the rules governing legal consultants in an effort to comply with the rules, and his cooperation with the Grievance Committee's investigation. Additionally, he asks that the Court consider his contributions to the military as a member of the National Guard, the commendation he received upon being honorably discharged, his hard work, the award he received as a distinguished student from the American Bar Association, and his current provision of legal services to low-income Spanish speaking clients.

Under the circumstances of this case, including the aforementioned mitigating circumstances, we find that a public censure is warranted.

ENG, P.J., MASTRO, RIVERA, SKELOS and DICKERSON, JJ., concur.

Ordered that the motion of the petitioner to confirm the report of the Special Referee is granted, and the, in effect, cross motion of the petitioner is denied; and it is further,

Ordered that the respondent, Miguel A. Terc, is publicly censured for his misconduct.

[985 NYS2d 350]

ROSE PARK PLACE, INC., et al., Respondents, v STATE OF NEW YORK, Appellant. (Appeal No. 1.)

Fourth Department, May 2, 2014

SUMMARY

APPEAL from a judgment of the Court of Claims (Michael E. Hudson, J.), entered September 14, 2012. The judgment awarded claimants money damages for the appropriation of land pursuant to the Eminent Domain Procedure Law and the Highway Law.

HEADNOTE**Eminent Domain — Consequential Damages — Award That Included Value of Land Sold before Taking**

In a proceeding in which claimants sought damages for the diminished value of land remaining after defendant State of New York's taking of approximately 1.22 acres from what was claimants' 17.3-acre parcel, Court of Claims erred in including within the acreage for which it awarded consequential damages a 4.63-acre parcel that was sold by claimants before the taking. When the sovereign takes part of a condemnee's property and leaves a remainder, just compensation includes not only the direct damages for the portion that was taken, but also any consequential or indirect damages caused by the taking that impaired the remaining portion of the property. However, the condemnee is allowed to multiply the higher per-acre value of the original parcel by the number of acres under his or her ownership at the time of the taking, not by the acreage he or she once owned and had previously sold. The concept of condemnation blight is irrelevant where the claimants did not own the parcel at issue at the time of the taking.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Courts §§ 36, 129, 133, 134; AM JUR 2d, Eminent Domain §§ 120, 279, 281–283, 476, 517.

CARMODY-WAIT 2d, Courts and Their Jurisdiction §§ 2:302, 2:304, 2:306–2:308; CARMODY-WAIT 2d, Eminent Domain §§ 108:115, 108:118, 108:120.

NY JUR 2d, Courts and Judges §§ 212, 213; NY JUR 2d, Eminent Domain §§ 146, 200–203, 318–320.

ANNOTATION REFERENCE

See ALR Index under Eminent Domain; Precedents.

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Database: NY-ORCS

Query: eminent /2 domain & consequential /2 damage /p
property land /s sold

APPEARANCES OF COUNSEL

Eric T. Schneiderman, Attorney General, Albany (*Owen Demuth* of counsel), for appellant.

Magavern Magavern Grimm LLP, Buffalo (*Edward J. Markarian* of counsel), for respondents.

OPINION OF THE COURT

FAHEY, J.

Here we address the issue whether consequential damages may be awarded when the real property in question was sold months before the taking of other real property that affects the land in question. Claimants commenced this proceeding seeking damages for the diminished value of approximately 16 acres of what claimants characterized as “remaining land” following defendant’s taking of approximately 1.22 acres of land from what was claimants’ 17.3-acre parcel. Following a trial, the Court of Claims awarded claimants consequential damages with respect to what the court concluded was 12.835 acres of that parcel. Included in the 12.835 acres of land for which the court awarded consequential damages were 4.63 acres of land sold by claimants to Progressive Casualty Insurance Company (Progressive Parcel) for \$1,800,000. That sale occurred in November 2005, i.e., before the taking of the aforementioned 1.22 acres of land in July 2006. Defendant now contends that the award of consequential damages was excessive inasmuch as the court erroneously awarded consequential damages for the Progressive Parcel. We agree.

I

Our analysis begins “with the proposition that [i]t is constitutionally mandated that the sovereign will pay just compensation for property it takes by its powers of eminent domain. Just compensation is properly measured by determining what the owner has lost” (*Matter of USA Niagara Dev. Corp. [Settco, LLC]*, 51 AD3d 377, 379 [2008], *lv denied* 11 NY3d 704 [2008] [internal quotation marks omitted]). Put differently, “[w]hen [defendant] takes property by eminent domain, the Constitution requires that it compensate the owner ‘so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred’ ” (*Matter of City of New*

York [Kaiser Woodcraft Corp.], 11 NY3d 353, 359 [2008], *rearg denied* 11 NY3d 903 [2009], quoting *City of Buffalo v Clement Co.*, 28 NY2d 241, 258 [1971], *rearg denied* 29 NY2d 640 [1971] [hereafter *Clement*]).

“When there is a partial taking of land, damages are measured ‘by finding the difference between the fair market value of the whole before the taking and the fair market value of the remainder after the taking’ ” (*Erie County Indus. Dev. Agency v Fry*, 254 AD2d 721, 721-722 [1998], quoting *Acme Theatres v State of New York*, 26 NY2d 385, 388 [1970]; see *McDonald v State of New York*, 42 NY2d 900, 900 [1977]; *National Fuel Gas Supply Corp. v Goodremote*, 13 AD3d 1134, 1135 [2004]). Therefore,

“when [defendant] takes part of a condemnee’s property and leaves a remainder, just compensation includes not only the direct damages for the portion that was taken, but also any consequential or indirect damages caused by the taking that impaired the remaining portion of the property . . . Consequential damages are measured by the difference between the before and after values, less the value of the land and improvements appropriated . . . The burden of proof is on the claimant to establish indirect damages and to furnish a basis upon which a reasonable estimate of those damages can be made” (*Lerner Pavlick Realty v State of New York*, 98 AD3d 567, 568 [2012]).

II

Before us here is not an issue concerning the *amount* of consequential damages with respect to the Progressive Parcel, but the issue whether *any* such damages should have been awarded relative to that parcel. Viewed as a whole, the Court of Appeals’ decision in *Wilmot v State of New York* (32 NY2d 164, 167-168 [1973], *rearg denied* 33 NY2d 657 [1973]) stands for the proposition that the condemnee is allowed to multiply the higher per-acre value of the original parcel by the number of acres under his or her ownership at the time of the taking, not by the acreage he or she once owned and had previously sold (see also *90 Front St. Assoc., LLC v State of New York*, 79 AD3d 708, 710 [2010]). In view of that proposition of law, here the court properly excluded the sale of the Progressive Parcel in calculating the pre-taking, per-acre value of claimants’ parcel.

The court, however, erred in including the Progressive Parcel in the acreage for which it awarded consequential damages.

Claimants attempt to evade *Wilmot* by contending that the part of that case providing that consequential damages are unavailable relative to property that is sold prior to a planned taking and from which no land is ultimately appropriated is dicta. We reject that contention.

“ ‘To identify dictum, it is useful to turn the questioned proposition around to assert its opposite, or to assert whatever alternative proposition the court rejected in its favor. If the insertion of the rejected proposition into the court’s reasoning, in place of the one adopted, would not require a change in either the court’s judgment or the reasoning that supports it, then the proposition is dictum. It is superfluous. It had no functional role in compelling the judgment’ ” (*People v Taylor*, 9 NY3d 129, 164 [2007, Read, J., dissenting], quoting Leval, Madison Lecture, *Judging Under the Constitution: Dicta about Dicta*, 81 NYU L Rev 1249, 1257 [2006]).

Applying that test here, we conclude that the part of *Wilmot* at issue is a secondary holding, i.e., that such determination was necessary to *Wilmot*’s primary holding with respect to the unsold land and is therefore law (*see Pollicino v Roemer & Featherstonhaugh*, 277 AD2d 666, 667-668 [2000]; *see also Matter of Hellner v Board of Educ. of Wilson Cent. School Dist.*, 78 AD3d 1649, 1650-1651 [2010]; *cf. United States v Henderson*, 961 F2d 880, 882 [1992]).

Claimants further attempt to avoid the holding of *Wilmot* through reference to the “condemnation blight” doctrine, but that attempt likewise fails. *Clement* teaches that a de facto taking

“requires a physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner’s power of disposition of the property. On the other hand, ‘condemnation blight’ relates to the impact of certain [value-depressing] acts [on the part of the condemning authority] upon the value of the subject property. It in no way imports a *taking* in the constitutional sense, but merely permits of a more realistic valuation of the condemned property in the

subsequent *de jure* proceeding. In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation” (28 NY2d at 255; *see id.* at 254).

Clement also teaches that, “[i]n . . . cases where true condemnation blight is present, the claimant may introduce evidence of value prior to the onslaught of the ‘affirmative value-depressing acts’ ” (*id.* at 257-258). In other words, the concept of condemnation blight “relates to the rules of evidence” (*id.* at 254), and is relevant to the measurement of damages; indeed, “when damages are assessed on [a] claim for [a] *de jure* appropriation, the claimant’s property should be evaluated not on its diminished worth caused by the condemnor’s action, but on its value except for such ‘affirmative value-depressing acts’ of the appropriating sovereign” (*id.* at 258). *Clement* does not, however, impact the application of the *Wilmot* principle, pursuant to which consequential damages are unavailable relative to property that is sold prior to a planned taking and from which no land is ultimately appropriated.

Inasmuch as claimants did not own the Progressive Parcel at the time of the taking, the concept of condemnation blight is irrelevant here. Moreover, even if claimants frame their claim for *de facto* taking by reference to condemnation blight, such characterization is unpersuasive inasmuch as there was no “physical entry by the condemnor, . . . physical ouster of the owner, . . . legal interference with the physical use, possession or enjoyment of the property or . . . legal interference with the owner’s power of disposition of the [Progressive Parcel]” (*id.* at 255).

III

We now turn to the issue of the remedy. Here, defendant challenges not the amount of consequential damages per square foot, but the square feet subject to an award of consequential damages. The square footage at issue is known to us, and defendant does not contest either the court’s pre-taking valuation of the land at issue (\$450,000 per acre or \$10.33 per square foot) or the post-taking value of the land at issue (\$1,766,625).

Our analysis is therefore straightforward: absent the Progressive Parcel, there are 8.21 acres of land for which consequential damages may be awarded. Multiplying the pre-taking value of

\$10.33 per square foot by 357,628 square feet yields a product of \$3,694,297.24. Subtracting \$1,766,625 (the post-taking value of the land at issue) yields a difference of \$1,927,672.24 in consequential damages. That figure is \$281,103 less than what the court awarded in consequential damages and, consistent with claimants' suggestion, we conclude that the judgment should be modified by vacating the award of consequential damages and substituting therefor an award of \$1,925,275 with an interest rate of 9% per annum covering the period from July 25, 2006 to September 14, 2012.

IV

Accordingly, we conclude that the court erred in awarding consequential damages for the Progressive Parcel, and that the judgment should be modified by vacating the award of consequential damages and substituting therefor an award of \$1,925,275 with an interest rate of 9% per annum covering the period from July 25, 2006 to September 14, 2012.

SMITH, J.P., PERADOTTO, CARNI and SCONIERS, JJ., concur.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by vacating the award of consequential damages and substituting therefor an award of \$1,925,275 with interest of 9% per annum for the period from July 25, 2006 to September 14, 2012 and as modified the judgment is affirmed without costs.

[987 NYS2d 70]

In the Matter of GWEN E. SNORTELAND (Admitted as GWEN ELIZABETH SNORTELAND), an Attorney, Respondent. DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, June 5, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on May 19, 2005 at a term of the Appellate Division of the Supreme Court in the First Judicial Department as Gwen Elizabeth Snorteland.

HEADNOTE**Attorney and Client — Disciplinary Proceedings — Interim Suspension**

Respondent attorney was immediately suspended from the practice of law on an interim basis pending further disciplinary proceedings for her willful failure to cooperate with the Departmental Disciplinary Committee's investigation into allegations of professional misconduct which immediately threatened the public interest arising out of a Securities and Exchange Commission complaint based on charges surrounding respondent's role as a transaction manager within an investment banking entity that mislead investors in a collateralized debt deal.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 37, 40, 44, 53.

CARMODY-WAIT 2d, Officers of Court §§ 3:256, 3:279, 3:323, 3:325.

NY JUR 2d, Attorneys at Law §§ 344, 361, 466, 467.

ANNOTATION REFERENCE

Failure to cooperate with or obey disciplinary authorities as ground for disciplining attorney—modern cases. 37 ALR4th 646.

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Database: NY-ORCS

Query: suspended /s immediate! & failed /3 cooperate & investor

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (Naomi F. Goldstein of counsel), for petitioner.

Gwen E. Snorteland, respondent pro se, no appearance.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law in the State of New York by the First Judicial Department on May 19, 2005 under the name Gwen Elizabeth Snorteland. While respondent does not maintain a law office in this Department, jurisdiction attaches based upon her admission within the First Judicial Department (Rules of App Div, 1st Dept [22 NYCRR] § 603.1).

The Departmental Disciplinary Committee moves for an order pursuant to 22 NYCRR 603.4 (e) (1) (I) immediately suspending respondent from the practice of law, until further order of this Court, based upon her willful failure to cooperate with the Committee's investigation into allegations of professional misconduct which immediately threatens the public interest.

The Committee commenced a sua sponte investigation into respondent's conduct after receiving a copy of a Security and Exchange Commission's (SEC) complaint against respondent and a cease and desist order. The SEC complaint was based on charges surrounding respondent's role as a transaction manager within an investment banking entity that mislead investors in a collateralized debt deal during the housing market crisis (2007-2008). Respondent settled the matter with the SEC and consented to the cease and desist order wherein she agreed to a one-year suspension without admitting or denying the SEC's allegations. Upon receiving a copy of the complaint along with the cease and desist order, the Committee made a series of attempts to contact respondent.

By letter dated August 8, 2013, the Committee wrote respondent at her registered address in Michigan advising her of the sua sponte investigation, enclosing a copy of the SEC complaint and cease and desist order, and requesting a response to the allegations and findings by the SEC. A copy of the letter sent by first-class mail was returned stamped "Return to Sender" and "Canceled Mailbox." The letter sent by certified mail was not returned. Thereafter, a Lexis search for respondent elicited two additional addresses, one in New York and one in Maine, with the Maine address being confirmed by her attorney in the SEC matter as a recent address. The Committee re-dated the August letter, and on October 2, 2013, sent a letter to respondent at the Maine address, again requesting an answer within 30 days. The

Maine post office sent respondent two notices about the certified letter before it was returned to the Committee.

The Committee also sent respondent a follow-up letter to the August 8 mailing by sending a letter on October 3, 2013 to the Michigan address as well as the newly obtained New York address. This letter advised respondent that she had 10 extra days to submit a response and that her failure to cooperate would expose her to the possibility of suspension for noncooperation. The first-class letters were not returned. However, the certified mailing to New York was returned marked “unable to forward.”

On November 21, 2013, a Committee staff attorney spoke with respondent’s attorney in the SEC matter. The Committee received a current address for respondent in Ohio. Thereafter, respondent telephoned the Committee staff attorney; extensively inquired about the investigation; stated that she did not want to deal with the investigation; asked if she could resign; and advised that she was no longer practicing law. The Committee staff attorney explained the resignation procedure for an attorney who is the subject of an investigation. Respondent asked the Committee to draft a proposed affidavit of resignation for her to review, make corrections and sign.

By letter dated December 9, 2013, the Committee wrote respondent, confirming the November 21, 2013 phone conversation and enclosed copies of the Committee’s original August 8, 2013 letter notifying her of the sua sponte investigation with the enclosures, and the October 3, 2013 letter advising her of the possible consequences of noncooperation. This letter was sent by first-class mail and certified mail to the new Ohio address with the certified copy being returned as “unclaimed.”

By letter dated January 13, 2014, the Committee sent respondent a draft affidavit of resignation and asked her to review it, make whatever changes she deemed necessary, sign it, and let the Committee know within 20 days what she planned on doing. Respondent did not reply within that time period. On February 19, 2014, respondent telephoned the Committee explaining that she had been very sick and unable to reply earlier but, in any event, she would not be resigning because she would not sign the document. The Committee staff attorney informed respondent of the option to seek an interim suspension due to incapacity if she was too ill to defend herself. Respondent was advised that she was required to file an answer to the sua sponte complaint and that if she failed to do so, her failure to cooperate could result in her interim suspension and eventual disbarment.

Further, respondent was provided five additional days to respond.

On February 24, 2014, the Committee received a handwritten letter from respondent dated February 19, 2014, which said: “I will not be filing an answer to the complaint or otherwise participate[] in this investigation . . . So go ahead and disbar me for ‘failure to cooperate’.” Upon receipt of respondent’s letter, the Committee wrote her to offer the chance to document her claimed health issues with medical records within 10 days. Respondent did not reply.

It is uncontroverted that the Committee made numerous attempts to communicate with respondent, and that she has thwarted its investigation by failing to answer the sua sponte complaint. Thus, we find that respondent has wilfully failed to cooperate with the Committee’s investigation. While respondent eventually made contact with the Committee, she made affirmative statements that she will not provide an answer to the complaint as directed by the Committee; she will not participate in its investigation; she invites the Committee to suspend or disbar her; and she defaulted on the instant motion seeking her immediate suspension. Such conduct constitutes willful noncompliance with a Committee investigation and threatens the public interest warranting immediate suspension from the practice of law (see e.g. *Matter of Jones*, 74 AD3d 1 [1st Dept 2010]; *Matter of Kaplan*, 49 AD3d 107 [1st Dept 2008]; *Matter of Medina*, 33 AD3d 250 [1st Dept 2006]; *Matter of Murawinski*, 30 AD3d 129 [1st Dept 2006]).

Accordingly, the Committee’s motion should be granted and respondent suspended from the practice of law, effective immediately, pursuant to 22 NYCRR 603.4 (e) (1) (i), and until the further order of this Court.

GONZALEZ, P.J., SWEENEY, MOSKOWITZ, RICHTER and CLARK, JJ., concur.

Respondent suspended from the practice of law in the State of New York, effective the date hereof, until such time as disciplinary matters pending before the Committee have been concluded, and until further order of this Court.

[987 NYS2d 338]

Ji SUN JENNIFER KIM, Respondent, v GOLDBERG, WEPRIN,
FINKEL, GOLDSTEIN, LLP, et al., Appellants.

First Department, June 3, 2014

SUMMARY

APPEAL from an order of the Supreme Court, New York County (Louis B. York, J.), entered April 25, 2013. The order, to the extent appealed from, denied defendants' motion to dismiss, or for summary judgment dismissing, the complaint alleging gender/pregnancy discrimination, hostile work environment, and retaliatory termination under the State and City Human Rights Laws.

HEADNOTES

Judgments — Collateral Estoppel — Discrimination Claims under State and Municipal Human Rights Laws Not Barred by Dismissal of Prior Federal Action Asserting Retaliation Claim Based on Family and Medical Leave Act

1. Collateral estoppel did not bar plaintiff's claims of retaliatory termination in an action to recover under the state Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*) where plaintiff's prior federal action asserting retaliation claims under the Family and Medical Leave Act (29 USC § 2601 *et seq.*) were dismissed, since the state and city claims were entirely distinct from the retaliation claims asserted in the federal action. In the federal action, the court only decided whether plaintiff was retaliated against for exercising her rights under the federal statute. In the state action however, plaintiff did not claim retaliation based on her exercise of federal statutory rights, but instead alleged retaliation under the state and city Human Rights Laws based on entirely different instances of protected activity. Specifically, plaintiff alleged she was discharged for filing a written complaint about her reprimand for allegedly reading a book during work hours, and for verbally complaining about an alleged inappropriate comment. Because the federal court's decision did not address either of those claimed bases for retaliation, it could not be said that the federal action "necessarily decided" the same issues raised by the state and city retaliation claims, and thus collateral estoppel did not apply. While the federal court found insufficient facts to conclude that discrimination played a role in the decision to terminate plaintiff, that finding was made solely in the context of analyzing the discrete claim of retaliation under the federal statute, and was unrelated to plaintiff's state and city claims.

Civil Rights — Discrimination in Employment — Retaliatory Discharge — Pretextual Reason Offered for Discharge

2. In an action alleging retaliatory termination claims under the state Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*) arising out of plaintiff's termination from employment, defendants' motion to dismiss was properly denied where there was no dispute that plaintiff engaged in protected

activity by making two complaints opposing discriminatory treatment. Similarly, there was no question that defendant law firm's termination of her constituted an adverse or disadvantageous employment action. After making the first complaint, plaintiff alleged she was told by one partner to refrain from complaining in the workplace, and following the second complaint, plaintiff claimed that another partner barely spoke to her again. In addition, plaintiff's termination two months after the second complaint may establish the necessary causal nexus between the protected activity and her discharge. Although defendants articulated a nonretaliatory reason for plaintiff's termination, namely a workforce reduction, triable issues of fact existed as to whether that stated reason was a pretext for retaliation, and whether, absent a retaliatory motive, defendant's decision to terminate her would have occurred, where the record contained evidence that at the time plaintiff was terminated the law firm was expanding and allegedly was "busier than ever." Accordingly, viewed in the light most favorable to plaintiff, the evidence was sufficient to defeat summary judgment on the retaliation claims.

Civil Rights — Discrimination in Employment — Hostile Work Environment

3. In an action alleging claims under the state Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*) arising out of plaintiff's termination from employment following her return to work after a maternity leave, dismissal of plaintiff's hostile work environment claim was warranted. There was no view of the evidence that any conduct by defendants was severe or pervasive enough to create an objectively hostile or abusive environment within the meaning of the state Human Rights Law. Plaintiff cited only isolated remarks or incidents and a reprimand for reading a book on the job. Plaintiff's claim that she was treated differently after returning from maternity leave was too vague to constitute evidence of a hostile work environment. Nor could plaintiff's hostile work environment claim be sustained under the city Human Rights Law, since a reasonable person would consider the complained-of conduct (e.g., one partner's refusal to speak to her) nothing more than petty slights and trivial inconveniences.

Civil Rights — Discrimination in Employment — Discrimination Based on Gender/Pregnancy

4. In an action under the state Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*) arising out of plaintiff's termination from employment following her return to work after a maternity leave, plaintiff's claim of gender/pregnancy discrimination was dismissed, where the only discriminatory act alleged was the denial of plaintiff's request for a modified work schedule. The evidence in the record established that defendant law firm's policy did not allow for a reduced schedule for any attorney, and that the firm had not permitted any associate attorney to work part-time in the past 10 years. Thus, plaintiff was unable to establish that she suffered unequal treatment in the terms and conditions of her employment under the state Human Rights Law, or that she was treated less well than other employees under the city Human Rights Law.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Civil Rights §§ 12, 36, 141, 469; AM JUR 2d,

Job Discrimination §§ 2037, 2057; AM JUR 2d, Judgments §§ 471, 491, 510, 534.

CARMODY-WAIT 2d, Limitation of Actions § 13:355; CARMODY-WAIT 2d, Pretrial Motions to Dismiss § 38:9; CARMODY-WAIT 2d, Judgments §§ 63:510, 63:526; CARMODY-WAIT 2d, Proceedings Against a Body or Officer §§ 145:407, 145:1139.

McKINNEY'S, Executive Law § 290 *et seq.*

NY JUR 2d, Civil Rights §§ 17, 31, 38, 110, 208, 213-214, 220, 232; NY JUR 2d, Judgments §§ 428, 440-441, 465-466, 472.

29 USCA § 2601 *et seq.*

ANNOTATION REFERENCE

See ALR Index under Collateral Estoppel; Equal Employment Opportunity; Family and Medical Leave Act; Judgments, Orders, and Decrees.

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APPEARANCES OF COUNSEL

L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (*Marie A. Hoenings* and *Nicole Feder* of counsel), for appellants.

Karpf, Karpf & Cerutti, P.C., Astoria (*Adam C. Lease* of counsel), for respondent.

OPINION OF THE COURT

RICHTER, J.

In this appeal, we are asked to decide whether plaintiff's claims of retaliatory termination under the New York State and New York City Human Rights Laws (Executive Law § 290 *et seq.*; Administrative Code of City of NY § 8-107 *et seq.*) are barred by collateral estoppel based on a federal court's dismissal of plaintiff's claims of retaliation asserted under the Family and Medical Leave Act of 1993 (29 USC § 2601 *et seq.*) (FMLA). We conclude that collateral estoppel does not apply because the state and city retaliation claims asserted in this action are entirely distinct from the FMLA retaliation claims raised and decided in the federal action. On the merits, we find that issues of fact exist as to whether the employer's stated reason for plaintiff's discharge was a pretext for retaliation. We grant summary judgment, however, dismissing plaintiff's claims of gender discrimination and hostile work environment.

In January 2008, plaintiff Ji Sun Jennifer Kim was hired as an associate attorney in the tax certiorari department of defendant law firm Goldberg, Weprin, Finkel, Goldstein, LLP. In January 2009, plaintiff learned she was expecting a child and informed the law firm of her pregnancy. In June 2009, while visibly pregnant, plaintiff was reprimanded by a partner at the law firm for allegedly reading a book during work hours. According to plaintiff, the partner stood extremely close and screamed at her, causing plaintiff to fear that she would be hit.

Plaintiff promptly emailed a complaint about the incident to defendants Arnold Mazel and Barry Zweigbaum, both partners in the law firm. In that complaint, plaintiff alleged that two other attorneys, both male, were engaging in similar behavior at the same time but were not admonished. Plaintiff's email expressed concern that she was singled out and treated unfairly due to her pregnancy. Defendant Andrew Albstein, the law firm's managing partner, wrote an email to plaintiff reiterating that reading a book during work hours was inappropriate, and denying that plaintiff was reprimanded due to her pregnancy. Plaintiff also alleges that Mazel told her that she made her situation worse by complaining.

In September 2009, plaintiff took 12 weeks' maternity leave. Upon her return to work in December 2009, plaintiff began to express breast milk at the office. At some point in February 2010, Zweigbaum, within earshot of plaintiff, is alleged to have made an inappropriate gender-based comment. The next day, plaintiff complained to Zweigbaum and another partner about the offensive remark. Plaintiff alleges that after she complained, Zweigbaum barely spoke to her.

At around the same time, plaintiff asked if she could work a reduced schedule so she could take care of her baby at home, but Mazel denied the request. According to Mazel, February was the tax certiorari department's busy season, and firm policy did not allow lawyers to work a reduced work schedule. Albstein confirmed that in the previous 10 years, the law firm had never allowed any associate attorney to work part-time. In April 2010, the law firm terminated plaintiff's employment, purportedly for budgetary reasons.

In August 2010, plaintiff commenced an action against defendants in the United States District Court for the Southern District of New York. In her amended complaint, plaintiff asserted that defendants had violated the FMLA. Specifically, plaintiff alleged that defendants interfered with her FMLA

rights by denying her February 2010 request for a reduced work schedule (the FMLA interference claim). Plaintiff also claimed that the law firm retaliated against her by terminating her for taking the 12 weeks of maternity leave in 2009, and for requesting the reduced work schedule in 2010 (the FMLA retaliation claim).^{*} The federal complaint also included claims of gender/pregnancy discrimination, hostile work environment and retaliation under the New York State Human Rights Law and the New York City Human Rights Law.

Defendants moved for summary judgment in the federal action, and in an opinion dated May 4, 2012, the federal court granted the motion (*see Kim v Goldberg, Weprin, Finkel Goldstein, LLP*, 862 F Supp 2d 311 [SD NY 2012]). The court dismissed the FMLA interference claim, finding that, under the circumstances, the FMLA did not entitle plaintiff to take intermittent leave in the form of a reduced work schedule (*id.* at 317). The court also dismissed the FMLA retaliation claim to the extent it was based on plaintiff's request for a reduced work schedule (*id.* at 318). The court concluded that because plaintiff was not entitled to intermittent leave under the FMLA, she was not exercising rights under the FMLA, and thus could not establish a *prima facie* case for retaliation based on her request for a reduced work schedule (*id.*).

The court also dismissed the FMLA retaliation claim based on plaintiff's having taken maternity leave, finding that she could not establish a *prima facie* case (862 F Supp 2d at 318). Specifically, the court concluded that there were insufficient facts to support a causal link between the 2009 leave and plaintiff's termination (*id.*). The court also found that even if a *prima facie* case was made out, plaintiff had failed to assert sufficient facts showing that the law firm's proffered nondiscriminatory reason for her termination was pretextual (*id.* at 319-321). Having disposed of plaintiff's federal FMLA claims, the court declined to exercise supplemental jurisdiction over the causes of action under the State and City Human Rights Laws, and dismissed them without prejudice (*id.* at 321). The federal court's decision contains no factual or legal findings with respect to the state and city claims.

In 2012, plaintiff commenced this action asserting, as relevant here, causes of action under the State and City Human

^{*} Under the FMLA, a plaintiff may raise separate claims for interference with FMLA rights and for retaliation against the exercise of those rights (*see Di Giovanna v Beth Israel Med. Ctr.*, 651 F Supp 2d 193, 198-199 [SD NY 2009]).

Rights Laws. In the amended complaint, plaintiff alleged that defendants discriminated against her based on gender/pregnancy, created a hostile work environment, and discharged her in retaliation for complaining about the alleged discrimination. Defendants moved to dismiss these claims pursuant to CPLR 3211 (a) (7) and (5) for failure to state a cause of action and as barred by collateral estoppel, and for summary judgment pursuant to CPLR 3211 (c). In a decision entered April 25, 2013, the court denied the motion, and this appeal ensued.

On appeal, defendants maintain that plaintiff's state and city claims are barred by collateral estoppel. Under the doctrine of collateral estoppel, a party is precluded from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action (*Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). To successfully invoke this doctrine, two requirements must be met. First, the issue in the second action must be identical to an issue which was raised, necessarily decided and material in the first action. Second, the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 [2007]). Where a federal court declines to exercise jurisdiction over a plaintiff's state law claims, collateral estoppel can still bar those claims provided that the federal court decided issues identical to those raised by the plaintiff's state claims (*see Sanders v Grenadier Realty, Inc.*, 102 AD3d 460, 461 [1st Dept 2013]). The party seeking to invoke collateral estoppel bears the burden of establishing identity of issue (*Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013]).

[1] Applying these principles, we conclude that defendants have not met their burden of showing that plaintiff's state and city claims of retaliatory termination are barred by collateral estoppel. The retaliation claims asserted here are entirely distinct from those raised and decided in the federal action. There, the court only decided whether plaintiff was retaliated against for exercising her FMLA rights. Here, however, plaintiff does not claim retaliation based on her exercise of FMLA rights, but instead alleges retaliation, under the State and City Human Rights Laws, based on entirely different instances of protected activity. Specifically, plaintiff alleges she was discharged for filing a written complaint about her reprimand for allegedly reading a book during work hours, and for verbally complaining about an alleged inappropriate comment. Because the federal

court's decision did not address either of these claimed bases for retaliation, it cannot be said that the federal action "necessarily decided" the same issues raised by the state and city retaliation claims, and thus collateral estoppel does not apply (*Welsbach Elec. Corp.*, 9 NY3d at 128 [internal quotation marks omitted]).

Defendants argue that collateral estoppel applies because the federal court, in addressing whether there was an FMLA violation, found insufficient facts to conclude that discrimination played a role in the law firm's decision to terminate plaintiff. A careful reading of the federal opinion makes clear that the court's finding was made solely in the context of analyzing the discrete claim of retaliation under the FMLA. Indeed, this was the only question adjudicated by the federal court. Notably, the court's statement, relied on by defendants, is contained in the part of its opinion entitled "*Retaliation for [plaintiff's] 2009 leave*" (862 F Supp 2d at 318), and the only protected activity addressed by the court was plaintiff's taking her maternity leave. As noted, the court did not mention, let alone engage in any analysis of, the distinct instances of protected activity that form the basis of plaintiff's state and city claims. Because the federal court never addressed the retaliation claims asserted in this action, and never addressed the issue of pretext in the context of those claims, its conclusions cannot serve as a collateral estoppel bar.

Our decision in *Jordan v Bates Adv. Holdings* (292 AD2d 205 [1st Dept 2002]) compels this result. In *Jordan*, the plaintiff brought an action in federal court alleging age, sex and disability discrimination under federal, state and city antidiscrimination laws (*id.* at 205). The federal court dismissed the federal sex and disability claims on procedural grounds as untimely, and dismissed the federal age claim on the merits, finding that there was insufficient evidence to defeat the defendant's showing of a nondiscriminatory motive for the plaintiff's discharge (*id.* at 205-206). The federal court declined to exercise jurisdiction over the state and city claims and dismissed them without prejudice (*id.* at 205).

The plaintiff in *Jordan* then brought an action in state court alleging age, sex and disability discrimination under state and city laws (292 AD2d at 206). The motion court dismissed these claims, finding, inter alia, that the plaintiff was collaterally estopped based on the federal court's findings as to the nondiscriminatory reasons for her termination (*id.*). We re-

versed, to the extent appealed from as limited by the briefs, concluding that the plaintiff was not collaterally estopped from litigating her sex and disability claims because the federal court made no specific factual determination as to those claims (*id.* at 207). We further found that the federal court's findings as to the motive behind the plaintiff's termination were made solely in the context of the age discrimination issue, and could not collaterally estop her from asserting her sex and disability claims in state court (*id.*). A similar result is warranted here, and the federal court's dismissal of the FMLA retaliation claims cannot collaterally estop plaintiff from litigating her distinct state and city retaliation claims.

[2] On the merits, the motion court properly denied defendants' motion to dismiss the retaliation claims. There is no dispute that plaintiff engaged in protected activity by making two complaints opposing discriminatory treatment. Similarly, there is no question that the law firm's termination of her constitutes an adverse or disadvantageous employment action (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 [1st Dept 2012]). After the first complaint, plaintiff alleges she was told by Mazel to refrain from complaining in the workplace, and following the second complaint, plaintiff claims that Zweigbaum barely spoke to her again. In addition, plaintiff's termination two months after the second complaint may establish the necessary causal nexus between the protected activity and her discharge (*see Ashok v Barnhart*, 289 F Supp 2d 305, 315 [ED NY 2003] ["A period of only two months between a protected activity and an adverse action may permit a reasonable jury to find the acts to be temporally proximate and causally related"]; *Lamberson v Six W. Retail Acquisition, Inc.*, 122 F Supp 2d 502, 512 [SD NY 2000] [employee's discharge two months after making complaints was sufficiently close in temporal proximity to infer a causal connection]).

Although defendants articulated a nonretaliatory reason for plaintiff's termination, namely a workforce reduction, triable issues of fact exist as to whether that stated reason was a pretext for retaliation, and whether, absent a retaliatory motive, the law firm's decision to terminate her would have occurred (*see Sandiford v City of N.Y. Dept. of Educ.*, 22 NY3d 914, 916 [2013]). The record contains evidence that at the time plaintiff was terminated, the law firm's tax certiorari department was expanding. According to plaintiff, at the time she was let go, the department was "busier than ever." Mazel confirmed this,

testifying that the department had filed a record number of applications in 2010, more than in each of the previous 10 years. Plaintiff also points to evidence showing that the law firm hired a new attorney to work in her department shortly before her termination, that she was subsequently replaced by an attorney transferred from another department, and that the firm hired another attorney for the tax certiorari department a few months after she was discharged. Viewed in the light most favorable to plaintiff, this evidence is sufficient to defeat summary judgment on the retaliation claims.

[3] However, dismissal of the hostile work environment claim is warranted. There is no view of the evidence that any conduct by defendants was severe or pervasive enough to create an objectively hostile or abusive environment, within the meaning of the State Human Rights Law (*see Chin v New York City Hous. Auth.*, 106 AD3d 443, 444-445 [1st Dept 2013], *lv denied* 22 NY3d 861 [2014]). Plaintiff cites only isolated remarks or incidents, and her being reprimanded for reading a book. Plaintiff's claim that she was treated differently after returning from maternity leave is too vague to constitute evidence of a hostile work environment. Nor can plaintiff's hostile work environment claim be sustained even under the City Human Rights Law, since a reasonable person would consider the complained-of conduct nothing more than "petty slights and trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009] [internal quotation marks omitted], *lv denied* 13 NY3d 702 [2009]).

[4] Finally, plaintiff's claim of gender/pregnancy discrimination should be dismissed. In her brief on appeal, the only discriminatory act alleged is the denial of plaintiff's request for a modified work schedule. However, the evidence in the record establishes that the law firm's policy did not allow for a reduced schedule for any attorney, and that the firm had not permitted any associate attorney to work part-time in the past 10 years. Thus, plaintiff is unable to establish that she suffered unequal treatment in the terms and conditions of her employment under the State Human Rights Law, or that she was treated less well than other employees under the City Human Rights Law (*see Short v Deutsche Bank Sec., Inc.*, 79 AD3d 503 [1st Dept 2010]).

Accordingly, the order of the Supreme Court, New York County (Louis B. York, J.), entered April 25, 2013, which, to the extent appealed from, denied defendants' motion to dismiss, or for summary judgment dismissing, the complaint alleging

gender/pregnancy discrimination, hostile work environment, and retaliatory termination under the State and City Human Rights Laws, modified, on the law, to grant the motion to the extent of dismissing the claims of discrimination and hostile work environment, and otherwise affirmed, without costs.

GONZALEZ, P.J., FRIEDMAN, RENWICK and FREEDMAN, JJ., concur.

Order, Supreme Court, New York County, entered April 25, 2013, modified, on the law, to grant the motion to the extent of dismissing the claims of gender/pregnancy discrimination and hostile work environment, and otherwise affirmed, without costs.

[987 NYS2d 37]

MAXIM A. STEPANOV et al., Appellants, v DOW JONES & COMPANY,
INC., Respondent.

First Department, May 29, 2014

SUMMARY

APPEAL from an order of the Supreme Court, New York County (Ellen M. Coin, J.), entered April 19, 2013. The order granted defendant's motion to dismiss the complaint.

Stepanov v Dow Jones & Co., Inc., 2013 NY Slip Op 33584, affirmed.

HEADNOTES

Libel and Slander — Truth — Express Defamation — Statements Not Capable of Defamatory Connotation

1. In a libel action arising out of an article defendant published detailing an embezzlement conspiracy involving Russian businessmen and officials, plaintiffs' complaint, insofar as it was premised on express defamation, was properly dismissed since the claims in the published article were based on substantially true statements that were not reasonably susceptible of defamatory connotations. The article stated that a shell company whose directors worked for plaintiff corporation was nested inside of a second shell company formed by an agency implicated in various illegal activities. At most, the article pointed out a connection between the second shell company and certain directors working for plaintiff as of the date of the article's publication. The article did not state that there was a connection while the illegal events were being perpetrated, over three years before publication. Moreover, evidence showed that at the time of publication there was in fact a connection between the two shell companies indicating that the article's assertions were substantially true.

Libel and Slander — Truth — Express Defamation — Statements Not Capable of Defamatory Connotation

2. In a libel action arising from an article defendant published entitled *Crime and Punishment in Putin's Russia*, which detailed an embezzlement conspiracy involving Russian businessmen and officials, a statement in the article identifying the individual defendant as a "former Russian diplomat," without clarifying that plaintiff served as a diplomat before Putin's presidency, was not expressly defamatory. The article's statement was clearly true, as it was clear that plaintiff was, in fact, a former Russian diplomat. Furthermore, even if the language could be construed to mean that plaintiff served during Putin's tenure, the corruption detailed in the article involved Russian police and tax officials, not diplomats.

Libel and Slander — Truth — Defamation by Implication — Legal Standard

3. To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, a plaintiff must make a rigorous showing that the language of the communication as a whole can reasonably be read both to impart a defamatory inference and to af-

firmatively suggest that the author intended or endorsed that inference. The standard is an objective one that asks whether the plain language of the communication itself suggests that an inference was intended or endorsed. Such a rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements. Accordingly, in a defamation action arising out of an article defendant published detailing an embezzlement conspiracy involving Russian businessmen and officials, plaintiffs were not impliedly defamed when the article noted that employees of the corporate plaintiff were directors of a shell company formed by an entity implicated in assorted illegal activities without clarifying that a certain wire transfer from the shell company occurred before anyone connected to plaintiffs began serving as a director of any affiliate of the shell company. The minor omission of the timeline of the shell company's involvement with the corporate defendant did not raise an implication that the plaintiff was connected to the scheme described in defendant's article.

**Libel and Slander — Truth — Defamation by Implication —
Reporting on Illegal International Financial Scheme**

4. In a libel action arising out of an article defendant published detailing an embezzlement conspiracy involving Russian businessmen and officials, plaintiffs were not defamed by implication where the article connected the corporate plaintiff to a shell corporation formed by an agency implicated in money laundering and other illegal activities. While the connection was attenuated, it was established that it was substantially true. The article also truthfully stated that the individual plaintiff was a former Russian diplomat and that the corporate plaintiff was founded in Cyprus. Those facts led to an inference that the shell corporation was at some point associated with two money laundering risk factors: "politically connected individuals" and "high-risk jurisdictions." Although the article could have more clearly stated the timeline of the shell corporation's involvement with the corporate plaintiff, that would not have made the involvement irrelevant, because the intended or endorsed implication, and the entire import, of that connection was clearly not to show that the corporate plaintiff was involved in a transaction carried out by the shell corporation or a tax-fraud scheme, but rather to show that the shell corporation had satisfied the money laundering risk factors and it should have been reported to regulators. In addition, plaintiffs were not defamed by an implication that they were involved in the illegal actions perpetrated by other shell companies formed by the agency notwithstanding that the article did not note that plaintiffs had severed ties with the agency before the activities occurred. The clear implication intended by the mention of those illegal activities was to show that the transaction involving the initial shell corporation was suspicious. The article could not reasonably be read to imply that plaintiffs were somehow involved in illegality.

**Libel and Slander — Truth — Defamation by Implication —
Properly Identifying or Misidentifying Plaintiff**

5. In a libel action arising out of an article defendant published, entitled *Crime and Punishment in Putin's Russia*, detailing an embezzlement conspiracy involving Russian businessmen and officials, the individual plaintiff was not defamed by implication by a statement in the article identifying him as a "former Russian diplomat," where the article did not clarify that plaintiff had left office before Putin's presidency. There was no reasonable reading of the factually true statement that could lend itself to a defamatory implication, since the article did not allege any corruption at all in Russia's diplomatic

corps and did not imply that the individual plaintiff himself was involved in any corruption. In addition, the article did not imply that the individual plaintiff was somehow involved in the criminal scheme, notwithstanding that it expressly stated that a woman and her husband with the same last name as plaintiff were central to the fraud without clarifying that they had no connection to plaintiff, since there was simply no reasonable reading of the article that imparted such an inference. The lone fact that they shared a last name that plaintiffs' counsel conceded is very common in Russia was far too attenuated to support a reasonable implication that plaintiff was not only related to the couple but somehow involved in their fraudulent activities.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Libel and Slander §§ 6, 21–25, 67, 71, 98, 107,
113, 114, 116, 122–125, 161–164, 167, 249–251.
DOBBS LAW OF TORTS §§ 44:519, 44:526–44:528, 44:537,
44:555, 44:556, 44:559–44:562.
NY JUR 2d, Defamation and Privacy §§ 4, 19–21, 24, 75–77,
99–108, 267.
NEW YORK LAW OF TORTS §§ 1:41–1:47, 1:49.

ANNOTATION REFERENCE

See ALR Index under Libel and Slander.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: defamation /s substantial /2 truth

APPEARANCES OF COUNSEL

Ganfer & Shore, LLP, New York City (*Steven Skulnik* of counsel), for appellants.

Davis Wright Tremaine, LLP, New York City (*Laura R. Handman*, *Camille Calman* and *Jason P. Conti* of counsel), for respondent.

OPINION OF THE COURT

FEINMAN, J.

Nearly two decades ago, the Court of Appeals acknowledged that there existed an open question under New York law regarding which test to apply to claims of defamation by implication, but did not reach the issue and concluded that the choice must “await another day” (*Armstrong v Simon & Schuster*, 85 NY2d 373, 381 [1995]). While no appellate court in this state has since addressed that particular issue, its day has finally come.

Plaintiffs, a Russian businessman and a company he founded (Midland Consult [Cyprus] Ltd.), claim that they were defamed in Bill Alpert's article *Crime and Punishment in Putin's Russia*, which appeared on April 18, 2011 in Barron's, a weekly newspaper published by defendant. The article described an embezzlement conspiracy involving Russian businessmen and officials.

The article reported that in 2006, the hedge fund Hermitage Capital realized a profit of about \$1 billion and paid \$230 million in taxes to Russia. Russian Interior Ministry police raided Hermitage's Moscow offices in June 2007, seizing its Russian subsidiaries' corporate seals and certificates. In October of that year, a "convicted killer" used the corporate seals to act in the subsidiaries' names to consent to judgments in a Russian court totaling about \$1 billion. On December 23, 2007, he and his "cohorts," masquerading as Hermitage officers, filed for a \$230 million tax refund, applying the judgments against Hermitage's \$1 billion in profits. On the following day, the Moscow tax bureau, headed by Olga Stepanova, approved the refund and wired the money to "brand-new accounts" at Moscow banks.

Hermitage launched a private investigation, hiring Russian lawyer Sergei Magnitsky. Credit Suisse records obtained through the investigation showed at least \$20 million flowing through the bank accounts of a number of "dummy corporations" associated with small nations in the two years following the \$230 million heist. Hermitage's informant, a Russian businessman who had been part of a network that paid Olga Stepanova and other officials for their roles in tax embezzlements, told Hermitage that these Credit Suisse transactions were intended as payments to Stepanova and her deputies for their assistance in the scam.

The article goes on to detail a number of transactions involving the Credit Suisse accounts. In doing so, it refers to plaintiffs in the following three paragraphs, out of the 40 comprising the entire article:

"On Jan. 23, 2008 the Credit Suisse accounts received about \$3 million from a shell company called Bristoll Export, registered in New Zealand by a company-formation agency called GT Group. After earlier *Barron's* stories showed that GT Group sold shells that were ultimately used to launder Mexican drug-cartel money through Wachovia Bank and, separately, to commission a plane filled with anti-

aircraft missiles and rocket launchers from North Korea, New Zealand police raided GT Group's offices in October of 2010.

"Nested inside the shell of Bristoll Export—like a Russian doll—was yet another shell company whose directors work at Midland Consult, a Russia-focused representative of offshore banks founded by a former Russian diplomat named Maxim A. Stepanov in Cyprus.

"The GT Group didn't respond to questions e-mailed to its headquarters on the island of Vanuatu. Midland Group's Maxim Stepanov would not identify the owners of Bristoll Export and said in an e-mail that his customers were 'honest, decent businessmen and have no criminal conduct found by the Courts of Justice' " (Bill Alpert, *Crime and Punishment in Putin's Russia* [Apr. 16, 2011], Barron's, available at <http://online.barrons.com/news/articles/SB50001424052970204569604576259313266852054>).

The article also reported that, shortly after the tax refund was approved by Olga Stepanova, her husband's Cyprus shell corporation received \$10.9 million. Although the article does not expressly state the husband's identity, it identifies a number of properties owned by Vladlen Stepanov, "the Stepanovs," and "Stepanova's family" and refers to "Olga's obligatory income declarations" showing the cumulative income "between herself and Vladlen" (*id.*).

In July 2008, Hermitage's lawyer Magnitsky filed criminal complaints with Russian government agencies, accusing Olga Stepanova, Police Colonel Kuznetsov, and others of being involved in the Hermitage fraud and another similar scheme. When Magnitsky testified to Russian prosecutors in October 2008, he was arrested, delivered to Kuznetsov, and imprisoned, where he was subjected to "harsh conditions" and pressured to retract his testimony and implicate himself. While in prison, the 37-year-old attorney "became gravely ill and, denied medical care, died on November 16, 2009" (*id.*). This led the Russian businessman mentioned above to become Hermitage's informant and provide the Credit Suisse bank records. In January 2011, Hermitage filed a complaint with the Swiss Federal Attorney General. It appears that the informant's bank records and the Swiss complaint provided the factual basis for most of the article's assertions.

In the complaint in this action, plaintiffs contended that the article was defamatory, stating that it was “false, disparaging, derogatory, and misleading to state or imply”: (1) that Midland was doing business with GT Group in 2010 when GT allegedly sold shell corporations to individuals involved in narcotics and weapons; (2) that Midland was involved with the companies used to launder drug-cartel money and ship weapons; (3) that Bristoll Export or its subsidiaries had directors who “work at Midland Consult”; and (4) that plaintiff Stepanov was a former Russian diplomat, because the article is entitled *Crime and Punishment in Putin’s Russia*, but Stepanov served as a diplomat under Mikhail Gorbachev and Boris Yeltsin, not Vladimir Putin.

Defendant moved to dismiss the complaint, arguing that the article was not defamatory to plaintiffs because it was substantially true that plaintiffs had a connection to Bristoll Export and that the article’s statements could not support a cause of action for defamation because they “were either not ‘of and concerning’ plaintiff[s] or not capable of having a defamatory meaning.” Alternatively, defendant argued that the statements were privileged under Civil Rights Law § 74 as a fair and true report of an official proceeding in Switzerland. Defendant submitted copies of the article, Hermitage’s Swiss complaint, and a follow-up article by Alpert and published in Barron’s that reported that the Swiss Attorney General had commenced a criminal investigation.

In opposition, plaintiffs submitted an affidavit from plaintiff Stepanov stating that he resigned from the government in 1997, before Putin became president, that Midland Consult was not involved with Bristoll Export until after the January 2008 transaction, that Midland Consult had severed ties with GT Group before GT’s “first legal troubles concerning the airplane,” and that he has no connection to Olga Stepanova or Vladlen Stepanov. He asserted that these facts show plaintiffs had nothing to do with the actions described in the article and that, had the timeline been included in the article, it would have been clear that the mention of plaintiffs was extraneous to the news story. Based on this, plaintiffs argued that the article’s statements were defamatory per se when viewed in context or, alternatively, defamatory by implication. Plaintiffs did not allege that any statement was explicitly inaccurate, but argued that the article did not include statements that would eliminate an inference that plaintiffs were involved with people and

companies engaged in illegal activity. Plaintiffs also argued that Civil Rights Law § 74 was inapplicable.

In reply, defendant argued that publishers can only be held responsible for what is actually written, stating that nothing in the article implied that plaintiffs were responsible for any wrongdoing and asserting that its inclusion of plaintiffs in the article was a matter of editorial judgment.

The court granted defendant's motion and dismissed the complaint (2013 NY Slip Op 33584[U] [2013]). It found that Civil Rights Law § 74 does not apply to the specific facts of this case, but that plaintiffs did not state a valid claim for express or implied defamation. Plaintiffs appealed this ruling, which we now affirm.

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Foster v Churchill*, 87 NY2d 744, 751 [1996] [internal quotation marks omitted]). To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense (*see Konrad v Brown*, 91 AD3d 545, 546 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]). On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are "reasonably susceptible of a defamatory connotation," such that the issue is worthy of submission to a jury (*Silsdorf v Levine*, 59 NY2d 8, 12 [1983], *cert denied* 464 US 831 [1983] [internal quotation marks omitted]).

Insofar as plaintiffs' complaint is premised on express defamation, it must be dismissed, as these claims are based on substantially true statements that are not reasonably susceptible of defamatory connotations.

[1] Plaintiffs argue that, by describing various illegal activities of GT Group and noting the links between GT Group and Bristoll Export and between Bristoll Export and Midland Consult, the article defamed them by leading readers to believe that Midland was connected to the Bristoll wire transfer and

GT's illegal activity. The article, however, only states that a "shell company whose directors work at Midland Consult" was "[n]ested inside the shell of Bristoll Export." At most, the article is pointing out a connection between a Bristoll Export shell company and certain directors who work at Midland Consult in the present (as of the article's publication). It does not state that there was a connection during the events of late 2007 and early 2008, over three years before the publication. Exhibits to Hermitage's Swiss complaint show that, at the time of the publication, the shell company referred to in the article was in fact the owner of Bristoll Export. Although the article indicated that Bristoll owned Midland and not vice versa, the article's assertion that the two were connected is substantially true. Therefore, it is not capable of the defamatory connotation that plaintiffs claim it carries.

[2] Plaintiffs also argue that identifying Maxim Stepanov as a "former Russian diplomat" is expressly defamatory when viewed in conjunction with the article's headline, *Crime and Punishment in Putin's Russia*, because he served as a diplomat before Putin's presidency. The article's statement is clearly true, as plaintiffs made clear that Maxim Stepanov was, in fact, a former Russian diplomat. Furthermore, even if the language could be construed to mean that Stepanov served during Putin's tenure, the corruption detailed in the article involved Russian police and tax officials, not diplomats. This statement is also clearly not expressly defamatory.

Plaintiffs' chief argument, however, is that the article's statements were defamatory by implication. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*Armstrong v Simon & Schuster*, 85 NY2d at 380-381 [internal quotation marks omitted]). The implied defamation cause of action was recognized by the Court of Appeals in a 1963 decision determining that, although the publication at issue contained no directly defamatory statements, "a jury should decide whether a libelous intendment would naturally be given to it by the reading public acquainted with the parties and the subject-matter" (*November v Time Inc.*, 13 NY2d 175, 179 [1963] [internal quotation marks omitted]). The following year, the U.S. Supreme Court's landmark decision in *New York Times Co. v Sullivan* (376 US 254 [1964]) found that the free speech protections guaranteed by the First Amendment to the US Constitution placed substantial limits on the right to

recover for defamatory statements (*see also Chapadeau v Utica Observer-Dispatch*, 38 NY2d 196, 198 [1975]). In a 1977 libel decision, after discussing the impact *Sullivan* had on defamation jurisprudence, the Court of Appeals addressed an aspect of the plaintiff's claim that was akin to implied defamation, noting that although an author "could not make up facts out of whole cloth, omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts, and juries, have no proper function" (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 383 [1977], *cert denied* 434 US 969 [1977] [citation omitted]).

In 1995, the Court of Appeals revisited the defamation by implication cause of action, noting that courts across the country have adopted different standards to balance these claims against the "concern that substantially truthful speech be adequately protected" (*Armstrong*, 85 NY2d at 381). However, the Court determined that the claim before it was not actually of implied defamation, but rather a more straightforward allegation of false statements of verifiable fact, and the question of the proper test for implied defamation claims remained open (*id.*).

The motion court adopted the approach taken by the court in *Biro v Condé Nast* (883 F Supp 2d 441, 463-467 [SD NY 2012]). That court, noting that neither the state nor federal appellate courts in New York had established a standard to be applied to a motion to dismiss a claim of defamatory implication, endorsed a rule articulated by several federal courts of appeals and already applied by at least one state trial court (*id.* at 464-465).

The D.C. Circuit Court of Appeals, relying in part on Eighth Circuit jurisprudence, determined:

"[I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning" (*White v Fraternal Order of Police*, 909 F2d 512, 520 [DC Cir 1990]; *see Janklow v Newsweek, Inc.*, 759 F2d 644, 648-649 [8th Cir 1985], *cert denied* 479 US 883 [1986]).

The Fourth Circuit stated that this inquiry requires “an especially rigorous showing”: the “language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference” (*Chapin v Knight-Ridder, Inc.*, 993 F2d 1087, 1093 [4th Cir 1993]). In a decision affirmed by this Court, the New York County Supreme Court quoted this *Chapin* standard before analyzing the plaintiff’s implied defamation claims and dismissing the complaint (*Rappaport v VV Publ. Corp.*, 163 Misc 2d 1, 5-6 [Sup Ct, NY County 1994], *affd* 223 AD2d 515 [1st Dept 1996]).

Plaintiffs argue that we should instead adopt a standard, accepted by a number of other courts, that does not require showing that a defendant intended or endorsed a defamatory inference. They argue that because they are not public figures, who must show a statement was made with actual malice, they should not be held to show the author intended or endorsed a defamatory implication. In doing so, plaintiffs conflate two entirely separate issues. The “actual malice” rule requires a public figure to prove by clear and convincing evidence that a defamatory statement was published with “knowledge that it was false or with reckless disregard of whether it was false or not” (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 353 [2009]). It is a subjective inquiry, “focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication” (*id.* at 354-355). The standard at issue here is the threshold question of whether a statement is capable of a defamatory implication. “Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance” (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985]). It is not a test for fault and whether a particular plaintiff is a public or private figure is not relevant to the inquiry. Furthermore, it is not a subjective standard like the “actual malice” test, but an objective one that asks whether the plain language of the communication itself suggests that an inference was intended or endorsed.

[3] We adopt the standard advanced by defendant and accepted by the motion court. To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, the plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or

endorsed that inference. We believe this rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements (*see Armstrong*, 85 NY2d at 381).

Applying the standard to each of plaintiffs' allegations of implied defamation, we find that none of the article's statements meet this standard and affirm the motion court's dismissal of the complaint.

Plaintiffs argue that they were impliedly defamed when the article noted that employees of Midland Consult were directors of a shell company affiliated with Bristoll Export without clarifying that the 2008 wire transfer from Bristoll occurred before anyone connected to plaintiffs began serving as a director of any affiliate of Bristoll. We do not agree that the minor omission of the timeline of Bristoll's involvement with Midland raises an implication that Midland was connected to the scheme described in the article. Nor do we agree that if the timeline had been included, it would have "revealed to the editors that [plaintiffs] had no place in the narrative." Plaintiffs misapprehend the clear purpose of this small passage in the context of the entire article.

Before describing the various transactions borne out in the Credit Suisse records, of which the Bristoll transaction was one, the article cited a money-laundering compliance expert who explained that a bank's obligation to report suspicions of money laundering arises from a confluence of factors including not only the use of offshore shells to hide income and assets, but also high-risk jurisdictions, a lack of legitimate commercial activity, and politically connected individuals. The article claims that Hermitage's Swiss complaint points out all these factors, then goes on to describe each transaction and its associated risk factors. Viewed in this context, it is clear that the only implication intended or endorsed by the author is that the Bristoll wire transfer qualifies as a suspicious transaction. The article first links Bristoll to GT Group and states that other shell companies associated with GT were involved in unrelated illegal actions, or "a lack of legitimate commercial activity." Indeed, it is clear from the article that the GT Group's offices were not raided until over two and a half years after the unrelated Bristoll transfer, but the author still included the information, and it clearly promotes an inference that at least one of the risk factors existed.

[4] The article then connects Bristoll to Midland and, while the connection is attenuated, it has been established that it is substantially true. The article also states the true facts that plaintiff Stepanov is a former Russian diplomat and that plaintiff Midland was founded in Cyprus. These facts lead to an inference that Bristoll was at some point associated with two more risk factors, “politically connected individuals” and “high-risk jurisdictions.” As the article did in its statements regarding GT Group, it could have more clearly stated the timeline of Bristoll’s involvement with Midland, but this would not have made the involvement irrelevant, because the intended or endorsed implication, and the entire import, of this connection was clearly not to show that Midland was involved in the Bristoll transaction or the tax-fraud scheme, but rather to show that Bristoll satisfied the money-laundering risk factors and it should have been reported to regulators.

Plaintiffs also contend they were defamed by an implication that they were involved in the illegal actions perpetrated by other shell companies formed by GT Group because the article did not note that plaintiffs had severed ties with GT before the activities occurred. Again, the clear implication intended by the mention of these illegal activities was to show that the Bristoll transaction was suspicious. It cannot reasonably be read to imply that plaintiffs were somehow involved in the schemes to launder Mexican drug cartel money or transport North Korean weapons.

[5] Plaintiffs reiterate their contention that identifying Maxim Stepanov as a “former Russian diplomat” implied that he was involved in the corrupt activities because the article did not clarify that he left office before Putin’s presidency. As discussed above, there is no reasonable reading of this true fact that can lend itself to a defamatory implication. The article does not allege any corruption at all in Russia’s diplomatic corps and does not imply that plaintiff Stepanov himself was involved in any corruption.

Finally, plaintiffs argue that the article implies that Maxim Stepanov was somehow involved in the scheme because it expressly states that Olga Stepanova and her husband Vladlen Stepanov were central to the fraud without clarifying that they had no connection to Maxim. There is simply no reasonable reading of the article that imparts this inference. The lone fact that they share a last name that plaintiffs’ counsel has conceded is very common in Russia, comparable to “Smith” in the United

States, is far too attenuated to support a reasonable implication that Maxim was not only related to Olga and Vladlen but somehow involved in their fraudulent activities.

Given that we conclude that nothing is expressed or implied in defendant's article that is capable of a defamatory meaning as it pertains to plaintiffs, the complaint was properly dismissed. We, therefore, need not address defendant's alternative argument that the content of the article is privileged as a fair report of an official proceeding under Civil Rights Law § 74.

Accordingly, the order of the Supreme Court, New York County (Ellen M. Coin, J.), entered April 19, 2013, which granted defendant's motion to dismiss the complaint should be affirmed, with costs.

ACOSTA, J.P., SAXE, MOSKOWITZ and MANZANET-DANIELS, JJ., concur.

Order, Supreme Court, New York County, entered April 19, 2013, affirmed, with costs.

[986 NYS2d 127]

JORDAN DEROSE, Appellant, v BLOOMINGDALE'S INC., Respondent. (And a Third-Party Action.)

First Department, May 27, 2014

SUMMARY

APPEAL from an order of the Supreme Court, New York County (Debra A. James, J.; op 2013 NY Slip Op 33641[U]), entered January 25, 2013. The order denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims.

HEADNOTE

Labor — Safe Place to Work — Failure to Provide Worker with Adequate Safety Device — Unavailability of Sole Proximate Cause Defense — No Need to Challenge Supervisor's Instructions

In an action to recover for personal injuries plaintiff worker sustained when he fell from an inadequate A-frame ladder while working at defendant's store, plaintiff was entitled to partial summary judgment on the issue of liability where plaintiff's supervisor explicitly directed him not to use an otherwise available Baker scaffold and defendant did not dispute that a Baker scaffold would have been the adequate device for plaintiff to engage in the required demolition work. A contractor's or owner's duty to furnish adequate safety devices under Labor Law § 240 (1) is nondelegable, rendering those who fail to furnish such devices absolutely liable for injuries that proximately result from an employee's elevation-related accident. While a defendant who provides an adequate safety device may assert the defense that an injured worker's neglect to use or misuse of an available device was the sole proximate cause of his or her injuries, that defense does not apply where a plaintiff was not provided with an adequate safety device. That plaintiff's supervisor explicitly directed him not to use the scaffold, citing defendant's policy against rolling equipment through the store while customers were present, rendered the scaffold essentially unavailable to plaintiff. Therefore, inasmuch as plaintiff was not provided with an adequate safety device, defendant could not avail itself of the sole proximate cause defense notwithstanding possible questions concerning which specific ladder plaintiff used or how he used it. Moreover, plaintiff was under no duty to have fetched the Baker scaffold in light of his supervisor's instructions to the contrary, since the law recognizes the realities of construction and demolition work and does not require a worker to demand an adequate safety device by challenging his or her supervisor's instructions and withstanding hostile behavior.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Building and Construction Contracts §§ 135, 138, 142; AM JUR 2d, Employment Relationship §§ 248–249, 268–269, 360; AM JUR 2d, Negligence §§ 847, 988.
CARMODY-WAIT 2d, Summary Judgment §§ 39:188, 39:191;

CARMODY-WAIT 2d, Actions Against Persons Jointly Liable § 123:87.

DOBBS LAW OF TORTS §§ 198, 213, 362.

MC KINNEY'S, Labor Law §§ 240 (1); 241 (6).

NEW YORK CONSTRUCTION LAW MANUAL §§ 13:1, 13:3–13:5, 13:8, 13:10, 13:14, (2013 ed)

NY JUR 2d, Agency and Independent Contractors §§ 436–446, 468; NY JUR 2d, Employment Relations §§ 285–289, 297, 302–307, 366, 380; NY JUR 2d, Premises Liability §§ 284, 287–291.

ANNOTATION REFERENCE

See ALR Index under Building and Construction; Proximate Cause; Safety Precautions or Devices; Scaffolds; Strict or Absolute Liability.

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Database: NY-ORCS

Query: scaffold! /s (prox! /2 cause) & super! /5 instruct!

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Lester Schwab Katz & Dwyer, LLP, New York City (*Harry Steinberg* of counsel), for respondent.

OPINION OF THE COURT

ACOSTA, J.P.

This appeal underscores the importance of Labor Law § 240 (1)'s protection of construction workers who are not provided with adequate safety devices. Because plaintiff's supervisor explicitly directed him not to use an otherwise available Baker scaffold, and defendant does not dispute that a Baker scaffold would have been the adequate device for plaintiff to engage in the required demolition work, plaintiff is entitled to partial summary judgment on defendant's liability where he used an inadequate A-frame ladder and was injured in a resulting fall.

Plaintiff is a carpenter who sustained injuries while working on a renovation project in defendant's Manhattan store. Defendant contracted with RP Brennan General Contractors (RP), a third-party defendant who employed plaintiff, to conduct renovation and demolition work. On the day of the accident, Gerry Cole, plaintiff's supervisor who was also employed by RP, instructed him to assist with demolition work in a different sec-

tion of the store from where he had been working. Cole told plaintiff to dismantle a temporary wall that had been erected to block the demolition work from the view of defendant's customers.

Plaintiff began walking toward the back of the store to fetch a Baker scaffold, which he determined was the proper device to stand upon while dismantling the wall.¹ However, Cole reprimanded plaintiff and directed him to use a ladder instead. Specifically, Cole told plaintiff that he could not "roll the f . . . [expletive deleted] scaffold through the store with customers" and commanded him to "[g]o work off the f . . . [expletive deleted] ladders" that were already in the section being demolished. Because he did not want to disobey his supervisor's orders or defendant's policy prohibiting workers from moving equipment around the store while customers were present, plaintiff did not obtain the Baker scaffold.

When plaintiff arrived in the demolition section of the store, he saw three ladders, two of which were fiberglass A-frame ladders that were already in use by other workers. The only other ladder available was a "rickety," old, wooden A-frame ladder. Nevertheless, because plaintiff had been instructed to complete the demolition work "ASAP," he used the wooden ladder. After working with that ladder for approximately one hour, plaintiff "began dismantling the top support beam of the wall." He attempted to place the ladder securely on the concrete floor, despite the fact that the floor was uneven because it had recently been jackhammered. While plaintiff stood on the ladder, with his feet approximately four feet from the ground, he swung his hammer. Unfortunately, after the hammer struck, the ladder "first shifted and wobbled, and then kicked out," causing plaintiff to fall to the ground. As a result of the fall, plaintiff suffered fractures to his face and wrist.

Plaintiff commenced this action in April 2011, alleging violations of Labor Law §§ 200, 240 (1) and 241 (6).² Defendant answered on June 2, 2011. On July 1, 2011, pursuant to defendant's discovery demands, plaintiff submitted medical records

1. According to plaintiff's affidavit, a Baker scaffold is a scaffold with locking wheels and a height-adjustable platform that is approximately two feet in width and six feet in length. The maximum height to which the platform can be raised is six feet.

2. Plaintiff's Labor Law § 241 (6) claim was predicated on 12 NYCRR 23-1.21 (b) (1), (3), (4) (iv) and (e), which, taken together, plaintiff asserts, require that ladders be secured from slipping and falling.

and authorizations to obtain other requested records. The preliminary conference order, dated August 30, 2011, specified that plaintiff would provide certain authorizations by October 14, 2011, and that depositions of all parties would be held on December 20, 2011. By letter dated September 19, 2011, defendant advised plaintiff that the authorizations for his Social Security Administration and Workers' Compensation Board files were not in proper form, and requested amended authorizations, which plaintiff provided on October 14, 2011.

On December 19, 2011, plaintiff's counsel called defendant's counsel to confirm that plaintiff's deposition would take place the following day in accordance with the preliminary conference order. Plaintiff argues that defendant refused, but defendant claims that it could not proceed with plaintiff's deposition because it was still awaiting documents pursuant to plaintiff's authorizations. Defendant further alleges that plaintiff's counsel verbally consented to adjourn the deposition until February 2, 2012. Plaintiff, however, denies consenting to the adjournment.³ The parties did not reduce the alleged agreement to writing, and neither party moved to amend the preliminary conference order or adjourn the deposition.

In any event, plaintiff filed a motion on December 28, 2011, seeking partial summary judgment on the issue of liability under Labor Law §§ 240 (1) and 241 (6). Plaintiff argued in his affidavit supporting the motion that

“[i]f [he] had been provided the Baker scaffold, [he] would not have fallen. The scaffold would have been proper because it would not have shifted as [he] hammered. And, because of its dimensions, it would have been able to better cope with the fact that the concrete floor was uneven.”

Defendant responded that the motion should be denied as premature, because plaintiff's deposition had not yet been conducted. However, the parties conducted plaintiff's deposition on February 2, 2012, and each party submitted supplemental motion papers. Defendant argued that plaintiff's deposition testimony raised triable issues of fact as to whether he was the

3. The record on appeal contains an email and letter, both dated December 19, 2011, which plaintiff points to as evidence that it was prepared for the deposition and that defendant's counsel refused to proceed. In an affidavit, sworn to on December 28, 2011, plaintiff's counsel states that the email was sent to defendant, and only cites to the letter without claiming that it was ever mailed. The letter is not accompanied by proof of mailing.

sole proximate cause of his injuries and as to the identification of the specific ladder that plaintiff used. Specifically, defendant noted plaintiff's testimony that the ladder he used had been destroyed by his coworker, Gary Moon, whereas photographs taken shortly after the accident by defendant's fire safety director, Thomas LaPera, showed a wooden ladder that did not precisely match plaintiff's description of the ladder from which he fell.⁴ Defendant further asserted that it wished to conduct depositions of LaPera, Moon, and Cole.

The motion court denied plaintiff's motion without prejudice as premature under CPLR 3212 (f) and CPLR 3214 (b) (2013 NY Slip Op 33641[U] [2013]). This appeal followed.

The Labor Law requires building owners and contractors who conduct construction or demolition projects to "furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, . . . ladders, . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed" (Labor Law § 240 [1]). The duty to furnish adequate safety devices is nondelegable, and those who fail to furnish such devices are absolutely liable for injuries that proximately result from an employee's elevation-related accident (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]; *Haimes v New York Tel. Co.*, 46 NY2d 132, 137 [1978]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279, 280 [1st Dept 2005]). A defendant who provides an adequate safety device may assert the defense that an injured worker—who neglected to use or misused the available device—was the sole proximate cause of his or her injuries (see *Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146, 147 [1st Dept 2004]). However, "[t]he sole proximate cause defense does not apply where [a] plaintiff was not provided with an adequate safety device as required by the Labor Law" (*Ferluckaj v Goldman Sachs & Co.*, 53 AD3d 422, 425 [1st Dept 2008], *revd on other grounds* 12 NY3d 316 [2009]).

Defendant does not dispute plaintiff's assertions that a Baker scaffold would have been the adequate safety device for the demolition work and that plaintiff was not provided with one. When plaintiff attempted to fetch the Baker scaffold from the back of defendant's store, his supervisor stopped him and commanded him to use the ladders in the section of the store that

4. Defendant submitted an unnotarized affidavit from LaPera stating that, shortly after plaintiff's fall, he photographed the only wooden ladder in the vicinity of the accident.

was being demolished. Defendant makes much of the issues concerning which ladder plaintiff used and the care with which he used the ladder, but that argument obfuscates the real issue in this case: plaintiff was not provided with the single device that would have enabled him to perform the work safely. The relevant consideration is defendant's failure to provide plaintiff with the Baker scaffold, rather than which of the three inadequate A-frame ladders plaintiff ultimately used. As plaintiff was not provided with an adequate safety device, defendant cannot avail itself of the sole proximate cause defense (*Ferluckaj*, 53 AD3d at 425).

Furthermore, defendant's proposition that plaintiff should have fetched the Baker scaffold (despite his supervisor's contrary instruction) or waited for the fiberglass ladders to become available is unconvincing. For example, defendant cites *Montgomery v Federal Express Corp.* (4 NY3d 805 [2005]), where the plaintiff declined to fetch an available ladder, opted instead to stand on an overturned bucket in order to reach an elevator motor room, and was injured while jumping the four feet down from the motor room (*see also Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006] [describing the facts of *Montgomery*]). However, unlike the plaintiff in *Montgomery*, plaintiff in this case initially exhibited the "normal and logical response . . . to go get" the adequate safety device when he attempted to fetch the Baker scaffold (*Montgomery*, 4 NY3d at 806 [internal quotation marks omitted]), but he was rebuffed by his supervisor. That plaintiff's supervisor explicitly directed him not to use the scaffold, citing defendant's policy against rolling equipment through the store while customers were present, rendered the scaffold essentially unavailable to plaintiff. There is no practical difference between what happened here—where a supervisor directs an employee to not use an otherwise available safety device—and a situation where a scaffold simply was not present at the work site (*see Rice v West 37th Group, LLC*, 78 AD3d 492, 496 [1st Dept 2010]).

In addition, the *Robinson* Court noted the plaintiff's concession that although the necessary "eight-foot ladders may have been in use at the time of his accident," the plaintiff's "foreman had *not* directed him to finish [the task at that time]," and thus the plaintiff's decision to use a shorter ladder by "standing on the ladder's top cap" was "the sole proximate cause of his injuries" (6 NY3d at 555 [emphasis added]). Here, by contrast, plaintiff's supervisor yelled and cursed at him to use the lad-

ders, and plaintiff was told to do the work “ASAP.” Therefore, even assuming that a sturdy A-frame ladder (instead of a Baker scaffold) would have been adequate for plaintiff to perform the demolition work, the fiberglass ladders that were in use by plaintiff’s coworkers cannot be said to have been available.

The Labor Law, recognizing the realities of construction and demolition work, does not require a worker to demand an adequate safety device by challenging his or her supervisor’s instructions and withstanding hostile behavior. To place that burden on employees would effectively eviscerate the protections that the legislature put in place. Indeed, workers would be placed in a nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work (*see Lombardi v Stout*, 80 NY2d 290, 296 [1992] [explaining that Labor Law § 240 “is intended to place the ultimate responsibility for building practices on the owner and general contractor in order to protect the workers who are required to be there but who are scarcely in a position to protect themselves from accidents”]; *see also Haimes*, 46 NY2d at 136, quoting 1969 NY Legis Ann at 407). When faced with an employer’s instruction to use an inadequate device, many workers would be understandably reticent to object for fear of jeopardizing their employment and their livelihoods. Labor Law § 240 (1) speaks for those workers and, through the statute, the legislature has made clear that the provision of adequate safety devices at work sites is imperative and that worker safety depends on absolute liability for contractors and owners who fail to furnish such devices (*see Lombardi*, 80 NY2d at 296).⁵

We reach the merits of this case notwithstanding defendant’s argument that plaintiff’s motion was premature. Although the parties proceeded with plaintiff’s deposition after the filing of the motion, plaintiff’s testimony was consistent with his affidavit. Therefore, defendant could not raise any issue of material fact that would preclude a grant of partial summary judgment concerning liability under Labor Law § 240 (1).

Finally, insofar as defendant raises comparative negligence or other issues that might provide a defense to liability on

5. It is of no moment that plaintiff was instructed not to use the Baker scaffold by Cole, an RP supervisor, rather than by defendant, since section 240 makes clear that “contractors *and owners*,” with few exceptions that are inapplicable here, are liable for failure to furnish adequate safety devices (Labor Law § 240 [emphasis added]; *see also Haimes*, 46 NY2d at 136).

plaintiff's Labor Law § 241 (6) claim (*see Long v Forest-Fehlhaber*, 55 NY2d 154 [1982]), we need not reach those issues because of our finding of defendant's liability under section 240 (1), which renders it absolutely liable for plaintiff's resulting injuries.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered January 25, 2013, which denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law §§ 240 (1) and 241 (6) claims, should be modified, on the law, to the extent of granting plaintiff's motion on the issue of liability pursuant to Labor Law § 240 (1), and otherwise affirmed, without costs.

RENWICK, FEINMAN and CLARK, JJ., concur.

Order, Supreme Court, New York County, entered January 25, 2013, modified, on the law, to the extent of granting plaintiff's motion on the issue of liability pursuant to Labor Law § 240 (1), and otherwise affirmed, without costs.

[987 NYS2d 129]

In the Matter of EUGENE C. ANYIKWA (Admitted as EUGENE CHIDIEBERE ANYIKWA), a Suspended Attorney, Respondent. DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, June 5, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on October 18, 1999 at a term of the Appellate Division of the Supreme Court in the First Judicial Department as Eugene Chidiebere Anyikwa.

HEADNOTE**Attorney and Client — Disciplinary Proceedings — Disbarment**

Inasmuch as more than six months elapsed since respondent attorney was suspended from the practice of law based on his failure to cooperate with the Departmental Disciplinary Committee's investigation of allegations that he was guilty of professional misconduct, and he neither appeared nor applied in writing for a hearing or reinstatement during that time period, respondent was disbarred pursuant to 22 NYCRR 603.4 (g).

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 37, 53, 58, 66, 107, 113
CARMODY-WAIT 2d, Officers of Court §§ 3:256, 3:281, 3:282,
3:323, 3:325, 3:326, 3:327, 3:337.
22 NYCRR 603.4 (g).
NY JUR 2d, Attorneys at Law §§ 361, 383, 466, 467, 469,
476, 478, 480.

ANNOTATION REFERENCE

Failure to cooperate with or obey disciplinary authorities as ground for disciplining attorney—modern cases. 37 ALR4th 646.

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APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (Elisabeth A. Palladino of counsel), for petitioner.

Eugene C. Anyikwa, respondent pro se, no appearance.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law in the State of New York by the First Judicial Department on October 18, 1999, under the name Eugene Chidiebere Anyikwa. At all times relevant to this proceeding, respondent has maintained an office for the practice of law within the First Judicial Department.

The Departmental Disciplinary Committee seeks an order, pursuant to Rules of the Appellate Division, First Department (22 NYCRR) § 603.4 (g), disbarring respondent from the practice of law, because he was suspended under 22 NYCRR 603.4 (e) (1) (i) and did not appear or apply to the Committee or this Court for a hearing or reinstatement within six months from the date of the order of suspension. Respondent was suspended because he failed to cooperate with the Committee's investigation into three disciplinary complaints that alleged neglect and failure to communicate with clients.

Previously, by unpublished order entered December 14, 2012, this Court granted the Departmental Disciplinary Committee's motion for an order permitting service by publication in the New York Law Journal of the Committee's motion to suspend respondent on an interim basis. The notice was published in the New York Law Journal on January 14, 2013. Service was also made by mailing a copy of the motion to respondent's last known business and residential addresses. The Committee's notice of motion seeking respondent's interim suspension contained the following notice:

“PLEASE TAKE FURTHER NOTICE, that pursuant to 22 NYCRR 603.4 (g), an attorney who is suspended under 603.4 (e) (1) and who has not appeared or applied in writing to the Committee or the Court for a hearing or reinstatement for six months from the date of the order of suspension, may be disbarred without further notice.”

Respondent did not appear on the motion.

On June 6, 2013, this Court granted the Committee's motion to the extent of suspending respondent from the practice of law, effective immediately, pursuant to 22 NYCRR 603.4 (e) (1) (i), and until further order of the Court (109 AD3d 76 [1st Dept 2013]). The Committee served respondent with a notice of entry

enclosing a copy of the Court's order of suspension, by mailing same to his last known business and residential addresses. The copy of the notice of entry was served by first-class mail and certified mail, return receipt requested.

Accordingly, inasmuch as more than six months have elapsed since this Court's June 6, 2013 suspension order and respondent has not appeared nor applied in writing to the Committee or this Court for a hearing or reinstatement, the Committee's motion for an order disbarring respondent, pursuant to 22 NYCRR 603.4 (g), should be granted and respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective immediately (*see Matter of Mainiero*, 109 AD3d 133 [1st Dept 2013]; *Matter of McGraw*, 107 AD3d 83 [1st Dept 2013]; *Matter of Siskin*, 78 AD3d 112 [1st Dept 2010]).

ACOSTA, J.P., RENWICK, MOSKOWITZ, FREEDMAN and CLARK, JJ., concur.

Respondent disbarred, and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, effective the date hereof.

[988 NYS2d 190]

In the Matter of STATE OF NEW YORK, Respondent, v RAUL L.,
Appellant.

Second Department, June 4, 2014

SUMMARY

APPEAL from an order of the Supreme Court, Orange County (Catherine M. Bartlett, J.), dated August 28, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order, upon a finding made after a nonjury trial that respondent suffered from a mental abnormality, and upon a determination made after a dispositional hearing that he was a dangerous sex offender requiring civil confinement, in effect, granted the petition and directed that respondent be committed to a secure treatment facility.

HEADNOTES

Crimes — Sex Offenders — Civil Commitment or Supervision — Mental Abnormality

1. In a Mental Hygiene Law article 10 proceeding commenced following respondent's sodomy and assault convictions after he, at 15 years of age, entered a woman's home, struck her in the head with a baseball bat and engaged in anal sexual contact with her while she was unconscious, Supreme Court's determination that respondent suffered from a "mental abnormality" within the meaning of Mental Hygiene Law § 10.03 (i) was warranted by the facts. At a nonjury trial, the State adduced evidence that respondent was diagnosed with sexual sadism, a mental condition listed in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, as one of the paraphilias, a group of diagnoses applicable to a range of abnormal sexual arousal. The State also adduced evidence that respondent was diagnosed with, among other things, paraphilia not otherwise specified, which may constitute a viable predicate mental disorder for a finding of mental abnormality. Although respondent submitted the report of a psychiatric examiner who opined that, given the lack of information about the underlying offense and respondent's refusal to acknowledge the sexual aspects of the crime, it was not possible to determine whether he should be diagnosed with sexual sadism and that he could not be diagnosed with paraphilic disorder because he had been incarcerated since age 15 and had not displayed any signs of the disorder during that time, the case came down to a battle of the experts, and Supreme Court's determination to credit the testimony of the State's expert witnesses instead of respondent's expert witness was supported by the record.

Crimes — Sex Offenders — Civil Commitment or Supervision — Dangerous Sex Offender Requiring Confinement

2. In a Mental Hygiene Law article 10 proceeding commenced following respondent's sodomy and assault convictions after he, at 15 years of age, entered a woman's home, struck her in the head with a baseball bat and engaged in anal sexual contact with her while she was unconscious, clear and convincing evidence supported Supreme Court's determination that respon-

dent was a dangerous sex offender requiring civil confinement in a secure treatment facility. A “dangerous sex offender requiring confinement” is defined under Mental Hygiene Law § 10.03 (e) as a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility. Here, following Supreme Court’s determination that respondent suffered from a mental abnormality, the State adduced evidence at a dispositional hearing that respondent displayed psychopathy, antisocial attitude and behavior and deviant sexual interests, the three factors that are the strongest predictors for sexually reoffending. Respondent’s age also increased the risk that he would sexually reoffend. The State further adduced evidence that respondent fell into the group of sex offenders with the highest rate of recidivism—those with antisocial behavior with psychopathy and deviant sexual interests.

**Crimes — Sex Offenders — Civil Commitment or Supervision —
Statutory Right to Counsel — Right to Representation Pro Se**

3. Due process requires that a sex offender in a Mental Hygiene Law article 10 proceeding can effectively waive his or her statutory right to counsel only after the court conducts a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent. Accordingly, where a sex offender makes a request to proceed pro se, the court must ascertain that the sex offender is aware of the dangers and disadvantages of giving up the right to counsel, such as must be conducted when a criminal defendant seeks to waive that fundamental right. An article 10 proceeding for the civil management of a sex offender is civil, rather than criminal, in nature, and the constitutional protections of the Sixth Amendment, which guarantees the right to counsel in criminal prosecutions, do not apply. Nevertheless, a respondent in an article 10 proceeding has a statutory right to counsel (*see* Mental Hygiene Law § 10.06 [c], [d]), and the principles established to safeguard the right to counsel in criminal cases have been applied to a variety of Family Court proceedings, which are also civil in nature but implicate constitutional due process considerations. The rights at stake in an article 10 proceeding are no less significant than those involved in the Family Court proceedings to which the criminal standard has been applied, and a respondent in an article 10 proceeding arguably faces an even more severe threat to his or her liberty than that faced by a criminal defendant. When successfully litigated by the State, an article 10 proceeding can result in civil confinement, after the respondent is released from prison, which is involuntary and indefinite, and can last the remainder of the respondent’s life.

**Crimes — Sex Offenders — Civil Commitment or Supervision —
Statutory Right to Counsel — Right to Representation Pro Se**

4. In a Mental Hygiene Law article 10 proceeding, respondent’s waiver of the statutory right to counsel was ineffective where Supreme Court failed to conduct the requisite searching inquiry to ensure that the waiver was unequivocal, voluntary, and intelligent. Respondent’s waiver of the right to counsel was not unequivocal as he did not express any desire to represent himself until after his counsel moved to withdraw due to an apparent disagreement with him over whether to seek an adjournment and the court informed him that, if new counsel were appointed, he or she would need four to five months to prepare. Respondent’s primary motivation in seeking to represent himself apparently was his concern that the appointment of new counsel would delay the proceeding, and the court engaged in no colloquy to

ascertain whether his request arose from an unequivocal desire to forgo the assistance of counsel. Moreover, respondent could not make an intelligent and voluntary choice to waive the assistance of counsel without being apprised, in any manner, of the dangers and disadvantages of self-representation. That respondent was alleged to be suffering from mental abnormality requiring confinement to a mental institution made it all the more imperative that the court adequately warn him of the risks inherent in proceeding pro se. Nevertheless, the court erroneously insisted, notwithstanding the concerns voiced by the Assistant Attorney General, that it had fulfilled its obligations by merely placing on the record that respondent did not want an attorney, that he understood he would represent himself and that he could read and write. Supreme Court thus deprived respondent of his statutory right to counsel.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Criminal Law §§ 906, 1149–1153; AM JUR 2d, Expert and Opinion Evidence §§ 139, 142; AM JUR 2d, Mentally Impaired Persons §§ 125, 127, 137, 139.
CARMODY-WAIT 2d, Arraignment, Preliminary Hearing, and Fitness to Proceed § 179:102; CARMODY-WAIT 2d, Right to Counsel §§ 184:80, 184:84, 184:86–184:89.
MCKINNEY'S, Mental Hygiene Law §§ 10.03 (e), (i); 10.06 (c), (d).
NY JUR 2d, Criminal Law: Procedure §§ 828, 830, 834, 840, 841, 846, 848; NY JUR 2d, Penal and Correctional Institutions §§ 45–52.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Expert and Opinion Evidence; Incompetent or Insane Persons.

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APPEARANCES OF COUNSEL

Steven A. Feldman, Uniondale (*Arza Feldman* of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York City (*Steven C. Wu* and *Won S. Shin* of counsel), for respondent.

OPINION OF THE COURT

LEVENTHAL, J.

In this proceeding pursuant to Mental Hygiene Law article 10

for the civil management of the appellant, a sex offender allegedly requiring civil management, the primary issue before this Court is whether the Supreme Court properly granted the appellant's request to give up his statutory right to counsel and conduct his defense pro se. For the reasons discussed below, we hold that due process requires that a sex offender's waiver of the statutory right to counsel in a Mental Hygiene Law article 10 proceeding be unequivocal, voluntary, and intelligent. To ensure that the waiver meets this standard, where a sex offender makes a request to proceed pro se, the court must conduct a searching inquiry to ascertain that the sex offender is aware of the dangers and disadvantages of giving up the right to counsel, such as must be conducted when a criminal defendant seeks to waive that fundamental right. Since the Supreme Court failed to conduct such an inquiry, the appellant's waiver of his right to counsel was ineffective, and the Supreme Court erred in permitting him to proceed pro se.

In 2005, the appellant was convicted of sodomy in the first degree pursuant to former Penal Law § 130.50, assault in the first degree (two counts), and assault in the second degree, upon a jury verdict, and sentenced to prison. The conviction related to acts committed in 2003, when, at 15 years of age, the appellant entered a woman's home, struck her in the head with a baseball bat, and engaged in anal sexual contact with her while she was unconscious.

In March 2011, as the appellant neared release from prison, the State of New York commenced this proceeding pursuant to Mental Hygiene Law article 10, also known as the Sex Offender Management and Treatment Act (hereinafter SOMTA), for the civil management of the appellant (*see* Mental Hygiene Law § 10.06 [a]). In an ensuing probable cause hearing, the Supreme Court concluded that there was probable cause to believe that the appellant was a sex offender requiring civil management and directed that he be detained at a secure treatment facility pending trial (*see* Mental Hygiene Law § 10.06 [k]).

On the date that a nonjury trial on the issue of whether the appellant suffered from a mental abnormality as defined in Mental Hygiene Law § 10.03 (i) was scheduled to commence, the appellant's appointed counsel moved for leave to withdraw from the case. Counsel's application was apparently prompted by a disagreement with the appellant about delaying the trial. As revealed by a letter from the appellant, the source of the conflict was the appellant's disagreement with counsel's recom-

mentation that the trial be adjourned; the appellant opposed an adjournment because he did not want to spend additional time in custody. The Supreme Court initially denied counsel's application for leave to withdraw and indicated that it would grant counsel an adjournment to prepare the appellant's psychiatric examiner, Dr. Leonard Bard.

The Supreme Court explained to the appellant that if his appointed counsel were to be relieved, new counsel would need four to five months to be ready for the trial. In response, the appellant stated that he would like to "fight" his own case. The court then indicated that it would relieve appointed counsel and designate him as the appellant's legal consultant. The appellant stated that he wanted to represent himself, was willing to proceed, and was "familiar with the DSM-IV." The Assistant Attorney General representing the State expressed concern that the court had not conducted a broader inquiry about the appellant's ability to handle the case, including an inquiry as to whether the appellant had a sufficient level of intelligence to represent himself. The court answered that its only obligation was to put on the record that the appellant did not want an attorney and that he understood that he would represent himself. The court also noted that the letter that the appellant had written regarding his disagreement with counsel demonstrated that the appellant could read and write. After the Assistant Attorney General stated, for a second time, that a further inquiry was necessary, the court replied that it was satisfied that the appellant was aware of what he was doing and permitted the appellant to proceed pro se.

At the ensuing mental abnormality trial, the State elicited testimony from Dr. Roger Harris, a psychiatrist, who testified as an expert in sexual psychiatry and sex offender evaluation. Dr. Harris diagnosed the appellant with sexual sadism and antisocial personality disorder, with many characteristics of psychopathy. Dr. Harris defined sexual sadism as a diagnosis in which the subject derives sexual arousal from physically injuring, psychologically harming, humiliating, or degrading another individual. He testified that sexual sadism is listed in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (hereinafter DSM-IV), as one of the paraphilias, a group of diagnoses applicable to "a range of abnormal sexual arousal." Examples of paraphilias given by Dr. Harris included pedophilia, transvestism, and exhibitionism.

Dr. Harris testified that the appellant's underlying conviction supported the diagnosis of sexual sadism because the appellant

struck the victim in the head with a baseball bat, causing the victim to bleed profusely from her head. The appellant then had to manipulate the victim's unconscious body in order to engage in anal sexual conduct with her. Dr. Harris testified that it was remarkable that, in a setting where the victim was unconscious and covered with blood, the appellant was able to become sexually aroused, maintain an erection, and reach orgasm. Dr. Harris opined that the appellant suffered from a mental abnormality as defined in the Mental Hygiene Law which affected his emotional, cognitive, and volitional capacities.

Dr. Paul Etu, a psychologist and psychiatric examiner, diagnosed the appellant with paraphilia not otherwise specified (hereinafter paraphilia NOS), antisocial disorder with traits relating to borderline personality disorder, schizotypal personality disorder, and histrionic personality disorder. Dr. Etu noted that the appellant was very deceitful, impulsive, aggressive, had shown a reckless disregard for others, and failed to show adequate remorse.

The appellant did not present any witnesses at the mental abnormality trial. However, he submitted to the court a report from Dr. Leonard Bard, who opined that, given the lack of information about the underlying offense and the appellant's refusal to acknowledge the sexual aspects of the crime, it was not possible to determine whether the appellant should be diagnosed with sexual sadism. Likewise, Dr. Bard asserted that the appellant could not be diagnosed with paraphilic disorder because the appellant had been incarcerated since the age of 15, and had not displayed any signs of that disorder during that time. Dr. Bard, however, diagnosed the appellant as suffering from borderline personality disorder with both antisocial and paranoid features. Although Dr. Bard acknowledged the possibility that the appellant would violate the conditions of release under strict and intensive supervision and treatment, he maintained that the appellant was nonetheless a candidate for such release.

Following the nonjury mental abnormality trial, the Supreme Court determined that the State had proven, by clear and convincing evidence, that the appellant suffers from a mental abnormality as defined by article 10 of the Mental Hygiene Law and ordered a dispositional hearing.

At the dispositional hearing, Dr. Harris testified that the appellant met the criteria for a dangerous sexual offender requiring confinement. He testified that the three factors that are the

strongest predictors for sexually reoffending are psychopathy, antisocial attitude and behavior, and deviant sexual interests; the appellant displayed all three factors. According to Dr. Harris, antisocial personality attitude and behavior had been shown to increase an individual's risk to sexually reoffend. In addition, the appellant's age increased the risk that he would sexually reoffend, since men in their early 20s were, as a group, at a higher risk.

Dr. Etu opined that the appellant required a much more intense level of treatment than he would get in the community. Dr. Etu explained that in his written report he had given the appellant a "rule out" diagnosis of sexual sadism since he did not have enough information at that time to make a definitive diagnosis of that condition. However, he had received new evidence following the mental abnormality trial, and had now diagnosed the appellant with sexual sadism. The new information included the appellant's assertions that he had worked as a prostitute and participated in bondage and sadomasochism. Dr. Etu testified that the group of sex offenders with the highest rate of recidivism were those with high antisocial behavior with psychopathy, and deviant sexual interests; that group reoffended at a rate of more than 60%. According to Dr. Etu, the appellant fell into the group of sex offenders with the highest rate of recidivism.

Dr. Bard testified for the appellant. According to Dr. Bard, the appellant's personality disorder was severe, had resulted in one specific horrendous act of sexual violence, and the appellant had not been able to alter his basic personality structure since the time of the offense. The diagnosis predisposed the appellant to the commission of sexual offenses, and had resulted in serious difficulty in controlling his impulses in the past. Dr. Bard opined that the appellant needed sex offender treatment and psychiatric treatment, which he could receive in the community under strict and intensive supervision. Dr. Bard did not believe that the appellant was a dangerous sex offender requiring confinement.

After the dispositional hearing, the Supreme Court determined that the appellant was a dangerous sex offender requiring confinement, and directed that he be committed to a secure treatment facility (*see* Mental Hygiene Law § 10.07 [f]).

On appeal, the appellant contends that the State failed to establish, by clear and convincing evidence, that he was a sex offender suffering from a mental abnormality, and that he was a

dangerous sex offender requiring confinement in a secure facility. He further contends that he was deprived of his statutory right to counsel because the Supreme Court failed to conduct a searching inquiry to ensure that he was aware of the dangers and disadvantages of proceeding pro se.

We begin our analysis by addressing the appellant's challenge to the Supreme Court's determinations that he was a sex offender suffering from a mental abnormality, and that he was a dangerous sex offender requiring confinement in a secure facility. In reviewing a determination made after a nonjury trial or hearing, the power of the Appellate Division is as broad as that of the trial or hearing court, and it may render the judgment that it finds warranted by the facts, taking into account that in a close case the trial or hearing judge had the advantage of seeing and hearing the witnesses (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *Matter of State of New York v Robert B.*, 106 AD3d 828 [2013]; *Matter of State of New York v Andrew J.W.*, 85 AD3d 805, 807 [2011]; *Matter of State of New York v Clarence D.*, 82 AD3d 776 [2011]).

A "[m]ental abnormality" is statutorily defined as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03 [i]). The State must establish by clear and convincing evidence that the appellant suffers from a mental abnormality (*see* Mental Hygiene Law § 10.07 [d]).

[1] The Supreme Court's determination that the State demonstrated, by clear and convincing evidence, that the appellant suffers from a "mental abnormality" within the meaning of Mental Hygiene Law § 10.03 (i) was warranted by the facts (*see Matter of State of New York v Terry P.*, 109 AD3d 934 [2013]). The statutory definition of mental abnormality does not require any specific psychiatric diagnosis and "utilize[s] phraseology that, while informed by prevailing medical knowledge, is intended to have greater legal, and not medical, significance" (*Matter of State of New York v Shannon S.*, 20 NY3d 99, 106 [2012]).

The State adduced evidence that the appellant was diagnosed with sexual sadism, a mental condition included in the DSM-IV, as explained by Dr. Harris. Moreover, the State adduced evi-

dence that the appellant was diagnosed with, among other things, paraphilia NOS, which “has been found to be a viable predicate mental disorder or defect that comports with minimal due process” (*id.* at 107, citing *Brown v Watters*, 599 F3d 602, 611-612 [7th Cir 2010], and *United States v Carta*, 592 F3d 34, 40-42 [1st Cir 2010]). Generally, the question of whether a diagnosis of paraphilia NOS constitutes a reliable predicate for a finding of mental abnormality presents a factual issue to be resolved at the trial (*see Matter of State of New York v Shannon S.*, 20 NY3d at 107).

Essentially, this case came down to a battle of the experts with respect to whether the appellant suffered from a mental abnormality as defined in Mental Hygiene Law § 10.03 (i). The Supreme Court’s determination to credit the testimony of the State’s expert witnesses instead of the testimony of the appellant’s expert witness is supported by the record, and we find no basis to disturb it (*see Matter of State of New York v R.W.*, 99 AD3d 1010, 1011 [2012]; *Matter of State of New York v Andrew J.W.*, 85 AD3d at 807). “The trier of fact is in the best position to evaluate the weight and credibility of conflicting expert medical and psychiatric testimony” (*Matter of State of New York v Andrew J.W.*, 85 AD3d at 807 [internal quotation marks omitted]; *see Matter of State of New York v Jason H.*, 82 AD3d 778, 780 [2011]; *Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394 [2009]).

[2] A “[d]angerous sex offender requiring confinement” is defined under Mental Hygiene Law article 10 as

“a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility” (Mental Hygiene Law § 10.03 [e]).

The State must establish by clear and convincing evidence that the appellant is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.07 [f]). Here, clear and convincing evidence supports the Supreme Court’s determination that the appellant is a dangerous sex offender requiring civil confinement in a secure facility (*see Matter of State of New York v Robert B.*, 106 AD3d at 828-829; *Matter of State of New York v Alfredo M.*, 96 AD3d 1068, 1069 [2012]; *Matter of State of New York v Jemal M.*, 91 AD3d 961, 962 [2012]).

We now address the appellant's contention that the Supreme Court erred in granting his request to give up his right to counsel and conduct his defense *pro se*. To resolve this issue, we must determine whether the due process considerations which underpin a sex offender's statutory right to counsel in a SOMTA proceeding obligate the court to conduct the same type of searching inquiry that is required in a criminal proceeding to ensure that the waiver of that right is unequivocal, voluntary, and intelligent. The appellant maintains that the same principles established for criminal proceedings apply to SOMTA proceedings. Consequently, the appellant submits that the Supreme Court violated his right to counsel when, despite repeated requests by the Assistant Attorney General, it granted his application to proceed *pro se* without first conducting a searching inquiry to ensure that he was aware of the dangers and disadvantages of proceeding *pro se*. The State responds that the requirement to conduct a searching inquiry applies only in criminal proceedings wherein the constitutional right to counsel is implicated, and not to civil proceedings under SOMTA wherein only a statutory right to counsel is implicated.

A criminal defendant's federal and state constitutional right to counsel includes the right to refuse appointed counsel (see *Faretta v California*, 422 US 806 [1975]; *Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 384-385 [2011]; *People v McIntyre*, 36 NY2d 10 [1974]; see also US Const Amend VI; NY Const, art I, § 6). However, since "[i]mplicit in a defendant's assertion of [the] right to proceed *pro se* is the decision to disavow the constitutional right to counsel" (*People v McIntyre*, 36 NY2d at 17), the court must be satisfied that the defendant's waiver is unequivocal, voluntary, and intelligent before permitting him or her to forgo counsel and proceed *pro se* (see *Faretta v California*, 422 US at 835; *People v Crampe*, 17 NY3d 469, 481 [2011]; *People v Arroyo*, 98 NY2d 101, 103 [2002]; *People v Smith*, 92 NY2d 516, 520 [1998]; *People v McIntyre*, 36 NY2d at 17).

To ascertain whether a waiver "meets these appropriately rigorous requirements" (*People v Smith*, 92 NY2d at 520), the court is obligated to conduct a "searching inquiry" to ensure that a criminal defendant's waiver is knowing, intelligent, and voluntary (see *People v Slaughter*, 78 NY2d 485, 491 [1991]). A waiver of the right to assigned counsel is voluntarily made when the trial court properly advises the defendant and can be certain that the "dangers and disadvantages of giving up the fundamental right to counsel have been impressed on the defendant" (*id.*

[internal quotation marks omitted]). Although a searching inquiry need not adhere to any rigid formula, litany, or catechism (see *People v Smith*, 92 NY2d at 520), the Court of Appeals has stated that it is better practice to ask a defendant about his or her “age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver” (*People v Arroyo*, 98 NY2d at 104 [internal quotation marks omitted]). While flexible, the court’s record inquiry “‘must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding *pro se*, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication’ ” (*id.*, quoting *People v Smith*, 92 NY2d at 520; see *People v Crampe*, 17 NY3d at 482).

A SOMTA proceeding is not, however, a criminal prosecution. “[W]hen the state acts through its *parens patriae* power to confine a sex offender for therapy and treatment, commitment proceedings are civil, not criminal, in nature” (*Matter of State of New York v Floyd Y.*, 22 NY3d 95, 103 [2013]; see *Allen v Illinois*, 478 US 364, 374 [1986]; *Addington v Texas*, 441 US 418, 425 [1979]; *Matter of State of New York v Campany*, 77 AD3d 92, 98 [2010]). Thus, the instant proceeding is civil, rather than criminal, in nature, and the constitutional protections of the Sixth Amendment, which guarantees the right to counsel, do not apply (see *Matter of State of New York v Floyd Y.*, 22 NY3d at 103).

Nevertheless, a sex offender in a SOMTA proceeding has a statutory right to counsel. In this regard, SOMTA provides that the court shall appoint counsel for a respondent where that respondent is financially unable to obtain counsel (see Mental Hygiene Law § 10.06 [c], [d]).

Although a statutory rather than a Sixth Amendment right to counsel is involved here, the appellate courts of this state have applied the same principles established to safeguard the right to counsel in criminal cases to a variety of Family Court proceedings. Such proceedings are also civil in nature, but implicate constitutional due process considerations because they frequently involve issues of fundamental import relating to the welfare and custody of children, and can result in adjudications that can bear a permanent and significant stigma, such as a finding of child abuse or neglect (see *Matter of Jung [State Commn. on Jud. Conduct]*, 11 NY3d 365, 372-373 [2008]; *Matter of Nowell M. [Katherine M.]*, 115 AD3d 746 [2014]; *Matter of Eunice D. [James F.D.]*, 111 AD3d 627, 628 [2013]). Family Court

proceedings can also potentially result in incarceration, such as where a parent is found in contempt for willful violation of a child support order (see *Matter of Madison County Support Collection Unit v Feketa*, 112 AD3d 1091 [2013]; *Matter of Bader v Hazzis*, 77 AD3d 742, 744 [2010]). In such proceedings the Family Court has been required to conduct a searching inquiry in order to determine whether an individual has knowingly and voluntarily requested to waive a statutory right to counsel and proceed pro se (see e.g. *Matter of Madison County Support Collection Unit v Feketa*, 112 AD3d 1091 [2013] [Family Ct Act art 4 child support proceeding]; *Matter of Massey v Van Wyen*, 108 AD3d 549 [2013] [Family Ct Act art 6 custody and visitation proceeding]; *Matter of Storelli v Storelli*, 101 AD3d 1787 [2012] [Family Ct Act art 4 proceeding relating to child support]; *Matter of Mia B. [Brandy R.]*, 100 AD3d 569, 570 [2012] [Family Ct Act art 10 child neglect proceeding]; *Matter of Melissa H. v Shameer S.*, 100 AD3d 535 [2012] [Family Ct Act art 8 family offense proceeding]; *Matter of Marvin P.*, 52 AD3d 722 [2008] [proceeding pursuant to CPL 330.20 and a related proceeding pursuant to Mental Hygiene Law art 33]; cf. *Matter of Kathleen K. [Steven K.]*, 17 NY3d at 386 [declining to reach issue of whether a parent in a proceeding to terminate parental rights pursuant to Social Services Law § 384-b “has a *Faretta*-type right of self-representation”]).

[3] The rights at stake in a SOMTA proceeding are no less significant than those involved in the above-cited Family Court cases. Indeed, a respondent in a SOMTA proceeding arguably faces an even more severe threat to his or her liberty than that faced by a criminal defendant. When successfully litigated by the State, such a proceeding can result in civil confinement, after a respondent is released from prison, which is involuntary and indefinite (see Mental Hygiene Law § 10.09), and can last the remainder of a respondent’s life. Therefore, we hold that a respondent in a SOMTA proceeding can effectively waive his or her statutory right to counsel only after the court conducts a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent.

[4] Applying these principles here, we find that the Supreme Court failed to secure an effective waiver of the appellant’s right to counsel. As an initial matter, it is clear from the record that the appellant’s waiver of the right to counsel was not unequivocal. The appellant’s request to represent himself was made only after his counsel moved to withdraw due to an ap-

parent disagreement with the appellant over whether to seek an adjournment in order to obtain additional time to prepare for trial. The court initially denied counsel's motion to withdraw, stating that it would grant an adjournment for a reasonable time to allow counsel to prepare for cross-examination and directing him to hire another doctor. The appellant did not express any desire to represent himself until after the Supreme Court informed him that if new counsel were to be appointed, the new counsel would need four to five months to prepare. It thus appears that the appellant's primary motivation in seeking to represent himself was his concern that the appointment of new counsel would delay the proceeding and cause him to spend additional time in custody. The court nevertheless engaged in no colloquy to ascertain whether the appellant's request to proceed pro se arose from an unequivocal desire to forgo the assistance of counsel, and invoke the right to self representation.

Moreover, the appellant could not make an intelligent and voluntary choice to waive the assistance of counsel without being apprised, in any manner, of the dangers and disadvantages of self-representation (*see People v Arroyo*, 98 NY2d at 104). Indeed, the fact that the appellant was alleged to be suffering from a mental abnormality requiring confinement to a mental institution made it all the more imperative that the Supreme Court adequately warn him of the risks inherent in proceeding pro se, and impress upon him the disadvantages of going to trial without the assistance of counsel. Notwithstanding the concerns voiced by the Assistant Attorney General, the Supreme Court erroneously insisted that it had fulfilled its obligations by merely placing on the record that the appellant did not want an attorney, that he understood he would represent himself, and that he could read and write.

In *Matter of State of New York v Floyd Y.* (22 NY3d at 103), the Court of Appeals held that while the subject of a SOMTA proceeding has a constitutional right to due process, the "constitutional protections of the Fifth and Sixth Amendments do not apply." Therefore, while the Supreme Court's error deprived the appellant of his statutory right to counsel, it did not constitute a violation of any Sixth Amendment right to counsel. Nevertheless, at the heart of the due process guarantees in the Federal and State Constitutions is the principle that when the State seeks to take life, liberty, or property from an individual, the State must provide effective procedures that guard against an erroneous deprivation (*see Matter of State of*

New York v Floyd Y., 22 NY3d 95 [2013]; *People v David W.*, 95 NY2d 130, 136 [2000]; *see also Mathews v Eldridge*, 424 US 319, 334-335 [1976]). It is clear that the Supreme Court's error deprived the appellant of his statutory right to counsel. That a court must conduct a searching inquiry in order to determine whether a respondent in a SOMTA proceeding intelligently and voluntarily waived the statutory right to counsel is manifest, considering that such proceedings invariably require expert testimony and two separate hearings (*see* Mental Hygiene Law §§ 10.03 [i]; 10.07 [a], [f]). Since the Supreme Court failed to conduct the requisite searching inquiry here, the appellant's waiver of his statutory right to counsel was ineffective.

In light of our determination, we need not address the appellant's remaining contentions.

Accordingly, the order is reversed, on the law, and the matter is remitted to the Supreme Court, Orange County, for further proceedings, including a trial pursuant to Mental Hygiene Law § 10.07. The respondent shall not be released pending the completion of such trial (*see* Mental Hygiene Law § 10.06 [k]).

MASTRO, J.P., BALKIN and LOTT, JJ., concur.

Ordered that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Orange County, for further proceedings, including a trial pursuant to Mental Hygiene Law § 10.07; and it is further,

Ordered that the respondent shall not be released pending the completion of such trial (*see* Mental Hygiene Law § 10.06 [k]).

[987 NYS2d 650]

In the Matter of the Claim of ANTHONY NICPON, Respondent, v
ZELASKO CONSTRUCTION, INC., et al., Respondents, and SPE-
CIAL FUND FOR REOPENED CASES, Appellant. WORKERS' COM-
PENSATION BOARD, Respondent.

Third Department, June 5, 2014

SUMMARY

APPEAL from a decision of the Workers' Compensation Board, filed January 18, 2013. The decision ruled that liability shifted to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a.

HEADNOTE

**Workers' Compensation — Special Funds — Special Fund for
Reopened Cases — Date of Last Payment of Compensation —
Lump-Sum Settlement**

Liability for future medical expenses did not shift to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a after a lapse of eight years from the date of claimant's injury and three years from the date claimant and his employer entered into a settlement agreement permitting claimant to retain the proceeds of a third-party action in exchange for, among other things, his forbearance of future indemnity benefits. Where a case is "disposed of by the payment of a lump sum," the date of the last payment of compensation is established by calculating the date to which the amount paid in the settlement would have extended had the award of indemnity benefits been made at the maximum compensation rate warranted on the date the lump-sum payment was approved (Workers' Compensation Law § 25-a [7]). Although the employer itself did not make the lump-sum payment to claimant, the proceeds of the third-party action constituted a lump-sum payment for purposes of Workers' Compensation Law § 25-a (7), which does not make reference to the source of such payment. Since the settlement agreement effectively "disposed" of the employer's obligation to pay future indemnity benefits in exchange for claimant's retention of the lump-sum payment from the third-party action, application of the statute was appropriate to bar the liability shift.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Workers' Compensation §§ 574, 576, 583, 593.
MCKINNEY'S, Workers' Compensation Law § 25-a.
NY JUR 2d, Workers' Compensation §§ 568, 766, 775–779.

ANNOTATION REFERENCE

Workers' compensation: reopening lump-sum compensa-
tion payment. 26 ALR5th 127.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: worker /2 compensation & special /2 fund /3
reopened & lump-sum

APPEARANCES OF COUNSEL

Steven M. Licht, Special Funds Conservation Committee, Albany (Jill B. Singer of counsel), for appellant.

Hamberger & Weiss, Buffalo (Renee E. Heitger of counsel), for Zelasko Construction, Inc. and another, respondents.

OPINION OF THE COURT

STEIN, J.

Claimant sustained an injury to his lower back in March 2003 and a workers' compensation claim was thereafter established for a temporary partial disability. In October 2005, claimant was classified with a permanent partial disability and the self-insured employer and its third-party administrator (hereinafter collectively referred to as the employer) were directed to continue payments at a tentative reduced earnings rate of \$125 per week. Thereafter, claimant sought to settle an outstanding third-party action arising out of the workplace accident for the sum of \$240,000. Claimant and the employer entered into an agreement in December 2008—which was approved by the Workers' Compensation Board pursuant to Workers' Compensation Law § 32—whereby the employer consented to the settlement of the third-party action, waived its liens for both past benefits and future medical expenses, and agreed to cover future medical costs in exchange for claimant's waiver of future indemnity benefits. In addition, the agreement made all prior tentative rates permanent.

In December 2011, the employer filed a request for further action, seeking to transfer responsibility for claimant's future medical expenses to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a. Following a hearing, a Workers' Compensation Law Judge found that Workers' Compensation Law § 25-a did not apply and discharged the Special Fund. However, the Board reversed and found the Special Fund liable. The Special Fund now appeals and we reverse.

Pursuant to Workers' Compensation Law § 25-a, liability for a claim will be transferred to the Special Fund when an application is made to reopen a closed case after a lapse of seven years

from the date of the injury and three years from the date of the last payment of compensation (see *Matter of Thurston v Consolidated Edison Co. of N.Y., Inc.*, 115 AD3d 1143, 1144 [2014]; *Matter of Porter v New York State Elec. & Gas Corp.*, 113 AD3d 987, 988 [2014]). The issue here distills to when the last payment of compensation was made in light of the settlement agreement between claimant and the employer. We note that, inasmuch as the resolution of this question is a matter of statutory interpretation, the Board's decision is not entitled to deference (see *Matter of Rivera v North Cent. Bronx Hosp.*, 101 AD3d 1304, 1305 [2012]; *Matter of Krausa v Totales Debevoise Corp.*, 84 AD3d 1545, 1546 [2011]).

Pursuant to Workers' Compensation Law § 25-a (7), where a case is "disposed of by the payment of a lump sum," the date of the last payment of compensation is established by calculating the date to which the amount paid in the settlement would have extended had the award of indemnity benefits been made at the maximum compensation rate warranted on the date the lump-sum payment was approved (see *Matter of Robinson v Holiday Showcase Rests., Inc.*, 46 AD3d 1178, 1179 [2007]; *Employer: Cerebral Palsy Assoc. of NYS*, 2014 WL 1630539, *1, 2014 NY Wrk Comp LEXIS 2610, *1 [WCB No. 0055 0289, Apr. 21, 2014]). Here, the employer entered into an agreement with claimant on December 30, 2008 that permitted claimant to retain the proceeds of the third-party action in exchange for, among other things, his forbearance of future indemnity benefits. In our view, these proceeds constituted a lump-sum payment for purposes of the statute. Contrary to the employer's contention that the statute only applies where the employer itself makes a lump-sum payment to the claimant, we note that the plain language of the statute indicates that it applies "where the case is disposed of by the payment of a lump sum," without reference to the source of such payment (Workers' Compensation Law § 25-a [7]). Thus, because the settlement agreement effectively "disposed" of the employer's obligation to pay future indemnity benefits in exchange for claimant's retention of a lump-sum payment from the third-party action, application of the statute is appropriate to bar transfer of liability for future medical benefits to the Special Fund. However, inasmuch as the record before us is insufficient to enable us to calculate the date to which the amount paid in the settlement would extend—taking into account such factors as the employer's share of litigation costs and the amount of the liens that the employer

waived—the matter must be remitted to the Board for a calculation of the date of the last payment of compensation for purposes of Workers’ Compensation Law § 25-a. The parties’ remaining contentions have been rendered academic by this decision.

LAHTINEN, J.P., GARRY and ROSE, JJ., concur.

Ordered that the decision is reversed, without costs, and matter remitted to the Workers’ Compensation Board for further proceedings not inconsistent with this Court’s decision.

[990 NYS2d 745]

In the Matter of LISA M. YAEGER, a Suspended Attorney, Respondent. GRIEVANCE COMMITTEE OF THE EIGHTH JUDICIAL DISTRICT, Petitioner.

Fourth Department, June 13, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee of the Eighth Judicial District. Respondent was admitted to the bar on June 27, 1991 at a term of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Suspension

Respondent attorney was guilty of professional misconduct based upon her conviction of the federal misdemeanor of filing a false income tax return, a serious crime within the meaning of Judiciary Law § 90 (4) (d). Under the totality of circumstances, including respondent's expression of remorse, her otherwise unblemished record, and the fact that she had made restitution in full, as well as the fact that the misconduct involved committing a fraud on the government in direct contravention of the obligation of all attorneys to comply with the laws, respondent was suspended for two years.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 35, 44, 65–69, 86, 89, 91, 114.

CARMODY-WAIT 2d, Officers of Court §§ 3:260, 3:276–3:277, 3:316, 3:322–3:323, 3:326–3:331, 3:336–3:337.

McKINNEY'S, Judiciary Law §§ 90 (4) (d).

NY JUR 2d, Attorneys at Law §§ 370, 375, 378–379, 382, 407, 467, 476, 483, 488–490, 496.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions; Ethics.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: suspen! /3 attorney! & (serious /2 crime!) & (tax /2 return) & two /2 year!

APPEARANCES OF COUNSEL

Guy C. Giancarlo, Associate Counsel, Eighth Judicial District Grievance Committee, Buffalo, for petitioner.

Joel L. Daniels, Buffalo, for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law by this Court on June 27, 1991. On September 20, 2013, she was convicted upon her plea of guilty in the United States District Court for the Western District of New York of three counts of filing a false income tax return in violation of 26 USC § 7207, a federal misdemeanor. Respondent admitted in the plea colloquy that she filed federal personal income tax returns for the tax years 2005 through 2007 wherein she failed to report all of the income that she had earned from her practice of law, with the result that she had avoided income taxes in the total amount of \$22,905. This Court thereafter determined that respondent had been convicted of a “serious crime” within the meaning of Judiciary Law § 90 (4) (d) and, by order entered October 23, 2013, the Court suspended respondent on an interim basis pursuant to Judiciary Law § 90 (4) (f) and directed her to show cause why a final order of discipline should not be entered. On February 10, 2014, respondent was sentenced in District Court to supervised release for a period of six months. Respondent subsequently appeared before this Court and was heard in mitigation.

In determining an appropriate sanction, we have considered respondent’s expression of remorse to this Court, her otherwise unblemished record and the fact that she has made restitution in full. We note, however, that respondent has committed a fraud on the government in direct contravention of the obligation of all attorneys to comply with the laws, particularly those so fundamental to our form of government as the filing of income tax returns and the payment of the determined tax (*see Matter of Mahon*, 15 AD2d 232, 234 [1962]). Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended from the practice of law for a period of two years, effective October 23, 2013, and until further order of this Court.

CENTRA, J.P., PERADOTTO, LINDLEY and WHALEN, JJ., concur.
Order of suspension entered.

[987 NYS2d 373]

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MAR-
LON COLE, Appellant.

First Department, June 5, 2014

SUMMARY

APPEALS from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered February 29, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

HEADNOTE

Crimes — Right to Representation Pro Se — Searching Inquiry by Court Required — Generalized Warnings Insufficient

In a prosecution for burglary, the trial court failed to conduct the required “searching inquiry” before allowing defendant to proceed pro se where the court gave nothing more than generalized warnings, and completely failed to advise defendant of the benefits of being represented by counsel. Before allowing a defendant to proceed pro se, the court must determine that the defendant’s waiver of the right to counsel is made knowingly, voluntarily, and intelligently. A waiver cannot be deemed knowing, voluntary and intelligent unless, after a “searching inquiry,” the court is satisfied that defendant is aware of the dangers and disadvantages of proceeding without counsel. The court must adequately inform the accused of the risks inherent in proceeding pro se and apprise the defendant of the singular importance of the lawyer in the adversarial system of adjudication. Here, the court’s statements to defendant that it was in his “interest” to continue with counsel; that “[g]enerally, [self-representation] is a very bad idea”; and that there were “all kinds of dangers in doing this,” its sole example being that defendant would have to give the opening statement himself, failed to insure that the dangers and disadvantages of giving up the fundamental right to counsel had been impressed on defendant. The court also failed to advise defendant about the importance of a lawyer in the adversarial system of adjudication. Further, a searching inquiry encompasses consideration of a defendant’s pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on the waiver’s validity. The colloquy should be extensive and should also include the nature of the charges and the range of allowable punishments.

RESEARCH REFERENCES

By the Publisher’s Editorial Staff

AM JUR 2d, Criminal Law §§ 1152–1154, 1158.

CARMODY-WAIT 2d, Right to Counsel §§ 184:80, 184:87,
184:89.

LA FAVE, ET AL., CRIMINAL PROCEDURE (3d ed) § 11.3.

NY JUR 2d, Criminal Law: Procedure §§ 830, 840, 841, 846.

ANNOTATION REFERENCE

Accused’s right to represent himself in state criminal proceeding—modern state cases. 98 ALR3d 13.

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Database: NY-ORCS

Query: searching /2 inquiry /s “pro se” & generalized

APPEARANCES OF COUNSEL

Robert S. Dean, Center for Appellate Litigation, New York City (Lisa A. Packard of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York City (Beth Fisch Cohen and Susan Axelrod of counsel), for respondent.

OPINION OF THE COURT

ACOSTA, J.

At issue in this burglary case is whether the trial court conducted the “searching inquiry” required by the Court of Appeals in *People v Crampe* (17 NY3d 469 [2011]) before allowing defendant to proceed pro se. We find that it did not and, therefore, reverse and remand for a new trial.

Defendant first requested to proceed pro se during the suppression hearing. Noting that they were “in the middle of a hearing,” the court advised defendant that he could confer with counsel about anything he thought counsel “should be doing” when the questioning of the witness was completed. At the conclusion of the evidence, counsel read a statement prepared by defendant, in which defendant sought suppression of a statement. A few days later, the court denied suppression and adjourned the case for trial. Defendant again asked to proceed pro se. The court said that that was a possibility and that it would be discussed on the next court date, and urged defendant to think about it. When defendant said that he “just need[ed] a legal adviser,” the court answered that defendant might get a legal adviser, but urged defendant to discuss it with counsel and “think about it.”

Several weeks later, counsel told the court that he and defendant had discussed the matter and that defendant still wanted to proceed pro se. Defendant responded, “Okay,” when the court asked how he was feeling, and, in response to the court’s inquiry about the level of his education, stated that he had “a full high school education” and “a diploma.”

The court instructed defendant:

“It is in your interest to continue to have [your attorney] represent you. You have a right to represent

yourself. That doesn't mean it is a good idea. In fact, it is probably a bad idea. Generally, it is a very bad idea. Mr. San Pedro is a trained attorney so I would urge you avail yourself of his services so that he can represent you in this case. I have every confidence that he will do a very good job.

"Can we proceed with him as your lawyer?"

Defendant responded, "I understand what you are saying but I have been studying and doing legal work. He will be [my] legal . . . advisor." The court told defendant that San Pedro could be his lawyer or his legal advisor, and defendant confirmed that he preferred to use counsel as a legal advisor. The court reminded defendant that he could change his mind at any time and have the attorney take over as counsel and that defendant should alert the court if he had "any legal questions" or needed to consult with counsel.

The court added,

"Understand that there are all kinds of dangers in doing this, not the least of which is if you find yourself in a position, for example, giving an opening statement in this case, the jury will actually hear you talk to them, which is something that will not happen if you chose not to testify in this case."

Defendant said that he understood. The court added that this was a course "fraught with problems" and that defendant should "think about it carefully and talk to Mr. San Pedro about it over lunch." The court permitted defendant to represent himself and granted defendant's request that San Pedro act as his legal advisor.

Before allowing a defendant to proceed pro se, the court must determine that the defendant's waiver of the right to counsel is made knowingly, voluntarily, and intelligently (*People v Crampe*, 17 NY3d 469, 481 [2011], *cert denied* 565 US —, 132 S Ct 1746 [2012]). A waiver cannot be deemed knowing, voluntary and intelligent unless, after a "searching inquiry," the court is satisfied that defendant is "aware of the dangers and disadvantages of proceeding without counsel" (*id.* [internal quotation marks omitted]). The court must adequately inform the accused of the "risks inherent in proceeding pro se" and apprise the defendant of "the singular importance of the lawyer in the adversarial system of adjudication" (*id.* at 482 [internal quotation marks omitted]).

It is not enough to tell the defendant that it is against his interests to represent himself, even when coupled with advise about the consequences of conviction (*see e.g. People v Kaltenbach*, 60 NY2d 797, 799 [1983] [court's declarations that defendant was entitled to be represented by a lawyer, that he was facing a serious charge, and that, if convicted, he could receive a year's imprisonment failed to adequately warn]; *People v Sawyer*, 57 NY2d 12, 21 [1982], *cert denied* 459 US 1178 [1983] [court's declaration that defendant was "facing a very serious charge" and that his "own best interests are probably served by having a lawyer represent you" were "woefully inadequate"]). It is not enough to warn the defendant in general terms that going pro se would be "extraordinarily dangerous" and "that most defendants who represent themselves are not successful," even when coupled with a discussion of the potential sentences (*People v Rafikian*, 98 AD3d 1139, 1140 [2nd Dept 2012], *lv denied* 20 NY3d 988 [2012]).

In addition to insuring that the defendant is aware of the dangers and disadvantages of proceeding pro se, a searching inquiry "encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on a waiver's validity" (*Crampe*, 17 NY3d at 482). The colloquy should also include the nature of the charges and the range of allowable punishments (*see United States v Fore*, 169 F3d 104, 108 [2d Cir 1999], *cert denied* 527 US 1028 [1999]).

A comparison of the warnings given in *People v Crampe* (17 NY3d at 473-474) and by the hearing court in *People v Wingate* (17 NY3d 469, 475-480 [2011] [decided with *Crampe*]), which were found inadequate by the Court of Appeals, with inquiry conducted by the trial court in *Wingate* (17 NY3d at 476-480), which was found adequate, illustrates the extent of the inquiry that must be conducted.*

* The trial court in *Crampe* merely gave the defendant a form advising of his rights, and said "[b]e here with a lawyer or without a lawyer, as you choose. I advise you to get a lawyer" (*Crampe*, 17 NY3d at 473-474).

The form stated:

"The defendant has the absolute right to have counsel at all times during this proceeding. The defendant has a further constitutional right to represent himself in a criminal proceeding.

"The defendant acknowledges and understands the risk of representing himself and the failure to cooperate with counsel. Among

(n. cont'd)

We quote extensively from the *Wingate* trial court's "extensive colloquy with defendant, drawing his attention to the many challenges that he would face if he proceeded pro se rather than avail himself of legal representation" (*id.* at 483), to stress the extent of the searching inquiry mandated by the Court. The trial court reviewed the favorable plea offer that defendant had turned down, warned him that as a discretionary persistent felon he faced a life sentence, "and stressed that, 'based on [its]

those risks is the risk that he could be convicted of a crime, and he may be sentenced to jail if found guilty.

"The defendant acknowledges that a criminal trial and proceedings associated with a trial are difficult to understand and complex in nature.

"If you elect to represent yourself by failure to cooperate with the Legal Aid Society and retain counsel, you acknowledge that you are under no distress, no threats or promises have been made to you, and you are not suffering from any mental defect, and your election to represent yourself is not affected by drugs or alcohol.

"You are further advised that you have a constitutional right to be present at a trial of these charges before this Court. This right may be waived by your conduct. Such conduct must be a knowing, voluntary, intelligent waiver of this right. Acknowledgment of this right is by your signature hereon this date.

"Further, your signature is taken as evidence that you are not under any distress or compulsion, and you are ready for trial on August 21, 2008 at 9:30 [a.m.], or any adjourn date thereafter without justifiable excuse, shall be deemed a waiver of your right to be present at the trial of these charges, and we will proceed in your absence at that time" (*id.* at 473-474).

The hearing court's inquiry in *Wingate* consisted of the following:

"[T]he court: You understand that you're facing felony charges, sir?

"[T]he defendant: Yes.

"[T]he court: You understand that you face jail time if convicted of the top charge in this indictment?

"[T]he defendant: Yes.

"[T]he court: Do you understand that the right to represent yourself is not an absolute right? If you can't conduct yourself in a proper manner in the courtroom, you would forfeit the right to pro se representation. Do you understand that?

"[T]he defendant: Yes.

"[T]he court: Sir, notwithstanding any of the risks that you face representing yourself, do you still wish to go forward and defend yourself in this case? That's your constitutional right. Do you understand that?

"[T]he defendant: Yes.

"[T]he court: Okay. I will allow you to represent yourself."

many years of experience,’ it was [the court’s] ‘good faith belief that it is a mistake to represent yourself’” (*id.* at 476).

The court next informed the defendant that the law could be complicated and that even lawyers should not engage in self-representation, especially given the exposure that the defendant was facing in the event of a conviction, and the defendant responded that he understood (*id.*).

“After reiterating that defendant ‘could be facing a long time in jail, up to life,’ the trial judge cautioned that it was ‘a big mistake to go it alone.’ The judge then asked defendant if he had any legal training, and defendant replied that he had been studying law for the last 10 or 12 years ‘in the street and different libraries’ and was ‘not a paralegal [but] just received legal research certificates.’ When the judge inquired if he was a college graduate, defendant responded that he held a two-year associate’s degree in labor studies from Empire State College, and was ‘a law librarian, library clerk in the facility’ where he worked” (*id.*).

The court again urged defendant to get a lawyer, and “[b]efore sending the case to the trial-ready part for disposition of defendant’s pro se speedy trial motion, the judge reiterated that defendant should think twice before representing himself” (*id.* at 477). After the defendant’s speedy trial motion was denied and his case was recalled for trial, the trial judge reiterated that the defendant should seriously consider getting a lawyer; defendant responded that he had asked for an attorney to assist him, but that he did not want an attorney to take control of his case (*id.*).

The trial judge then had an extensive dialogue with defendant, filling 20 pages of transcript. The court delved into the defendant’s age, competency in English, whether he was taking or had ever taken medications that might compromise his understanding, and confirmed that defendant did not suffer from any mental or physical condition that might impair his ability to follow what was happening in court. The judge also asked the defendant whether he had sufficient time to reflect on his decision to go pro se, and whether doing so was still his desire, to which the defendant said yes (*id.* at 477). Later in the inquiry, the court asked defendant whether he had been coerced or threatened or in any way influenced to request to represent himself (*id.* at 478).

The trial judge also reviewed defendant's education and employment history, and knowledge of the criminal justice system. In response, the defendant stated that he had an "A" average in college and had worked as a legal clerk. He also had experience with the criminal justice system, and had "some success representing himself in this case in the past," although he never represented himself at a trial. Further inquiry convinced the court that the defendant had no knowledge of the rules of evidence (*id.* at 478).

The trial judge also probed the defendant's understanding of the charges he was facing and the plea offer that had been made, and the length of the possible sentence he might receive if convicted. The defendant said that he understood his lawyers' explanations of court procedures and legal issues related to the charges. He nonetheless preferred self-representation. "[O]therwise, he would not know about 'things . . . going on between [his attorney] and the DA'" (*id.*).

The trial judge questioned the defendant about his knowledge of the distinct functions of the judge and the jury. The defendant "answered that the 'jury would be the triers of the facts' and would decide the case 'based on the facts . . . presented . . . and the instructions'" (*id.*). The defendant described the prosecutor's role as

"to seek justice not just convictions. Her duty is to present her case . . . and to do it fairly. My job is to protect, preserve the rights of myself . . . , and to present the same information or evidence that I have to contradict what is being stated by the witnesses . . . that [the] prosecution presents" (*id.*).

The trial judge then addressed some of the dangers of proceeding pro se:

"[T]he law recognizes the right of a person to defend himself or herself. However, the law also recognizes such a choice may not be a wise one. Let me alert you now to some of the [dangers] of self-representation so that you will be aware of them before you finally decide whether you wish to give up your right to be represented by a lawyer. Please listen to me carefully. Even the most intelligent and educated layman has small and sometimes no skills in the field of law. Left without the assistance of counsel, he or she may be put on trial without a proper charge and

convicted upon incomplete[], irrelevant, or inadmissible evidence. Often the layman lacks the skill [or] knowledge to adequately prepare his or her defense, even though he may have a good one. Without counsel, though an accused may not be guilty, he faces the danger of conviction because he does not know how to adequately protect his legal rights. Lawyers are both generally college and law school trained before they are permitted to take the bar examination. Only those who pass the bar are licensed to practice law. The number who become trial lawyers [is] small. In order to adequately represent a client, a trial lawyer needs a comprehensive knowledge of the rules of evidence, which I believe you do not possess, as well as an understanding of the art of jury selection and the art of cross-examination . . . [M]ost non-lawyers do not have such education and training. Did you understand what I just said?" (*Id.* at 479.)

The defendant answered "Yes" (*id.*).

"The trial judge then asked defendant if he understood that almost all pro se representations are unsuccessful; that by choosing to represent himself he was not entitled to a lawyer, although the judge would appoint a lawyer to 'sit next to [him] and give [him] legal advice'; that he would be held to the same legal standards as an attorney; that he would 'receive no advantage or assistance from [the] court' because '[e]ven in those cases where [he] show[ed] a lack of complete knowledge of how to represent [himself], [the court couldn't] jump in the middle' and help him out; that when defendant did 'something wrong,' the judge was going to 'call [him] on it' and he had to 'live with that'; that he risked not being able to understand legal terms of art used in court proceedings, the 'case names used and what they stand for' and potentially applicable rules or theories of criminal law; that he would be subject to the same rules of evidence as an attorney and chanced not being able to introduce evidence because of his ignorance of these rules; that his examination of witnesses would be held to the same standards as those expected of an attorney; that he would have to make his own opening and closing

statements to the jury; that the assistant district attorney presenting the case against him was trained in the law and was familiar with criminal law principles, and would not ‘go “easy” on’ him because he was representing himself; that by waiving his right to counsel he was giving up the ‘benefit of [an] attorney’s ability, training, and past experiences in speaking to a jury’; and that he would be expected to ‘conduct [himself] appropriately in the courtroom.’ Defendant indicated that he understood all of these things, and ‘[w]ithout a doubt’ still wished to represent himself” (*id.* at 479-480).

Last, the court admonished the defendant that “‘self-representation [was] not a license to abuse’ the courtroom’s ‘dignity and decorum,’ cautioning him that if he did not conduct himself properly he might lose his right to be present at trial” (*id.* at 480).

Here, we find that the trial court’s inquiry failed to satisfy *Crampe*’s “searching inquiry” standard. The court gave nothing more than generalized warnings, and completely failed to advise defendant of the benefits of being represented by counsel. The court’s statements to defendant that it was in his “interest” to continue with counsel; that “[g]enerally, [self-representation] is a very bad idea”; and that there were “all kinds of dangers in doing this,” its sole example being that defendant would have to give the opening statement himself, failed to insure “that the dangers and disadvantages of giving up the fundamental right to counsel [had] been impressed on . . . defendant” (*Crampe*, 17 NY3d at 481). The court also failed to advise defendant about the “importance of the lawyer in the adversarial system of adjudication” (*see Crampe*, 17 NY3d at 482 [internal quotation marks omitted]). Because we find that the court did not make the requisite searching inquiry, we reverse the judgment convicting defendant and remand for a new trial.

Since we are ordering a new trial, we do not address defendant’s other arguments.

Accordingly, the judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered February 29, 2012, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of eight years, should be reversed, on the law, and the matter remanded for a new trial.

FRIEDMAN, J.P., RENWICK, MANZANET-DANIELS and GISCHE, JJ., concur.

Judgment, Supreme Court, New York County, rendered February 29, 2012, reversed, on the law, and the matter remanded for a new trial.

[987 NYS2d 484]

In the Matter of the Claim of JAMIE HAZAN, Appellant, v WTC VOLUNTEER FUND et al., Respondents. WORKERS' COMPENSATION BOARD, Respondent.

Third Department, June 5, 2014

SUMMARY

APPEAL from a decision of the Workers' Compensation Board, filed September 19, 2012. The decision ruled that claimant was not a participant in the World Trade Center rescue, recovery or cleanup operations and denied his claim for workers' compensation benefits.

HEADNOTE

Workers' Compensation — Coverage — World Trade Center Volunteer Fund — Definition of "Volunteer"

An individual need not have been affiliated with an authorized rescue entity or volunteer agency at the time he or she participated in World Trade Center rescue, recovery, or cleanup operations in order to qualify for coverage under Workers' Compensation Law article 8-A as a "volunteer" (*see* Workers' Compensation Law § 161 [1] [b] [i]). Thus, the decision of the Workers' Compensation Board denying claimant benefits for injuries allegedly sustained as a result of his exposure to dust and toxins during the two days that he assisted as an emergency medical technician at ground zero and a nearby triage center, solely on the basis that he "did not serve under the direction of an authorized rescue entity or volunteer agency" in accordance with the definition of volunteer provided in Board-issued orders, was reversed. The Board's imposition of such a requirement is contrary to the plain terms of the statute, which does not define the term volunteer, and also the commonly-understood meaning of the word. That similar restrictive language was considered, but deleted from the final version of Workers' Compensation Law article 8-A, is persuasive evidence that the legislature rejected the more restrictive definition of volunteer that was originally proposed. While the Board has consistently relied upon its own orders in denying benefits to volunteers who were not affiliated with an authorized rescue entity or volunteer association, the Board's chair, although vested with certain powers to administer the Workers' Compensation Law (Workers' Compensation Law § 141), is not vested with the authority to supplement or amend duly enacted legislation.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Workers' Compensation §§ 51, 145.

McKINNEY'S, Workers' Compensation Law § 161 (1) (b) (i).

NY JUR 2d, Workers' Compensation §§ 9, 447, 988.

ANNOTATION REFERENCE

Recovery of workers' compensation for acts of terrorism.
20 ALR6th 729.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: worker /2 compensation & world /2 trade /2 center
/s volunteer

APPEARANCES OF COUNSEL

Pro Bono Appeals Program, Albany (*Michael J. Hutter* of counsel), for appellant.

OPINION OF THE COURT

EGAN JR., J.

On the morning of September 11, 2001, claimant, a former emergency medical technician, started walking from his residence on the upper west side of Manhattan toward the World Trade Center site to offer assistance in the rescue and recovery efforts. While en route, claimant heard that a triage center was being established at the Chelsea Piers and he proceeded to that location, where he spent the day sorting supplies and setting up a treatment area. The following day, claimant went to ground zero, found his way around the barriers, flashed his emergency medical technician card and badge to gain access to the site and attempted to search for survivors. Claimant was not registered or affiliated with any volunteer organization or agency during the course of these two days, and he did not aid in the rescue or recovery operations after September 12, 2001.

In March 2010, claimant registered his participation as a volunteer in the World Trade Center rescue, recovery and/or cleanup operations with the Workers' Compensation Board (*see* Workers' Compensation Law § 162) and thereafter filed this claim for workers' compensation benefits for injuries allegedly sustained as a result of his exposure to dust and toxins at the sites in question. Following various proceedings, a Workers' Compensation Law Judge (hereinafter WCLJ) found that claimant sustained a compensable injury for gastroesophageal reflux disease, depression, anxiety, chronic rhinitis and sinusitis and awarded benefits. The World Trade Center Volunteer Fund sought review of the WCLJ's decision, contending that claimant failed to meet the definition of "volunteer" because he did not provide proof that he was acting under the direction and control of a volunteer agency. In rebuttal, claimant argued, among other things, that the case also should have been established for asthma. The Board reversed the WCLJ's decision, finding that claimant did not meet the definition of "first response emer-

gency services personnel” as set forth in the final revised Order of the Chair No. 967 issued by the Board’s chair in 2006 and, hence, did not qualify as a volunteer. This appeal by claimant ensued.

Workers’ Compensation Law article 8-A, which is to be afforded a liberal construction, “was enacted ‘to remove statutory obstacles to timely claims filing and notice for latent conditions resulting from hazardous exposure for those who worked in rescue, recovery or cleanup operations following the World Trade Center September 11th, 2001 attack’ ” (*Matter of Williams v City of New York*, 66 AD3d 1203, 1204 [2009], quoting Senate Mem in Support, 2006 McKinney’s Session Laws of NY at 1915). A “volunteer” may qualify for coverage under the statute provided he or she tenders to the Board satisfactory evidence that he or she participated in the rescue, recovery, or cleanup operations at the World Trade Center site (*see* Workers’ Compensation Law § 161 [1] [b] [i])—a geographical location defined by Workers’ Compensation Law § 161 (2)—between September 11, 2001 and September 12, 2002 and suffers from a “[q]ualifying condition,” including rhinitis and sinusitis (*see* Workers’ Compensation Law § 161 [3] [a]), gastroesophageal reflux disease (*see* Workers’ Compensation Law § 161 [3] [c]) and anxiety or depression (*see* Workers’ Compensation Law § 161 [3] [d]). Here, the Board did not directly address the time, location and activity elements of the statute; rather, the Board denied claimant’s application for workers’ compensation benefits solely because claimant “did not [serve] under the direction of an authorized rescue entity or volunteer agency” and, hence, “[did] not meet the definition of [a] volunteer” within the meaning of Workers’ Compensation Law article 8-A.

“It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. The starting point is always to look to the language itself and where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning” (*Matter of Joyce [Coface N. Am. Ins. Co.—Commissioner of Labor]*, 116 AD3d 1132, 1133 [2014] [internal quotation marks and citations omitted]; *see Matter of Talisman Energy USA, Inc. v New York State Dept. of Envtl. Conservation*, 113 AD3d 902, 904 [2014]), as “the text of a provision is the clearest indicator of the enactors’ intent” (*Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]). Here, Workers’ Compensation Law § 161 does not define the term volunteer, and Workers’ Compensation Law article 8-A is otherwise silent

in this regard. Affording such term its plain and ordinary meaning (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 232), a volunteer is defined as, among other things, "a person who performs a service willingly and without pay" (Dictionary.com, <http://dictionary.reference.com/browse/volunteer?s=t> [accessed May 12, 2014]). Noticeably absent from both Workers' Compensation Law article 8-A and the commonly understood meaning of the word volunteer is any requirement that such individual "serve under the direction of an authorized rescue entity or volunteer agency." Accordingly, the Board's imposition of such a requirement is, to our analysis, contrary to the plain terms of the statute.

Moreover, our conclusion in this regard is fully supported by the underlying legislative history. Following September 11, 2001, the House of Representatives appropriated various funds to, insofar as is relevant here, assist the Board in processing claims related to the terrorist attack. To that end, \$25,000,000 was allocated to the Uninsured Employers Fund "for reimbursement of claims related to the first response emergency services personnel who were injured, were disabled, or died due to the terrorist attacks" (Department of Defense and Emergency Supplemental Appropriations for Recovery From and Response to the Terrorist Attacks on the United States Act, 2002, as added by Pub L 107-117, 115 Stat 2230, 2313 [107th Cong, 1st Sess, Jan. 10, 2002]). In the absence of contemporaneous enabling legislation, the Board issued Order of the Chair No. 967 in June 2003, which defined the term "first response emergency services personnel" as:

"[a]ll persons who, serving without compensation or remuneration, and serving under the direction of an authorized rescue entity or volunteer agency, provided services to deal with the emergency situation created by the September 11, 2001 terrorist attack on the World Trade Center, including but not limited to firefighting, rescue, emergency medical, health and sanitation services, emergency debris clearance, care and shelter of those made homeless, distribution of food, water, and medical supplies and other equipment."¹

1. A revised order—issued in July 2003—contained the same definition of "first response emergency services personnel," and both the original and

(n. cont'd)

Thereafter, the Board routinely applied this definition of volunteer to deny awards to claimants who were not associated with an authorized rescue entity or volunteer agency (*see e.g. Employer: WTC Volunteer*, 2006 WL 196769, 2006 NY Wrk Comp LEXIS 319 [WCB No. 0045 1670, Jan. 11, 2006]; *Employer: WTC Volunteer*, 2005 WL 3029277, 2005 NY Wrk Comp LEXIS 9568 [WCB No. 0044 7096, Nov. 1, 2005]).

Thereafter, in August 2006, the Legislature enacted Workers' Compensation Law article 8-A (*see* L 2006, ch 446; Senate Mem in Support, 2006 McKinney's Session Laws of NY at 1914). In response, a final revised Order of the Chair No. 967 was issued, which, although acknowledging this legislative enactment, nonetheless retained the requirement that a volunteer be affiliated with an authorized rescue entity or volunteer agency in order to qualify for benefits—a requirement that the Board has continued to impose in its subsequent decisions (*see e.g. Employer: WTC Volunteer*, 2013 WL 5959058, 2013 NY Wrk Comp LEXIS 10020 [WCB No. G038 2498, Oct. 29, 2013]; *Employer: WTC Volunteer*, 2009 WL 1392412, 2009 NY Wrk Comp LEXIS 9211 [WCB No. 0080 3691, May 8, 2009]). The flaw in the Board's analysis on this point is that, prior to the enactment of Workers' Compensation Law article 8-A, several bills were circulated in the Legislature that defined a “volunteer rescue worker” as one who “rendered service under the direction and control of an authorized rescue entity” (2003-2004 NY Senate Bill S04693; 2003-2004 NY Assembly Bill A08844; 2001-2002 NY Assembly Bill A09482). Significantly, however, such language is not included in Workers' Compensation Law article 8-A, and “[t]he deletion of this explicit language from the version of [Workers' Compensation Law article 8-A] that finally passed is persuasive evidence that the Legislature rejected” the more restrictive definition of volunteer that originally was proposed (*Majewski v Broadalbin-Perth Cent. School Dist.*, 231 AD2d 102, 107 [1997], *affd* 91 NY2d 577 [1998]; *see generally Matter of Jessica D. v Jeremy H.*, 77 AD3d 87, 89-91 [2010]).

Finally, to the extent that the Board has consistently relied upon the subject orders in denying benefits to volunteers who were not affiliated with an authorized rescue entity or volunteer association, we need note only that while Workers' Compensation Law § 141 vests the Board's chair with certain powers to administer the provisions of the Workers' Compensa-

revised order also defined what constituted an “authorized rescue entity or authorized volunteer agency.”

tion Law, it does not vest him or her with the authority to supplement or amend duly enacted legislation. Accordingly, whatever the net effect of such orders may be, they “cannot overrule the statute itself” (*Matter of Russomanno v Leon Decorating Co.*, 306 NY 521, 525 [1954]). In sum, as neither the statutory language nor the legislative history supports the Board’s requirement that an individual be affiliated with an authorized rescue entity or volunteer agency in order to qualify as a volunteer and, hence, be eligible for the coverage afforded under the statute, the Board’s decision denying claimant’s application for benefits upon this particular ground cannot stand.² That said, claimant still must satisfy the time, location and activity elements of Workers’ Compensation Law article 8-A in order to be entitled to benefits, and we therefore remit this matter to the Board for consideration of those issues and, more to the point, the sufficiency of claimant’s proof thereon.

LAHTINEN, J.P., MCCARTHY, ROSE and LYNCH, JJ., concur.

Ordered that the decision is reversed, without costs, and matter remitted to the Workers’ Compensation Board for further proceedings not inconsistent with this Court’s decision.

2. To the extent that it may be argued that the imposition of such a requirement is necessary in order to guard against frivolous claims, the remedy lies with the Legislature in the form of a statutory amendment.

[987 NYS2d 275]

In the Matter of SAMUEL J. IANACONE, JR., an Attorney, Respondent. GRIEVANCE COMMITTEE OF THE SEVENTH JUDICIAL DISTRICT, Petitioner.

Fourth Department, June 13, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee of the Seventh Judicial District. Respondent was admitted to the bar on July 9, 1975 at a term of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Suspension

Respondent attorney was guilty of professional misconduct based upon his conviction of the misdemeanor of criminal tax fraud in the fifth degree, a serious crime within the meaning of Judiciary Law § 90 (4) (d). Under the totality of circumstances, including the serious nature of the misconduct, as well as respondent's otherwise unblemished record, and the facts that he had paid the delinquent taxes arising from the misconduct and the misconduct was unrelated to his practice of law, respondent was suspended from the practice of law for three years, but the suspension was stayed on certain conditions.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 37, 86, 89, 113.

CARMODY-WAIT 2d, Officers of Court §§ 3:276, 3:326, 3:328, 3:337.

MCKINNEY'S, Judiciary Law § 90 (4) (d).

NY JUR 2d, Attorneys at Law §§ 366, 375-378, 476, 478, 480, 483.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions; Taxes.

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Query: suspen! & guilty /s tax /2 fraud /4 fifth

APPEARANCES OF COUNSEL

Andrea E. Tomaino, Principal Counsel, Attorney Grievance Committee of the Seventh Judicial District, Rochester, for petitioner.

Richard A. Kaul, Rochester, for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law by this Court on July 9, 1975. On October 3, 2013, he was convicted upon his plea of guilty in Monroe County Court to criminal tax fraud in the fifth degree in violation of Tax Law § 1802, a class A misdemeanor. Respondent admitted during the plea colloquy that he willfully failed to file his state personal income tax return for the year 2009. This Court thereafter determined that respondent had been convicted of a “serious crime” within the meaning of Judiciary Law § 90 (4) (d) and, by order entered December 20, 2013, directed him to show cause why a final order of discipline should not be entered. On March 4, 2014, respondent was sentenced in County Court to a three-year period of probation, which included the condition that he file and pay state income taxes in a timely fashion during the period of probation. Respondent subsequently appeared before this Court and was heard in mitigation.

In determining an appropriate sanction, we have considered the serious nature of the misconduct, as well as the matters submitted by respondent in mitigation, which include his otherwise unblemished record and the fact that he has paid the delinquent taxes arising from the misconduct. We have further considered that the misconduct was unrelated to his practice of law. Accordingly, after consideration of all of the factors in this matter, we conclude that respondent should be suspended from the practice of law for a period of three years, and until further order of this Court. We direct, however, that the period of suspension be stayed on condition that respondent, during that period, shall comply with the conditions of probation that were imposed by County Court. Furthermore, in accordance with the order entered herewith, respondent during the period of suspension must submit to the Grievance Committee documentation establishing that he has timely filed his state and federal income tax returns and paid any income taxes due therewith, whether in full or by installment agreement (*see Matter of Kolodziej*, 84 AD3d 1584, 1584 [2011]). The Grievance Committee shall report to this Court any substantial failure by respondent to comply with the aforementioned conditions, whereupon the Grievance Committee may move before this Court to vacate the stay of respondent’s suspension. Respondent may apply to this Court

for an order terminating the period of suspension after three years.

SMITH, J.P., FAHEY, CARNI AND SCONIERS, JJ., concur.

Order of suspension entered.

[987 NYS2d 65]

In the Matter of THEODORE A. VIALET (Admitted as THEODORE ANTHONY VIALET), an Attorney, Respondent. DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, June 3, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on May 29, 1996 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department as Theodore Anthony Violet.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Censure

Pursuant to the reciprocal disciplinary provisions of 22 NYCRR 603.3, respondent was publicly censured predicated upon similar discipline imposed on him by the United States Court of Appeals for the Second Circuit for his misconduct in connection with numerous petitions for review in immigration matters in which he failed to comply with the court's scheduling orders, and submitted deficient and untimely briefs. Because the report of the Committee on Admissions and Grievances was not sufficiently clear as to how respondent violated disciplinary rules prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation, and illegal conduct adversely reflecting on his honesty, trustworthiness or fitness as a lawyer, that finding was not a basis for reciprocal discipline. Furthermore, the Departmental Disciplinary Committee did not specifically cite to those violations as part of its argument that respondent's misconduct before the Second Circuit would also constitute misconduct if committed before the courts of New York State.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 38, 45, 113.

CARMODY-WAIT 2d, Officers of Court §§ 3:261, 3:263, 3:298, 3:326, 3:328, 3:333.

22 NYCRR 603.3.

NY JUR 2d, Attorneys at Law §§ 348–350, 440, 442, 475–478, 483, 490.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions.

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Query: censured & reciprocal & misconduct /s circuit & immigration

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (Orlando Reyes of counsel), for petitioner.

Theodore A. Violet, respondent pro se, no appearance.

OPINION OF THE COURT

Per Curiam.

Respondent Theodore A. Violet was admitted to the practice of law in the State of New York by the Second Judicial Department on May 29, 1996, under the name Theodore Anthony Violet. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

By petition dated February 7, 2014, the Departmental Disciplinary Committee (DDC) seeks an order, pursuant to Judiciary Law § 90 (2) and Rules of the Appellate Division, First Department (22 NYCRR) § 603.3, publicly censuring respondent predicated upon similar discipline imposed by the United States Court of Appeals for the Second Circuit on February 7, 2012 (460 Fed Appx 30 [2012]), or, in the alternative, sanctioning respondent as this Court deems appropriate.

By order of February 25, 2010, the Second Circuit referred respondent to its Committee on Admissions and Grievances (CAG) for investigation and preparation of a report on whether he should be subject to disciplinary and/or corrective action. At issue was, inter alia, respondent's conduct in connection with 31 petitions for review in immigration matters in which he failed to comply with the court's scheduling orders resulting, in many instances, in dismissal. In other instances, respondent filed briefs only after the court had issued orders to show cause why the petitions for review should not be dismissed. Also at issue was respondent's submission of deficient briefs.

By letter of March 1, 2010 entitled "Notice of Referral and Proceeding," the CAG provided respondent with a copy of the referral order and directed him to respond within 30 days. Respondent explained that his failure to comply with the court's scheduling orders and his deficient briefing were the result of, inter alia: (1) poor health; (2) an unmanageable caseload; (3) inadequate office support; and (4) time pressures and short

deadlines imposed by the court's rules. As to his deficient briefing, respondent emphasized that only a small percentage of the total number of briefs he submitted to the court were of poor quality; he apologized for his conduct, and emphasized that he did not intentionally fail to meet the court's deadlines.

On October 8, 2010, a hearing was held before a CAG subcommittee at which respondent appeared pro se and testified on his own behalf. Respondent essentially reiterated the explanations set forth in his prior responses and emphasized, *inter alia*, that he successfully moved to have some of the dismissed matters reopened by the Board of Immigration Appeals.

In May 2011, the CAG issued its report in which it found by clear and convincing evidence that respondent had committed misconduct and recommended that he be publicly reprimanded and required to fulfill certain CLE requirements. The CAG also concluded that respondent had filed deficient briefs in several cases, in violation of Federal Rules of Appellate Procedure rule 28 (a) (9) (A), and continued to do so even after the court issued its referral order.

Based upon the foregoing the CAG found that respondent violated, *inter alia*: Code of Professional Responsibility DR 1-102 (a) (5) (22 NYCRR 1200.3 [a] [5]) and rule 8.4 (d) of the Rules of Professional Conduct (22 NYCRR 1200.0) (conduct prejudicial to the administration of justice); DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]) and rule 8.4 (h) (conduct that adversely reflects on fitness as a lawyer); DR 6-101 (a) (22 NYCRR 1200.30 [a]) and rules 1.1 (b) and 1.3 (b) (lack of competence, inadequate preparation, and neglect); DR 7-101 (a) (22 NYCRR 1200.32 [a]) and rules 1.1 (c) (1) and (2) and 1.3 (c) (failure to seek the objectives of a client; prejudice or damage to a client, and failure to carry out a contract of employment); rule 1.2 (e) (failure to properly exercise professional judgment); DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4]) and rule 8.4 (c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and rule 8.4 (b) (illegal conduct adversely reflecting on honesty, trustworthiness or fitness as a lawyer) (discussed further *infra*).*

As to aggravation, the CAG noted: (1) respondent's pattern of failing to meet deadlines or failing to apply for extensions before

* The conduct at issue occurred between 2008 and 2009 and, therefore, must be evaluated under both the former Code of Professional Responsibility Disciplinary Rules and the current Rules of Professional Conduct.

deadlines had passed fell “slightly on the side of aggravation”; and (2) while respondent had improved his timeliness, he continued to miss court imposed deadlines. The CAG also found significant mitigation, to wit: (1) respondent expressed remorse and lacked a selfish motive; (2) he provided valuable legal services to under-served West African immigrants, predominantly in asylum cases; (3) he charged low fees which made him accessible to his clients; (4) he accepted responsibility for his misconduct and instituted corrective measures; (5) the misconduct at issue occurred over a relatively brief period of time; (6) he had reduced his appellate caseload; and (7) he had enjoyed some success in significant asylum cases.

As to sanction, the CAG opined:

“[i]t is the Committee’s conclusion that [respondent] was not properly equipped to handle the influx of Second Circuit matters that came in to his office—that is, [respondent] lacked sufficient practical skills, support staff, and experience to adequately follow the Court’s rules and properly protect his clients’ interests. It also is this Committee’s conclusion, however, that because of [respondent’s] educational background and his genuine dedication to his clients’ needs, [respondent] is indeed capable of competently representing petitioners before the Court . . .

“In light of all the factors noted above, the Committee recommends that [respondent] receive a public reprimand from the Court.”

The CAG also recommended that respondent be required to complete certain CLE requirements.

In June 2011, respondent submitted a response to the CAG’s report in which he, *inter alia*, acknowledged his misconduct and agreed with the CAG’s findings and recommendations. Respondent argued, however, that the CAG’s report failed to list *all* the cases he had managed to reopen after their dismissal by the court.

By order of February 7, 2012, the Second Circuit adopted the CAG report, publicly reprimanded respondent, and imposed the CLE requirements recommended by the CAG. The Second Circuit addressed respondent’s response to the CAG’s report stating that it construed his argument that the CAG’s list of reopened matters was incomplete as a request to consider ad-

ditional mitigation. The court found, however, that the CAG had credited respondent's reopening of cases beyond the two matters cited in its report. It is this order of public reprimand that forms the basis of the instant motion for reciprocal discipline.

The only defenses to reciprocal discipline are enumerated at 22 NYCRR 603.3 (c), to wit: a lack of notice and opportunity to be heard in the foreign jurisdiction; an infirmity of proof establishing the misconduct; and the misconduct at issue in the foreign jurisdiction would not constitute misconduct in New York (*Matter of Hoffman*, 34 AD3d 1 [1st Dept 2006]). Respondent's failure to appear notwithstanding, no such defenses are available. Respondent received notice of the allegations at issue in the Second Circuit's referral order and in the CAG's notice of referral and proceedings, submitted responses to the CAG's notice, testified at the hearing and submitted a response to the CAG's report in which he acknowledged his misconduct and accepted its recommendations. In addition, there is no infirmity of proof since the findings of misconduct are supported by respondent's admissions and court records.

Moreover, respondent's conduct in failing to comply with court scheduling orders, and submitting deficient and untimely briefs would constitute misconduct in New York under DR 1-102 (a) (5) and (7) (22 NYCRR 1200.3 [a] [5], [7]), rule 8.4 (d) and (h), DR 6-101 (a), rules 1.1 (b) and 1.3 (b) and (c), DR 7-101 (a) (22 NYCRR 1200.32 [a]) and rules 1.1 (c) (1) and (2) and 1.2 (e).

However, the CAG's finding that respondent violated DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4]) and rule 8.4 (c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and (b) (illegal conduct adversely reflecting on honesty, trustworthiness or fitness as a lawyer) should *not* be a basis for reciprocal discipline because the CAG's report is not sufficiently clear as to how the conduct at issue (i.e. failure to meet briefing deadlines and submission of deficient briefs) violated these rules. Further, the DDC does not specifically cite to these three violations as part of its argument that respondent's misconduct before the Second Circuit would also constitute misconduct if committed before the courts of New York State.

Thus, the only issue left for this Court to decide is the appropriate sanction to be imposed. As a general rule in reciprocal disciplinary matters, this Court gives significant weight to the sanction imposed by the jurisdiction in which the charges were initially brought (*see Matter of Jaffe*, 78 AD3d 152, 158 [1st

Dept 2010]; *Matter of Jarblum*, 51 AD3d 68 [1st Dept 2008]). In addition, a public censure is in accord with this Court's precedent involving similar misconduct involving immigration matters (see *Matter of Rudrakumaran*, 113 AD3d 107 [1st Dept 2013]; *Matter of Fengling Liu*, 109 AD3d 284 [1st Dept 2013]; *Matter of Zhang*, 101 AD3d 79 [1st Dept 2012]; *Matter of Guttlein*, 100 AD3d 166 [1st Dept 2012]; *Matter of Gell*, 94 AD3d 116 [1st Dept 2012]; *Matter of Adinolfi*, 90 AD3d 32 [1st Dept 2011]).

Accordingly, the Committee's petition is granted and respondent is publicly censured pursuant to 22 NYCRR 603.3.

MOSKOWITZ, J.P., RICHTER, MANZANET-DANIELS, CLARK and KAPNICK, JJ., concur.

Respondent publicly censured.

[988 NYS2d 593]

BASICNET S.p.A. et al., Appellants, v CFP SERVICES LTD., Doing Business as CFP TRADE SERVICES, Respondent, et al., Defendants.

First Department, June 19, 2014

SUMMARY

APPEAL from an order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered October 30, 2013. The order denied plaintiffs' motion for summary judgment on their breach of contract claim against defendant CFP Services Ltd.

HEADNOTES

Banks and Banking — Letter of Credit — Compliance with Terms of Irrevocable Standby Letter of Credit — Ambiguous Compliance Term

1. The terms of irrevocable standby letters of credit (SLC) requiring plaintiffs, beneficiaries of the SLCs and licensors of certain trademarks, to submit an authenticated Society for Worldwide Interbank Financial Telecommunication (SWIFT) message from defendant SLC issuer confirming plaintiffs' "fulfilment of their commitment towards the account party" were satisfied when the issuer sent a SWIFT message to plaintiffs' bank confirming its receipt of the fully executed amended agreement between plaintiffs and defendant licensee and its guarantor. The SWIFT message requirement was ambiguous as the singular term "commitment" was not defined and the requirement made no reference to the amended license agreement. All ambiguities in a letter of credit are construed against the issuer and consequently the ambiguity as to what "commitment" the requirement referred to, and therefore what document was required to satisfy it, must be construed in plaintiffs' favor. Moreover, plaintiffs' interpretation of the requirement was the only reasonable and legally cognizable interpretation of the provision. The purpose of the amended license agreement was to restructure the debt owed and payable to plaintiffs as a result of the licensee's and its guarantor's default under the original licensing agreement, and plaintiffs fulfilled their commitment to the licensee and guarantor to do so when they executed the amendment. Accordingly, when defendant issued the SWIFT message acknowledging receipt of the fully executed amended agreement, the requirement was satisfied.

Banks and Banking — Letter of Credit — Compliance with Terms of Irrevocable Standby Letter of Credit — Independence Principle

2. Plaintiffs, beneficiaries of irrevocable standby letters of credit (SLC) and licensors of certain trademarks, complied with the terms of the letters requiring them to produce an authenticated Society for Worldwide Interbank Financial Telecommunication (SWIFT) message from defendant SLC issuer confirming plaintiffs' "fulfilment of their commitment towards the account party," when defendant sent a SWIFT message to plaintiffs' bank confirming its receipt of the fully executed amended agreement between plaintiffs and defendant licensee and its guarantor, notwithstanding the issuer's contention that, under the requirement, it was to be the sole arbiter of plaintiffs' fulfill-

ment of their commitment. Defendant issuer's interpretation of the requirement would impermissibly conflict with the independence principle, which is the foundation on which all letters of credit are built. The principle provides that the issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the contract, and separate as well from any obligation of the issuer to its customer under their agreement. The independence principle is recognized by International Standby Practices (ISP) 98 of the International Chamber of Commerce, to which the letters referred, and is codified in UCC 5-103 (d). To permit defendant to interpret the SWIFT message requirement as giving it authority to decide when plaintiffs had fulfilled their commitment would conflict with the independence principle and make defendant's obligations under the letters illusory. In addition, the terms of the SLCs did not expressly modify or exclude the application of rules of ISP 98 and, even in the event of a conflict, the UCC provides that the independence principle is mandatory and may not be varied by agreement (*see* UCC 5-103 [c]; 5-116 [c]).

Estoppel — Equitable Estoppel — Demand That Beneficiary of Irrevocable Standby Letter of Credit Comply with Certain Terms — Collusion of Issuing Bank

3. Defendant, the issuing bank of irrevocable standby letters of credit, would be estopped from asserting that plaintiffs, beneficiaries of the letters, failed to comply with terms in the letters requiring the issuer's confirmation of plaintiffs' "fulfilment of their commitment towards the account party" where defendant engaged in improper communications relating to dishonoring the letters with the defendants who obtained the letters. To permit the payor to pressure or collude with the bank to dishonor the draft destroys the very principle upon which the commercial utility of letters of credit rests.

Banks and Banking — Letter of Credit — Backdating of Underlying Documents

4. Defendant, the issuing bank of irrevocable standby letters of credit which were issued in connection with an amended license agreement between plaintiffs and the defendants who obtained the letters, was not excused from making payment on the letters because the amendment to the license agreement was backdated. While an issuing bank may refuse to honor documents that appear on their face strictly to comply with the terms and conditions of the letter of credit but are forged or materially fraudulent, or if honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant (*see* UCC 5-109 [a]), because the smooth operation of international commerce requires that requests for payment under letters of credit not be routinely obstructed by prepayment litigation, the fraud exception is a narrow one that is only available on a showing of intentional fraud. Moreover, the fact that plaintiffs signed the amended license agreement approximately two weeks after the date appearing in the agreement was not material to the terms of the letters. There was a valid underlying transaction, and the backdating does not excuse the issuer from paying on the letters.

Banks and Banking — Letter of Credit — Compliance with Terms of Irrevocable Standby Letter of Credit — Standard of Compliance

5. Discrepancies between the documents required by the terms of irrevocable standby letters of credit (SLC) and those submitted by plaintiffs, the beneficiaries of the letters, did not excuse defendant, the issuing bank, from paying on the letters, since the documents provided by plaintiffs contained the

information specified by the letters' requirements. One requirement called for a written signed statement from the beneficiary (plaintiffs) stating that the applicant, which had entered into a commercial licensing agreement with plaintiffs, failed to discharge its obligations as per the terms of the underlying contract and "this SLC," while plaintiffs submitted written signed statements stating that the applicant had failed to discharge its obligations as per the terms of the license agreement and of "SLC [relevant number]." There was no possibility that the difference between "this SLC" and "SLC [relevant number]" could have misled defendant to its detriment. Another requirement called for a signed letter of default notice from the beneficiary to the licensee be sent via either of two commercial delivery services with written confirmations evidencing inability to deliver, but one of the confirmations was misaddressed. However, as both confirmation notices indicated that the licensee had moved, the addressing error was not meaningful.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Letters of Credit §§ 6, 9, 25, 29, 30, 32.

McKINNEY'S, UCC 5-103 (c), (d); 5-116.

NY JUR 2d, Credit Cards and Letters of Credit §§ 34-37, 39, 46, 49, 60, 52, 64-67.

WHITE AND SUMMERS, UNIFORM COMMERCIAL CODE
§§ 26:3, 26:12, 26:19-26:23, 26:41.

ANNOTATION REFERENCE

What constitutes compliance of documents presented with terms of letter of credit so as to require honor of draft under UCC 5-114. 8 ALR5th 463.

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APPEARANCES OF COUNSEL

Satterlee Stephens Burke & Burke LLP, New York City (*James F. Rittinger*, *Alun W. Griffiths* and *Dai Wai Chin Feman* of counsel), for appellants.

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

OPINION OF THE COURT

ANDRIAS, J.

Plaintiffs are the beneficiaries of irrevocable standby letters of credit (SLCs) issued by defendant CFP Services Ltd. doing business as CFP Trade Services. The SLCs were issued in con-

nection with an amended license agreement between plaintiffs, as licensors, defendant Kappa North America, Inc., as licensee, and defendant Total Apparel Group, Inc. (TAG), as Kappa's guarantor. Although CFP allegedly issued the SLCs with the understanding that the amendment to the license agreement had already been signed, it was executed shortly after the SLCs were issued and was backdated.

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

Supreme Court denied plaintiffs' motion for summary judgment on their breach of contract claim against CFP on the grounds that the backdating of the amendment to the license agreement was arguably a material misrepresentation and that plaintiffs had not established, as a matter of law, compliance with requirement E. We now hold that plaintiffs are entitled to payment under the SLCs and that their motion for summary judgment should have been granted.

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

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

recourse to funds in the event of another breach by Kappa and TAG.

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

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

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

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

"C) A SIGNED LETTER OF DEFAULT NOTICE FROM . . . THE BENEFICIARY TO APPLICANT KAPPA . . . WITH A TEN BUSINESS DAY CURE PERIOD PROVISION CALLING FOR THE AMOUNT OF PAYMENT DUE AS PER THE CONTRACT SENT VIA FEDEX OR DHL SUPPORTED BY PROOF OF DELIVERY OF THIS DEFAULT NOTICE TO KAPPA . . . AT 525 SEVENTH AVE-

NUE SUITE 501 NEW YORK, NY 10018 ISSUED BY FEDEX/DHL OR FEDEX/DHL WRITTEN CONFIRMATION EVIDENCING INABILITY TO DELIVER FOR ANY REASON WHATSOEVER.

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

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

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

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

Plaintiffs acknowledged that they were aware of the inclusion of requirement E in the SLCs when they executed the amend-

ment to the license agreement, but maintain that after Kappa advised them that it would be too time-consuming to delete the clause, the following language was inserted into the amendment in paragraph (2) to address their concerns:

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

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

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

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

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

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

Asserting that Kappa and TAG acknowledged their material default in the July 1, 2011 release and waiver agreement and that their payment demand to CFP satisfied all five documentary requirements of the SLCs, plaintiffs seek to recover the full

amount of the SLCs from CFP under a breach of contract theory. CFP answered, and asserted affirmative defenses and counterclaims, including misrepresentation and fraud based on the backdating of the amended license agreement.

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

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

Under New York law, in order to recover on its claim that the issuer wrongfully refused to honor its request to draw down on a letter of credit, the beneficiary must prove that it strictly complied with the terms of the letter of credit (*see United Commodities-Greece v Fidelity Intl. Bank*, 64 NY2d 449 [1985]; *see also Marino Indus. Corp. v Chase Manhattan Bank, N.A.*, 686 F2d 112 [2d Cir 1982]). “The corollary to the rule of strict compliance is that the requirements in letters of credit must be explicit, and that all ambiguities are construed against the [issuer]” (*Marino*, 686 F2d at 115 [internal quotations marks and citation omitted]; *see also Nissho Iwai Europe v Korea First Bank*, 99 NY2d 115, 121-122 [2002]; *Barclay Knitwear Co. v King’swear Enters.*, 141 AD2d 241, 246-247 [1st Dept 1988], *lv denied* 74 NY2d 605 [1989]). The reasoning is that “[s]ince the beneficiary must comply strictly with the requirements of the letter, it must know precisely and unequivocally what those requirements are” (*Marino*, 686 F2d at 115).

“Where a letter of credit is fairly susceptible of two constructions, one of which makes it fair, customary

and one which prudent men would naturally enter into, while the other makes it inequitable, the former interpretation must be preferred to the latter, and a construction rendering the contract possible of performance will be preferred to one which renders its performance impossible or meaningless” (*Venizelos, S. A. v Chase Manhattan Bank*, 425 F2d 461, 466 [2d Cir 1970]).

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

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

[2] Furthermore, CFP's interpretation of requirement E would impermissibly conflict with the independence principle, which is the foundation on which all letters of credit are built.

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

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

From the beneficiary's perspective, the independence principle makes a letter of credit superior to a normal surety bond or guaranty because the issuer is primarily liable and is precluded from asserting defenses that an ordinary guarantor could assert. Indeed, “a letter of credit would lose its commercial vitality if before honoring drafts the issuer could look beyond the terms of the credit to the underlying contractual controversy or performance between its customer and the beneficiary” (*Township of Burlington v Apple Bank for Sav.*, 1995 WL 384442, *5, 1995 US Dist LEXIS 8878, *14 [SD NY, June 28, 1995, No. 94 Civ 6116 (JFK)]; *see also Voest-Alpine Intl. Corp. v Chase Manhattan Bank, N.A.*, 707 F2d 680, 682-683 [2d Cir 1983]).

SLC 765 and SLC 769 each specify that “THIS LETTER OF CREDIT IS SUBJECT TO ISP [International Standby Practices] 98 ICC [International Chamber of Commerce] NO. 590 AND THE LAWS OF THE UNITED STATES OF AMERICA. PLACE OF JURISDICTION NEW YORK.” Pursuant to New York Uniform Commercial Code § 5-116 (a), “[t]he liability of an issuer . . . is governed by the law of the jurisdiction” designated by the SLC. Pursuant to UCC 5-116 (c), if an SLC governed by UCC article 5 incorporates “any rules of custom or

practice,” such as ISP 98 (Institute of International Banking Law and Practice, Inc., International Standby Practices ISP 98 [1998]), and if there is conflict between article 5 and those rules, then the rules govern “except to the extent of any conflict with the nonvariable provisions specified in subsection (c) of section 5-103.”

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

“Because a standby is independent, the enforceability of an issuer’s obligations under a standby does not depend on:

“(i) the issuer’s right or ability to obtain reimbursement from the applicant;

“(ii) the beneficiary’s right to obtain payment from the applicant;

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

“(iv) the issuer’s knowledge of performance or breach of any reimbursement agreement or underlying transaction.”

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

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

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

The doctrine of independent contracts, as codified in UCC article 5, allows the letter of credit to provide “‘a quick, eco-

nomic and trustworthy means of financing transactions for parties not willing to deal on open accounts' ” (*Mennen*, 91 NY2d at 21, quoting *All Serv. Exportacao, Importacao Comercio, S.A. v Banco Bamerindus Do Brazil, S.A., N.Y. Branch*, 921 F2d 32, 36 [2d Cir 1990]). “Only staunch recognition of this principle by the issuers and the courts will give letters of credit the continuing vitality that arises from the certainty and speed of payment under letters of credit” (Official Comment, reprinted in McKinney’s Cons Laws of NY, Book 62^{1/2}, UCC 5-103 at 346).

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

CFP asserts that its interpretation of requirement E is nonetheless enforceable and must be strictly construed because the rules of ISP 98 may be varied by the terms of the SLCs (ISP 98 rule 1.01 [c]), and plaintiffs accepted the SLCs with requirement E. CFP reasons that the definition of “document” in ISP 98 encompasses a “representation of fact, law, right, or opinion” (ISP 98 rule 1.09 [a]), and that it had the right to express its “opinion” as to whether plaintiffs had fulfilled their commitment towards Kappa. We disagree.

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

provides that the independence principle is mandatory and may not be varied by agreement (UCC 5-103 [c]).*

[3] Even assuming, arguendo, that CFP's interpretation of requirement E is correct and that the parties could contract out of such a fundamental principle, CFP would be estopped from enforcing requirement E based on the improper communications it had with Kappa relating to dishonoring the SLCs (*see E & H Partners v Broadway Natl. Bank*, 39 F Supp 2d 275, 284-285 [SD NY 1998]). To evaluate plaintiffs' presentations, CFP spoke to officers of Kappa and considered Kappa's written notices of the dispute between itself and plaintiffs and its objections to payment of plaintiffs' claims. While CFP asserts that its discussions with Kappa related to whether the alleged discrepancies in plaintiffs' presentations should be waived, CFP's answer to interrogatories confirms that its discussions with Kappa predate plaintiffs' demands for payment, including "letters to [CFP], dated August 10, 2011 . . . [and] September 1, 2011 . . . , wherein [Kappa] clearly notified [CFP] of a dispute between [Kappa] and TAG and [plaintiffs] concerning the underlying Contract between those parties and the amounts due on [plaintiffs'] claim." "[T]o permit the payor to pressure or collude with the bank to dishonor the draft destroys the very principle upon which the commercial utility of letters of credit rests" (*E & H Partners*, 39 F Supp 2d at 285). In this regard, as a further indication of collusion, we note that according to the amended complaint, unbeknownst to plaintiffs, on October 14, 2010, Kappa, at CFP's request, provided a notarized letter to CFP, stating:

"We agree that these standby letters of Credit will have the following documentary requirement as a 'special clause[']".

"AUTHENTICATED SWIFT MSG FROM CNFUS33 TO BENEFICIARY'S BANK CONFIRMING BENEFICIARY'S FULFILLMENT OF THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY.

* Section 5-103 states:

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

“We agree that you shall have no obligation whatsoever to send the Swift Message or issue any amendments.”

[4] CFP is not excused from making payment because the amendment to the license agreement was backdated. The fraud exception has been codified in the UCC, which provides that an issuing bank may refuse to honor documents that “appear[] on [their] face strictly to comply with the terms and conditions of the letter of credit” but are “forged or materially fraudulent,” or if “honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant” (UCC 5-109 [a]). However, because the smooth operation of international commerce requires that requests for payment under letters of credit not be routinely obstructed by prepayment litigation, the fraud exception to the independence principle “is a narrow one” that is only available on a showing of “intentional fraud” (*All Serv. Exportacao, Importacao Comercio, S.A. v Banco Bamerindus Do Brazil, S.A., NY Branch*, 921 F2d 32, 35 [2d Cir 1990]; see also *First Commercial Bank*, 64 NY2d at 295 [fraud is “(a) limited exception to this rule of independence”]; *Banque Worms, N.Y. Branch v Banque Commerciale Privee*, 679 F Supp 1173, 1182 [SD NY 1988], *affd* 849 F2d 787 [2d Cir 1988] [the fraud exception “is limited to situations in which the wrongdoing of the beneficiary has permeated the entire transaction”]).

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

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

Rule 4 of ISP 98 governs the duties and responsibilities an issuing bank must undertake when examining documents. Rule 4.01 (b) states that “[w]hether a presentation appears to comply is determined by examining the presentation on its face against the terms and conditions stated in the standby as interpreted

and supplemented by these Rules which are to be read in the context of standard standby practice.” Rule 4.09 states:

“If a standby requires:

“(a) a statement without specifying precise wording, then the wording in the document presented by must appear to convey the same meaning as that required by the standby;

“(b) specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, the typographical errors in spelling, punctuation, spacing, or the like that are apparent when read in context are not required to be duplicated and blank lines or spaces for data may be completed in any manner not inconsistent with the standby; or

“(c) specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, and also provides that the specified wording be ‘exact’ or ‘identical’, then the wording in the documents presented must duplicate the specified wording, including typographical errors in spelling, punctuation, spacing and the like, as well as blank lines and spaces for data must be exactly reproduced.”

According to the official UCC commentary, the strict compliance standard does not require that the documents presented by the beneficiary be exact in every detail (Official Comment, reprinted in McKinney’s Cons Laws of NY, Book 62^{1/2}, UCC 5-108 at 367) [“Strict compliance does not mean slavish conformity to the terms of the letter of credit . . . (and) does not demand oppressive perfectionism”]).

The documents provided by plaintiffs contained the information specified in requirements B and C. Requirement B calls for a written signed statement from the beneficiary (plaintiffs) stating that the applicant (Kappa) “FAILED TO DISCHARGE ITS OBLIGATIONS AS PER THE TERMS OF THE UNDERLYING CONTRACT [THE LICENSE AGREEMENT] AND THIS SLC.” Plaintiffs submitted written signed statements stating that Kappa “failed to discharge its obligations as per the terms of the License Agreement . . . and of SLC [relevant number].” There is no possibility that the difference between “this SLC” and “SLC [relevant number]” “could mislead [CFP] to its detriment” (*see E & H Partners*, 39 F Supp 2d at 283-284; *Bank of*

Cochin Ltd. v Manufacturers Hanover Trust Co., 612 F Supp 1533, 1541 [SD NY 1985], *affd* 808 F2d 209 [2d Cir 1986]).

Requirement C called for “A SIGNED LETTER OF DEFAULT NOTICE FROM . . . THE BENEFICIARY TO . . . KAPPA . . . SENT VIA FEDEX OR DHL SUPPORTED BY PROOF OF DELIVERY . . . ISSUED BY FEDEX/DHL OR FEDEX/DHL WRITTEN CONFIRMATION EVIDENCING INABILITY TO DELIVER.” Plaintiffs submitted signed letters of default notice to Kappa, sent via FedEx, and written confirmations from FedEx evidencing inability to deliver. CFP is refusing to pay on the SLC with Basic Properties as beneficiary because—instead of one FedEx confirmation being addressed to BasicNet and the other being addressed to Basic Properties—they are both addressed to BasicNet. However, both of FedEx’s notices say that Kappa moved. Thus, regardless of who sent the package (BasicNet or Basic Properties), Kappa would not have received it. Thus, the fact that both FedEx confirmations were addressed to BasicNet is a “nonmeaningful” error (*see Ocean Rig ASA v Safra Natl. Bank of N.Y.*, 72 F Supp 2d 193, 199 [SD NY 1999]).

Accordingly, the order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about October 30, 2013, which denied plaintiffs’ motion for summary judgment on their breach of contract claim against defendant CFP, should be reversed, on the law, and the motion granted, without costs.

TOM, J.P., ACOSTA, DEGRASSE and RICHTER, JJ., concur.

Order, Supreme Court, New York County, entered on or about October 30, 2013, reversed, on the law, without costs, and the motion granted.

[987 NYS2d 233]

In the Matter of DEREK P. McDOWELL, a Suspended Attorney,
Respondent. GRIEVANCE COMMITTEE FOR THE SECOND, ELEVENTH,
AND THIRTEENTH JUDICIAL DISTRICTS, Petitioner.

Second Department, June 18, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts. Respondent was admitted to the bar on November 14, 1979 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department. By decision and order on motion of this Court dated April 26, 2013, the respondent was immediately suspended pursuant to 22 NYCRR 691.4 (l) (1) (i), the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts was authorized to institute and prosecute a disciplinary proceeding against the respondent based on a petition dated January 14, 2013, the respondent was directed to serve and file an answer to the petition within 20 days, and the issues raised were referred to the Honorable Charles Thomas, as Special Referee, to hear and report.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Disbarment

Since respondent attorney, who had been immediately suspended from the practice of law based on his failure to cooperate with the Grievance Committee, inasmuch as he failed to submit an answer to a complaint of professional misconduct filed against him, failed to serve an answer to the Committee's petition or to request additional time in which to do so, the charges in the petition were deemed established, and respondent was disbarred upon his default (Judiciary Law § 90).

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 37, 53, 63, 113.
CARMODY-WAIT 2d, Officers of Court §§ 3:256, 3:289,
3:325-3:327, 3:337.
McKINNEY'S, Judiciary Law § 90.
NY JUR 2d, Attorneys at Law §§ 361, 414, 466, 470, 476,
478, 480.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Disbarment of Attorney;
Discipline and Disciplinary Actions.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: disbarred /5 default & failed /3 cooperate & converted

APPEARANCES OF COUNSEL*Diana Maxfield Kears*, Brooklyn, for petitioner.**OPINION OF THE COURT**

Per Curiam.

The Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts moves to adjudicate the respondent in default with respect to a petition dated January 14, 2013.

The petition contains a single charge, alleging that the respondent failed to cooperate with the Grievance Committee, inasmuch as he failed to submit an answer to a complaint of professional misconduct filed against him by Laurice Mann.

On June 20, 2013, the respondent was personally served with a copy of this Court's decision and order on motion dated April 26, 2013, immediately suspending him pursuant to 22 NYCRR 691.4 (l) (1) (i) and authorizing the Grievance Committee to institute and prosecute a disciplinary proceeding against the respondent based on the allegations in the petition dated January 14, 2013. To date, the respondent has failed to serve an answer to either petition or request additional time in which to do so.

On September 16, 2013, a copy of the Grievance Committee's motion to hold the respondent in default was personally delivered to the respondent, and copies were mailed to him by regular and certified mail.

To date, the respondent has neither responded to the motion nor requested additional time in which to do so.

Accordingly, the Grievance Committee's motion is granted, the charge is deemed established, and, effective immediately, the respondent is disbarred upon his default, and his name is stricken from the roll of attorneys and counselors-at-law. We note that, in an opinion and order in a related disciplinary proceeding commenced against the respondent, this Court granted the Grievance Committee's motion to hold the respondent in default with respect to a petition dated March 12, 2013, based on allegations that he converted funds entrusted to him in connection with a real estate transaction, and disbarred the

respondent effective immediately (*see Matter of McDowell*, 120 AD3d 117 [2014] [decided herewith]).

ENG, P.J., MASTRO, RIVERA, SKELOS and LOTT, JJ., concur.

Ordered that the petitioner's motion to adjudicate the respondent to be in default is granted; and it is further,

Ordered that, pursuant to Judiciary Law § 90, effective immediately, the respondent, Derek P. McDowell, is disbarred, and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

Ordered that the respondent, Derek P. McDowell, shall continue to comply with this Court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

Ordered that pursuant to Judiciary Law § 90, the respondent, Derek P. McDowell, is commanded to continue to desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that if the respondent, Derek P. McDowell, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

[987 NYS2d 234]

In the Matter of DEREK P. McDOWELL, a Suspended Attorney,
Respondent. GRIEVANCE COMMITTEE FOR THE SECOND, ELEVENTH,
and THIRTEENTH JUDICIAL DISTRICTS, Petitioner.

Second Department, June 18, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts. Respondent was admitted to the bar on November 14, 1979 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department. By decision and order on motion of this Court dated April 26, 2013, *inter alia*, the respondent was immediately suspended pursuant to 22 NYCRR 691.4 (l) (1) (i). By decision and order on application of this Court dated May 29, 2013, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against the respondent based on a petition dated March 12, 2013, the respondent was directed to serve and file an answer to the petition within 20 days, and the issues raised were referred to the Honorable Charles Thomas, as Special Referee, to hear and report.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Disbarment

Since respondent attorney, who had been immediately suspended from the practice of law based on allegations that he converted funds entrusted to him in connection with a real estate transaction, failed to submit an answer to the Committee's petition or to request additional time in which to do so, the charges in the petition were deemed established, and respondent was disbarred upon his default (Judiciary Law § 90).

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 37, 53, 63, 113.

CARMODY-WAIT 2d, Officers of Court §§ 3:256, 3:289,
3:325-3:327, 3:337.

McKINNEY'S, Judiciary Law § 90.

NY JUR 2d, Attorneys at Law §§ 361, 414, 466, 470, 476,
478, 480.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Disbarment of Attorney;
Discipline and Disciplinary Actions.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: disbarred /4 default & converted /s real /2 estate

APPEARANCES OF COUNSEL*Diana Maxfield Kears*e, Brooklyn, for petitioner.**OPINION OF THE COURT**

Per Curiam.

The Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts moves to adjudicate the respondent in default with respect to a petition dated March 12, 2013.

The petition contains a single charge, alleging that the respondent converted funds entrusted to him in connection with a real estate transaction.

On June 20, 2013, the respondent was personally served with a copy of this Court's decision and order on motion dated April 26, 2013, inter alia, immediately suspending him pursuant to 22 NYCRR 691.4 (l) (1) (i), and a copy of this Court's decision and order on application dated May 29, 2013, authorizing the Grievance Committee to institute a disciplinary proceeding against the respondent based on the allegations set forth in the petition dated March 12, 2013. To date, the respondent has failed to serve an answer to that petition or request additional time in which to do so.

On September 16, 2013, a copy of the Grievance Committee's motion to hold the respondent in default was personally delivered to the respondent, and copies were mailed to him by regular and certified mail.

To date, the respondent has neither responded to the motion nor requested additional time in which to do so.

Accordingly, the Grievance Committee's motion is granted, the charge is deemed established, and, effective immediately, the respondent is disbarred upon his default, and his name is stricken from the roll of attorneys and counselors-at-law. We note that, in an opinion and order in a related disciplinary proceeding commenced against the respondent, this Court granted the Grievance Committee's separate motion to hold the respondent in default in connection with a petition dated January 14, 2013, based on allegations that the respondent failed to submit an answer to a complaint of professional misconduct filed against him by Laurice Mann, and disbarred the respon-

dent effective immediately (*see Matter of McDowell*, 120 AD3d 114 [2014] [decided herewith]).

ENG, P.J., MASTRO, RIVERA, SKELOS and LOTT, JJ., concur.

Ordered that the petitioner's motion to adjudicate the respondent to be in default is granted; and it is further,

Ordered that, pursuant to Judiciary Law § 90, effective immediately, the respondent, Derek P. McDowell, is disbarred, and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

Ordered that the respondent, Derek P. McDowell, shall continue to comply with this Court's rules governing the conduct of disbarred, suspended, and resigned attorneys (*see* 22 NYCRR 691.10); and it is further,

Ordered that pursuant to Judiciary Law § 90, the respondent, Derek P. McDowell, is commanded to continue to desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, judge, justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is further,

Ordered that if the respondent, Derek P. McDowell, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

[987 NYS2d 387]

In the Matter of MARK R. COLODNE (Admitted as MARK RALPH COLODNE), an Attorney, Respondent. DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, June 17, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on July 7, 1981 at a term of the Appellate Division of the Supreme Court in the First Judicial Department as Mark Ralph Colodne.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Disbarment

Respondent attorney, who failed to advise an investor in a high-risk hedge fund, which he had formed and managed, that the fund engaged in trading activities not authorized by its controlling documents; falsely represented that the fund had retained the services of an independent accountant; falsely represented to the investor that her funds were lost as a result of the fund's unsuccessful investment in computer chips; and failed to provide the Departmental Disciplinary Committee with documents requested during its investigation, was guilty of professional misconduct and was disbarred (Code of Professional Responsibility DR 1-102 [a] [4], [5], [7] [22 NYCRR 1200.3 (a) (4), (5), (7)]). Notwithstanding respondent's lack of prior disciplinary history, his misconduct was intentional and involved repeated, material misrepresentations to the investor who lost most of her savings. Significant evidence was presented in aggravation, namely that respondent testified falsely at his deposition before the Committee, that he engaged in similar misconduct with respect to other investors and has not satisfied the two judgments obtained against him, and that he improperly transferred the funds of a deceased tax client into a joint brokerage account. Furthermore, the Appellate Division could not issue an order directing restitution pursuant to Judiciary Law § 90 (6-a) (a) because respondent's fraudulent solicitation of investment funds from the investor occurred in his role as a financial adviser, not in connection with the practice of law.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 37, 70, 82, 113.

CARMODY-WAIT 2d, Officers of Court §§ 3:279, 3:326, 3:333-3:335, 3:337, 3:340.

McKINNEY'S, Judiciary Law § 90 (6-a).

22 NYCRR 1200.3 (a) (4), (5), (7).

NY JUR 2d, Attorneys at Law §§ 407, 408, 476, 478, 480, 482, 490, 491.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Disbarment of Attorney; Discipline and Disciplinary Actions; Investments.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: disbarred & aggravat! & solicit! /s invest!

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (Kevin P. Culley of counsel), for petitioner.

Mark R. Colodne, respondent pro se, no appearance.

OPINION OF THE COURT

Per Curiam.

Respondent was admitted to the practice of law in the State of New York by the First Judicial Department on July 7, 1981 as Mark Ralph Colodne. At all times relevant to this proceeding, respondent maintained a registered office in Florida, where he resides.

In December 2011, the Departmental Disciplinary Committee brought five disciplinary charges against respondent alleging that he violated the Code of Professional Responsibility DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4]) (conduct involving dishonesty, fraud, deceit or misrepresentation) (three counts); DR 1-102 (a) (5) (22 NYCRR 1200.3 [a] [5]) (conduct prejudicial to the administration of justice); and DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7]) (conduct adversely reflecting on fitness as a lawyer). The charges arose from respondent's solicitation of an investor in a high-risk hedge fund which he formed and managed. The Committee alleged that respondent failed to advise the investor that the fund engaged in trading activities not authorized by its controlling documents, falsely represented that the fund had retained the services of an independent accountant, falsely represented to the investor that her funds were lost as a result of the fund's unsuccessful investment in computer chips, and failed to provide the Committee with documents requested during the investigation. In his answer, respondent denied that he violated DR 1-102 (a) (4) (22 NYCRR 1200.3 [a] [4]) and did not address the other charges.

Respondent does not practice law, but operates a tax preparation and consulting business in Florida. Buono, a retired government employee, and her husband sought financial advice from

respondent, whom they had used as a tax preparer and financial adviser for the previous five years. Respondent advised Buono to invest in a hedge fund he had formed and managed, Green Oak Hedge Fund, Ltd. (Green Oak), assuring her that it was conservative and safe, and employed a trading strategy that was guaranteed not to lose money. However, according to Green Oak's offering materials and its limited liability partnership agreement, which were never provided to Buono, the fund utilized an options trading strategy and involved a high degree of risk, including the possibility that investors could lose part or all of their investment.

In March 2005, Buono invested \$26,874.92 in Green Oak, which constituted most, if not all, of her savings. At that time, respondent did not have Buono sign a limited partnership agreement or subscription agreement, which were required to become an investor in Green Oak. Rather, Buono's funds were deposited into an E*Trade account that respondent created on her behalf. When Buono received a financial statement indicating that her funds were sitting inactive in the E*Trade account, she pressed respondent for an explanation. In February 2006, respondent met with Buono and had her sign the signature pages for an amended and restated limited partnership agreement and a subscription agreement, but did not provide her with the agreements themselves.

Respondent also failed to advise Buono that, in November 2005, Green Oak had lost nearly all of its assets (more than \$800,000) in a failed transaction involving the purchase and sale of computer chips. The transaction at issue involved three business entities which were the alter egos of Rick Hopkinson, who defrauded respondent and Green Oak, and absconded with the invested funds. Respondent asserted that the transaction with Hopkinson was authorized by the Green Oak's governing documents, however, he conceded at the hearing that it was outside of Green Oak's stated trading strategy. He also conceded that he could have advised Buono about the loss before he transferred her funds from the E*Trade account to Green Oak's account in March 2006, but he chose not to do so.

Respondent promised Buono that she would receive monthly statements, but she only received one. When Buono confronted respondent about this, he told her that the statements prepared by the fund's accountant could not be sent because they contained inaccuracies and promised quarterly statements in the future. Buono did not receive any quarterly statements. In

August 2007, her daughter contacted the accountant listed on Green Oak's website. That individual informed her that he was never Green Oak's accountant and that he had received similar complaints from other investors regarding respondent and Green Oak.

During an August 2007 meeting, respondent disclosed to Buono and her husband that Green Oak had no money, that it had been defrauded in the computer chip venture, and that Buono's funds were being used to pursue litigation against Hopkinson and others. Notably, Buono's funds were not actually invested with Green Oak until March 2006, which was after the fund had incurred the substantial losses related to the computer chip venture. During his deposition before the Committee, respondent initially testified that Buono's funds were invested in Green Oak prior to the computer chip transaction, however, he changed his testimony once he was shown the relevant bank records. At the August 2007 meeting, respondent gave Buono a written contract promising to repay the amount of her initial investment, which he never did. On November 2007, Buono filed a complaint with the Committee.

In addition to his misrepresentations to Buono, between 2006 and 2007, after Buono's investment, respondent withdrew from the fund more than \$20,000 for himself and other entities he controlled. He also disbursed \$126,000 to entities owned and controlled by a Leonard Conticello, a purported stock analyst employed by Green Oak who did not hold any investor advisory or broker's licenses and no prior training or experience in investing.

Respondent conceded that he made numerous distributions to Green Oak investors in disregard of governing documents, which only permitted quarterly distributions and upon receipt of written request by the investor. Specifically, respondent permitted certain investors to withdraw their funds, at any time, without calculating principal and interest, or apportioning losses that accrued, while other investors, like Buono, were kept unaware of the fund's insolvent condition. Respondent also repeatedly failed to provide the Committee with the specified documentation it requested related to Green Oak.

For two days in August and October 2012, respondent appeared pro se at the hearing before the Referee. At the conclusion of the Committee's case and directly after he finished testifying, he withdrew his answer and admitted to all the charges. Accordingly, upon application of the Committee, in a

report dated January 8, 2013, the Referee sustained all of the charges. Respondent waived a sanction hearing and agreed that evidence in aggravation and mitigation would be presented in the form of documentary and written submissions.

As part of its case in aggravation, the Committee cited to the fact that three former investors of Green Oak had obtained judgments against respondent in two Florida lawsuits, for \$246,000 and \$100,000. The actions at issue were predicated upon claims of breach of contract and fraud in the inducement. Respondent has not satisfied either judgment, in whole or in part. The Committee also presented evidence that, in an unrelated matter, respondent may have used forged documents to withdraw funds from a deceased person's E*Trade account without permission or authority to do so, and used said funds for his own personal purposes. The account at issue concerned a tax client of respondent's who died in July 2003. Between December 2003 and July 2004, documents purportedly containing the client's signature were used to open a joint E*Trade account in his name and that of respondent, and, thereafter, approximately \$126,000 was transferred from the client's individual E*Trade account to the joint account. Account statements showed that respondent traded on the account for approximately 18 months. At the request of the deceased client's executor, E*Trade commenced an investigation, which ultimately resulted in E*Trade returning the transferred funds to the individual account and closing the joint account.

Respondent was examined on this issue during his deposition in one of the Florida lawsuits. He professed some confusion as to the dating of the documents at issue, but acknowledged that he authorized the transfer of funds from the individual account to the joint account. However, he claimed the transfer occurred prior to his client's death when he purportedly held a power of attorney.

The Referee gave respondent until December 28, 2012 to make any submission in mitigation of the charges or to refute the evidence in aggravation, but he failed to make any submission. The Committee submitted a post-hearing memorandum in which it argued that respondent should be disbarred. Despite the opportunity to do so, respondent did not submit a post-hearing memorandum.

The Referee recommended that respondent be suspended from the practice of law for three years and be required to make full restitution to Buono. The Referee found respondent's fail-

ure to disclose to Buono the risks inherent in investing in Green Oak and that it had sustained substantial losses in the computer chip investment, which was outside the scope of its stated investment activity, was “serious and material.” Furthermore, respondent solicited Buono’s investment even though he knew that she did not qualify as a “suitable investor” and could not afford to lose her investment. The Referee noted that respondent misled Buono that Green Oak pursued a conservative investment strategy and made misrepresentations to her regarding the reason she had not received promised periodic statements. The Referee also found that respondent concealed the fund’s precarious financial condition from Buono all the while paying substantial fees to himself and his business associates, in addition to indiscriminate disbursements to other investors without apportioning losses.

The Referee determined that respondent’s misconduct was aggravated by the fact that he falsely testified at his deposition that Buono’s funds were invested with Green Oak prior to the failed computer chip transaction and that he did not advise Buono of the failed, improper computer chip transaction in 2006 when he transferred her funds to Green Oak. The Referee found respondent’s misconduct was further aggravated by similar conduct in connection with the Florida lawsuits that resulted in judgments entered against him and his actions in the deceased tax client matter. While respondent did not present a case in mitigation, the Referee, nonetheless, noted some mitigating factors, including respondent’s lack of a prior disciplinary history in his 30 years as an admitted attorney.

On April 2, 2013, a Hearing Panel heard oral arguments. Respondent did not appear at the oral argument despite notification by the Committee via two voice-mails and a letter sent certified mail, return receipt requested which was signed for by respondent. Before the Panel, the Committee argued for confirmation of the Referee’s liability findings, but modification of his sanction, urging disbarment.

In its report dated April 29, 2013, the Hearing Panel unanimously affirmed the Referee’s liability findings, but agreed with the Committee that respondent should be disbarred. The Panel also recommended that respondent be ordered to make full restitution to Buono, including accrued interest.

The Panel found that disbarment was warranted by: (1) respondent’s admission of all the charges; (2) the fact he engaged in similar misconduct with respect to other investors

and failed to satisfy two of their judgments entered against him; (3) his disregard of his obligation to cooperate with the Committee's investigation; (4) the evidence that he submitted forged documents in connection with the deceased client's matter; and (5) his failure to appear at the oral argument before the Panel without offering any explanation for his absence.

The Departmental Disciplinary Committee seeks an order, pursuant to Rules of the Appellate Division, First Department (22 NYCRR) §§ 603.4 (d) and 605.15 (e) (2) and Judiciary Law § 90 (2) confirming the Hearing Panel's findings of fact and conclusions of law and its sanction recommendation of disbarment. Respondent was served with the Committee's petition at his registered address in Florida by first-class mail and certified mail, return receipt requested, but has not submitted a response.

The Hearing Panel's liability findings are amply supported by respondent's admission of all charges, as well as the witness testimony and documentary evidence presented at the hearing. Respondent's misconduct is sufficiently egregious to warrant disbarment.

Although respondent has no prior disciplinary history, his misconduct was intentional and involved repeated, material misrepresentations to Buono and she lost most of her savings. There also is significant evidence of aggravation, namely that respondent testified falsely at his deposition before the Committee, that he engaged in similar misconduct with respect to other Florida investors and has not satisfied the two judgments they obtained against him, and he improperly transferred the funds of a deceased tax client into a joint brokerage account.

As to the Hearing Panel's additional recommendation that respondent's reinstatement be conditioned upon his making full restitution to Buono with interest, this Court cannot issue an order directing restitution pursuant to Judiciary Law § 90 (6-a) (a). Respondent's fraudulent solicitation of investment funds from Buono occurred in his role as a financial adviser, not in connection with the practice of law as contemplated by the statute.

Accordingly, the petition is granted, the Hearing Panel's report and recommendation of disbarment is confirmed, and respondent's name is stricken from the roll of attorneys and counselors-at-law in the State of New York, effective immediately.

SWEENY, J.P., RENWICK, SAXE, FREEDMAN and RICHTER, JJ.,
concur.

Respondent disbarred, and his name stricken from the roll of
attorneys and counselors-at-law in the State of New York, effective the date hereof.

[988 NYS2d 50]

In the Matter of EDNA SHANNON, Deceased.

FAMILY SERVICE SOCIETY OF YONKERS, Petitioner, v WESTCHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent, and EASTCHESTER REHABILITATION & HEALTH CARE CENTER, Appellant.

First Department, June 17, 2014

SUMMARY

APPEAL from two orders of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about February 7, 2013 and May 30, 2013 respectively. The first order, to the extent appealed from, directed petitioner to turn over to respondent Westchester County Department of Social Services the balance of the funds remaining in the guardianship estate of Edna Shannon, an incapacitated person now deceased. The second order denominated Eastchester Rehabilitation & Health Care Center's motion to reargue a motion to reargue and/or renew and denied the motion.

HEADNOTE

Incapacitated and Mentally Disabled Persons — Guardian for Personal Needs or Property Management — Priority of Claims upon Death of Person in Need of Assistance — Competing Claims of Social Services Department and Skilled Nursing Facility

In a proceeding to settle competing claims to the funds in an incapacitated decedent's guardianship account, the claim of respondent skilled nursing facility for services rendered during decedent's life had priority over respondent Department of Social Services's (DSS) Medicaid lien, which arose after decedent's death, since the nursing facility's claim arose before the decedent's death and Mental Hygiene Law § 81.44 (d) allows the guardian to retain assets to secure known claims. Section 81.44 (d) provides that, within 150 days of the death of an incapacitated person, a guardian must serve on the personal representative of the decedent's estate a statement of assets and notice of claim, and, "except for property retained to secure any known claim, lien or administrative costs of the guardianship," deliver all guardianship property to the personal representative. Consistent with section 81.44 (d), the order and judgment appointing the guardian authorized the guardian to "[p]ay bills after [decedent's] death . . . if incurred prior to said death, if authority to pay any such bills would otherwise have existed." Furthermore, section 81.44 (d) does not limit "any claims" to administrative costs and should be broadly construed. Here, the nursing facility filed a notice of claim against the guardianship account during decedent's lifetime while DSS asserted a claim against the estate only. Although DSS was a preferred creditor pursuant to Social Services Law § 104, it had a priority claim only against the estate and the nursing facility should have been paid before any funds passed to the estate.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Guardian and Ward §§ 106, 117; AM JUR 2d, Welfare Laws §§ 41, 42, 92, 95, 99.
McKINNEY'S, Mental Hygiene Law § 81.44 (d), (e); Social Services Law § 104.
NY JUR 2d, Hospitals § 165; NY JUR 2d, Infants and Other Persons Under Legal Disability §§ 528, 530; NY JUR 2d, Public Welfare and Old Age Assistance §§ 402, 403, 405.

ANNOTATION REFERENCE

See ALR Index under Guardian and Ward; Medicaid; Nursing and Convalescent Homes.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: nursing /2 facility home & guardian & priority

APPEARANCES OF COUNSEL

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, Lake Success (*Sarah C. Lichtenstein* of counsel), for appellant.

Robert F. Meehan, White Plains (*Eileen Campbell O'Brian* and *James Castro-Blanco* of counsel), for respondent.

OPINION OF THE COURT

ACOSTA, J.

On this appeal we are called upon to decide whether Eastchester Rehabilitation & Health Care Center was entitled to be paid, after Edna Shannon's death, for services rendered to her during her life, from assets controlled by her guardian pursuant to Mental Hygiene Law § 81.44 (d). Westchester County Department of Social Services (DSS) maintained that it was a preferred creditor and therefore that its claim had priority over Eastchester's claim. We hold that since Eastchester's claim arose before Shannon's death, and section 81.44 (d) allows the guardian to retain assets to secure known claims, Eastchester's claim has priority over that of DSS, which arose after Shannon's death.

Eastchester, a skilled nursing facility, admitted Edna Shannon into its care in 2005. In 2008, due to Shannon's need for assistance, and concerns about the proper handling of her finances by third parties, Eastchester commenced a proceeding pursuant to Mental Hygiene Law article 81 to have a guardian appointed

for her person and property. It also filed an application for medical assistance for Shannon's nursing home costs. In 2009, DSS determined that Shannon was eligible for Medicaid, effective September 1, 2008. By order and judgment entered April 24, 2009, Supreme Court appointed Family Service Society of Yonkers as her guardian. Among other things, the court conferred on Family Service Society the authority to pay Shannon's nursing home expenses and to pay bills after her death. Shannon died in December 2011 at age 87.

On June 2, 2010, approximately a year and a half before Shannon died, Eastchester filed a claim with Family Service Society seeking \$164,208 for services that Eastchester had provided that were not covered by Medicaid. By letter dated June 2, 2010, Eastchester also submitted the claim for filing with Supreme Court, Bronx County.

By order entered November 17, 2010, the court granted Family Service Society's motion for an order authorizing the sale of Shannon's home in New Rochelle for approximately \$300,000. The court stated that there was no likelihood that Shannon would be able to return to living independently in her home, and that "the sale of this house is warranted so that the proceeds from the sale can be used to pay for her long term care."

The sale closed in November 2010, and the net proceeds, \$297,882.20, were deposited into Family Service Society's guardianship account for Shannon. By order entered February 28, 2011, the court confirmed the sale.

By letter dated September 8, 2010, DSS had advised Family Service Society that Shannon owed DSS \$166,005.63 in medical assistance payments, and by letter dated January 28, 2011, it had advised that she owed \$192,352.47. DSS did not request payment at that time.

After Shannon's death, by letter dated July 5, 2012, DSS informed Family Service Society that it was asserting a preferred claim pursuant to Social Services Law § 104, and that the "updated lien amount" was \$271,661.62. DSS requested that when the "estate is ready for distribution," Family Service Society issue a check to DSS for that amount.

By order to show cause dated August 6, 2012, Family Service Society commenced a proceeding to settle its final account as guardian of Shannon's person and property. Family Service Society listed Eastchester as a claimant for \$164,208, and DSS as a claimant for \$166,005.63.

Eastchester opposed Family Service Society's petition and argued that it had priority over DSS because its claim of \$222,650 for the period of care from September 1, 2006 through August 31, 2008 accrued before DSS's claim against the estate began to accrue. Eastchester argued that DSS had no statutory lien against Shannon's home (the source of the remaining funds in the estate) when it was sold, and that DSS should not receive any preferred creditor status.

DSS also opposed the petition, as well as Eastchester's position, and argued that Shannon was a Medicaid recipient from approximately September 1, 2008 until her death on December 10, 2011. DSS stated that it had provided assistance to Shannon in the amount of \$271,661.62. DSS argued that it was a preferred creditor pursuant to Social Services Law § 104, and that because Eastchester had failed to reduce its claim to a judgment, Eastchester was a general creditor over which DSS had priority.

The court agreed with DSS and determined that, after \$14,400 was paid to Family Service Society for fees incurred as Shannon's guardian, \$188,599.27 remained in the estate, of which \$9,000 would be paid in legal and court fees, and the balance would be turned over to DSS in satisfaction of its Medicaid lien. We now reverse.

As Eastchester was to be paid out of the guardianship account before any funds passed to the estate, its claim had priority over DSS's claim. Mental Hygiene Law § 81.44 (d) provides that, within 150 days of the death of an incapacitated person, the guardian must serve on the personal representative of the decedent's estate, or if none, the public administrator or chief fiscal officer, a statement of assets and notice of claim, and, "*except for property retained to secure any known claim*, lien or administrative costs of the guardianship," deliver all guardianship property to the personal representative, public administrator, or chief fiscal officer (emphasis added).

Indeed, consistent with section 81.44 (d), the order and judgment appointing the guardian authorized Family Service Society to "[a]pply [Shannon's] resources and income, if any, toward her outstanding and accruing nursing home expenses," and to "[p]ay bills after [Shannon's] death . . . if incurred prior to said death, if authority to pay any such bills would otherwise have existed." In addition, the court order that authorized the sale of Shannon's home stated that the sale was warranted "so that the proceeds from the sale can be used to pay for her long term

care.” Although the court did not specifically refer to Eastchester, as opposed to DSS, DSS concedes that it did not assert a claim during Shannon’s lifetime but asserted a claim against the estate only.

Thus, while Eastchester filed a notice of claim against the guardianship account on June 2, 2010, DSS did not send a claim letter to Family Service Society until July 5, 2012, after Shannon’s death, asserting a claim against the estate pursuant to Social Services Law § 104.

Unlike the claims in *Matter of Swingearn* (59 AD3d 556 [2d Dept 2009]), which were competing claims during the decedent’s lifetime for benefits incorrectly paid (*see* Social Services Law § 369 [2] [a] [i]), and the claims in *Matter of Pierce* (106 AD2d 892, 892 [4th Dept 1984], *lv denied* 64 NY2d 609 [1985]), which were competing claims against the estate, Eastchester’s claim accrued during the decedent’s lifetime, against the guardianship account, with no competing creditors. Thus, Eastchester should have been paid before any funds passed to the estate. DSS, as a preferred creditor pursuant to Social Services Law § 104, had a priority claim only against the estate. Contrary to the court’s conclusion, it was irrelevant that Eastchester had not reduced its lien to a judgment, which would have given it priority over competing creditors, because DSS had no viable competing claim against Shannon’s guardianship account.

Contrary to the dissent, nothing in Mental Hygiene Law § 81.44 (d) and (e) “limit[s] the guardian’s right to retain property equal in value only to the expenses connected with the administration of the guardianship, such as those itemized in the guardian’s petition for a final accounting.” Had the legislature intended that result, it would have clearly stated that the guardian could retain assets to secure any known claim or lien only insofar as it was associated with administrative expenses. Instead, consistent with its stated justification “to facilitate the transition between a guardianship for an incapacitated person and an estate after the death of such incapacitated person” (Sponsor’s Mem, L 2008, ch 175, 2008 NY Legis Ann at 127), the legislature gave the guardian broader rights to pay off “*any known claim*, lien or administrative costs of the guardianship pursuant to subdivision (e) of this section” (Mental Hygiene Law § 81.44 [d] [emphasis added]). In other words, in addition to serving upon the personal representative of the estate “a statement of assets and notice of claim” within 150 days of the incapacitated person’s death, section 81.44 (d) authorizes the

guardian to pay off any known claims. This broader construction is consistent with Mental Hygiene Law § 81.44 (a) (4), which defines “[s]tatement of assets and notice of claim.” Specifically, in detailing the information to be included in a statement of assets and notice of claim, section 81.44 (a) (4) provides that, in addition to some identifying information (such as a caption and index number), the statement must contain

“a description of the nature and approximate value of guardianship property at the time of the incapacitated person’s death; with the approximate amount of any claims, debts or liens against the guardianship property, including *but not limited to* medicaid liens, tax liens and *administrative costs*, with an itemization and approximate amount of such costs and claims or liens” (emphasis added).

Thus, section 81.44, read as a whole, does not limit “any claims” to administrative costs. In fact, it does just the opposite; it lists administrative costs as a type of claim that the guardian can pay off. Section 81.44 (e), which states in relevant part, “the guardian may retain, pending the settlement of the guardian’s final account, guardianship property equal in value to the claim for administrative costs, liens and debts,” does not limit the guardian’s authority pursuant to section 81.44 (d) to retain property to pay off any known claims or liens in addition to administrative costs.

In light of our conclusion, we need not reach Eastchester’s remaining contentions.

Accordingly, the order of the Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about February 7, 2013, which, to the extent appealed from, directed petitioner to turn over to respondent Westchester County Department of Social Services the balance of the funds remaining in the guardianship estate of Edna Shannon, an incapacitated person now deceased, should be reversed, on the law, without costs, and petitioner is directed to turn over DSS’s share of the balance of the guardianship account to respondent Eastchester Rehabilitation & Health Care Center. The appeal from the order, same court and Justice, entered on or about May 30, 2013, which denied Eastchester’s motion to reargue, denominated a motion to reargue and/or renew, should be dismissed, without costs, as taken from a nonappealable paper.

FREEDMAN, J. (dissenting). I respectfully dissent, and would affirm Supreme Court’s determination that the Medicaid lien

imposed by Social Services Law § 104 (1) takes precedence over a claim by the general creditor, respondent Eastchester Rehabilitation & Health Care Center. Once Edna Shannon died, all funds other than those reserved for the administration of her guardianship in accordance with Mental Hygiene Law § 81.44 passed to her estate (SCPA 103 [19]). Accordingly, Supreme Court properly directed that the decedent's guardian turn over to respondent Westchester County Department of Social Services (DSS) all of the remaining funds in the guardianship estate after paying administrative fees, as expressly provided for by Mental Hygiene Law § 81.44.

This dispute over which of two creditors has the superior claim to the assets of the decedent's estate arises from this proceeding to settle the final account of her guardianship. The relevant facts are as follows: On December 13, 2005, the decedent, then 81 years old, moved from her home in New Rochelle, New York, to Eastchester Rehabilitation & Health Care Center. She resided at Eastchester until November 2008, when the facility commenced a proceeding under Mental Hygiene Law article 81 for the appointment of a guardian of her person and property because she suffered from dementia.

In January 2009, Supreme Court adjudged the decedent an incapacitated person, and in an April 2009 order appointed petitioner, Family Service Society of Yonkers, her guardian. The order authorized the guardian, among other things, to "[a]pply the [decedent's] resources and income . . . toward her outstanding and accruing nursing home expenses" and "[p]ay bills after the death of the [decedent] if incurred prior to said death, if authority to pay any such bills would otherwise have existed." The order also authorized the guardian to sell the decedent's house, subject to court approval.

In December 2008, Eastchester, on the decedent's behalf, applied for and was granted Medicaid benefits to cover the decedent's care. DSS agreed to pay Eastchester \$764 per month for September through December 2008 and \$816 per month for January through August 2009. These amounts were less than Eastchester's full charge.

In September 2010, DSS notified the guardian that the decedent owed the agency about \$166,000 for its Medicaid assistance. On November 25, 2009, Eastchester discharged the decedent to another nursing facility in Somers, NY, and in June 2010, Eastchester filed a notice of appearance and proof of claim in the guardianship proceeding seeking about \$164,000 for the

balance due for the decedent's care that Medicaid had not covered.

In October 2010, the guardian sought, on notice to both DSS and Eastchester, and obtained court approval to sell the decedent's house to pay for her ongoing long-term care. The guardian deposited the net proceeds of the sale, about \$298,000, into a separate guardianship account. Shortly thereafter, DSS notified the guardian that the amount the decedent owed Medicaid had increased to about \$192,000.

The decedent died on December 10, 2011, at age 87. In a July 2012 letter to the guardian, DSS stated that Medicaid assistance to the decedent totaled about \$272,000 and that the agency was asserting a preferred lien against the estate assets under Social Services Law § 104.

In August 2012, the guardian moved for an order approving and settling the guardianship's final account. In its petition, the guardian itemized fees and disbursements connected with the administration of the guardianship, which totaled about \$82,000.¹ The final account stated that about \$189,000 remained in the decedent's estate, most of which derived from the proceeds of the house sale.

The guardian stated that it had advised both DSS and Eastchester that their total claims exceeded the remaining amount and that it would not pay either unless they agreed to an apportionment. Each respondent contended that its claim had priority over the other's, and the guardian asked the court to apportion between respondents the assets remaining after the administrative costs of the guardianship were paid.

The majority finds that either the guardian should have paid Eastchester from the guardianship account while the decedent was still alive or, in accordance with Mental Hygiene Law § 81.44, the guardian should have retained the funds to pay Eastchester in the guardianship account instead of transferring them to the decedent's estate.

However, while the decedent was still living, both respondents had presented the guardian with claims against her assets to

1. Those costs included court-approved fees for the guardian, its attorneys, and the court examiner, related expenses in connection with the administration of the guardianship, the maintenance costs for the decedent's home before its sale, legal and other fees and expenses connected with the sale, court-ordered fees in connection with the guardianship proceeding, the net available monthly income charge to the decedent in connection with Medicaid, and miscellaneous expenses for the decedent's personal needs.

cover her care. The appointment order had authorized but not directed the guardian to pay the decedent's debts during her life. A guardian's authority terminates with the incapacitated person's death (Mental Hygiene Law § 81.36 [a] [3]). Upon the decedent's death, any funds in the guardianship account that remained after administrative fees of the guardianship were paid automatically passed into the decedent's estate (SCPA 103 [19]).

Social Services Law § 104 (1) specifically states:

“A public welfare official may bring action or proceeding against a person discovered to have real or personal property, or against the estate or the executors [or] administrators . . . of a person who dies leaving real or personal property, if such person . . . received assistance and care during the preceding ten years . . .

“In all claims of the public welfare official made under this section the public welfare official shall be deemed a preferred creditor.”

Thus, DSS's claim for Medicaid reimbursement took priority over Eastchester's claim because Eastchester was relegated to the status of a general creditor.

Mental Hygiene Law § 81.44, enacted in 2008, is designed for the limited purpose of paying expenses incurred in administration of the guardianship. As the Sponsor's Memorandum notes, the statute

“is designed to facilitate the transition between a guardianship for an incapacitated person and an estate after the death of such incapacitated person. It [clarifies] the rights of the personal representative of the estate to marshal guardianship funds and codifies the right of the guardian to retain a reserve to cover reasonably anticipated administrative expenses of the guardianship” (Sponsor's Mem, L 2008, ch 175, 2008 NY Legis Ann at 127).

In relevant part, subdivision (d) of Mental Hygiene Law § 81.44 provides that, within 150 days after the incapacitated person's death, the guardian must deliver the guardianship assets to the appointed representative of the decedent's estate,² with the exception of assets retained “to secure any known

2. Or, if no representative has been appointed, the public official notified of the death.

claim, lien or administrative costs of the guardianship *pursuant to [Mental Hygiene Law § 81.44 (e)]*” (emphasis supplied).

Subdivision (e) of Mental Hygiene Law § 81.44, referred to in subdivision (d), provides that, unless the court orders otherwise, when the incapacitated person dies “the guardian may retain, pending the settlement of the guardian’s final account, guardianship property equal in value to the claim for administrative costs, liens and debts.” The majority interprets subdivision (e) to mean that the guardian should have retained the funds to pay Eastchester’s bill because it was a “known claim . . . of the guardianship” as set forth in subdivision (d). But subdivisions (d) and (e), when read together, as they must be, limit the guardian’s right to retain property equal in value only to the expenses connected with the administration of the guardianship, such as those itemized in the guardian’s petition for a final accounting. Inasmuch as Eastchester’s claim for services was unrelated to the administration of the decedent’s guardianship, the guardian could not retain the funds to pay the claim under Mental Hygiene Law § 81.44 (d); rather, the guardian was required to turn the funds remaining after covering administrative expenses over to the personal representative of the decedent’s estate.

As Supreme Court pointed out, if Eastchester had reduced its claim against the decedent to a judgment while she lived, the outcome of this proceeding might have been different, because DSS’s statutory claim did not arise until her death, and earlier judgment creditors may have preferred rights against the estate (*see Matter of Pierce*, 106 AD2d 892 [4th Dept 1984], *lv denied* 64 NY2d 609 [1985]). However, as to the decedent’s estate, Eastchester merely stands as a general creditor whose claim is subordinate to that of DSS (*see Matter of Swingearn*, 59 AD3d 556 [2d Dept 2009] [holding that right of DSS to recover payment of Medicaid benefits was conferred by statute and DSS became a preferred creditor having priority over nursing home, which had not reduced its claim to judgment]).

Despite the court’s directive in the appointment order that after the decedent’s death, the guardian could pay bills incurred while the decedent was still living, the guardian could not be given more authority than provided under section 81.44. The decedent’s death terminated the guardian’s authority to pay her debts to Eastchester and use the proceeds of the home sale to pay for her nursing home expenses.

Accordingly, after payment of administrative expenses, the remaining funds must be turned over to the estate representative for payment to DSS.

TOM, J.P., and KAPNICK, J., concur with ACOSTA, J.; FREEDMAN, J., dissents in a separate opinion.

Order, Supreme Court, Bronx County, entered on or about February 7, 2013, reversed, on the law, without costs, and petitioner is directed to turn over DSS's share of the balance of the guardianship account to respondent Eastchester Rehabilitation & Health Care Center. Appeal from order, same court, entered on or about May 30, 2013, dismissed, without costs, as taken from a nonappealable paper.

[988 NYS2d 62]

In the Matter of PHILIP H. TEPLEN (Admitted as PHILIP HENRY TEPLEN), an Attorney, Respondent. DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, PETITIONER.

First Department, June 24, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on March 2, 1983 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department as Philip Henry Teplen.

HEADNOTE**Attorney and Client — Disciplinary Proceedings — Resignation**

Inasmuch as respondent's proffered resignation complied with the requirements of 22 NYCRR 603.11 in that his affidavit averred that the resignation was submitted voluntarily and with full awareness of the implications of its submission, and he acknowledged that he could not successfully defend himself against charges of professional misconduct if they were predicated upon the matters under investigation, respondent's resignation was accepted and his name was stricken from the roll of attorneys.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 31, 37, 62–64, 113.
CARMODY-WAIT 2d, Officers of Court §§ 3:289–3:291, 3:318,
3:319, 3:326, 3:337.
22 NYCRR 603.11 (a).
NY JUR 2d, Attorneys at Law §§ 409, 410, 414, 415, 462,
464, 476, 478, 480.

ANNOTATION REFERENCE

Propriety of attorney's resignation from bar in light of pending or potential disciplinary action. 54 ALR4th 264.

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Database: NY-ORCS

Query: resignation /s stricken & conver! /3 escrow & mis-
approp! /5 client

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (Norma I. Melendez of counsel), for petitioner.

Richard E. Grayson for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Philip H. Teplen was admitted to the practice of law in the State of New York by the Second Judicial Department on March 2, 1983, under the name Philip Henry Teplen. At all times relevant to these proceedings, respondent maintained an office for the practice of law within the First Judicial Department.

The Departmental Disciplinary Committee moves for an order, pursuant to Rules of the Appellate Division, First Department (22 NYCRR) § 603.11, accepting respondent's affidavit of resignation from the practice of law and striking his name from the roll of attorneys. Respondent's affidavit of resignation, sworn to on March 27, 2014, states that (1) his resignation is submitted freely, voluntarily and without coercion or duress, and that he is fully aware of the implications of submitting his resignation, including the fact that he cannot apply for reinstatement for seven years from the date his name is stricken from the rolls; and (2) if charges were brought predicated upon the misconduct under investigation, he would not be able to successfully defend himself on the merits against such charges (*see* 22 NYCRR 603.11 [a] [1], [3]). Specifically, respondent acknowledged that he cannot successfully defend himself on the merits against allegations of intentional conversion and misappropriation of client funds belonging to his former client, Gayle K. Dunne, a citizen of Ireland who, at the relevant time, was living in Switzerland. Respondent explains that Ms. Dunne retained him to obtain a U.S. Immigration investment visa. Respondent advised her to wire funds into his escrow account to demonstrate to the immigration authorities that she was in the process of investing in order to assist in obtaining the investor visa. On November 18, 2010, Ms. Dunne wired \$500,000 into respondent's escrow account. Respondent began withdrawing those funds, without permission or authority, for his own personal expenditures.

On December 10, 2010, Ms. Dunne requested the return of \$170,000 in order to take advantage of a different investment opportunity. By that date, respondent had depleted all of the \$500,000 Ms. Dunne had wired into his escrow account.

On December 26, 2010, Ms. Dunne commenced an action against respondent in Supreme Court, New York County. On

April 29, 2011, respondent and his law firm, jointly and severally, entered into an affidavit of confession of judgment in favor of Ms. Dunne in the amount of \$500,000, less payments made, plus interest. Respondent avers that he repaid all of the funds he intentionally converted, plus interest and attorneys' fees in the amount of \$31,666.66. However, it appears that this claim is disputed.

Ms. Dunne filed a complaint with the Departmental Disciplinary Committee in December 2012 alleging conversion of escrow funds. Respondent answered, and as noted, admitted that he intentionally converted those funds to his personal use, without permission or authority.

Respondent acknowledges that if charges were brought based upon the misconduct under investigation, they would "warrant disbarment" and include: violations of rules 1.15 (a) and 8.4 (c) of the Rules of Professional Conduct (22 NYCRR 1200.0) due to his misappropriation and intentional conversion of \$500,000 in escrow funds, respectively; a violation of rule 1.15 (b) (1) by his commingling personal funds with client funds in his escrow account, and using his escrow account as a personal account; a violation of rule 1.15 (b) (2) by failing to, inter alia, identify his escrow account as required; and a violation of rule 8.4 (h) in that the aforementioned misconduct adversely reflects on his fitness as a lawyer.

Respondent's affidavit complies with this Court's rule regarding the resignation of attorneys under these circumstances (22 NYCRR 603.11; *Matter of Riley*, 115 AD3d 112 [1st Dept 2014]; *Matter of Gibson*, 114 AD3d 182 [1st Dept 2014]; *Matter of Telemaque*, 110 AD3d 210 [1st Dept 2013]).

Accordingly, the motion is granted, respondent's resignation accepted and his name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to March 27, 2014.

SWEENY, J.P., ACOSTA, RENWICK, ANDRIAS and FREEDMAN JJ., concur.

Respondent's name stricken from the roll of attorneys and counselors-at-law in the State of New York, nunc pro tunc to March 27, 2014.

[991 NYS2d 400]

RITA CUSIMANO, Individually and Derivatively as Shareholder, Officer, Partner and Member of BERITA REALTY CORP. and Others, et al., Appellants, v ANDREW V. SCHNURR, CPA, et al., Respondents, and BERNARD V. STRIANESE et al., Third-Party Intervenors-Respondents.

First Department, August 7, 2014

SUMMARY

APPEAL from a judgment and an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 11, 2013 and July 16, 2013, respectively. The judgment and the order, to the extent appealed from, granted defendants' cross motion and the intervenors' motions to stay the arbitration to the extent of staying the arbitration of all claims against defendant Andrew V. Schnurr on statute of limitations grounds, and staying the arbitration of certain claims against intervenors and the remaining defendants on statute of limitations grounds, and granted plaintiffs' motion to stay the action to the extent of directing the parties to arbitrate the non-time-barred claims.

Cusimano v Schnurr, 40 Misc 3d 1208(A), 2013 NY Slip Op 51077(U), reversed.

HEADNOTES

Appeal — Preservation of Issue for Review — Failure to Raise Issue in Lower Court

1. In an action against certified public accountants in which the parties disagreed on whether the matter should be submitted to arbitration and whether certain claims were barred by the statute of limitations, the argument that certain choice of law provisions in the parties' various agreements required the timeliness issue to be decided by the court was unpreserved for appellate review since that argument was not raised in the court below.

Arbitration — Federal Arbitration Act — Agreements Involving Interstate Commerce — Commercial Real Estate

2. The Federal Arbitration Act (9 USC § 1, *et seq.*) applied to agreements whereby defendant certified public accountants performed accounting and tax services for the individual plaintiffs and various entities controlled by them that owned commercial property in New York and Florida, since the Act applies to agreements "involving commerce" and each of the agreements in question affected commerce, broadly understood. Plaintiffs' entities rented commercial property, and because commercial real estate can affect interstate commerce, the ownership and investment in plaintiff's commercial buildings, one of which was occupied by an international chain hotel with another housing a national chain drug store in Florida, rendered the Act applicable to the parties' agreements. The fact that the parties' action concerned the alleged

mismanagement of family entities in New York did not render the Act inapplicable. The proper inquiry is whether the economic activity in question represented a general practice bearing on interstate commerce in a substantial way, and here that activity involved substantial commercial transactions covering real properties, some of which were not in New York, and the properties were part of national businesses. Moreover, the Act was not rendered inapplicable by the fact that the agreements themselves did not expressly contemplate interstate transactions. Requiring parties to include a specific reference to interstate commerce in their agreements would undermine the purpose of the Act by encouraging further litigation as parties contested whether interstate commerce was contemplated at the time the agreement was executed.

Arbitration — Waiver of Right to Arbitrate — Judicial Determination of Waiver Issue

3. In an action against certified public accountants in which the parties disagreed on whether the matter should be submitted to arbitration, the issue of whether plaintiffs waived their right to arbitration by commencing a plenary action did not need to be determined by the arbitrator simply because the parties' agreements referenced the rules of the American Arbitration Association. It was not apparent from the wording of the arbitration clauses in the parties' agreements that they intended to have the specific issue of waiver by litigation conduct decided by the arbitrator. Moreover, the parties specifically sought a ruling from the court as to whether the arbitration or the court action could proceed based on the parties' prior litigation posture, and it is a long-established rule that courts, not arbitrators, decide whether a party's litigation conduct constitutes a waiver of arbitration.

Arbitration — Waiver of Right to Arbitrate — Participation in Litigation — Lack of Prejudice

4. Where an action and an arbitration proceeding were commenced arising out of the same dispute, which ultimately was determined by the court to be governed by the Federal Arbitration Act, plaintiffs did not waive their right to have a statute of limitations issue determined by the arbitrator by commencing the action, since their actions did not result in the requisite prejudice to defendants that would support a finding of waiver. When assessing the question of waiver, any doubts concerning whether there has been a waiver are to be resolved in favor of arbitration. Although plaintiffs commenced the action in court, they did not engage in aggressive litigation involving multiple motions addressed to the merits, nor did they pursue state court appeals. The only substantive motion in the action was made by defendants. Plaintiffs did move to disqualify defense counsel, relief which could have been sought in arbitration, but that type of motion would be insufficient to constitute waiver under federal case law. Although plaintiffs requested subpoenas while defendants' motion to dismiss was pending, no actual discovery took place. Therefore, plaintiffs did not obtain any evidence that would not have been available to them in arbitration. Moreover, inasmuch as the motion court gave plaintiffs leave to replead with specificity their claims of fraud and breach of fiduciary duty, they were not attempting to relitigate issues they had lost before the motion court, as they did not receive any greater advantage by filing a statement of claim in an arbitration than they would have obtained had they filed an amended complaint. A delay of one year did not, in itself, amount to protracted litigation, and the expense incurred in responding to plaintiffs' procedural motion and subpoenas did not, by itself, establish waiver.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Alternative Dispute Resolution §§ 91, 101–102, 206–207, 231, 235; AM JUR 2d, Appellate Review §§ 514, 577, 618–619, 777.
CARMODY-WAIT 2d, Appeals in General §§ 70:94, 70:104, 70:108, 70:334; CARMODY-WAIT 2d, Arbitration § 141:287.
NY JUR 2d, Appellate Review §§ 136, 595, 601, 612–614, 633; NY JUR 2d, Arbitration and Award §§ 118, 250.
9 USCA § 1 *et seq.*

ANNOTATION REFERENCE

See ALR Index under Appeal and Error; Arbitration; Preservation.

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Query: arbitration & account! /s waiver!

APPEARANCES OF COUNSEL

Dewey Pegno & Kramarsky LLP, New York City (*David S. Pegno*, *Tamara L. Bock* and *David C. Gartenberg* of counsel), for appellants.

Garvey Schubert Barer, New York City (*Alan A. Heller* and *Ella Aiken* of counsel), for Andrew V. Schnurr and others, respondents.

Joseph & Terracciano, LLP, Syosset (*Peter J. Terracciano* and *Janine T. Lynam*, of counsel), for Bernadette Strianese, respondent.

OPINION OF THE COURT

RICHTER, J.

In this appeal, we must determine, first, whether the Federal Arbitration Act (FAA) (9 USC § 1 *et seq.*) applies to the underlying agreements and, second, whether plaintiffs waived their right to arbitrate a statute of limitations issue by having pursued their claims through litigation. We conclude that the FAA does apply and, therefore, the question of whether plaintiffs' claims are time-barred should be determined by the arbitrator. We also find that plaintiffs did not waive their right to have the statute of limitations issue decided by the arbitrator.

Plaintiffs Rita Cusimano and Dominic J. Cusimano are husband and wife, and intervenors Bernard V. Strianese and Bernadette Strianese are Rita's father and sister respectively. Rita and the Strianeses own or formerly owned, in various degrees, certain entities that invest in commercial real estate. Defendants Andrew V. Schnurr, CPA and Michael Gerard Norman, CPA are certified public accountants who, along with Michael Gerard Norman, CPA, P.C., Norman's accounting firm (collectively the accountants), are alleged to have provided accounting and tax services to the Cusimanos and the various entities. The first of these entities is the Strianese Family Limited Partnership (FLIP), which initially owned commercial property in Deer Park, New York, and now owns a commercial property in Florida, which is currently leased to a CVS Drug Store. The second entity is Berita Realty, LLC (Berita), which currently owns a minority interest in an entity that owns a Marriott Hotel in New York State. The third enterprise consists of two entities known collectively as the Seaview Corporations (Seaview), which own two commercial buildings in New York State.

In September 2011, the Cusimanos commenced this action against the accountants alleging that they acted in concert with the Strianeses to misappropriate distributions and assets from Berita, commit tax fraud in relation to FLIP, and fraudulently induce Rita to sell her interest in Seaview to Bernard.¹ The complaint asserts causes of action for aiding and abetting fraud, accounting malpractice and breach of fiduciary duty, and seeks both monetary and injunctive relief.²

In February 2012, the accountants moved to dismiss the complaint, asserting that the Cusimanos' claims are barred by the statute of limitations. They also sought dismissal on several other grounds, including failure to allege the fraud claim with particularity and failure to state a cause of action.³ In an oral decision rendered July 17, 2012, the motion court dismissed the malpractice claims against Schnurr as time-barred based on its conclusion that he ceased to render any accounting services in

1. Rita asserts claims both individually and derivatively on behalf of FLIP and Berita.

2. Following the filing of the complaint, the Cusimanos moved to disqualify the accountants' counsel. The court denied that motion and that issue is not before us on this appeal.

3. While the accountants' motion was pending, the Cusimanos served several nonparty subpoenas. It appears that no discovery was exchanged in response to these subpoenas.

or about 2002. The motion court also concluded that the malpractice claims against Norman and his firm were barred by the statute of limitations to the extent they involved acts or omissions preceding 2008. In addition, the motion court found that the fraud and breach of fiduciary duty claims were not pleaded with the specificity required by CPLR 3016 (b), but gave plaintiffs leave to replead. In light of the motion court's decision on repleading, it stayed discovery.

In September 2012, instead of filing an amended complaint, the Cusimanos filed a demand for arbitration and statement of claim with the American Arbitration Association (AAA). In the arbitration, which was brought against both the accountants and the Strianeses, the Cusimanos asserted claims similar to those raised in the complaint in the court action. Plaintiffs then moved pursuant to CPLR 7503 (a) to stay the action pending the arbitration. The accountants cross-moved pursuant to CPLR 7503 (b) to permanently stay the arbitration on the grounds that the arbitration claims are time-barred. By separate motions, the Strianeses each moved to intervene in the court action and to permanently stay the arbitration based on the statute of limitations. The Cusimanos opposed a stay of arbitration and argued that, because the agreements were subject to the FAA, the issue of the statute of limitations was for the arbitrator, not the court, to decide.

In a decision and order entered July 16, 2013, the motion court found that the FAA does not apply to the agreements at issue because they do not involve interstate commerce (40 Misc 3d 1208[A], 2013 NY Slip Op 51077[U] [2013]). Thus, the motion court concluded that the question of whether the claims are barred by the statute of limitations was for it to decide. The motion court then found that many of the Cusimanos' claims were barred by the statute of limitations, and granted the accountants' and the Strianeses' motions to the extent of permanently staying arbitration of the time-barred claims.⁴ The motion court also concluded that any right Rita may have had to arbitrate was waived by her resort to, and participation in, the litigation of this action. Finally, the court granted plaintiffs' motion to the extent of directing the parties to proceed to arbitration on the non-time-barred claims. A judgment was

4. The motion court also granted the Strianeses' motions to intervene.

entered on September 11, 2013, and plaintiffs now appeal from both the order and judgment.⁵

[1] We first determine whether the court properly considered the statute of limitations issue or whether it should have been left for the arbitrator. Essential to this question is the determination of whether the FAA applies to the agreements of the three family entities. It is well settled, and the parties do not dispute, that if the agreements are governed by the FAA, then the timeliness issue is for the arbitrator, not the court (*see Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]).⁶ The FAA governs agreements which “evidenc[e] a transaction involving commerce” (9 USC § 2). In determining if the FAA applies to a contract, the central question is whether the “agreement is a contract evidencing a transaction involving commerce within the meaning of the [FAA]” (*Citizens Bank v Alafabco, Inc.*, 539 US 52, 53 [2003] [internal quotation marks omitted]).

Courts have interpreted the term “involving commerce” broadly (*see id.* at 56; *Allied-Bruce Terminix Cos. v Dobson*, 513 US 265, 270 [1995]). In *Allied-Bruce*, the United States Supreme Court concluded that the purpose of the FAA—to reduce the amount of litigation through the enforcement of arbitration agreements—supports a broad interpretation of the term “involving commerce” (513 US at 275). The Court declined to restrict transactions involving commerce only to those “activities within the flow of interstate commerce” (*id.* at 273 [internal quotation marks and emphasis omitted]). Rather, it found the phrase “involving commerce” to be the equivalent of “affecting commerce,” a term associated with the broad application of Congress’s power under the Commerce Clause (*id.* at 273-274; *see Citizens Bank*, 539 US at 56).

The Supreme Court reaffirmed this interpretation of “involving commerce” in *Citizens Bank*, stating that “it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce—that is, within the flow of interstate commerce” (539 US at 56 [internal quotation marks

5. None of respondents cross-appealed from the motion court’s order and judgment sending some claims to arbitration.

6. Bernadette argues that even if the FAA applies, certain choice of law provisions in the various agreements require that the timeliness issue be decided by the court (*see Diamond Waterproofing*, 4 NY3d at 253). Because neither she nor the other respondents raised this issue before the motion court, it is unpreserved for appellate review and we decline to reach it in the interest of justice.

omitted)). Further, the Court held that individual transactions do not need to have a substantial effect on interstate commerce in order for the FAA to apply (*id.*). Rather, as long as there is economic activity that constitutes a general practice “bear[ing] on interstate commerce in a substantial way,” the FAA is applicable (*id.* at 57; *see also Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 478 [2006], *cert dismissed* 548 US 940 [2006]; *ImClone Sys. Inc. v Waksal*, 22 AD3d 387, 387 [1st Dept 2005]).

[2] Based on a broad application of the term “involving commerce,” we find that the FAA applies to the agreements at issue. Each of the agreements concerns transactions that affect commerce, and all of the entities are involved in the rental of commercial property. FLIP’s rental property, which is located in Florida, is leased by a CVS drug store; Berita owns an interest in an entity that in turn owns a Marriott Hotel; and Seaview owns two commercial buildings. Because commercial real estate can affect interstate commerce, the ownership of and investment in the commercial buildings here, one of which is occupied by an international chain hotel and another which houses a national chain drug store located out-of-state, renders the FAA applicable to these agreements (*see Frumkin v P&S Constr., N.Y., Inc.*, 116 AD3d 602, 603 [1st Dept 2014]).

We reject respondents’ claims that the FAA is inapplicable because, in their view, this is a dispute about the mismanagement of the family entities in New York State. The proper inquiry is whether the economic activity in question represents a general practice that bears on interstate commerce in a substantial way (*see Citizens Bank*, 539 US at 56-57; *Diamond Waterproofing*, 4 NY3d at 250 [FAA was applicable “as the contract had an effect on interstate commerce” (emphasis added)]). This dispute not only involves substantial commercial transactions covering real properties, some of which are not in this state, but as plaintiffs note, the properties are part of national hotel and drug store chains.

Respondents contend that the FAA does not apply because the agreements themselves do not expressly contemplate transactions involving interstate commerce. This argument seeks to narrow the applicability of the FAA in a manner that the courts have declined to adopt. In *Allied-Bruce*, the Supreme Court faced the question of whether, at the time of agreement, the parties must have contemplated that the contract would evidence a transaction involving substantial interstate commerce or if it was enough that a transaction involving commerce had

occurred in fact (513 US at 277-279). The Court found that requiring parties to include a specific reference to interstate commerce in their agreements would undermine the purpose of the FAA by encouraging further litigation as parties contested whether interstate commerce was contemplated at the time the agreement was executed (*id.* at 278-279). The fact that the agreements here did not expressly contemplate the ownership of commercial real estate that would affect interstate commerce does not, under *Allied-Bruce*, preclude this Court from finding that the FAA applies.⁷

[3] Having determined that the issue of statute of limitations should be determined by the arbitrator, we now turn to the question of waiver.⁸ Although a party may have a right to arbitrate, the court may determine that a party has waived this right by having participated in litigation (*Matter of Advest, Inc. v Wachtel*, 253 AD2d 659, 660 [1st Dept 1998]; see *Ryan v Kellogg Partners Inst. Servs.*, 58 AD3d 481, 481 [1st Dept 2009]).⁹ There is a “strong federal policy favoring arbitration,” and waiver should not be “lightly inferred” under the FAA

7. Respondents’ reliance on *Matter of Laszlo N. Tauber & Assoc. I v American Mgt. Assn.* (304 AD2d 413 [1st Dept 2003]) is misplaced. *Laszlo* predates both *Citizens Bank* and *Diamond Waterproofing*, which reiterated the broad interpretation of the phrase “involving commerce” (*Diamond Waterproofing*, 4 NY3d at 252).

8. [3] We reject plaintiffs’ contention that the issue of waiver must be sent to arbitration because the agreements at issue reference the AAA rules. In *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd’s* (66 AD3d 495 [1st Dept 2009], *aff’d* 14 NY3d 850 [2010]), this Court held that where the arbitration agreement referred to arbitration under the AAA rules, the question of arbitrability is left to the arbitrators. However, that case did not involve the issue presented here, i.e., whether a waiver occurred as a result of conduct during litigation. Indeed, this Court in a recent case, *21st Century N. Am. Ins. Co. v Douglas* (105 AD3d 463 [1st Dept 2013]), which discussed *Life Receivables*, decided the issue of whether arbitration was waived by engaging in discovery. Furthermore, it is not apparent from the wording of the arbitration clauses that the parties intended to have the specific issue of waiver by litigation conduct decided by the arbitrator (see generally *Zachariou v Manios*, 68 AD3d 539, 539-540 [1st Dept 2009]). Nor would it make sense to do this, given the specific issue here, where the parties sought a ruling from the court as to whether the arbitration or the court action can proceed based on the parties’ prior litigation posture.

9. [3] There is no merit to plaintiffs’ contention that the issue of waiver should be decided by the arbitrator. It is true that *Diamond Waterproofing* contains dicta suggesting that waiver is a matter for the arbitrator to decide (4 NY3d at 252, citing *Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 84 [2002]). Notwithstanding that language, several circuit courts of appeal have concluded that *Howsam* did not change the long-established rule that courts,

(n. cont’d)

(*Leadertex, Inc. v Morganton Dyeing & Finishing Corp.*, 67 F3d 20, 25 [2d Cir 1995] [internal quotation marks omitted]; see *Rush v Oppenheimer & Co.*, 779 F2d 885, 887 [2d Cir 1985]). A party does not waive the right to arbitrate simply by pursuing litigation, but by “engag[ing] in protracted litigation that results in prejudice to the opposing party” (*Kramer v Hammond*, 943 F2d 176, 179 [2d Cir 1991] [internal quotation marks and citation omitted]).

In determining what constitutes protracted litigation for the purposes of waiver, there is no bright line rule. Rather, the court should consider three factors: (1) the amount of time between the commencement of the action and the request for arbitration; (2) the amount of litigation thus far; and (3) proof of prejudice to the opposing party (*Leadertex*, 67 F3d at 25; see *Matter of Advest*, 253 AD2d at 660-661). Indeed, “[t]he key to a waiver analysis is prejudice” (*Thyssen, Inc. v Calypso Shipping Corp., S.A.*, 310 F3d 102, 105 [2d Cir 2002]). Prejudice may either be substantive prejudice or result from excessive delay or costs caused by the moving party’s pursuit of litigation prior to seeking arbitration (*id.* at 105), though cost alone is not sufficient to establish prejudice (see *Blimpie Intl. v D’Elia*, 277 AD2d 69, 70 [1st Dept 2000]). A party may be substantively prejudiced when the other party is attempting to relitigate an issue through arbitration, has participated in substantial motion practice, or seeks arbitration after engaging in discovery that is unavailable in arbitration (see *Leadertex*, 67 F3d at 26).

[4] Applying these principles, we find that plaintiffs’ actions in this litigation have not prejudiced respondents such that the court must find waiver. Although plaintiffs commenced this action in court, they did not engage in aggressive litigation involving multiple motions addressed to the merits, nor did they pursue state court appeals (see *Kramer*, 943 F2d at 178-179 [defendant found to have waived right to arbitrate where he pursued multiple appeals in two states, including petitioning the Supreme Court for writ of certiorari]). Importantly, the only substantive motion in this action was made by the accountants. Plaintiffs moved only to disqualify defense counsel, relief which could have been sought in arbitration. In any event, this type of

not arbitrators, decide whether a party’s litigation conduct constitutes a waiver of arbitration (see *Grigsby & Assoc., Inc. v M Sec. Inv.*, 664 F3d 1350, 1354 [11th Cir 2011]; *JPD, Inc. v Chronimed Holdings, Inc.*, 539 F3d 388, 394 [6th Cir 2008]; *Ehleiter v Grapetree Shores, Inc.*, 482 F3d 207, 217 [3d Cir 2007]; *Marie v Allied Home Mgt. Corp.*, 402 F3d 1, 11-12 [1st Cir 2005]).

motion would be insufficient to constitute waiver under the federal case law. Respondents point to the fact that plaintiffs requested subpoenas while the motion to dismiss was pending, but no actual discovery took place. Therefore, plaintiffs did not obtain any evidence that would not be available to them in arbitration (*see Leadertex*, 67 F3d at 26).

Respondents assert that plaintiffs, by seeking arbitration, are attempting to relitigate the issues they lost before the motion court. However the motion court gave plaintiffs leave to replead with specificity, effectively giving plaintiffs “another bite at the apple,” at least as to the sufficiency of the pleadings. Thus, plaintiffs have not received any greater advantage by filing a statement of claim in an arbitration than they would have obtained had they filed an amended complaint. In any event, respondents point to no case finding waiver solely because a party filed an arbitration demand after limited motion practice, particularly where, as here, only one year had passed and no discovery had been exchanged.¹⁰

The accountants argue that plaintiffs’ delay in seeking arbitration is prejudicial because it caused them to experience unnecessary delay and expenses.¹¹ They stress the amount of time that passed between plaintiffs’ filing their complaint and pursuing arbitration and argue that they incurred legal fees in challenging plaintiffs’ subpoenas. A delay of one year does not, in itself, amount to protracted litigation (*see Kramer*, 943 F2d at 178-179 [party found to have waived right to arbitrate where four years had passed]), particularly where a delay “was not accompanied by substantial motion practice or discovery” (*Thysen*, 310 F3d at 105). Further, the expense the accountants incurred in responding to plaintiffs’ procedural motion and subpoenas does not, by itself, establish waiver (*see id.*; *Blimpie*, 277 AD2d at 70). Indeed, this Court has found that “[p]retrial expense and delay, without more, does not constitute prejudice sufficient to support” waiver (*Blimpie*, 277 AD2d at 70).

10. Respondents’ contention that this case is analogous to *Louisiana Stadium & Exposition Dist. v Merrill Lynch, Pierce, Fenner & Smith Inc.* (626 F3d 156 [2d Cir 2010]) is unavailing. In that case, the plaintiffs filed two “essentially identical” actions in federal and state court and filed three complaints before finally seeking arbitration (*id.* at 158).

11. Because the Strianeses were not named as defendants in plaintiffs’ original complaint and were not involved in the motion to dismiss, they cannot claim prejudice because of the litigation costs involved in the earlier motion, and any waiver claim based solely on this argument is unavailing as to them.

Although plaintiffs could have sought arbitration sooner, the fact that they did not file a substantive motion or obtain discovery material that would not have been available in arbitration weighs in favor of allowing arbitration to proceed. Indeed, when assessing the question of waiver, “any doubts concerning whether there has been a waiver are resolved in favor of arbitration” (*Leadertex*, 67 F3d at 25). In light of the strong preference for arbitration and the lack of prejudice to respondents, we find that no waiver has occurred (*see Thyssen*, 310 F3d at 104-105).

We have considered respondents’ remaining contentions and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 11, 2013, which, to the extent appealed from, granted defendants’ cross motion and intervenors’ motions to stay the arbitration to the extent of staying the arbitration of all claims against defendant Schnurr on statute of limitations grounds and staying the arbitration of certain claims against intervenors and the remaining defendants on statute of limitations grounds, and granted plaintiffs’ motion to stay the action to the extent of directing the parties to arbitrate the non-time-barred claims, should be reversed, on the law, defendants’ cross motion and intervenors’ motions denied, plaintiffs’ motion granted, and the action stayed pending the arbitration, without costs. The appeal from the order of the same court and Justice, entered July 16, 2013, should be dismissed, without costs, as subsumed in the appeal from the judgment.

TOM, J.P., MOSKOWITZ, DeGRASSE and KAPNICK, JJ., concur.

Judgment, Supreme Court, New York County, entered September 11, 2013, reversed, on the law, defendants’ cross motion and intervenors’ motions denied, plaintiffs’ motion granted, and the action stayed pending the arbitration, without costs. Appeal from order, same court and Justice, entered July 16, 2013, dismissed, without costs, as subsumed in the appeal from the judgment.

[987 NYS2d 852]

In the Matter of JOHN B. STELLA (Admitted as JOHN BASIL STELLA), an Attorney, Respondent. GRIEVANCE COMMITTEE FOR THE SECOND, ELEVENTH, AND THIRTEENTH JUDICIAL DISTRICTS, Petitioner.

Second Department, June 25, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts. Respondent was admitted to the bar on September 8, 1993 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department as John Basil Stella. By decision and order of this Court dated February 11, 2013, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against the respondent based on his conviction of a misdemeanor tax offense, and the issues raised were referred to the Honorable Stella Schindler, as Special Referee, to hear and report.

HEADNOTE

Attorney and Client — Disciplinary Proceedings — Censure

Respondent attorney was guilty of professional misconduct based upon his plea of guilty to failure to pay tax, an unclassified misdemeanor. Under the totality of circumstances, including respondent's disciplinary history, which consisted of a caution and an admonishment for failing to register with the Office of Court Administration, as well as his remorse and acceptance of responsibility; his cooperation with the Grievance Committee's investigation; his excellent reputation in the legal community; his sentence in the criminal action of a conditional discharge; personal circumstances, including his battle with throat and neck cancer; the placing of the financial needs of others over his own; and the fact that he was forced to close his law practice for approximately 1½ years due to serious illness, respondent was publicly censured.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 89, 113.

CARMODY-WAIT 2d, Officers of Court §§ 3:276, 3:277, 3:326, 3:328, 3:329, 3:332.

NY JUR 2d, Attorneys at Law §§ 375–378, 381, 382, 476, 478, 480, 483, 486, 489.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions; Taxes.

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Database: NY-ORCS

Query: censured & misdemeanor /s fail! /5 tax & mitigating

APPEARANCES OF COUNSEL

Diana Maxfield Kearse, Brooklyn (*Melissa D. Broder* of counsel), for petitioner.

Mischel & Horn, P.C., New York City (*Richard E. Mischel* of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

The Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts served the respondent with a petition containing a single charge of professional misconduct. After a preliminary conference on May 9, 2013, and a hearing conducted on June 4, 2013, and June 10, 2013, the Special Referee sustained the charge. The Grievance Committee now moves to confirm the Special Referee's report and to impose such discipline upon the respondent as the Court deems just and appropriate. The respondent has submitted a response and cross-moved to reopen the hearing to introduce additional mitigation evidence or, in the alternative, to confirm the Special Referee's report and impose a public censure. The respondent does not contest that the charge should be sustained.

The one charge alleges that the respondent is guilty of professional misconduct in that he has been convicted of a crime, in violation of rule 8.4 (b) and (h) of the Rules of Professional Conduct (22 NYCRR 1200.0). On April 5, 2012, in the Criminal Court of the City of New York, New York County, the respondent pleaded guilty to failure to pay tax, in violation of former Tax Law § 1810, an unclassified misdemeanor. He was sentenced to a conditional discharge, fined \$500, and directed to make restitution to New York State in the amount of \$43,644. In addition, the sentence included a condition that the respondent timely file and pay all future taxes.

In view of the evidence adduced, and the respondent's admissions, the Special Referee properly sustained the charge. Accordingly, the Grievance Committee's motion to confirm the Special Referee's report is granted.

Although the respondent does not contest the charge, he objects vigorously to various remarks made by the Special Ref-

eree, and requests that the hearing be reopened for the admission of additional mitigation evidence. The respondent claims that he was unduly restricted in his presentation of certain mitigation evidence. Upon our review of the record, including the Special Referee's remarks, we find that the additional mitigation evidence the respondent seeks to introduce would be cumulative to that already in the record, and would not alter the outcome of this proceeding. An adequate opportunity was afforded the respondent for the presentation of mitigation evidence.

The respondent was cautioned in 1998 and admonished in 2000, both times for failure to reregister with the Office of Court Administration. He is presently current with his reregistration fees.

We find no excuse for the respondent's misconduct, which consisted of failing to file tax returns and pay taxes for multiple years. However, in determining the appropriate measure of discipline to impose, the respondent asks that the Court consider the following mitigating factors: his remorse and acceptance of responsibility; his cooperation with the Grievance Committee's investigation; his excellent reputation in the legal community; his sentence in the criminal action of a conditional discharge; personal circumstances, including his battle with throat and neck cancer; and the placing of the financial needs of others over his own. The respondent was forced to close his law practice for approximately 1½ years due to serious illness. He has regained his health and recently resumed the practice of law.

In view of the mitigating circumstances, we find that a public censure is warranted.

ENG, P.J., MASTRO, RIVERA, SKELOS and BALKIN, JJ., concur.

Ordered that the Grievance Committee's motion to confirm the Special Referee's report is granted, the respondent's cross motion insofar as it seeks to confirm the Special Referee's report is granted, and the cross motion is otherwise denied; and it is further,

Ordered that the respondent, John B. Stella, is publicly censured for his professional misconduct.

[987 NYS2d 392]

In the Matter of THERESA RACHT, an Attorney, Respondent.
DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT, Petitioner.

First Department, June 19, 2014

SUMMARY

DISCIPLINARY PROCEEDINGS instituted by the Departmental Disciplinary Committee for the First Judicial Department. Respondent was admitted to the bar on February 26, 1986 at a term of the Appellate Division of the Supreme Court in the Second Judicial Department.

HEADNOTE**Attorney and Client — Disciplinary Proceedings — Suspension**

Respondent attorney was guilty of professional misconduct based upon her conviction of the class A misdemeanor of criminal tax fraud in the fifth degree, a serious crime within the meaning of Judiciary Law § 90 (4) (d), for failure to file tax returns and pay state and New York City personal income taxes for a two-year period. Under the totality of circumstances, including that respondent had no prior disciplinary history; acknowledged her misconduct; took prompt corrective action to make necessary filings in dealing with taxing and criminal authorities and put in place safeguards to ensure ongoing compliance; the fact that respondent's misconduct was not venal, although it was protracted—with persistent violations of the Tax Law over the course of nearly a decade; no client was harmed; and notwithstanding that respondent had opted to expend funds for travel rather than for payment of her taxes, respondent was suspended from the practice of law for a period of six months.

RESEARCH REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Attorneys at Law §§ 37, 86, 89, 113.

CARMODY-WAIT 2d, Officers of Court §§ 3:276, 3:327, 3:328, 3:337.

MCKINNEY'S, Judiciary Law § 90 (4) (d).

NY JUR 2d, Attorneys at Law §§ 366, 375–378; 476, 478, 480, 483.

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions; Taxes.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: suspended & mitigat! & misdemeanor /s fail! /5
tax

APPEARANCES OF COUNSEL

Jorge Dopico, Chief Counsel, Departmental Disciplinary Committee, New York City (Raymond Vallejo of counsel), for petitioner.

Michael S. Ross, for respondent.

OPINION OF THE COURT

Per Curiam.

Respondent Theresa Racht was admitted to the practice of law in the State of New York by the Second Judicial Department on February 26, 1986. At all times relevant herein, she has maintained an office for the practice of law within the First Judicial Department.

On April 3, 2013, respondent pleaded guilty in Criminal Court of the City of New York, New York County, to two counts of criminal tax fraud in the fifth degree, in violation of Tax Law § 1802, a class A misdemeanor, for failure to file tax returns and pay New York State and New York City personal income taxes for the tax years 2009 and 2010. Respondent was sentenced to a one-year conditional discharge, a fine of \$20,000 and a mandatory \$250 surcharge. Respondent was also ordered to pay \$105,833 for outstanding 2004 through 2011 New York State and New York City personal income taxes.

By unpublished order entered August 8, 2013, this Court, upon the petition of the Departmental Disciplinary Committee (the Committee), deemed the offense to which respondent pleaded guilty a “serious crime” pursuant to Judiciary Law § 90 (4) (d) and Rules of the Appellate Division, First Department (22 NYCRR) § 603.12 (a), and referred the matter to a Hearing Panel (the Panel) for a sanctions hearing. On October 3, 2013, the Panel conducted a hearing and the Committee introduced documentary evidence but did not call any witnesses. Respondent testified on her own behalf, called one character witness, and submitted a character letter. Following the hearing, both parties submitted memoranda in which the Committee argued for a one-year suspension and respondent urged a sanction no greater than a six-month suspension.

By a report dated February 10, 2014, the Panel recommended a six-month suspension as the appropriate sanction in light of certain mitigating factors. In particular, the Panel noted that (1) respondent acknowledged her wrongdoing; (2) she took “prompt corrective action to make necessary filings in dealing

with taxing and criminal authorities, including retaining attorneys and accountants to organize and manage the process, and [put] in place safeguards to ensure ongoing compliance”; and (3) she has no prior disciplinary history in over 25 years of practice.

The Panel found only one aggravating factor, namely that during the period at issue, respondent annually earned between \$101,380 and \$187,212, and rather than pay her taxes, had traveled within the United States and abroad. Nevertheless, the Panel noted that respondent had not lived an unduly extravagant lifestyle, as evidenced by the fact that she did not own her own home or a car and still had \$18,000 in law school debt more than 25 years after her graduation. The Panel concluded that while respondent’s “lack of substantial outside expenses should have made payment of her taxes less onerous, . . . it does not appear to be the case that [r]espondent failed to pay her taxes because of a profligate lifestyle. Rather, it appears that her lifestyle was moderate, her failure to pay was not venal and was instead due to a mental block with the task before her.”

The Panel further noted that although the Committee sought a one-year suspension “based on [r]espondent’s persistent violations of the tax law over the course of nearly a decade,” the Committee conceded that: (1) respondent’s misconduct was not venal, although it was protracted; and (2) no client was harmed by respondent’s misconduct. In the Panel’s view, the mitigation presented by respondent was more substantial than that in recent cases involving similar tax-related misconduct in which this Court imposed one-year suspensions (*see Matter of Roisman*, 89 AD3d 164 [1st Dept 2011] [one-year suspension for tax attorney’s failure to file tax returns and pay state and federal taxes for seven years despite financial ability to do so, and where his excuse for such failure was completely unsupported and belied by the evidence at the sanction hearing]; *Matter of Rosenberg*, 82 AD3d 85 [1st Dept 2011] [one-year suspension for failure to file tax returns and pay taxes for five years, where attorney’s annual income was between \$360,000 and \$600,000, and the attorney regularly filed for extensions, which he then ignored]; *Matter of Goldman*, 71 AD3d 9 [1st Dept 2009] [one-year suspension for attorney’s failure to file both state and federal tax returns for seven years, even after he was ordered to pay, and where he received annual compensation in excess of \$300,000, and his tax delinquency was due to his gambling habit

and his significant investments in a failing restaurant business]; *Matter of Howley*, 70 AD3d 218 [1st Dept 2009] [one-year suspension for attorney who failed to file tax returns or pay New York State nonresident taxes for over 10 years, and failed to file and pay federal and New Jersey resident taxes for at least nine years, and lived an extremely lavish lifestyle]).

The Committee now moves for an order pursuant to 22 NYCRR 603.4 (d) and 605.15 (e) (2) confirming the findings of fact and conclusions of law and imposing whatever sanction this Court deems appropriate under the circumstances. Respondent, through counsel, has submitted a response in which she supports the Panel's recommendation for a six-month suspension.

Under all the circumstances presented, the deterrent effect of a six-month suspension, recommended by the Panel, is an appropriate penalty (*see Matter of Rehbock*, 260 AD2d 58 [1st Dept 1999] [six-month suspension for federal felony conviction of income tax evasion where attorney had no prior disciplinary history and took responsibility for his misconduct by cooperating with the IRS and making restitution]; *Matter of Burns*, 242 AD2d 49 [1st Dept 1998] [six-month suspension where attorney failed to file state or federal income tax returns, or pay taxes for 12 years because he did not have the money, and where he had a previously unblemished record and impressive character witnesses]; *Matter of Sorkin*, 80 AD2d 31 [1st Dept 1981] [six-month suspension for attorney who aided and assisted in the preparation of federal income tax returns which contained substantially overstated deductions for a business which employed him]).

Accordingly, the Committee's petition is granted to the extent of confirming the Panel's report and recommendation in its entirety, and respondent is suspended from the practice of law for a period of six months and until further order of this Court.

RENWICK, J.P., DeGRASSE, FREEDMAN, RICHTER and MANZANET-DANIELS, JJ., concur.

Respondent suspended from the practice of law in the State of New York for a period of six months, effective 30 days after the date hereof and until further order of this Court.

[986 NYS2d 190]

In the Matter of MARVIN P., Respondent; KATHLEEN M. RICE et al., Appellants.

Second Department, May 21, 2014

SUMMARY

APPEALS, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of the Supreme Court, Orange County (Catherine M. Bartlett, J.), dated August 17, 2012. The order, after a hearing in a proceeding pursuant to CPL 330.20 (9) for a subsequent retention order, denied the application for the continued retention of respondent.

HEADNOTE

Mental Health — Person Acquitted of Crime by Reason of Insanity — Subsequent Retention Order

In a proceeding pursuant to CPL 330.20 (9) seeking a subsequent retention order by petitioner Commissioner of Mental Health, Supreme Court erred in determining that respondent no longer suffered from a dangerous mental disorder and ordering his release upon an order of conditions. The Appellate Division determined that Supreme Court did not make the appropriate inquiry—whether respondent suffers from a “dangerous mental disorder or is mentally ill” (CPL 330.20 [9])—and, making its own findings of fact, concluded that appellants demonstrated by a fair preponderance of the evidence that respondent was mentally ill as statutorily defined and that he currently constituted a physical danger to himself or others (CPL 330.20 [1] [c]). Appellants’ psychologist and psychiatrist opined that respondent suffered from bipolar disorder and various personality disorders, and respondent’s documented behaviors over the past 20 years were indicative of those disorders. While respondent refused to submit to an examination of his current medical condition by petitioner’s mental health professionals, a reliable diagnosis could be made based on interactions with and observations of respondent. Moreover, respondent’s dangerousness warranted his retention in a secure psychiatric facility. Respondent had a long history of volatile propensities toward other patients and staff, medication refusal and noncompliance, and repeated refusal to comply with treatment programs; in addition, although the underlying offense was committed nearly 20 years earlier, it was extremely violent, and respondent refused to take responsibility for it, nor did he acknowledge that he even had an active mental illness. Furthermore, the evidence respondent presented to show that he did not suffer from a mental illness and was not dangerous was not credible.

RESEARCH REFERENCES

By the Publisher’s Editorial Staff

AM JUR 2d, Mentally Impaired Persons §§ 5, 10, 14, 16, 17, 56, 63, 66.

CARMODY-WAIT 2d, Arraignment, Preliminary Hearing, and Fitness to Proceed §§ 179:102–179:105.

McKINNEY'S, CPL 330.20 (1) (c); (9).

NY JUR 2d, Criminal Law: Procedure §§ 1804, 1808, 2881, 2882, 2889.

ANNOTATION REFERENCE

Discharge from commitment and supervised release of civilly committed sex offender under state law. 78 ALR6th 417.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS

Query: continued /2 retention /2 order & dangerous! & expert

APPEARANCES OF COUNSEL

Kathleen M. Rice, District Attorney, Mineola (*Tammy J. Smiley* and *Jacqueline Rosenblum* of counsel), appellant pro se.

Eric T. Schneiderman, Attorney General, New York City (*Cecilia C. Chang* and *Patrick J. Walsh* of counsel), for New York State Office of Mental Health, appellant.

Marvin P., respondent pro se.

OPINION OF THE COURT

CHAMBERS, J.

The primary question before us is whether, pursuant to CPL 330.20 (1) (c), the respondent currently suffers from a dangerous mental disorder necessitating his continued retention in a secure psychiatric facility. Following a hearing, the Supreme Court determined that the respondent no longer suffered from a dangerous mental disorder and ordered his release upon an order of conditions. We disagree and reverse. In reaching our conclusion, we consider the significance of the respondent's refusal to submit to an evaluation by an Office of Mental Health psychologist to assess his present mental condition.

Background

The Underlying Offense

On September 11, 1993, the respondent repeatedly stabbed his wife, Susan, as she slept, inflicting six stab wounds including a punctured lung. Susan survived. The respondent was charged with attempted murder in the second degree and a related offense. With the permission of the court and the consent

of the People, the respondent pleaded not responsible by reason of mental disease and became an insanity acquittee pursuant to CPL 220.15. As required, he submitted to a psychiatric examination and appeared for a hearing, after which the Supreme Court determined that he suffered from a dangerous mental disorder (*see* CPL 330.20 [1] [c]). Subsequently, the Supreme Court ordered his commitment to Kirby Forensic Psychiatric Center (hereinafter Kirby), a secure facility, for treatment (*see* CPL 330.20 [1] [b]; [6]).

Initial Commitment Period

The respondent remained at Kirby for almost five years. While hospitalized, he was diagnosed with either bipolar disorder, on Axis I, or a personality disorder with a history of major depression, on Axis II, or some combination thereof. Clinicians reported that the respondent “was provocative, demanding, impulsive, disruptive and verbally abusive to staff and [other patients].” They noted his failure to comply with treatment and medication regimens and, as a result, Kirby was permitted to medicate him over his objection. They further noted his obsessive behaviors, including his preoccupation with his various lawsuits and his attempted sexual contact with female staff.¹

Release and Recommitment

Following a retention hearing on November 2, 1998, the Supreme Court ordered the respondent transferred to Middletown Psychiatric Center (hereinafter Middletown), a nonsecure

1. In a written report, Dr. Patricia Simon-Phelan, a psychologist who became familiar with the respondent when she was assigned to his ward at Kirby, wrote that he was consumed with his many lawsuits and, according to one psychiatrist, would spend the entire night awake reviewing his lawsuits without appearing tired. In Susan’s divorce action against him, the respondent, proceeding pro se, made more than 50 motions. The presiding judge in the divorce action said that he had a “history of bombarding the Court with unnecessary” motions and frivolous applications. Simon-Phelan also noted the respondent’s abusive and threatening behavior, including sexual advances he made towards female staff. For example, in 1997, the respondent wrote a disturbing and threatening letter to a female staff member. He wrote that he wanted her to bear his two children and that he did not “usually lose in the end.” He would try his “damndest” to “prevail with blood gushing out of all orifices.” Later, he gave that staff member a copy of *The Count of Monte Cristo*, a novel in which the protagonist, following his escape from prison, seeks revenge on those responsible for his wrongful imprisonment. In 2001, the respondent became enamored with a female therapy aide. He wrote her a romantic letter. After she refused his advances, he continued writing to her and expressed his dismay over her rejection. After the aide reported his letter-writing to her superiors, the respondent retaliated by accusing her of sexual misconduct. He claimed that she “conspicuously hugs clients, forcing her breasts into the client’s chest (or other parts on occasion).”

facility, upon a finding that, while he was still mentally ill and in need of confinement (*see* CPL 330.20 [1] [d]), he did not constitute a physical danger to himself or others (*see* CPL 330.20 [1] [c]). In October 2003, the Supreme Court ordered the respondent released from Middletown with an order of conditions which included a court order of protection directing him to refrain from any contact with Susan, then his ex-wife. However, in January 2005, the respondent telephoned Susan and told her that he loved her and was miserable without her. She told him not to call her again. He persisted, calling her twice more, asking in his last phone call if she would meet him for dinner in Massachusetts. Susan contacted the police because she was “unnerved to an extreme degree,” and the respondent was arrested on a charge of second-degree criminal contempt. As a result of this charge, he pleaded guilty and was sentenced to a definite term of incarceration of one year. While in jail, he was examined and found to be dangerously mentally ill and in need of treatment at a secure psychiatric facility. The examining psychiatrist noted that the respondent was highly litigious and grandiose, and minimized his past acts of violence. On August 12, 2005, the Commissioner of Mental Health (hereinafter the Commissioner) applied for and subsequently obtained a recommitment order, and the respondent has been confined under successive retention orders at Mid-Hudson Forensic Psychiatric Center (hereinafter Mid-Hudson), a secure psychiatric facility, ever since.

Applications for Retention

Prior to the filing of the instant application, the Commissioner filed four applications for further retention of the respondent at Mid-Hudson. The matters were repeatedly delayed, largely because the respondent, whose stated lifelong ambition is to become an attorney, discharged multiple attorneys and insisted on representing himself. Each of his prior retention applications was supported by a forensic psychiatric report, authored by a psychiatrist or a psychologist, concluding that the respondent was dangerously mentally ill. Although the respondent challenged the applications for further retention, he refused to allow the Commissioner’s examiners to interview him for their forensic psychiatric reports to the court on his mental condition. Nonetheless, the forensic reports reflected that the respondent had no insight concerning his mental illness, refused to participate in treatment, made threats of violence against staff members and patients, assaulted others,

and was verbally abusive toward patients, often provoking altercations.

Retention Hearing

The Appellants' Case

The instant application for the continued retention of the respondent was filed by the Commissioner on September 22, 2011. At the hearing on the application, the appellants presented Simon-Phelan's 35-page forensic report, along with her testimony and the testimony of Dr. Peter Formica. Initially, Simon-Phelan and Formica noted that the respondent refused to be interviewed on multiple occasions, just as he had during each of the four previous applications filed by the Commissioner. In reaching their conclusions, they relied on their observations of, and interactions with, the respondent, along with their review of a multitude of documents, including the uniform case record, various psychiatric examination reports spanning a 20-year period, police reports, and court records.

Simon-Phelan and Formica both concluded that the respondent is mentally ill. They agreed that the respondent is suffering from bipolar disorder on Axis I. Simon-Phelan explained that bipolar disorder is a mental illness characterized by episodes of mania, followed by depression. The respondent tends to be more manic; in fact, it is his natural state. When so, the respondent cannot control his emotions and, he has excessive energy, pressured speech, disorganized thoughts, and a flight of ideas. The respondent enjoys this state, feeling that it makes him more productive. However, he has reached the point where he is delusional. His mania manifests itself in excessive, overzealous litigation. He spends countless hours with his approximately 10 cases. For example, in September 2011 alone, he asked the Mid-Hudson librarian to make 50,000 copies of his paper work. He has sent numerous faxes to various judges and has called the "commissioner of quality of care" repeatedly. Formica stated that the respondent's mania surrounding his litigation is a defense, a way to avoid depression.

In addition, on Axis II, the respondent suffers from a severe personality disorder. According to Simon-Phelan, the respondent suffers from narcissistic and grandiose personality disorders. According to Formica, the respondent suffers from an antisocial personality disorder with narcissistic features and a personality disorder not otherwise specified. The respondent's refusal to listen to rules, excessive use of the telephone and computer, inflated ego, propensity for lying, lack of remorse,

cursing, threats, and use of ethnic and racial slurs, all support the diagnoses. Simon-Phelan's report includes examples of his "provocative, offensive, [and] aggressive behaviors" toward other patients and staff such as the following: in October 2006, he held a pen to another patient's throat, for which he was placed on one-to-one supervision; during the period from May to July 2007, he threw a cup of water at a staff member, knocked a cup of coffee out of a staff member's hand, spit at a patient, and scratched another patient while trying to take his food; in September 2009, he put blue markings on his body with a pen in an attempt to falsely accuse staff members of having beat him, and he abused his telephone privileges; also in 2009, when the respondent made a threatening remark to another patient, he was placed on one-to-one monitoring for several months and, then, following an assault on another patient, he was placed on one-to-three supervision. The year 2011 "brought more of the same," as the respondent monopolized the phone, argued with staff over the use of pens, and verbally abused both patients and staff by cursing at them and using racial slurs. Similarly, progress notes from the four months preceding the hearing recount instances where, for example, he confronted a staff member about a television, struggled with another staff member over a remote control, threatened to expose himself if he was not given a pen, and smacked another patient because the patient was too close to his legal papers. The respondent antagonized some of the other patients to the point where they wanted to strike him.

Further, Simon-Phelan and Formica concluded that the respondent is a danger to himself and to others. Prior to January 2011, before Formica became the respondent's treating psychiatrist, the respondent had taken small doses of psychiatric medication and responded well. Since then, however, the respondent has refused to take any psychiatric medication. The respondent was medicated only on an emergency basis when he became extremely agitated, eight times in 2011, and three times in 2012. Formica attributed the decrease in psychiatric medication to the fact that the respondent was taking medication for hypothyroidism, which is also used to treat mania. Formica stated that, as a result of the respondent's refusal to take medication, he has no or very poor insight into his mental illness. Indeed, the respondent has denied that he has an active mental illness. Likewise, the respondent has no insight into the underlying incident. He denies that he stabbed Susan, and has

offered to prove that she stabbed herself. According to Simon-Phelan, the respondent is angry about being detained and is still angry with Susan, who had taken from him, a former millionaire, everything that he had worked so hard to earn. Until the respondent started taking medication and gained insight into his mental illness, Susan remained “at great risk for further harm.” Formica opined that the respondent, if released, would try to repeat the offense. The respondent is also a danger to himself. He likes to engage in risky behavior by, for example, taunting the most dangerous patient at Mid-Hudson, which he does because he feels entitled to do so or believes that there will not be any consequence for it. Formica explained that people who are manic like to engage in dangerous behavior because it gives them a feeling of exhilaration. In short, considering factors demonstrative of a dangerous individual, such as a history of refusing to participate in treatment and to take prescribed medication, violent behavior, and lack of insight and impulse control, the respondent is dangerously mentally ill.

The Respondent's Case

The respondent presented the testimony of Allison Conner, a psychologist, and Quazi Al-Tariq, a psychiatrist.

Allison Conner's Testimony

Allison Conner, whose 37-page report was entered into evidence, testified as follows: Conner became acquainted with the respondent in January 1995, when she was at Kirby. Between September 1998 and July 1999, she was his treating psychologist. While under her treatment, the respondent was consistent in mood and behavior, acting rationally and logically. In 1999, Conner left Kirby and entered private practice.

In 2003, following the respondent's release, Conner treated him on an outpatient basis. She found him to be vigilant in caring for his psychiatric issues. He communicated with her regularly, sought medication, and even voluntarily checked himself into a hospital when he felt anxious. She noted in her report, however, that the respondent never told her that he planned to contact Susan, and that later, the respondent told her that he had not violated the order of protection because Susan had waived it. Following his recommitment, Conner did not communicate with him again until July 2009.

At that time, the respondent retained Conner as an examiner and witness for the instant hearing. Over the next three years, they were in contact almost daily, largely by telephone. She dis-

agreed with the appellants' experts' diagnoses of bipolar disorder and, in fact, concluded that he is not mentally ill at all. Rather, he has only personality traits of personality disorders. It was only those examiners with "cursory" or "superficial" knowledge of the respondent who concluded that he was bipolar. Indeed, although Simon-Phelan's report stated to the contrary, those who had the most contact with the respondent while he was at Kirby had offered a diagnosis of major depressive disorder with psychotic features, single episode, and his diagnosis was changed to bipolar disorder nearly a decade after the underlying offense. It is unlikely that a high-functioning individual such as the respondent with no prior psychiatric issues would suddenly develop bipolar disorder in his 60s. There is no real connection between mania and litigiousness, although the respondent is "overzealous" in his legal matters. He writes because there is nothing else for him to do. Although progress notes indicate that he is "bothersome" and violates Mid-Hudson rules and regulations, the violations are never specified. Although it was said that he threatens staff, the only threats he made were to sue and write legal complaints. Further, there is a notable absence of evidence in the progress notes of an unstable mood. It seems that he is simply "annoying and irritating to staff, causing them to dislike him." He is angry at being detained for seven years after making a nonthreatening phone call, and when his "buttons [are] pushed," he pushes back. His behavior in this regard is completely predictable. When he feels his rights are being violated, he protests loudly and provocatively with his voice and pen, because those are his only tools. When he speaks with Conner, he is "courteous, composed and goal-directed." She attributes his "loudness" to him being from New York and Jewish, just as she is. He is, she testified, "quite normal" for someone who is from New York and Jewish.

When questioned about the instances where the respondent had allegedly held a pen to a patient's throat, punched another patient, spit on a patient, threw water at an aide, and claimed to have physically abused his first wife, Conner said the first instance was "very questionable," the second "self defense," the third and fourth accidental, and the fifth fabricated so that there would be a basis for their divorce, which Conner characterized as an "act of chivalry." Conner denied that she had lost all objectivity and was simply accepting the respondent's word for everything, despite the fact that she had no way of confirming the veracity of the respondent's explanations. To the contrary, she said, her opinion of him had remained the same since 1999.

In addition to concluding that the respondent is not mentally ill, Conner opined that he is not dangerous. He is now 74 years old, and has medical conditions, including heart disease. The underlying offense, his memory of which is incomplete, was a single episode and the result of anxiety and major depressive disorders brought about by stress, which conditions are now in full remission. At the time of the underlying offense, the respondent was overleveraged. The Internal Revenue Service (hereinafter the IRS) was auditing him. He felt financially vulnerable and feared losing everything he had, including his home. His anxiety increased and he experienced severe insomnia over at least six months. He became paranoid, fearing that the IRS was pruning his trees in order to spy on him. He planned to kill himself, but he was unable to do so. After the underlying offense, he “decompensated quite quickly.” Now he has insight into why he “decompensated.” Indeed, when released, he sought psychiatric help because he was feeling anxious and did not want to “decompensate” again. He is not going to pursue Susan if released. He has “no ambiguity” surrounding her, no hope of reconciling with her as he had in the past, and no desire or reason to contact her. Although the underlying offense had resulted in the respondent losing his fortune as well as his liberty, he had no animosity toward her. Conner was “impressed” with his “forgiving attitude” toward Susan. The relationship was over, and he had moved on. To that end, if released, the respondent planned to write an autobiography or movie script, return to his former career as a United States Treasury agent, or study law under an attorney in Vermont in the hope of sitting for the New York State bar examination.

Quazi Al-Tariq’s Testimony

Al-Tariq testified as follows: He treated the respondent between September and December 2010 while at Mid-Hudson. In preparation for the instant hearing, he examined the respondent for 1½ hours and spent about another 1½ hours reviewing his medical records, which were contained in seven or eight two-inch-thick binders. Like Conner, he concluded that the respondent has no disorder on Axis I, and only personality traits of personality disorders on Axis II, which do not require medication or hospitalization, only some counseling. Some of his symptomatology overlaps with bipolar disorder, but he is not bipolar. If the respondent were truly bipolar, he would not be able to function in court without being medicated, as he was doing. When provoked, he would become upset or angry. He

becomes so when he cannot control his environment, because he does not want his things moved. However, any normal person would be upset by these circumstances. He has very high self-esteem, which others view as delusional.

Further, the respondent is not dangerous. He has not threatened anyone. The calls he placed to Susan were not threatening. They were a way of reconciling, and “he paid the price” for violating the order of protection. Al-Tariq noted that Susan had asked to dismiss the charges related to the respondent’s underlying offense, and that Susan and the respondent had lived together while the respondent was out on bail. The underlying offense itself was attributable to stress. The respondent did not threaten staff or patients at Mid-Hudson, and other patients intimidated him over minor issues regarding phone calls and returning pens. In addition, his medical conditions limit him physically.

On cross-examination, Al-Tariq acknowledged that he had been found guilty by an arbitrator of multiple instances of double-billing and was terminated from his employment with Mid-Hudson. Also, in June 2009, Al-Tariq had concurred in a forensic report finding the respondent dangerously mentally ill. Al-Tariq explained that when the forensic committee meets, its determination must be unanimous, even if some of its members disagree. He stated that the committee simply follows the directions of the District Attorney’s Office as to whether an individual should be released.

The Order Appealed From

In a written order, the Supreme Court concluded that the appellants had not proven that the respondent is dangerously mentally ill and, thus, denied the appellants’ application for his continued retention and directed that he be released subject to an order of conditions to be prepared by the Commissioner. This Court granted the appellants’ motion for leave to appeal from the order and to stay enforcement of the order pending hearing and determination of the appeals. We now reverse.

Analysis

Initially, in reviewing a determination such as this, made after a hearing (*see* CPL 330.20 [9]), this Court’s authority is as broad as that of the Supreme Court (*see Matter of Amir F.*, 94 AD3d 1209, 1212 [2012]). Our factual review power permits us to render the determination warranted by the facts, making our own findings of fact when necessary, while bearing in mind that

in a close case, the Supreme Court had the advantage of seeing and hearing the witnesses (*see Matter of George L.*, 85 NY2d 295, 305 [1995]; *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *Matter of Jeremiah S. [New York State Commr. of Mental Health]*, 69 AD3d 730, 732 [2010]; *see also Matter of Thomas G.*, 50 AD3d 1139, 1140 [2008]). In this instance, we cannot defer to the Supreme Court's determination and are compelled to make our own findings of fact (*see Matter of Hogue [Seltzer]*, 187 AD2d 230, 237 [1993]; *cf. People v Rodriguez*, 77 AD3d 280, 284 [2010]). Despite the significant conflicts in the psychiatric testimony, the Supreme Court made almost no findings of fact (*see Matter of Carpinello v Floyd A.*, 23 AD3d 179, 182 [2005]).

Moreover, the Supreme Court's four-page order includes only a summary of the evidence, its observation that the respondent conducted himself well during the two-day hearing, and an implicit finding that the respondent's witnesses were more credible. Based on some of the comments in the order, the Supreme Court justified its determination in part on facts that were irrelevant—that the respondent had spent more time detained for violating the order of protection by calling Susan than he did for stabbing her, and that Susan did not want the respondent to be prosecuted for the underlying offense of attempted murder.² Further, the Supreme Court seemed to place too much emphasis on facts that had only a minimal bearing on its determination, such as that the respondent did not threaten Susan during his telephone calls to her. Left with only these few comments, we must conclude that the Supreme Court did not make the appropriate inquiry: whether the respondent suffers from a “dangerous mental disorder or is mentally ill” (CPL 330.20 [9]; *see Matter of George L.*, 85 NY2d at 302; *Matter of Rabinowitz v James M.*, 50 AD3d 451 [2008]).

2. It is for this very reason that the New York State Unified Court System instituted specialized domestic violence courts so that felony domestic violence cases are brought before judges who have been trained in the dynamics of domestic violence and therefore know that domestic violence victims often drop charges for reasons that have nothing to do with the severity of the charge or the veracity of the complaint (*see Robert Wolf, Principles of Problem Solving Justice* at 3 [2007], available at <http://www.courtinnovation.org/sites/default/files/Principles.pdf> [accessed Mar. 17, 2014]; Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W St U L Rev 1, 4 [2000] [noting that in domestic violence cases, the victims often have compelling reasons, such as fear, economic dependence, or affection, for feeling ambivalent about cooperating with the legal process]).

This appeal calls upon us to apply settled law to unique facts. For the reasons set forth below, we conclude that the appellants demonstrated by a fair preponderance of the evidence that the respondent is mentally ill as statutorily defined and that he currently constitutes a physical danger to himself or others (*see Matter of Arto ZZ.*, 24 AD3d 947, 948 [2005]; *Matter of Richard S.*, 208 AD2d 750, 751 [1994]; Jerome Prince, Richardson on Evidence § 3-206 [Farrell 11th ed 2008]).

Mental Hygiene Law § 1.03 (20) defines a mental illness as “an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation.”

Upon our review of the record, we find that the credible evidence established that the respondent suffers from a mental illness, the first element of a dangerous mental disorder (*see* CPL 330.20 [1] [c]). Simon-Phelan and Formica opined that the respondent suffers from bipolar disorder, along with various personality disorders, whether narcissistic, grandiose, or antisocial. Most relevant, the respondent’s behaviors, consistently displayed over the past 20 years, as thoroughly documented throughout the record, are indicative of these disorders. These behaviors include his aggressive and violent acts, his abrasiveness when speaking to others, his refusal to follow rules, his inappropriate sexual advances, his inflated self-esteem, his high level of energy, his excessive writing, and his overzealousness with respect to litigation (*see Matter of Mental Hygiene Legal Servs. ex rel. James U. v Rhodes*, 195 AD2d 160, 162 [1994]). Although the categorization of the respondent’s mental illness has differed between mental health professionals, a number of professionals have drawn the same conclusions as Simon-Phelan and Formica, dating back as far as 1994. As one psychiatrist put it in 2003, the debate about whether the respondent’s “pathology is Axis I or Axis II or some combination thereof . . . can be carried on indefinitely,” but when one considers his symptomatic exacerbation, poor judgment, and poor impulse control, all of which continue to exist, he remains in “the category of dangerously mentally ill.”

In *Matter of George L.* (85 NY2d at 308), the Court of Appeals outlined the factors justifying an insanity acquittee’s retention in a secure facility. The prosecution may meet its burden

“by presenting proof of a history of prior relapses into violent behavior, substance abuse or dangerous activities upon release or termination of psychiatric treatment, or upon evidence establishing that continued medication is necessary to control defendant’s violent tendencies and that defendant is likely not to comply with prescribed medication because of a prior history of such noncompliance or because of threats of future noncompliance” (*id.*).

In *Matter of David B.* (97 NY2d 267, 279 [2002]), the Court of Appeals added that, in considering the level of dangerousness an insanity acquittee must exhibit in order to be detained in a nonsecure facility, a court may also consider

“the nature of the conduct that resulted in the initial commitment, the likelihood of relapse or a cure, history of substance or alcohol abuse, the effects of medication, the likelihood that the patient will discontinue medication without supervision, the length of confinement and treatment, the lapse of time since the underlying criminal acts and any other relevant factors that form a part of an insanity acquittee’s psychological profile.”

Between the two determinations, confinement in a secure facility, as opposed to a nonsecure facility, there is an overlap of factors (*see id.*). The difference in dangerousness is a matter of degree; confinement in a secure facility requires that the insanity acquittee’s dangerousness be more pronounced (*see id.* at 278-279). Consideration of these factors here warrants a finding that the respondent’s dangerousness is pronounced and, thus, he must be retained in a secure facility.

In assessing the respondent’s dangerousness, we note as a threshold matter that the respondent’s refusal to be formally interviewed by the appellants’ mental health professionals does not inure to his benefit. “Having refused to submit to a new psychological evaluation, [the respondent] may not now rely on the absence of a more current psychiatric evaluation to support his contention that the [appellants] failed to prove that he” is dangerously mentally ill (*Matter of State of New York v Jason H.*, 82 AD3d 778, 780 [2011]; *see also Ughetto v Acrish*, 130 AD2d 12, 21 [1987]). A proceeding such as this is civil in nature (*see Matter of Oliver C. v Weissman*, 203 AD2d 458, 459 [1994]). The respondent’s refusal to submit to an examination of his current medical condition is comparable to a party’s failure to

appear for a deposition or an independent medical examination (see *Matter of State of New York v Jason H.*, 82 AD3d at 780; *Matusewicz v Jo Jo's Auto Parts, Inc.*, 18 AD3d 828, 829 [2005]). In that context, a sanction would be appropriate. While the respondent cannot be sanctioned under these circumstances, his failure to cooperate does not render the appellants' proof in this case insufficient. In any event, as Formica testified during the hearing, the lack of a formal interview did not preclude him from reaching a reliable diagnosis. A more complete assessment might have been made had the respondent agreed to be interviewed, to the extent he was willing to refrain from lying and manipulating the facts, as he has in the past. However, as Formica explained, a reliable diagnosis could be made based on his interactions with and observations of the respondent.

We turn next to the respondent's attempted murder of Susan, the act that led to his initial commitment pursuant to CPL 330.20. Although the underlying offense was committed nearly 20 years ago, it was extremely violent (see *Matter of George L.*, 85 NY2d at 306; *Matter of Carpinello v Floyd A.*, 23 AD3d at 182-183; see also *Matter of Commissioner of Off. of Mental Health v Glenn B.*, 44 AD3d 517, 518 [2007]). The respondent does not take responsibility for stabbing Susan (see *Matter of Rabinowitz v James M.*, 50 AD3d at 452; *Matter of Carpinello v Floyd A.*, 23 AD3d at 183). Rather, he denies stabbing her, as Formica recounted in his testimony. The respondent's filings with this Court reflect the same. The first necessary step toward rehabilitation, which goes to the very heart of CPL 330.20, cannot be taken until the respondent acknowledges that he stabbed his wife and expresses his sincere regret (see generally *Matter of Silmon v Travis*, 95 NY2d 470, 477 [2000] [noting that rehabilitation may be given effect by considering remorse and insight]; *Matter of Umer K.*, 257 AD2d 195, 196 [1999] ["The first step toward rehabilitation is a sincere admission of the wrongdoing"]). Such an acknowledgment would demonstrate a level of insight into his mental illnesses, that they make him prone to violence, and that he has to be vigilant, both in monitoring the things that trigger negative behavior and in taking medication. Yet, like his refusal to take responsibility for the act that led to his commitment, the respondent does not acknowledge that he even has an active mental illness (see *Matter of Carpinello v Floyd A.*, 23 AD3d at 183; *Matter of Jamie R. v Consilvio*, 17 AD3d 52, 62 [2005], *affd* 6 NY3d 138 [2006]). Rather, he believes that he had a one-time mental breakdown brought on by stress.

The respondent does not participate in treatment and he refuses to take any psychiatric medication, despite evidence that small doses of medication, such as the medication used to treat his hypothyroidism, are effective in treating his illnesses (see *Matter of Rabinowitz v James M.*, 50 AD3d at 452). CPL 330.20 contemplates a progression through treatment. Yet, the respondent has not progressed at all because he refuses all treatment (see Mental Hygiene Law § 1.03 [20]; cf. *Matter of Arto ZZ.*, 24 AD3d 947 [2005]). Indeed, the respondent believes that his mania makes him more productive. That may be the case, but, it also makes him more dangerous. As Formica stated, the respondent has not taken steps to “mitigate [his] dangerousness.” Stated differently, until the respondent starts undergoing treatment, it has to be assumed that he is just as dangerous today as he was the day he returned to Mid-Hudson. He was dangerous when he was first recommitted to Mid-Hudson, and he has not treated that dangerousness in any way since his recommitment (see generally *Matter of Ferry v Goord*, 268 AD2d 720 [2000]). As a consequence of the respondent’s lack of insight and refusal to participate in treatment, it is unlikely that he will comply with any future medical treatment, even if directed, whether in a secure or nonsecure facility, or as a condition of an order of release (see CPL 330.20).

In addition, the record is replete with instances where the respondent has relapsed into violent behavior. After he was released on bail pending trial in 1994, he lived with Susan. During that time, among other disturbing conduct, he carried knives in his briefcase, and threatened to cut off her breasts and shove a sharp object into her buttocks. At one point, the respondent and Susan had an argument and he physically restrained her. The Nassau County District Attorney’s Office was contacted, and they sought to hold him in custody.³

The dissent implicitly considers it of no moment that, in this case, the respondent violated an order of protection. Although the respondent’s attempts to contact Susan on the telephone in 2005 could, in isolation, be viewed as harmless or innocent, they reflect his continuing fixation on her that cannot simply be dismissed as innocuous. While his words were nonthreatening, i.e., he professed his love for her, told her he was miserable without her, and asked her to have dinner with him at a partic-

3. In his brief, the respondent states that he had to restrain Susan because she was having an “explosive mood swing” brought on by “Premenstrual Dysphoric Disorder.”

ular restaurant in Massachusetts, these unwanted phone calls were made in violation of an order of protection and his conditions of release, and “[o]bviously . . . [they] must be viewed in the context of the prior relationship that existed between [them]” (*People v Brown*, 61 AD3d 1007, 1009 [2009]). When so viewed, the fact that the respondent’s words themselves were not overtly threatening provides no assurance that he does not pose a danger to Susan. Despite Susan’s entreaties not to call her again after the first call, he persisted in calling her two more times before she contacted the police. Indeed, Susan’s decision to contact the police in order to have the respondent arrested for violating the order of protection because, as she said, the calls “unnerved [her] to an extreme degree,” demonstrated that she herself feared for her physical safety—a fear that was well justified in light of the respondent’s manipulative nature and past history of physical violence.⁴

Since his recommitment, the respondent has also relapsed into violent conduct. He has held a pen to another patient’s neck, and punched, smacked, and spit at other patients. When he does not get his way or is directed to comply with Mid-Hudson rules, he is combative, curses, and uses ethnic and racial slurs. In the four months leading up to the hearing, the respondent struggled with a staff member over a remote control, threatened to expose himself if he was not given a pen, and hit another patient because the patient was too close to his legal papers. On several occasions the respondent became so agitated that Formica had to forcibly medicate him over his objection. The respondent also places himself at risk of injury by antagonizing dangerous patients, which, according to Formica, he does because he finds it exhilarating (see *Matter of Richard H. v Consilvio*, 6 AD3d 7, 16 [2004]). The respondent is so dangerous,

4. Commentators have noted that there is a growing body of research that documents “the profound use of nonviolent manners” by which abusers control and threaten their victims, such as harassing phone calls (Joanne Belknap, Ann T. Chu & Ann P. DePrince, *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 Duke J Gender L & Pol’y 373, 377 [spring 2012]), and have observed that abusers frequently use telephone calls to apologize and woo their victims back, and to threaten and seek revenge against them (*id.* at 378, 385). Former Chief Judge Judith S. Kaye, for example, observed that perpetrators of domestic violence present a particularly high risk for continuing, even escalating, violence against complainants as they seek further control over their choices and actions (see Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W St U L Rev 1, 4 [2000]).

both to others and to himself, that in the most secure psychiatric facility in New York State he has been placed at various times on one-to-one or even one-to-three monitoring. Clearly, the record supports the inference that the respondent's disruptive behavior would continue and escalate absent interruption by his monitors and the repeated emergency administration of medication for extreme agitation (*see Matter of George L.*, 85 NY2d at 304).

The evidence the respondent presented to show that he does not suffer from a mental illness and is not dangerous was simply not credible. Al-Tariq concurred in a June 2009 forensic report, finding that the respondent was dangerously mentally ill. It was only after Al-Tariq was terminated from Mid-Hudson for dishonesty that he changed his opinion. Al-Tariq explained that the committee had to be unanimous in its report and, in any event, it simply followed the directions of the District Attorney's Office. However, the record reflects that, at other times, the committee has not reached a unanimous decision on whether the respondent was dangerously mentally ill. Moreover, if, as Al-Tariq claims, he simply deferred to the District Attorney, such deference shows a serious ethical lapse and belies his current concern over the respondent's liberty interest. To that point, Al-Tariq's feeling that the respondent had "paid the price" for violating the order of protection had no place in his assessment. CPL 330.20 proceedings are not concerned with punishment, but treatment and the protection of society (*see Jones v United States*, 463 US 354, 369 [1983]). Al-Tariq's assessment that the respondent is not dangerous because he did not threaten Susan when he called her in January 2005 was shortsighted, as he failed to recognize that, in cases of domestic violence, offenders frequently engage in escalating courses of conduct (*see People v Cajigas*, 19 NY3d 697, 702 [2012]). In any event, as previously explained, Susan found the calls threatening, which was how any objectively reasonable person would have viewed them. Al-Tariq did not mention any of the respondent's disturbing conduct in 1994 when he was released on bail and, concomitantly, did not express how it bore on his assessment of the respondent's dangerousness. Al-Tariq also failed to consider that Susan may not have wanted the respondent prosecuted and allowed him to live with her for reasons that had nothing to do with her assessment of his dangerousness, reasons that may even have been irrational (*see Alexandria Zylstra, Mediation and Domestic Violence: A Practical Screening Method for Media-*

tors and Mediation Program Administrators, 2001 J Disp Resol 253, 255-256).⁵

Al-Tariq testified that the respondent becomes angry and upset when provoked, just as any person would. However, the respondent's reactions are anything but normal. Spitting, hitting, and using racial and ethnic slurs when one does not get his way are not normal reactions. Also, although not willing to diagnose him as bipolar, Al-Tariq had to acknowledge that some of the symptoms he observed, such as the respondent's very high self-esteem, are symptoms of bipolar disorder and narcissistic personality disorder.

Conner's assessment displayed a lack of objectivity. Conner accepted every innocent explanation the respondent offered for his conduct. She did so without the benefit of hearing from those involved in the subject incidents, such as the respondent's first wife or Susan, and without any basis for evaluating the veracity of his explanations. The general tone of her report reflects that she has adopted the respondent's belief, expressed throughout his brief, that Mid-Hudson and the Nassau County District Attorney's Office are conspiring to keep him detained by fabricating progress notes and suppressing relevant evidence. Her unusually close relationship with the respondent, as evidenced by her nearly daily telephone contact with him, may be the explanation for her markedly one-sided point of view.

In addition, some of the comments she made during her testimony alone call into question the soundness of her judgment. Her comment that the respondent has forgiven Susan, despite the fact that she was the one stabbed, was, to say the least, odd. It reflects again that she has adopted the respondent's point of view without giving any consideration to how he has manipulated the facts to portray himself as a victim. Like the respondent, Conner does not appreciate how the stabbing and the respondent's violation of the order of protection have affected Susan. Conner's remark that the respondent's behavior simply reflects that he is a typical "New York Jew" was intemperate and unprofessional. A misguided stereotype is no explanation for his atypical behavior.

Some of Conner's conclusions are contradicted by the record. For example, her report states that while the respondent was at Kirby between 1995 and 2001, his diagnosis by all of his examin-

5. One doctor described the respondent's relationship with Susan as "pathological."

ers, with the exception of a single doctor, was major depressive disorder with psychotic features, single episode, and mixed personality disorder with narcissistic and histrionic features. However, Simon-Phelan recounted in her forensic report that during the respondent's commitment at Kirby, he had a diagnosis of bipolar disorder, and she identified five different doctors who diagnosed him with either bipolar disorder I or bipolar disorder II during the first three years of his commitment. Conner testified that there is no connection between mania and litigiousness, but, as Simon-Phelan testified, the respondent's mania manifests itself in excessive litigation, and Conner herself acknowledged that the respondent was overzealous in his legal matters.

Although the Supreme Court found that the respondent conducted himself in an orderly and respectful manner during the hearing (*see Matter of Timothy M.*, 307 AD2d 295, 296 [2003]), bipolar disorder is episodic in nature. Moreover, Formica noted that, as is fairly typical of a person with bipolar disorder, the respondent is able to control himself over a short period of time, such as he did during this brief two-day hearing. In short, the evidence presented by the appellants was more persuasive.

In addition, we are not persuaded by the fact that the respondent would be subject to an order of conditions upon his release. His violation of the order of protection, and his violations of Mid-Hudson's rules that have continued unabated since his recommitment, make it unlikely that he will comply with an order of conditions. On these facts—a long history of volatile propensities toward other patients and staff, medication refusal and noncompliance, and repeated refusal to comply with treatment programs—we simply cannot conclude that the respondent should be placed in a nonsecure psychiatric facility.

We conclude that the respondent suffers from a dangerous mental disorder such that his retention in a secure psychiatric facility is warranted. Accordingly, the order is reversed, on the facts, and the application for the continued retention of the respondent is granted.

SKelos, J. (concurring in part and dissenting in part). Upon the application for a subsequent retention order to continue the respondent's confinement in a secure psychiatric facility, the Supreme Court determined that the respondent neither had a "[d]angerous mental disorder" nor was "[m]entally ill" (CPL

330.20 [1] [c], [d]), and directed that the respondent be released upon an order of conditions. The majority concludes that, contrary to the Supreme Court's determination, the appellants met their burden of proving that the respondent had a "[d]angerous mental disorder" (CPL 330.20 [1] [c]), requiring his continued confinement in a secure psychiatric facility. We disagree and conclude, as a matter of law, that without regard to the case presented by the respondent, the appellants failed to make a prima facie showing that the respondent suffered from a "[d]angerous mental disorder" (*id.*). Instead, we find, contrary to the Supreme Court's determination, that the appellants demonstrated that the respondent was "[m]entally ill" (CPL 330.20 [1] [d]), such that a retention order should be issued, but that the respondent should be transferred to a nonsecure psychiatric facility. Therefore, we concur in part and dissent in part.

In 1994, the respondent entered a plea of not responsible by reason of mental disease or defect (*see* Penal Law § 40.15) to a charge of attempted murder in the second degree, which was based upon an incident in which he stabbed his then second wife, Susan. In 1995, after a hearing, and upon evaluations by two psychiatrists, who diagnosed the respondent with bipolar disorder, the respondent was found to have a "[d]angerous mental disorder" (CPL 330.20 [1] [c]), and was confined to Kirby Forensic Psychiatric Center (hereinafter Kirby), a secure facility (*see* CPL 330.20 [6], [1] [f]).

In June 2000, upon the recommendation of members of his treatment team at Kirby, as well as a forensic evaluation by a staff psychiatrist at Kirby and an independent forensic evaluation, both finding that the respondent was no longer dangerously mentally ill, the respondent was transferred to Middletown Psychiatric Center (hereinafter Middletown), a nonsecure facility.

While at that facility, it was noted that the respondent "would become agitated, loud, and confrontational when he perceived injustices against him or was asked to follow the ward procedures." However, it was specifically noted that the respondent "had not displayed any assaultive behavior." The types of problematic behaviors in which the respondent engaged at Middletown included shouting matches with patients over use of the computer, obsessive writing of letters and legal documents concerning perceived wrongs against him, using communal spaces as his private "office," writing letters to female staff members expressing romantic interest, forbidding patients

to use the telephone, making derogatory remarks to a patient, threatening to write up staff members and to get them suspended or have their licenses revoked, and only minimally participating in therapy. Based upon these behaviors, Middletown was granted permission, in 2002, to medicate the respondent over his objection. However, Middletown determined not to request permission to give the respondent antipsychotic medications, as opposed to mood stabilizers, since he showed “no clinical evidence of any overt psychotic symptoms.”

In October 2003, upon an order of the Supreme Court, the respondent was released from Middletown with an order of conditions (*see* CPL 330.20 [12]). During that time, the respondent lived with his mother, participated in outpatient therapy, worked to restore his business, and, on one occasion, presented himself to a hospital for inpatient psychiatric care when he felt depressed. In February 2005, Susan reported to the police that she had received three telephone calls from the respondent (one of which was a voice-mail message), in violation of an order of protection. Susan reported that the respondent had told her that he loved her and asked her to go out to dinner with him. Upon a plea of guilty, the respondent was convicted of criminal contempt and sentenced to one year in jail. While in jail, the respondent was evaluated by a psychiatrist, who recommended inpatient hospitalization based upon the respondent’s “continued litigiousness, his grandiosity, and his minimization of his past acts of violence.” Four months later, the psychiatrist amended his report to indicate that the respondent was “dangerously mentally ill” and in need of treatment at a secure facility. In October 2005, the respondent was admitted to Mid-Hudson Forensic Psychiatric Center (hereinafter Mid-Hudson), a secure facility.

While confined at Mid-Hudson, the respondent refused to take medication, and questioned his psychiatric diagnosis. He also reportedly antagonized patients and made hurtful and inappropriate comments to them, made derogatory comments and was verbally abusive to staff, refused to comply with staff directives, “hoard[ed]” legal papers, refused to shower, threw a cup of water on a staff member, and knocked a cup of coffee out of a staff member’s hand. In October 2006, the respondent placed a pen on a patient’s throat, and the following month, punched a patient. A few days after that episode, Mid-Hudson made an application for authorization to medicate the respondent over his objection. The respondent was also medicated over his objection

a number of times in 2011 and 2012, “after displaying rapid, pressured speech, flight of ideas, and paranoid ideation,” as well as unspecified “agitated” behavior. In applying to medicate the respondent over objection, the respondent’s treating doctor indicated that he was “mainly afraid that [the respondent would] have another heart attack” from becoming so agitated.

On September 22, 2011, the present application was made for a subsequent retention order (*see* CPL 330.20 [9]), to continue the respondent’s confinement at Mid-Hudson for a period not to exceed two years, based upon the view that the respondent continued to suffer from a “[d]angerous mental disorder” (CPL 330.20 [1] [c]). In support of the application, Mid-Hudson submitted forensic psychiatric reports authored by staff psychologist Patricia Simon-Phelan, and psychiatrist Michael H. Stone. Simon-Phelan and Stone both diagnosed the respondent with bipolar disorder and a personality disorder, and opined, based upon the history of the respondent’s prior confinement, as detailed above, and his lack of insight into his illness and refusal to take medication, that the respondent had a “dangerous mental disorder.”

A hearing was held on the application, at which Simon-Phelan testified that she believed that the respondent was a danger to others because it was her opinion that “he would try to harm” Susan. Simon-Phelan further opined that the respondent was a danger to himself because “[h]e aggravates other patients so much that if anyone were to hit him, then he would be in danger of having a stroke.” Similarly, the respondent’s treating psychiatrist, Peter Formica, when asked whether the respondent was a danger to himself and others, indicated that he was “a danger mainly to himself” because he provokes the other patients. Formica also predicted that the respondent would be a danger to Susan if he were released to the community.

In opposition, the respondent presented evidence from psychologist Allison Conner, who opined that the respondent did not suffer from bipolar disorder, and that he did not require any mental health treatment. The respondent further presented evidence from psychiatrist Quazi Al-Tariq, who agreed with Conner that the respondent was not bipolar, or “[m]entally ill” as that term is defined in CPL 330.20 (1) (d), although he acknowledged that he concurred in a report issued in June 2009, which found the respondent to be suffering from bipolar disorder and in need of continued confinement at that time.

The Supreme Court concluded that the respondent did not have a “[d]angerous mental disorder” and was not “[m]entally

ill” (CPL 330.20 [1] [c], [d]), such that he should be released upon an order of conditions (*see* CPL 330.20 [12]).

If, upon a hearing on an application for subsequent retention of a defendant in a secure facility, the court determines that the defendant has a “dangerous mental disorder,” it must issue a subsequent retention order (CPL 330.20 [9]). “Dangerous mental disorder” means that “a defendant currently suffers from a ‘mental illness’ as that term is defined in [Mental Hygiene Law § 1.03 (20)]” and “that because of such condition he currently constitutes a physical danger to himself or others”^{*} (CPL 330.20 [1] [c]; *see Matter of George L.*, 85 NY2d 295, 302 [1995]).

If, however, the court finds that the defendant is “mentally ill but does not have a dangerous mental disorder,” it must issue a subsequent retention order, along with an order transferring the defendant to a nonsecure facility and an order of conditions for the transfer (CPL 330.20 [9]; *see* CPL 330.20 [11]; *Mental Hygiene Legal Servs. v Wack*, 148 AD2d 341, 343 [1989]). For purposes of CPL 330.20, “[m]entally ill” means

“that a defendant currently suffers from a mental illness for which care and treatment as a patient, in the in-patient services of a psychiatric center . . . is essential to such defendant’s welfare and that his judgment is so impaired that he is unable to understand the need for such care and treatment” (CPL 330.20 [1] [d]).

Although not expressly stated in the statutory definition of “mentally ill,” in order to satisfy due process concerns, “a constitutionally required minimum level of dangerousness to oneself or others . . . must be shown before an insanity acquittee may be retained in a non-secure facility” (*Matter of David B.*, 97 NY2d 267, 276 [2002]). However, “the concept of danger necessary to justify confinement in a nonsecure facility is not equivalent to the heightened dangerousness finding—dangerous mental disorder—that justifies placement in a secure facility” (*Matter of Jamie R. v Consilvio*, 6 NY3d 138, 152 n 12 [2006]). Rather, the Court of Appeals has held that “the criteria for mental illness” provided in CPL 330.20 (1) (d) “satisfy the

^{*} “Mental illness” is defined in the Mental Hygiene Law as “an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation” (Mental Hygiene Law § 1.03 [20]).

constitutional requirement of ‘dangerousness’ ” (*Matter of David B.*, 97 NY2d at 279). In other words, the findings that inpatient care is necessary and that the individual does not understand the need for such care are sufficient to satisfy the minimum level of dangerousness required to retain an individual in a nonsecure facility (*see id.*).

Here, although the appellants demonstrated that the respondent is “[m]entally ill” (CPL 330.20 [1] [d]), so as to warrant his retention in a nonsecure facility, they failed, as a matter of law, to meet their burden of demonstrating by a preponderance of the evidence (*see People v Escobar*, 61 NY2d 431 [1984]) that the respondent was suffering from a “[d]angerous mental disorder” (CPL 330.20 [1] [c]), so as to justify his continued confinement in a secure facility.

In *Matter of George L.* (85 NY2d 295 [1995]), the Court of Appeals discussed the showing necessary to support a finding of current dangerousness, so as to warrant retention in a secure facility. It explained:

“[t]he prosecution may meet its burden of proving that a defendant poses a current threat to himself or others warranting confinement in a secure environment, for example, by presenting proof of a history of prior relapses into violent behavior, substance abuse or dangerous activities upon release or termination of psychiatric treatment, or upon evidence establishing that continued medication is necessary to control defendant’s violent tendencies and that defendant is likely not to comply with prescribed medication because of a prior history of such noncompliance or because of threats of future noncompliance” (*id.* at 308).

In that case, the appellant, who suffered from acute paranoid schizophrenia, was confined in a psychiatric hospital after having assaulted his father (*see id.* at 298). The appellant was subsequently released, upon the opinions of his doctors that he was compliant with his medications and had gained insight into his illness (*see id.*). However, only 10 days after his release, the appellant attacked his father with a hunting knife (*see id.* at 299). Seventeen months later, the appellant was found to be suffering from a “[d]angerous mental disorder” (CPL 330.20 [1] [c]). The Court of Appeals affirmed that finding, stressing “the peculiar circumstances of appellant’s *relapse*” and the fact that his “behavior had already once frustrated the presumably rea-

sonable expectations of mental health professionals” (*Matter of George L.* at 308). Further, the Court indicated that the violent nature of the defendant’s criminal act constituted significant evidence of his dangerousness because that act had occurred only 17 months earlier, and that the lack of any more recent violence was not particularly significant, since the appellant had been “tranquilized” and confined for the entire 17-month period following the crime (*id.* at 307).

In a similar vein, the Court of Appeals affirmed a finding that the appellant was suffering from a “dangerous mental disorder” in *Matter of Francis S.* (87 NY2d 554, 561 [1995]), based upon the appellant’s “history of prior relapses into *violent* behavior and of recurrent substance abuse and noncompliance with treatment programs upon release” (*id.* at 561 [emphasis added]).

In contrast, the circumstances in the respondent’s case do not support the heightened dangerousness finding required for retention in a secure facility. The only evidence of violent conduct offered by the appellants, other than the 1994 offense against Susan, was the respondent’s acts, six years before the hearing, of holding a pen to a patient’s throat and punching a patient, and five years before the hearing, of knocking a cup of coffee out of a staff member’s hand. While there are vague references to “assault” in Simon-Phelan’s psychiatric report, there is no description of, or other facts pertaining to, any specific assault committed by the respondent. Simon-Phelan’s report is similarly vague as to the reason that the respondent was periodically placed on close supervision, indicating that he was placed on close supervision for “provocative behavior,” for his own protection against assault by others, and once, simply, “for assault.” In the same vein, although the respondent was reported to have “threatened” staff or patients, there is no indication that any of these threats were violent in nature, as opposed, for example, to threats of lawsuits or to staff members’ employment status. Further, while applications to medicate the respondent over objection were made on a number of occasions, only one of those occasions—stemming from the incident, six years prior to the hearing, in which the respondent punched a patient—was related to any violent behavior on his part. Rather, the applications were made, in large part, due to the respondent’s manifestation of typical, nonviolent bipolar symptoms and a concern by his treating doctor that his agitation would worsen his deteriorated medical condition.

Thus, we cannot agree with the majority's characterization of the appellants' evidence as being replete with examples of threats and physical acts of violence. The lack of evidence of any specific assaultive or violent conduct over a five-to-six-year period in which the respondent was not continuously medicated is significant to the question of the respondent's present dangerousness, unlike the lack of evidence of violent conduct in *Matter of George L.* during the relevant 17-month period in which George L. was "tranquilized" (*Matter of George L.*, 85 NY2d at 307). Moreover, while the respondent's underlying crime was undoubtedly extremely violent, it was committed 19 years prior to the hearing, and behavior of that nature was never repeated, even during the respondent's period of confinement in a nonsecure facility or during his release into the community.

As to the remainder of the respondent's behaviors while confined, it cannot be said that they indicate present dangerousness for purposes of confinement to a secure facility. As established by the record and as amply recited in the majority opinion, the respondent's mental illness manifests itself in excessive and overzealous litigiousness, annoying behaviors, verbal abuse, and socially offensive behavior such as use of racial or ethnic epithets. This conduct does not demonstrate that the respondent poses a physical threat to others.

Indeed, when specifically asked at the hearing why they believed that the respondent was a physical danger to himself or others, the appellants' experts, Simon-Phelan and Formica, only speculated that the respondent might harm Susan, and concluded that he was a danger to himself because he provoked other patients. Unlike a patient who, for example, is suicidal or prone to self-mutilation, the respondent's provocation of other patients does not show that he is a physical danger to himself. A concern that the respondent might anger and be hurt by other people simply does not justify "the significant limitations on [the respondent's] liberty interest which accompany secure confinement" (*Matter of George L.*, 85 NY2d at 308).

As to Simon-Phelan's and Formica's belief that the respondent would harm Susan, the Court of Appeals has made clear that "a finding that a defendant 'currently constitutes a physical danger to himself or others' must be based on more than expert speculation that he or she poses a risk of relapse or reverting to violent behavior once medical treatment and supervision are discontinued" (*id.* at 307-308, quoting CPL

330.20 [1] [c]). Although the respondent violated the order of protection issued in Susan's favor during his period of release into the community, he did not engage in any violent or threatening behavior toward her. In fact, he limited his contact with her to the telephone. The forensic psychiatric reports offered by the appellants do not contain evidence that the respondent expressed or harbored any intent to physically harm Susan. There is simply no reason to conclude, based upon the respondent's specific circumstances, including his conduct during the 19 years since the underlying offense, that the respondent's behavior with respect to Susan would escalate, or that the respondent, who is now 74 years old and, according to the appellants' proof, in poor physical health, would be a physical danger to her, if transferred to a nonsecure facility. Thus, any such conclusion would be mere speculation.

Accordingly, without considering the respondent's evidence, we conclude as a matter of law that the appellants failed to make a prima facie showing that the respondent "currently constitutes a physical danger to himself or others" (CPL 330.20 [1] [c]), thus requiring confinement in a secure facility (*cf. Matter of Francis S.*, 87 NY2d at 561; *Matter of George L.*, 85 NY2d at 308; *Matter of Rabinowitz v James M.*, 50 AD3d 451, 452 [defendant properly found to have a "'dangerous mental disorder'" where the defendant made threats of violence against staff members and patients of the facility, engaged in physical acts of violence, refused to participate in treatment, and was accused of forced sexual contact upon a fellow patient (quoting CPL 330.20 [1] [c])]; *Matter of Carpinello v Floyd A.*, 23 AD3d 179 [2005] [defendant properly retained in a secure facility where, inter alia, while confined, he was involved in 15 violent incidents]; *Matter of John P.*, 265 AD2d 559, 559 [1999] [petitioner showed that patient posed a substantial threat of physical harm to himself or others where evidence demonstrated that patient had "serious difficulty maintaining control of his rage and anger, and that he was frequently violent and verbally abusive"]).

Instead, contrary to the Supreme Court's conclusion, the evidence demonstrated that the respondent exhibited the minimum level of dangerousness to himself or others required to retain him in a nonsecure facility. In this respect, the opinions of the appellants' experts, the respondent's history, including the underlying offense, diagnoses of bipolar disorder since the early 1990s, and his documented behaviors while confined, as well as the respondent's refusal to take medication and denial

of any mental illness, demonstrate that the respondent is still in need of inpatient psychiatric care and that he is unable to understand the need for such treatment. The opinions of the respondent's experts—that he suffered from a single episode of depression at the time of the offense against Susan but was not otherwise mentally ill and did not require treatment—were not credible. Those opinions were belied by numerous psychiatric evaluations of the respondent performed by different psychiatrists and psychologists through the years, many of whom opined that the respondent suffered from bipolar disorder, and by the respondent's conduct while confined. That conduct and the respondent's history amply demonstrated that the respondent was not yet prepared to function in the community (see *Matter of Zheng Z.*, 78 AD3d 720, 721 [2010]; *Matter of Jerriell O.*, 288 AD2d 313, 314 [2001]).

We further note that, because the respondent was initially classified as having a “dangerous mental disorder,” he would continue to be subject to the procedural restrictions in CPL 330.20 even upon his transfer to a nonsecure facility (see *Matter of Jamie R. v Consilvio*, 6 NY3d at 143; *Matter of Norman D.*, 3 NY3d 150, 152 [2004]; *Matter of Michael R.R. [Commissioner of Mental Health]*, 233 AD2d 30, 34 [1997]). Thus, a court order would be required, for example, for any off-ground furlough, release, or discharge, and the District Attorney's Office would be notified of any further court proceedings, with the option of participating (see CPL 330.20 [10], [12], [13]; *Matter of Jamie R. v Consilvio*, 6 NY3d at 143; *Matter of Norman D.*, 3 NY3d at 154-155).

Accordingly, we would reverse the order and remit the matter for a finding that the respondent is “[m]entally ill” (CPL 330.20 [1] [d]), and for the issuance of a subsequent retention order and, pursuant to CPL 330.20 (11), a transfer order and an order of conditions.

RIVERA, J.P., and HINDS-RADIX, J., concur with CHAMBERS, J.; SKELOS J., concurs in part and dissents in part in a separate opinion in which AUSTIN, J., concurs.

Ordered that the order is reversed, on the facts, without costs or disbursements, the application for the continued retention of the respondent is granted, and the matter is remitted to the Supreme Court, Orange County, for the issuance of a continued retention order in accordance with CPL 330.20 (9).

MEMORANDA

OF

DECISIONS RENDERED DURING THIS PERIOD EMBRACED IN THIS VOLUME

FIRST DEPARTMENT, AUGUST, 2014

(August 7, 2014)

1 CALVIN E. THOMAS, Appellant, v NEW YORK CITY HOUSING
AUTHORITY, Respondent. [990 NYS2d 517]—

Municipal Corporations—Notice of Claim—Sufficient Particularity of Notice

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 4, 2013, which granted defendant's motion to strike from the bill of particulars allegations concerning the handrail of the staircase where plaintiff allegedly fell, and denied plaintiff's cross motion for leave to amend the notice of claim, modified, on the law, to deny defendant's motion, and otherwise affirmed, without costs.

Plaintiff claims that on August 15, 2011, as he stepped from the stairs and onto the second floor landing of stairway "A" in defendant's building, he slipped and fell on a puddle of urine, feces and debris on the landing. He testified that he held onto the handrail as he descended the stairs but "quickly released" his hand upon encountering a lock at the base of the handrail.

In the amended notice of claim, dated November 11, 2011, plaintiff alleged that the accident was attributable to the dangerous, defective and unsafe condition of the second-floor landing. In the bill of particulars, dated March 12, 2012, plaintiff further specified that defendant was negligent in failing to maintain, repair and clean the handrail near the landing, and in causing and allowing the handrail to remain obstructed so as to prevent its use by people traversing the stairway.

Defendant moved to strike the allegations in the bill of particulars concerning the condition of the handrail, and plaintiff cross-moved for leave to serve an amended notice of claim. The motion court granted defendant's motion and denied plaintiff's cross motion.

We modify to deny defendant's motion. Plaintiff's claim that defendant failed to maintain the handrail along the stairway at or near the second floor may be fairly inferred from the notice of claim, which alleged that defendant was negligent in maintaining the second floor landing area (*Jackson v New York City Tr. Auth.*, 30 AD3d 289, 291 [1st Dept 2006]). The notice of claim alleged generally that defendant failed to maintain stairway "A" in the vicinity of the second-floor landing, causing plaintiff's injury. The bill of particulars merely amplified the allegations of negligence concerning the landing area by further specifying that defendant had failed to maintain the handrail at the landing area (*e.g. Jackson*, 30 AD3d at 291 [claim of general negligence in notice of claim sufficient to encompass plaintiff's more specific claims that the absence of handholds or grab bars inside of bus contributed to the accident]; *see also Jimenez v City of New York*, 117 AD3d 535 [1st Dept 2014]; *Brown v City of New York*, 56 AD3d 304 [1st Dept 2008]).

To the extent claims concerning the handrail were "new," they were made well within the one year-and-90 day limitation period and did not impede defendant's ability to conduct a meaningful investigation. Plaintiff testified at the General Municipal Law § 50-h hearing concerning the obstructed handrail and the feces and urine filled landing area. Moreover, photographs of the landing area depicting the stairs and the obstructed handrail were shown to plaintiff at the hearing.

In light of our ruling that allegations concerning the handrail may be fairly inferred from the notice of claim, plaintiff's cross motion to amend the notice of claim is rendered academic. Concur—Mazzarelli, Manzanet-Daniels and Clark, JJ.

Gonzalez, P.J., and Sweeny, J., dissent in a memorandum by Sweeny, J., as follows: Because I cannot agree with the majority's conclusion that plaintiff's allegations concerning a defective handrail may be fairly inferred from the notice of claim, I must dissent.

The amended notice of claim states the accident was: "due to the dangerous, defective, broken, hazardous, dimly lit, wet, feces-filled and unsafe condition of said landing. . . . [Defendant was also negligent] in its ownership, design, construction, operation, maintenance, management, repair and control of the premises mentioned, and more specifically the aforementioned landing. [Defendant was] further negligent in allowing, causing, creating and permitting the landing to be, become and remain in a broken, dangerous, defective, unstable, dimly lit, wet, feces-filled and unsafe condition; in causing, allowing and permitting the landing to be carelessly, negligently and dangerously

maintained, creating a trap, nuisance and hazard upon the said premises and more particularly upon the landing and in failing to post any notice or warning of the said dangerous and defective condition at said premises and landing.” Nowhere in the amended notice of claim is there even an indication of a defective handrail being a substantial factor in the accident.

Therefore, the allegations contained in the bill of particulars regarding defective conditions of the handrail were not set forth in, and, despite the majority’s conclusion, cannot fairly be inferred from, the allegations in the notice of claim (*DeJesus v New York City Hous. Auth.*, 46 AD3d 474, 475 [1st Dept 2007]).

Nor did plaintiff’s General Municipal Law § 50-h hearing testimony provide notice that he claimed that the handrail was defective or contributed to his accident (*Scott v City of New York*, 40 AD3d 408, 410 [1st Dept 2007]). The only reference to the handrail in plaintiff’s testimony was that he was holding on to it and let go because of what turned out to be a lock at the end of the railing. There was never so much as an inference that the handrail was in any way defective much less a cause of the accident. The record simply does not support the majority’s conclusion concerning the allegations of a defective handrail.

2 TARSHEKA LUCKEY et al., Appellants, v CITY OF NEW YORK et al., Respondents. [991 NYS2d 34]—

Negligence—Duty—State’s Duty to Protect Inmates—Emergency Medical Assistance

Municipal Corporations—Tort Liability—Correction Officers—Deliberate Indifference to Inmate’s Serious Medical Needs

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered December 7, 2012, which, sua sponte, dismissed the 42 USC § 1983 claim against defendant Connie Rashid, and granted the other defendants’ motion for summary judgment dismissing the complaint, except that portion of the medical malpractice claims predicated on the failure to prescribe controller medication, unanimously modified, on the law, to deny the motion with regard to the negligence claim against the City and the section 1983 claims against defendant Myrtle Powell, and reinstate the section 1983 claim against defendant Rashid, and otherwise affirmed, without costs.

Plaintiffs’ decedent was an inmate at Rikers Island who was treated for chronic asthma during the few weeks in which she was incarcerated before her death. The court incorrectly dismissed the negligence claims against the City, as there are triable issues of fact about whether the response of its correction officers breached a duty to protect decedent from reason-

ably foreseeable harm in providing emergency medical assistance once she complained of difficulty breathing and otherwise exhibited signs of an asthma attack (*see generally Sanchez v State of New York*, 99 NY2d 247 [2002]). Dozens of eyewitnesses provided conflicting accounts regarding, among other things, the timing of the officers' calls for medical assistance, and whether resuscitative efforts undertaken before medical personnel arrived were performed by the officers or whether other inmates took such measures in the face of inaction by the officers. Plaintiffs' expert affirmation raised triable issues of fact as to the adequacy of the officers' response and the soundness of defendants' expert's opinions. The City's reliance on governmental immunity is unavailing, since there are triable issues of fact as to whether the death was caused in part by a negligent failure to comply with mandatory rules and regulations of the New York City Department of Corrections (DOC), requiring, among other things, that correction officers respond immediately in a medical emergency, and that officers who are trained and certified in CPR administer CPR where appropriate (*see Valdez v City of New York*, 18 NY3d 69, 80 [2011]).

Similarly, the court incorrectly dismissed plaintiffs' 42 USC § 1983 claim against Powell, since there are triable issues of fact about whether her conduct constituted "deliberate indifference" to decedent's "serious medical needs" (*Estelle v Gamble*, 429 US 97, 103-105 [1976]). Powell also failed to establish her entitlement to qualified immunity (*see Anderson v Creighton*, 483 US 635, 638 [1987]).

The court correctly dismissed plaintiffs' section 1983 claim against Perry. There is no indication in the record that Perry contributed to the decedent's death in any way. Rather, his involvement as Director of DOC's Investigations Division was to oversee the investigation of this incident after decedent's death. He had no responsibility for creating guidelines or procedures for the response to inmates' medical conditions or the provision of medical services to inmates. There is nothing before us that would warrant the imposition of section 1983 liability against him.

The court should not have dismissed plaintiffs' section 1983 claim against defendant Rashid, who did not move for summary judgment, in light of the default judgment entered against her in this action.

The court correctly dismissed the section 1983 claim against the City. Although the face of the complaint does not contain a section 1983 claim against the City, and plaintiffs' bill of particulars clarified that they have made no such claim, the parties'

submissions in their appellate briefs have treated the complaint as asserting such a claim. There is, however, no evidence of a “policy or custom” evincing deliberate indifference to the rights of inmates (*Connick v Thompson*, 563 US —, —, 131 S Ct 1350, 1359-1360 [2011]). “[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action” (563 US at —, 131 S Ct at 1360 [internal quotation marks and citation omitted]). “Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights” (563 US at —, 131 S Ct at 1360).

Here, the two employees allegedly acting unconstitutionally were involved in the very incident for which section 1983 damages are sought against the City. Accordingly, their conduct could not have put the City on prior notice that its training was deficient, sufficient to demonstrate the City’s “deliberate indifference” (563 US at —, 131 S Ct at 1360).

The court properly found, in the alternative to its dismissal of the section 1983 claims, that plaintiffs are precluded from seeking damages for loss of enjoyment of life or loss of familial association, such damages being inapplicable to this wrongful death action (*see Banks ex rel. Banks v Yokemick*, 177 F Supp 2d 239, 246 n 5 [SD NY 2001]; *see also McCray v City of New York*, 2007 WL 4352748, *27, 2007 US Dist LEXIS 90875, *94-96 [SD NY, Dec. 11, 2007, Nos. 03-Civ-9685, 03-Civ-9974, 03-Civ-10080 (DAB)]).

We have considered plaintiffs’ remaining arguments for affirmative relief and find them unavailing. Concur—Sweeny, J.P., Renwick, Andrias, Richter and Kapnick, JJ.

3 GRAYSON JOHNSON, Plaintiff, v CITY OF NEW YORK, Respondent, and BOVIS LEND LEASE, LMB, INC., Appellant, et al., Defendant. [991 NYS2d 36]—

Labor—Safe Place to Work—Statutory Agent—Supervisory Control over Work

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 6, 2013, which, to the extent appealed from as limited by the briefs, granted the City of New York’s motion for summary judgment on its contractual and common-law indemnification cross claims against defendant Bovis Lend Lease, LMB, Inc., unanimously affirmed, without costs.

Triable issues of fact were raised by plaintiff’s deposition testimony as to whether the debris and garbage he observed on the floor prior to his accident caused the foot of his ladder to

jump or slip out from beneath him. Plaintiff claimed that when placing the ladder, he swept the area beneath it with his foot and checked to make sure that there was no debris before climbing to the fourth rung. While plaintiff testified that he assumed that it was a piece of debris that caused his ladder to jump or slip, he also said that he never saw any specific piece of debris under his ladder, either before or after his accident.

Although relevant only to plaintiff's pending Labor Law §§ 240 (1) and 241 (6) claims against Bovis, the undisputed evidence established that Bovis was a statutory agent for the City since it possessed and exercised supervisory control and authority over the work being done (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]). "When the work giving rise to [the duty to conform to the requirements of section 240 (1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory 'agent' of the owner or general contractor" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]). Bovis's own superintendent testified that Bovis functioned as the "eyes and ears" of the City for the subject construction project, and it had broad responsibility under its contract to coordinate and supervise the work of the four prime contractors, including plaintiff's employer (*Walls* at 864). While one of these four prime contractors, Tully Construction Co., Inc., was labeled in its contract with the City as a "general contractor," the deposition testimony of Tully's superintendent confirmed that Bovis had the authority to direct Tully's work.

Since the indemnity provision requires Bovis to indemnify the City for Bovis's negligence "or from [its] failure to comply with any provision of this contract or of law," the City is entitled to full contractual indemnification for any violation of the Labor Law. Concur—Sweeny, J.P., Renwick, Andrias, Richter and Kapnick, JJ. [**Prior Case History: 2013 NY Slip Op 31791(U).**]

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSEPH GARCIA, Appellant. [990 NYS2d 415]—

Crimes—Consolidation and Severance—Burglary and Robbery Crimes
 Crimes—Identification of Defendant—Pattern Distinctive to Other Crimes

Judgment, Supreme Court, New York County (Carol Berkman, J., at severance motion; Charles H. Solomon, J., at suppression hearing; Daniel P. FitzGerald, J., at jury trial and sentencing), rendered January 20, 2010, convicting defendant of burglary in the first and second degrees, robbery in the second degree (two counts), attempted robbery in the second degree

and petit larceny, and sentencing him, as a second violent felony offender, to an aggregate term of 37 years, unanimously affirmed.

Defendant failed to establish good cause for a severance under CPL 200.20 (3) (a). While there were evidentiary differences between one of the three incidents at issue and the remaining two, there was no material variance in the quality of proof for the separate incidents, and the evidence as to each of the three crimes was presented separately and was readily capable of being segregated in the minds of the jury, as they occurred on different dates and involved entirely different witnesses (*see People v Ford*, 11 NY3d 875, 879 [2008]; *see also People v Streitferdt*, 169 AD2d 171, 176 [1991], *lv denied* 78 NY2d 1015 [1991]). In any event, defendant has not established that the joinder of the three incidents caused him any prejudice.

The court properly exercised its discretion in instructing the jury that it could consider similarities between two of the crimes on the issue of identification. The crimes had enough distinctive aspects to establish a pattern that was probative of defendant's identity (*see People v Beam*, 57 NY2d 241, 253 [1982]; *People v Swinton*, 87 AD3d 491, 493 [1st Dept 2011], *lv denied* 18 NY3d 862 [2011]). The two burglaries, committed within two days, shared many features that formed a pattern when viewed collectively. Although the crimes were not identical, "[i]t is not necessary that the pattern be ritualistic for it to be considered unique; it is sufficient that it be a pattern which is distinctive" (*Beam*, 57 NY2d at 253).

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's pro se claims. Concur—Sweeny, J.P., Renwick, Andrias, Saxe and Kapnick, JJ.

5 In the Matter of CARLOS FERNANDEZ, Appellant, v NEW YORK CITY TRANSIT AUTHORITY, Respondent. [990 NYS2d 519]—

Civil Service—Disciplinary Punishment—Termination Penalty Excessive for First Incident

Order, Supreme Court, Bronx County (John A. Barone, J.), entered March 29, 2013, which denied the petition to vacate the arbitrator's decision upholding respondent's (NYCTA) termination of petitioner's employment, and granted NYCTA's cross motion to dismiss the petition, unanimously modified, on the law, to grant the petition to the extent of vacating the penalty of termination and to deny the cross motion, and the matter is remanded for the imposition of a lesser penalty, and otherwise affirmed, without costs.

Although we are troubled by the lack of a transcript to review

the record of the arbitration proceeding, we have no basis to disturb the arbitrator's credibility findings. We find, however, that the termination of Fernandez's employment as the sanction for a single, alleged transgression is grossly excessive and shocks our sense of fairness (see *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). When the incident at issue occurred, Fernandez had been a NYCTA bus driver for 15 years, had received consistently positive performance evaluations, and had never been disciplined.

Moreover, by imposing the harsh penalty of termination on its employee for a first incident, NYCTA disregarded its own disciplinary guidelines. NYCTA's policy is found in the collective bargaining agreement between the agency and Fernandez's union, which provides that NYCTA "shall be guided by 'the principle of progressive discipline' in the administration of its disciplinary procedures."

Here, depriving Fernandez of his livelihood because of a single incident "is disproportionate to the misconduct . . . or to the harm or risk of harm to the agency or institution, or to the public" (*Pell*, 34 NY2d at 234; see also *Matter of Principe v New York City Dept. of Educ.*, 94 AD3d 431 [1st Dept 2012] [termination disproportionate for petitioner with spotless, five-year record], *affd* 20 NY3d 963 [2012]; *Matter of Riley v City of New York*, 84 AD3d 442 [1st Dept 2011] [termination disproportionate for petitioner with 15 years of service and good record]; *Matter of Solis v Department of Educ. of City of N.Y.*, 30 AD3d 532, 532 [2d Dept 2006] [termination unwarranted for petitioner with "otherwise unblemished 12-year record"]). Concur—Mazarelli, J.P., Acosta, Freedman, Richter and Clark, JJ.

6 SHERYL MENKES, Appellant, v BETH ABRAHAM HEALTH SERVICES, Respondent, et al., Defendants. [990 NYS2d 414]—

Disclosure—Examination before Trial—Nonparty Witness—Motion to Quash Subpoena

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 8, 2013, which granted defendants' motion to quash a subpoena ad testificum served on a nonparty witness, unanimously reversed, on the facts, without costs, and the motion denied. Appeal from order, same court and Justice, entered June 26, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to renew, unanimously dismissed, without costs, as academic.

In May 2012, plaintiff served a nonparty subpoena on Cecilia Zuckerman, the former chief operating officer of defendant Beth

Abraham Health Services (BAHS), who had not been employed by BAHS since 1999. In support of their motion to quash, defendants submitted Zuckerman's affidavit in which she averred that she was not properly served with the subpoena and that she did not treat any patients at BAHS and had no recollection of plaintiff's decedent or of BAHS's rules, policies, and procedures during the relevant period in the late 1990s.

In opposition to the motion, plaintiff did not submit evidence that the process server was denied entry into Zuckerman's building before leaving the subpoena with her doorman, as is required to show proper leave and mail service under CPLR 308 (2) (*see Soils Eng'g Servs. v Donald*, 258 AD2d 425 [1st Dept 1999]). Plaintiff, however, now asks this Court to take judicial notice of the process server's affidavit of service, "which is contained within the court file of the Supreme Court, Bronx County, as subpoenaed and transferred to this Court in connection with the appeal." Plaintiff argues that the affidavit establishes that leave and mail service was proper because the process server left the subpoena with Zuckerman's doorman only after he was denied entry into her building. Importantly, it is uncontested that the subpoena was then mailed to Zuckerman at her home address and was received by her. Therefore, the Court will reach the merits of the motion to quash.

Defendants' contention that the deposition would be a futile exercise in light of the passage of time and the witness's sworn denial of any relevant knowledge, is not sufficient to establish "that the discovery sought is 'utterly irrelevant' to the action or that the 'futility of the process to uncover anything legitimate is inevitable or obvious' " (*Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014]). Therefore, the deposition of nonparty Zuckerman should go forward. Concur—Friedman, J.P., Sweeny, Andrias, Saxe and Kapnick, JJ.

(August 14, 2014)

1 MADISON 96TH ASSOCIATES, LLC, Respondent, v 17 EAST 96TH OWNERS CORP., Sued Herein as 17 EAST OWNERS CORP., Appellant. 17 EAST 96TH OWNERS CORP., Plaintiff, v MADISON 96TH ASSOCIATES, LLC, Defendant, and 21 EAST 96TH STREET CONDOMINIUM, Respondent. (And Third-Party Actions.) [990 NYS2d 811]—

**Adjoining Landowners—Encroachments—Evidence of Encroachment
Assignments—Purchase of Claims for Purpose of Bringing Action—Assign-
ment Not Champertous Where Legitimate Claim Exists and Action Com-
menced before Purchase**

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 29, 2013, which granted plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

This is an action for trespass based on the encroachment of air conditioners from defendant 17 East 96th Owners Corp.'s (defendant) abutting building into plaintiff Madison 96th Associates, LLC's (plaintiff) air space. It is immaterial that plaintiff failed to submit a survey accompanied by the surveyor's affidavit as proof of the encroachment (*see Thomson v Nayyar*, 90 AD3d 1024, 1026 [2d Dept 2011]). Defendant's formal judicial admission in its answer is dispositive (*see People v Brown*, 98 NY2d 226, 232 n 2 [2002]; *GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 626 [1st Dept 2011, Richter, J., concurring]; *Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673 [1st Dept 2010] [allegation in complaint]). Moreover, defendant's attorney's informal judicial admission that the air conditioners "admittedly encroach" on plaintiff's air space is some evidence of the encroachment (*see Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 103 [1996]; *Leonia Bank v Kouri*, 3 AD3d 213, 220 [1st Dept 2004]), as is the testimony of one of defendant's unit owners confirming the accuracy of a document indicating the protrusion of his air conditioner.

The orders relied upon by defendant as law of the case were not binding on the motion court in deciding the instant motion for summary judgment because of the parties' different evidentiary burdens on the motions that those orders decided (*see Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467 [1st Dept 1987]). Moreover, the September 6, 2006 order did not actually decide the relevant issue (*see Ferolito v Vultaggio*, 115 AD3d 541 [1st Dept 2014]; *NYP Holdings, Inc. v McClier Corp.*, 83 AD3d 426, 427-428 [1st Dept 2011]). In any event, this Court is not bound by law of the case as represented by the trial level rulings defendant relied upon (*Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]).

Contrary to defendant's contention, dismissal, by the previously assigned Justice, of its adverse possession counterclaim and affirmative defense on the ground that it could not actually possess plaintiff's air space does not preclude plaintiff's claim for interference with its rights (*see generally Ain v Glazer*, 257 AD2d 422, 423 [1st Dept 1999]).

The assignment to plaintiff of the claim in this action was not champertous. The action had been commenced before the assignment and the closing on the property, and the purpose of

the assignment was not to make money from a claim that “would not be prosecuted if not stirred up,” but to enforce a legitimate claim (*Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.*, 13 NY3d 190, 201 [2009] [internal quotation marks omitted]; see also *71 Clinton St. Apts. LLC v 71 Clinton Inc.*, 114 AD3d 583, 585 [1st Dept 2014]).

This Court declines to reach defendant’s arguments regarding damages since summary judgment was only awarded on liability and the issue of the amount of damages has not yet been addressed below. Moreover, nominal damages are presumed in trespass cases (see *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95-96 [1993]; *Shiffman v Empire Blue Cross & Blue Shield*, 256 AD2d 131 [1st Dept 1998]), obviating the need for plaintiff to make out a prima facie case for damages on its motion for summary judgment on liability.

We have considered defendant’s other contentions, and find them unavailing. Concur—Gonzalez, P.J., Sweeny, Moskowitz, Freedman and Kapnick, JJ.

2 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v HENRY HARRIS, Appellant. [990 NYS2d 812]—

Crimes—Plea of Guilty—Sufficiency of Allocution—Failure to Establish Factual Basis for Offense or Advise Defendant of Consequences of Plea Crimes—Harassment—Sufficiency of Evidence—Threat of Physical Harm

Judgment, Supreme Court, Bronx County (George Villegas, J.), rendered December 7, 2011, convicting defendant, upon his plea of guilty, of disorderly conduct, and sentencing him to a conditional discharge and a \$120 fine, unanimously reversed, on the law and as a matter of discretion in the interest of justice, to the extent of vacating the plea, dismissing the counts of the accusatory instrument charging harassment in the second degree and menacing in the third degree, and remanding for further proceedings on the remaining charges.

Defendant’s plea allocution did not establish a factual basis for the offense, or establish that he understood any of the rights he was giving up by pleading guilty. Since the allocution was completely inadequate, we conclude that the plea should be vacated in the interest of justice (see *People v Vickers*, 84 AD3d 627 [1st Dept 2011]).

In addition, the accusatory instrument was insufficient as a matter of law with regard to the harassment and menacing charges. The allegation that defendant pointed his finger in a shooting motion and stated, “I’m going to shoot you,” without any indication that defendant was armed at the time, did not

set forth an imminent threat of harm to the complainant. Nor were any facts alleged showing the statement should have been taken seriously (*see People v Dietze*, 75 NY2d 47, 53-54 [1989]). However, the other charges were sufficiently stated. Concur—Gonzalez, P.J., Acosta, DeGrasse, Freedman and Richter, JJ.

3 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KINGSLEY SIMPSON, Appellant. [990 NYS2d 813]—

Crimes—Right to Counsel—Effective Representation—Failure to Advise Defendant of Deportation Consequences of Guilty Plea
Crimes—Appeal—Matters Reviewable

Order, Supreme Court, Bronx County (Robert A. Sackett, J.), entered on or about May 31, 2012, order, same court (Gia L. Morris, J.), entered on or about June 14, 2012, and order, same court (Judith Lieb, J.), entered on or about June 29, 2012, each of which denied defendant's CPL 440.10 motion to vacate one or more judgments of the Criminal Court, Bronx County, unanimously affirmed.

Defendant's ineffective assistance of counsel claims were primarily based on his attorneys' alleged failure to advise him about the risk of deportation arising from his guilty pleas (*see Padilla v Kentucky*, 559 US 356 [2010]). However, *Padilla* has no retroactive application to this appeal (*see Chaidez v United States*, 568 US —, 133 S Ct 1103 [2013]; *People v Baret*, 23 NY3d 777 [2014]). Defendant has not set forth any valid ineffectiveness claims that are independent of *Padilla*. Specifically, in addition to his *Padilla* claims, defendant argues on appeal that his counsel misadvised him about the immigration consequences of his guilty pleas (*see People v McDonald*, 1 NY3d 109, 111 [2003]). Defendant's supporting affidavits, however, contain no assertions that he was given erroneous advice by counsel. Where a CPL 440.10 motion is based upon the existence or occurrence of facts, the motion papers must contain sworn allegations of such facts (CPL 440.30 [1] [a]). Accordingly, the courts below properly denied defendant's erroneous advice claims because they were not supported by the necessary allegations of fact (*see* CPL 440.30 [4] [b]).

Defendant's claims relating to the court's failure to advise him of the immigration consequences of his plea (*see People v Peque*, 22 NY3d 168 [2013]), and his other claims based on alleged deficiencies in his plea allocutions, are not properly before this Court. A claim of a deficiency in a plea allocution is record-based and therefore may not be raised by way of a CPL 440.10 motion (*see* CPL 440.10 [2] [c]). We have considered defendant's remaining contentions and find them unavailing. Concur—Sweeny, J.P., Andrias, Moskowitz, DeGrasse and Gische, JJ.

4 ERENA TOPCHIEVA, Respondent, v THE LOVETT COMPANY, LLC, et al., Appellants, et al., Defendant. [990 NYS2d 815]—

Negligence—Maintenance of Premises—Slip and Fall upon Entering Lobby—Placement of Mat

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 20, 2013, which denied the motion of defendants the Lovett Company, L.L.C. and the Lex 54 Condominium for summary judgment dismissing the complaint, unanimously affirmed, without costs.

As clearly depicted on the surveillance video included in the record, plaintiff was injured when she slipped and fell immediately upon entering the lobby of defendants' building. One of the lobby's double glass doors was closed and locked, while the door through which plaintiff entered was unlocked and periodically held open by the doorman for pedestrians who were entering and exiting the building, including plaintiff. The evidence shows that while a mat was placed at the threshold, it was primarily placed in front of the locked door. After examining the video, we conclude that Supreme Court correctly held that there was an issue of fact as to whether defendants were negligent in their placement of the mat. Concur—Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels and Feinman, JJ. [**Prior Case History: 2013 NY Slip Op 31947(U).**]

5 LEXINGTON PARK REALTY LLC et al., Appellants, v NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Respondent. [992 NYS2d 1]—

Insurance—Construction of Policy—What Constitutes “Entrustment”

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered March 26, 2013, which, to the extent appealed from, granted defendant insurer's motion for summary judgment dismissing the complaint, and denied the insured plaintiffs' cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

The insurance policy exclusion at issue, which precludes coverage for loss due to “[d]ishonest or criminal act[s]” committed by anyone to whom the insured plaintiffs entrusted the subject property for any purpose, applies here. Plaintiffs leased the insured premises to a tenant, which converted the premises into a youth hostel, removed the kitchen cabinets and appliances to turn the kitchens into additional dormitory areas, and, when the hostel closed, did not return the cabinets or appliances (*see Neighborhood Invs., LLC v Kentucky Farm Bur. Mut. Ins. Co.*, 430 SW3d 248, 252-253 [Ky Ct App 2014]). Plaintiffs

argue that the term “entrustment” in the policy pertains solely to chattels and not to fixtures (see e.g. *AXA Art Ins. Corp. v Renaissance Art Invs., LLC*, 32 Misc 3d 1223[A], 2011 NY Slip Op 51397[U] [Sup Ct, NY County 2011] [loss of art works consigned to a gallery], *affd* 102 AD3d 604 [1st Dept 2013], *lv denied* 21 NY3d 855 [2013], *cert denied* 571 US —, 134 S Ct 792 [2013]). However, in *Abrams v Great Am. Ins. Co.* (269 NY 90, 92 [1935]), the Court of Appeals explained that an insurance contract’s language “must be given its ordinary meaning,” and “common words” in a policy such as entrusted are not “used as words of art with legalistic implications.” Accordingly, *Abrams* taught, when a contract indicates that the property is entrusted, it can be understood that the parties mean that possession of property is willingly “surrender[ed] or deliver[ed] or transfer[red],” to be “used for the purpose intended by the owner The controlling element is the design of the owner rather than the motive of the one who obtained possession” (*id.*). Here, we find that the terms of the policy at issue do not limit what can be entrusted, that property may be entrusted to another under a triple net lease agreement, and that the entrustment refers to the entirety of the premises unless otherwise specified.

We reject plaintiffs’ contention that they did not admit that the tenant caused the loss. Plaintiffs made the admission in verified interrogatory responses, which were affirmed by the president of plaintiff Eminent Realty LLC a year before defendant moved for summary judgment. The president’s subsequent evasive deposition testimony that he was unable to extract from the tenant an admission that he had taken or removed the missing kitchen fixtures, does not meaningfully contradict his earlier verified statement that the tenant was the thief, and thus does not raise an issue of fact as to the thief’s identity.

The June 1, 2011 letter from defendant’s third-party administrator did not constitute an admission of coverage. The letter explicitly stated that any tentative agreement regarding the claimed loss was subject to defendant’s approval and “the terms and conditions of the policy.” Accordingly, defendant did not admit coverage or waive the right to assert a policy exclusion. Indeed, the doctrine of waiver is inapplicable, given that the issue here is the existence or nonexistence of coverage (see *Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]; see also *Nicoletta v Berkshire Life Ins. Co.*, 99 AD3d 567, 567 [1st Dept 2012]). Concur—Friedman, J.P., Acosta, Saxe, Feinman and Gische, JJ.

(August 19, 2014)

1 In the Matter of RONA TAYLOR et al., Appellants, v SHARON CLARKE, Respondent, et al., Respondent. In the Matter of SHARON CLARKE, Respondent, v RONA TAYLOR et al., Appellants, et al., Respondent. [990 NYS2d 816]—Order and judgment (one paper), Supreme Court, Kings County (David I. Schmidt, J.), entered on or about August 6, 2014, unanimously affirmed for the reasons stated by Schmidt, J., without costs or disbursements.

No opinion. Order filed. Concur—Manzanet-Daniels, J.P., Feinman, Gische, Clark and Kapnick, JJ.

(August 21, 2014)

1 In the Matter of VERDELL MACK et al., Appellants, v LATOYA JOYNER, Respondent, et al., Respondent. [991 NYS2d 312]—Judgment, Supreme Court, Bronx County (John W. Carter, J.), entered on or about August 15, 2014, denying the petition, unanimously affirmed, without costs.

Upon review of the record, we find that the work product of certain subscribing witnesses was fraudulent. Nonetheless, we do not find, as a matter of law, that the entire designating petition is permeated with fraud (*see Matter of Felder v Storobin*, 100 AD3d 11, 15 [2d Dept 2012]).

We do not reach respondent's request for affirmative relief as she did not file a notice of appeal. Concur—Manzanet-Daniels, J.P., Richter, Feinman, Clark and Kapnick, JJ.

2 In the Matter of CAROLYN D. JONES, Appellant, v MICHAEL A. BLAKE, Respondent, et al., Respondents. [991 NYS2d 595]—

Elections—Residence Requirement

Judgment, Supreme Court, Bronx County (John W. Carter, J.), entered August 15, 2014, dismissing the petition, unanimously affirmed, without costs.

This appeal arises out of a special proceeding in which petitioner sought to establish that respondent did not satisfy the residency requirements for the public office of Member of the Assembly. Specifically, article III, § 7 of the New York State Constitution provides that “[n]o person shall serve as a member of the legislature unless he or she . . . has been a resident of the state of New York for five years, and, except as hereinafter otherwise prescribed, of the assembly . . . district for the twelve months immediately preceding his or her election.” The Elec-

tion Law defines residence as “that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return” (Election Law § 1-104 [22]).

After a hearing before a special referee, at which both documentary and testimonial evidence was adduced, the special referee found that respondent satisfied both the five-year and one-year prongs of the constitutional residency requirement. The IAS Court confirmed the report and recommendations of the special referee and dismissed the petition.

Our review of this record is informed by two guiding principles. First, it is well settled that in a proceeding such as this, the burden of proof is on the petitioner to establish by clear and convincing evidence that the claimed residence is not bona fide or otherwise compliant with constitutional or statutory requirements (*see Matter of Stavisky v Koo*, 54 AD3d 432, 433 [2d Dept 2008]). Second, generally when a reference has been made to a special referee to hear and report, if the referee’s determination turns upon an assessment of the witnesses’ credibility, the court should defer to the referee as the trier of fact (*Matter of American Tr. Ins. Co. v Wason*, 50 AD3d 609 [1st Dept 2008]). In proceedings such as this, because the question of residence is a factual one, based on a variety of factors and circumstances, where there is conflicting evidence, “the resolution of the conflict lies within the province of the . . . finder of fact, and should not be disturbed on appeal unless it is obvious that the . . . conclusion could not be reached under any fair interpretation of the evidence” (*Matter of Fernandez v Monegro*, 10 AD3d 429, 430 [2d Dept 2004] [internal quotation marks omitted]).

Here, while it is true that the documentary evidence, including respondent’s tax returns and voting record, could support an inference that respondent, who has had a peripatetic work history, did not intend to continue to reside in New York, there was also contrary evidence before the court. The contrary evidence, which was expressly credited by the special referee, included, but was not limited to, respondent’s testimony as to his intent and the temporary nature of his employment and living arrangements outside New York. Accordingly, we find no basis on which to disturb the court’s adoption of the special referee’s report and recommendations. Concur—Manzanet-Daniels, J.P., Feinman, Gische, Clark and Kapnick, JJ.

3 In the Matter of TREVOR McK., a Child Alleged to be Neglected. ADMINISTRATION FOR CHILDREN’S SERVICES, Appellant; TEANJA N.T., Respondent. [991 NYS2d 312]—

Parent, Child and Family—Abused or Neglected Child—Mother’s Mental

Condition Did Not Support Neglect Finding

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about February 26, 2014, which, after a hearing, dismissed with prejudice the petition alleging that respondent mother had neglected the subject child, unanimously affirmed, without costs.

The Family Court's determination, that petitioner failed to demonstrate by a preponderance of the evidence that the mother's mental condition placed the child in actual or imminent danger, has a sound and substantial basis in the record (*Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 435-436 [1st Dept 2010]). On appeal, the Family Court's assessment of witness credibility and its fact-finding are afforded great deference (*see Matter of Brittni K.*, 297 AD2d 236, 237-238 [1st Dept 2002]). Here, we find no reason to interfere with the Family Court's ruling. Although the mother may have some problems and may be in denial regarding the extent of her son's misdeeds, there is support in the record for the court's conclusion that the mother's behavior did not rise to the level required to support a neglect finding.*

The court providently exercised its discretion in denying the attorney for the child's application seeking a mental health evaluation of the mother. The application was made during the hearing, and the record fails to satisfactorily establish why the application was not made sooner by the petitioner or the child's attorney. Although petitioner, in its reply brief, agrees with the child's attorney that the mid-hearing request for a mental health evaluation should have been granted, it does not request that the case be remanded for an evaluation. Rather, petitioner argues that the evidence it presented was sufficient to support a neglect finding, a position we reject. Concur—Gonzalez, P.J., Acosta, DeGrasse, Freedman and Richter, JJ.

Motion to strike portions of briefs denied.

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAMAL CHAMLEE, Also Known as JAMAL CHANLEE, Appellant. [991 NYS2d 313]—

Crimes—Unlawful Search and Seizure—Suppression Hearing Necessary to Determine Existence of Exigent Circumstances Justifying Forced Warrantless Entry

Appeal from judgment, Supreme Court, New York County

* We note that at the time the briefs were filed, the child no longer lived with his mother as a result of the determination in the juvenile delinquency case.

(Edward J. McLaughlin, J.), rendered November 8, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second degree, criminal possession of a weapon in the second degree and criminally using drug paraphernalia, and sentencing him to an aggregate term of 12 years, held in abeyance, and the matter remanded for a suppression hearing.

Defendant moved, pursuant to CPL 710.60, to suppress contraband recovered from his apartment on the grounds that the drug paraphernalia and gun were obtained as a result of an illegal entry to his apartment, and, thus, an illegal search. Alternatively, defendant sought a hearing. The motion court summarily denied both applications, finding that defendant's motion did not contain "sworn allegations of fact" sufficient to warrant a suppression hearing. Defendant denied "engaging in any unlawful activity at the time he was observed by plain clothes officers" in the hallway outside his apartment before being chased into his apartment by the police officers, who then broke down the door.

The facts as set forth in a search warrant application, that the police obtained after the forced entry and which were not available to defendant at the time he moved for a hearing, are that an undercover officer saw three or four men outside defendant's apartment smoking marijuana. The officer alerted the other plainclothes officers who came to the apartment but did not see or smell marijuana when they arrived. The officers identified themselves, which caused the four men to run into the apartment and lock the door. One of the officers then claimed he heard a male voice say, "[H]ide the gun." Based on these facts, the officers, after requesting entry, broke down the door in order to gain entry into the apartment, where they observed drugs and paraphernalia, and, based upon these observations, obtained a search warrant.

In denying defendant's application for a hearing, the Court summarily found that exigent circumstances justified the pursuit and warrantless entry, based upon the individuals in the hallway reportedly having smoked marijuana, then racing into the apartment and locking the door, and the need to prevent destruction of evidence. Defendant argues in his brief that at most some individuals were seen smoking marijuana, a class B misdemeanor that would not present exigent circumstances sufficient for a forced entry.

Under the circumstances presented here, where the information proffered by the People to support the forcible entry was conclusory and defendant did not have access to available infor-

mation, we find that it was incumbent upon the motion court to conduct a hearing to determine whether there were sufficient exigent circumstances to justify the forced warrantless entry (see *People v Bryant*, 8 NY3d 530 [2007] [holding that a *Mapp/Dunaway* hearing should have been held where there was a question of whether defendant had actually engaged in criminal activity warranting a seizure]; see also *People v Dunnell*, 50 AD3d 606 [1st Dept 2008] [holding summary denial of a hearing based solely on lack of standing was improper where People provided limited information concerning the basis for defendant's arrest], citing *People v Hightower*, 85 NY2d 988 [1995]). Concur—Gonzalez, P.J., Acosta, DeGrasse, Freedman and Richter, JJ.

5 In the Matter of ROBERT PASTALOVE, Appellant, v RAYMOND KELLY, as the Police Commissioner of the City of New York, and as Chairman of the Board of Trustees of the Police Pension Fund, Article II, et al., Respondents. [991 NYS2d 39]—

Civil Service—Retirement and Pension Benefits—Accidental Disability Retirement—Police Officer Responding to Fire Emergency—Trip and Fall over Charged Fire Hose

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 30, 2012, denying the CPLR article 78 petition to annul the determination of the Board of Trustees of the Police Pension Fund, dated June 8, 2011, which rejected petitioner's application for an accidental disability retirement (ADR) pursuant to Administrative Code of the City of New York § 13-252 in favor of an ordinary disability retirement (ODR), and dismissing the proceeding, affirmed, without costs.

Petitioner, a uniformed police officer with the New York City Police Department, was the first emergency responder to a residential fire in the early morning hours of April 23, 2008. He injured his right hand and wrist when, as he stepped over two fire hoses laid down by the firefighters, they were charged with water, causing him to trip and fall. Petitioner applied for ADR benefits about a year and a half later. The Medical Board Police Pension Fund Article II (Medical Board) found that petitioner had suffered a permanent disability and recommended that he be granted ADR benefits. The Board of Trustees of the New York City Police Pension Fund Article II met on several occasions in 2011 to address the Medical Board's conclusion that petitioner's disability was the direct result of his accident.

The Board of Trustees is always tasked with making its own determination as to causation (see *Matter of Picciurro v Board of Trustees of N.Y. City Police Pension Fund*, Art. II, 46 AD3d

346, 348 [1st Dept 2007]). While it never questioned that petitioner suffered an accident, the Board of Trustees ultimately deadlocked on the question of causation, that is to say, whether his injury occurred as the result of a reasonable risk of his work, or of an out-of-the-ordinary, sudden mischance that would entitle him to ADR benefits. As is customary following a tie vote, the Board of Trustees denied petitioner's application for ADR, and he was awarded ordinary disability benefits (*see Matter of Walsh v Scoppetta*, 18 NY3d 850 [2011]). Petitioner then brought an article 78 proceeding challenging the Board of Trustees's determination as arbitrary and capricious or an abuse of discretion (*see CPLR 7803* [3]). Supreme Court denied the petition and dismissed the proceeding, and this appeal ensued.

Not every line of duty injury will result in an award of ADR (*see Matter of McCambridge v McGuire*, 62 NY2d 563, 567-568 [1984]). When the denial of ADR benefits to a police officer is the result of a tie vote by the Board of Trustees, this Court is required to uphold the denial unless "it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident" (*Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997] [internal quotation marks omitted]). Thus, the issue before us is whether, reviewing the record, it can be said, as a matter of law, that petitioner's disability was the natural and proximate result of a service-related accident.

In the context of ADR benefits, the Court of Appeals has defined an accident as a "'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact,'" while "'an injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury'" (*Matter of Kenny v DiNapoli*, 11 NY3d 873, 874 [2008], quoting *Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 57 NY2d 1010, 1012 [1982]). It is petitioner's burden to establish that his injuries resulted from an accident as defined in the context of ADR (*see Matter of Brown v Kelly*, 100 AD3d 480 [1st Dept 2012]).

Normal risks in most jobs are not unexpected (*see Matter of Gray v Kerik*, 15 AD3d 275, 275 [1st Dept 2005] [the petitioner's knee twisted and "snapped" as he exited his patrol car to direct traffic; stepping out of vehicle to direct traffic does not in itself constitute a "sudden, fortuitous mischance" that is "accidental" under the law (internal quotation marks omitted)]; *see also*

Matter of Ortiz v New York City Employees' Retirement Sys., 173 AD2d 237, 238 [1st Dept 1991], *lv denied* 78 NY2d 864 [1991] [elevator mechanic attempted to step down from the elevator car which he was repairing, caught his foot in the elevator door's gate-chain, and fell two to three feet to the floor below; "nature of the occurrence was reasonably within the risk of the work performed"]; *compare Matter of Finazzo v Safir*, 273 AD2d 75, 75 [1st Dept 2000] [after the employee stepped out of his patrol car and walked toward the station house, he "tripped in a construction hole"; his injury was the result of an accident within the meaning of section 13-252 of the Administrative Code]].

While it is true that petitioner was a police officer, not a firefighter, it cannot be said as a matter of law that his ordinary employment duties did not include responding to a fire emergency. As the Board of Trustees had before it some credible evidence of lack of causation, it did not err as a matter of law in concluding that petitioner's disability was not the result of an accident within the meaning of Administrative Code § 13-252 (see *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]). Finally, contrary to the dissent, we do not regard the charging of fire hoses at the scene of a fire as a sudden, fortuitous, or unexpected event. Concur—Friedman, J.P., Andrias, Richter and Feinman, JJ.

Manzanet-Daniels, J., dissents in a memorandum as follows: Petitioner was the first emergency responder to a fire in a multi-level, single room occupancy residential building fire at 3:24 a.m. on April 23, 2008. He parked his vehicle and ran into the smoke-filled building, and was evacuating dozens of tenants through narrow, smoked-filled hallways and down stairwells when the fire department arrived on the scene.

Petitioner exited the building, encountering a chaotic, crowded rescue scene. Petitioner was instructed by fire department personnel to move his vehicle from the front of the building. As petitioner made his way toward the vehicle, a fire hose was unexpectedly "charged," or filled with water, causing it to jump off the ground, and petitioner, who was attempting to step over the hose, to trip and fall. It is undisputed that petitioner suffered a wrist fracture so severe that he was found to be permanently disabled for full police work.

The majority now affirms the decision of the motion court denying petitioner an ADR pension, reasoning that his injury was not the result of a service-related "accident." I cannot countenance such constrictive reasoning, nor its result.

The contemporaneous evidence establishes that petitioner tripped and fell over a fire hose that unexpectedly “charged” while he attempted to comply with the fire department’s directive to move his vehicle (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 147 [1997]). This event constitutes “a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact” (*Matter of Starnella v Bratton*, 92 NY2d 836, 838 [1998] [internal quotation marks omitted]).

A trip and fall occasioned by a fire hose, in the middle of a chaotic rescue scene, cannot be characterized as a misstep in the ordinary course of employment, as the majority finds. Petitioner did not fall down a flight of stairs, like the petitioner in *Starnella*, but encountered an unexpected and non-stationary object in the midst of a chaotic, frenetic scene, making the case more similar to *Matter of Flannelly v Board of Trustees of N.Y. City Police Pension Fund* (278 AD2d 113 [1st Dept 2000] [officer’s trip and fall over a tangle of television and VCR wires in police locker room, while performing routine security inspection, constituted a service-related accident as a matter of law]).

The fact that a police officer may have familiarity with fire scenes generally, or has responded to fire scenes in the past, is not the equivalent of familiarity or knowledge of a *particular* fire scene sufficient to render the placement or movement of objects “expected”; each fire scene is different and none are stationary or controlled. The majority’s decision has the effect of penalizing an officer who, with no thought to his own health or safety, evacuated residents from a burning building, and will dissuade first responders in the future from taking similar heroic action. **[Prior Case History: 2012 NY Slip Op 32008(U).]**

6 ARKIN KAPLAN RICE LLP et al., Appellants, v HOWARD KAPLAN et al., Respondents. [991 NYS2d 597]—

Contracts—Construction—Rent Obligations of Partnership’s Partners-in-Dissolution under Sublease

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about June 6, 2013, which granted defendants’ motion for partial summary judgment to the extent of dismissing plaintiffs’ claim with respect to defendants’ personal liability under the sublease after the date of their withdrawal from plaintiff Arkin Kaplan Rice, LLP (AKR), and denied plaintiffs’ cross motion for partial summary judgment declaring that defendants are jointly and severally liable for all remaining obligations under the sublease, both in their individual capaci-

ties and as partners of AKR, unanimously modified, on the law, to the extent of declaring that AKR is liable for obligations under the sublease through the duration of the extended period, defendants Howard Kaplan and Michelle Rice are not jointly and severally liable for all remaining obligations under the sublease in their individual capacities, and Arkin Solbakken LLP is not the successor to AKR, and otherwise affirmed, without costs.

In 1968, plaintiff Stanley S. Arkin (Arkin) founded the law firm Arkin Horan. In March 1996, the firm changed its name to Arkin, Schaffer & Kaplan LLP (ASK). The firm represented corporate entities and individuals in civil litigation. On August 25, 1999, ASK entered into a sublease with Ladenburg Thalmann & Co., Inc. (the sublandlord) for office space on the 35th floor of 590 Madison Avenue (the sublease). ASK, Arkin, defendant Howard Kaplan, nonparties Hyman Schaffer, Jeffrey Kaplan, and Mark S. Cohen executed the sublease, as subtenants.

Section 24 of the sublease provides, in relevant part:

“A. Notwithstanding anything herein contained to the contrary, upon the admission of any new partner (hereinafter referred to as a ‘New Partner’) to the Partnership, such New Partner shall be jointly and severally liable for the performance of Subtenant’s obligations under this Sublease without regard to any limitation of liability inherent in the business organization of the Partnership and Subtenant shall deliver confirmation thereof to Sublandlord within ten (10) days of such New Partner’s admission to the Partnership.

“B. Notwithstanding anything herein contained to the contrary, upon the withdrawal of any partner (other than Stanley S. Arkin) from the Partnership (hereinafter referred to as a ‘Withdrawing Partner’), such Withdrawing Partner shall, upon the date of withdrawal from the Partnership (hereinafter referred to as the ‘Withdrawal Date’), be deemed to be released from this Sublease as of the Withdrawal Date and shall have no further rights or obligations under this Sublease from and after the Withdrawal Date.”

In August 2002, Arkin Kaplan LLP (Arkin Kaplan) (successor in interest to ASK), Arkin, Schaffer, Howard Kaplan, nonparty Anthony B. Coles, defendant Michelle Rice, and the sublandlord executed an amendment to the sublease (the first amendment). The purpose of the first amendment was to expand the sublease space on the 35th floor. In the amendment, the sublandlord acknowledged that Jeffrey Kaplan and Mark S. Cohen had withdrawn as partners of Arkin Kaplan and were, therefore,

“released from any and all obligations under the Sublease” and that Coles and Rice were admitted as partners of Arkin Kaplan.

In October 2004, Arkin Kaplan, Stanley Arkin, Howard Kaplan, Rice, nonparty Sean O’Brien and the sublandlord executed a second amendment to the sublease (the second amendment). The purpose of this amendment was to add all of the remaining space on the 35th floor. This amendment also granted Arkin Kaplan the option to extend the sublease’s June 30, 2010 expiration date to June 29, 2015, upon six months’ written notice to the sublandlord. In the second amendment, the sublandlord acknowledged that Jeffrey Kaplan had withdrawn as a partner of Arkin Kaplan and was released from any and all obligations under the sublease.

In July 2006, when defendant Rice was elevated to a named partner, Arkin Kaplan changed its name to AKR. By letter dated November 16, 2009, AKR informed the sublandlord that it wished to extend the sublease for an additional five years, to June 29, 2015. In July 2011, Sean O’Brien, a partner at AKR, withdrew from the firm.

In March 2012, AKR’s partners began mediation in an attempt to resolve certain differences concerning the firm’s structure. By letter dated May 17, 2012, counsel for defendants Kaplan and Rice informed Arkin’s counsel that “[t]here is ‘no continuing firm,’ ” as “[AKR] is a partnership-in-dissolution.”¹ The AKR partners-in-dissolution were plaintiffs Arkin and Lisa Solbakken and defendants Kaplan and Rice.

Also on May 17, 2012, Kaplan and Rice announced the formation of their new law firm, defendant Kaplan Rice LLP (Kaplan Rice).² That same day, AKR amended its certificate of registration with the Department of State to change its name to Arkin Solbakken LLP (Arkin Solbakken).

On June 26, 2012, Kaplan and Rice informed the sublandlord in writing that they had withdrawn from their obligations as signatories on the sublease. The sublandlord responded the same day, rejecting Kaplan and Rice’s withdrawal and notifying them both that it intended to hold them liable under the sublease despite AKR’s dissolution.

On July 10, 2012, Arkin Solbakken submitted a filing with the Department of State, purporting to change its name back to

1. The motion court noted that, for purposes of the parties’ motions and pending a final determination on the merits, the date of AKR’s dissolution was May 17, 2012.

2. At the time of dissolution, AKR was a 12-attorney law firm; most of the associates, along with several staff members, eventually went to work for Kaplan Rice.

Arkin Kaplan Rice LLP. The next day, July 11, 2012, Arkin Solbakken filed a new certificate of registration with the Department of State, registering the firm as a limited liability partnership. That same month, Arkin, on behalf of AKR, served on Kaplan and Rice notices to quit and vacate, in an attempt to evict them from the premises on or before August 15, 2012. Arkin also replaced AKR on the firm's office door with the name Arkin Solbakken.

Shortly thereafter, plaintiffs AKR, Arkin, and Solbakken commenced this action against Kaplan, Rice, and Kaplan Rice.³ By amended complaint, plaintiffs allege that AKR's partners-in-dissolution continued to operate two separate law partnerships out of the premises and that defendants remained in the space from May 18, 2012 to August 31, 2012 but refused to compensate AKR for their use of the space and for the services they used. The complaint further alleges that defendants converted assets belonging to AKR and engaged in other actions that interfered with the orderly winding up of AKR's affairs. For example, plaintiffs allege, Kaplan and Rice prevented them from paying rent under the sublease.

Although the complaint asserts nine causes of action, defendants moved for partial summary judgment only on the causes of action moved for partial summary judgment only on the causes of action for breach of fiduciary duty, tortious interference with contract, and declaratory judgment relating to the lease obligations. In the cause of action for breach of fiduciary duty, plaintiffs seek an injunction (a) enjoining and restraining Kaplan, Rice and their employees from "preventing, delaying or in any way interfering with the payment by AKR" of rent under the sublease and any other payments owed to other entities and (b) directing Kaplan, Rice and their employees to report to AKR regarding any work they may have done for Kaplan Rice between April 2012 and May 17, 2012. The cause of action for tortious interference with contract seeks essentially the same injunctive relief as the first cause of action. The eighth cause of action for declaratory judgment seeks a declaration that AKR's rent obligations under the sublease, through its extended expiration, are AKR's liabilities and that AKR's assets must be paid or reserved against these liabilities before any distribution of AKR assets to its partners.

Defendants moved for partial summary judgment dismissing plaintiffs' claims that sought to have AKR's rent obligations

3. In November 2012, Kaplan and Rice commenced a separate action against Arkin, Solbakken and Arkin Solbakken LLP, asserting one cause of action for an accounting (*Howard J. Kaplan and Michelle A. Rice v Stanley A. Arkin, Lisa C. Solbakken and Arkin Solbakken LLP* [index No. 653835/2012]).

paid out of AKR's partnership assets. Plaintiffs opposed the motion and cross-moved for partial summary judgment, seeking a declaration that defendants Kaplan and Rice remained jointly and severally liable for all remaining obligations under the sublease through its expiration on June 29, 2015.

The motion court correctly found that the sublease at issue is a contract subject to general principles of contract interpretation; the plain language of section 24 (B) of the sublease releases any withdrawing partner, other than Arkin, from any further rights or obligations under the sublease upon the date of withdrawal. Indeed, the language in section 24 (B) is "reasonably susceptible" to only one interpretation (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). The motion court therefore properly rejected plaintiffs' argument that section 24 (B) referred only to Kaplan and Rice's personal liability, and therefore, that Kaplan and Rice's share of the partnership assets should be used to pay rent or other obligations to the sublandlord under the sublease after they withdrew from the firm. On the contrary, section 24 (B) does not contain any limitations or qualifications, and there is no basis to interpret the parties' agreement as impliedly stating something that they did not specifically include (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272, 274 [1st Dept 2007]). Accordingly, defendants Howard Kaplan and Michelle Rice, as withdrawing partners, were released from any further obligations, including the requirement to pay rent, under the sublease as of the date of their withdrawal.

Similarly, plaintiffs argue that Partnership Law § 71 mandates the payment of creditors from partnership assets before partners are individually required to make contributions to satisfy the partnership's debts and liabilities, and thus, section 24 (B) of the sublease does not release Kaplan and Rice from liability under the sublease. We reject this argument. While New York Partnership Law sets forth the rules for distribution of partnership assets and liabilities in "settling accounts between the partners after dissolution," section 71 expressly provides that those rules are "subject to any agreement to the contrary." Here, the parties had a contrary agreement—namely, the sublease.

However, we disagree with the motion court's finding that because AKR never signed the sublease, its liability ended as of the date of dissolution. Arkin Kaplan last amended the sublease in 2004 and Arkin, Kaplan, and Rice, among other partners, signed the amendment. When Rice became a named partner in the law firm in 2006 and Arkin Kaplan formally changed its name to Arkin Kaplan Rice, LLP, the sublease was never

amended to replace Arkin Kaplan with AKR as a signatory to the sublease. Nonetheless, from 2006 until its dissolution in 2012, AKR's payment of rent while in possession of the premises created a presumption of an assignment of the sublease (*see Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP*, 22 AD3d 936, 937 [3d Dept 2005]).

Moreover, we find sufficient facts in the record to support a finding that AKR assumed Arkin Kaplan's obligations under the sublease (*see Probst v Rochester Steam Laundry Co.*, 171 NY 584, 588-589 [1902]; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 147-148 [2d Dept 2009]). AKR exercised the option to extend the sublease for a five-year period, and represented itself to be the subtenant under the sublease, both to the sublandlord and in various sub-sublease agreements with third parties—sub-subleases to which the sublandlord consented. On this basis, among others, we find that AKR is liable for any obligations under the sublease until the expiration of the extended period.

Finally, the evidence in the record does not support the motion court's finding that Arkin Solbakken is the successor to AKR. In drawing its conclusion, the court pointed to the fact that Arkin Solbakken was "carrying on the business of AKR by having taken possession of the Premises upon AKR's dissolution." However, when defendants Kaplan and Rice commenced their new firm, Kaplan Rice, they too acquired the right of possession of the premises upon the dissolution of AKR. Moreover, although Arkin amended the AKR certificate of registration to reflect the new firm name of Arkin Solbakken, the amended certificate was immediately changed and a new filing registering Arkin Solbakken as a limited liability partnership became effective. As to Arkin's attempts to evict defendants from the premises for nonpayment of rent, his actions could reasonably have been based on his remaining rent obligations under the sublease.

We have considered the parties' remaining arguments and find them unavailing. Concur—Acosta, J.P., Andrias, Moskowitz and Manzanet-Daniels, JJ. [**Prior Case History: 2013 NY Slip Op 31210(U).**]

7 ARKIN KAPLAN RICE LLP et al., Appellants, v HOWARD KAPLAN et al., Respondents. [991 NYS2d 314]—Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered December 4, 2012, which granted defendants' motion to enforce prior court orders to the extent of directing plaintiffs to return money to plaintiff Arkin Kaplan Rice LLP's (AKR) account at Signature Bank forthwith, and requiring two signatures on all future

disbursements from the account, unanimously affirmed, with costs.

Plaintiffs' use of funds in the AKR account to pay post-dissolution rent expenses was in violation of a preliminary injunction and subsequent orders limiting plaintiffs' use of those funds to the payment of pre-dissolution expenses. Contrary to plaintiffs' apparent contention, defendants were not required to demonstrate anew their entitlement to the preliminary injunction in support of their motion to enforce the injunction.

We reject plaintiffs' argument that they were not afforded an opportunity to be heard or to present evidence in response to defendants' motion. Plaintiffs' counsel acknowledged on the record in open court that he was prepared to address the merits of defendants' argument, and never sought to introduce any evidence or request additional time to submit a brief in opposition, despite being afforded the opportunity to do so.

Contrary to defendants' contention, the order on appeal is not superseded by the motion court's June 3, 2013 order, since the two orders do not address the same issues.

While defendants are correct that AKR lacks standing to bring this appeal, because it is not an aggrieved party within the meaning of CPLR 5511, the individual plaintiffs do not lack standing.

We have considered plaintiffs' remaining contentions and find them unavailing. Concur—Tom, J.P., Acosta, Andrias and DeGrasse, JJ.

8 BABY PHAT HOLDING COMPANY, LLC, Respondent, v KELLWOOD COMPANY, Appellant. [991 NYS2d 592]—

Corporations—Disregarding Corporate Entity—Abuse of Corporate Form

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 3, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss and to compel arbitration, unanimously modified, on the law, to dismiss the claim for negligent misrepresentation, and otherwise affirmed, without costs.

The complaint alleges that plaintiff entered into an agreement with defendant's wholly owned subsidiary, nonparty Phat Fashions, LLC (PFLLC), to purchase certain trademarks, copyrights and contractual rights. One of the key assets sold by PFLLC was a license under which a company called Intimateco paid royalties directly to defendant as compensation for its use of a PFLLC trademark. Although PFLLC is denominated as the seller under the agreement, plaintiff alleges that all of its nego-

tiations were exclusively with defendant and it paid the \$5.35 million purchase price directly to defendant. Prior to signing the agreement, defendant provided plaintiff with a royalty schedule showing that PFLLC's license with Intimateco would yield a minimum guaranteed income stream of \$1.5 million over the next three years. However, plaintiff further alleges that defendant knew that the guaranteed income from the Intimateco license was only \$75,000 for that period of time. The agreement expressly requires PFLLC to cease doing business following the contract closing and that PFLLC shall "wind-up, liquidate, dissolve or otherwise cease its legal existence" within 30 days of the six-month period following the closing.

Upon discovering the alleged misrepresentation concerning the income stream expected from Intimateco, plaintiff made a demand for arbitration based on the agreement's arbitration clause, which provides that any dispute arising under or related to the agreement shall be submitted to binding arbitration. Defendant resisted, claiming that it is not a party to the agreement and is therefore not bound by the arbitration provision. Thereafter, plaintiff commenced the instant action asserting causes of action for: (1) breach of contract based upon an alter ego theory; (2) constructive trust; (3) negligent misrepresentation; (4) restitution; and (5) abatement of the purchase price for mutual mistake. Defendant moved to dismiss the complaint or to stay the action and compel arbitration against nonparty PFLLC. Defendant argued that the complaint should be dismissed because plaintiff's only recourse was to arbitrate against PFLLC. In the alternative, it argued that the complaint should be dismissed for failure to join PFLLC, a necessary party.

Defendant's effort to compel plaintiff to arbitrate its contract claim against PFLLC as the basis for having this action dismissed against it was properly rejected by the motion court. The complaint only contains claims against defendant, which resisted plaintiff's original demand for arbitration. Even were defendant correct that PFLLC, its now defunct subsidiary, stands to be inequitably affected by any judgment rendered in plaintiff's favor in this action, dismissal is not warranted (*see* CPLR 1001). Were the complaint dismissed, plaintiff would have no other effective forum in which to have its claims against defendant resolved. Given the parameters of the arbitration clause in the agreement with PFLLC, plaintiff cannot include or assert claims against PFLLC in this action; nor has defendant agreed to participate in arbitration. Moreover, PFLLC has been dissolved and is now judgment proof, making any judgment or award plaintiff achieves against it a pyrrhic victory. There is no

prejudice to defendant in that it can assert all of its claims and defenses in this action. In any event, even assuming defendant is prejudiced, it could have avoided such prejudice by participating in arbitration when it was originally demanded of it (*see* CPLR 1001 [b] [3]; *L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 13 [2007]).

We also reject defendant's argument that any liability alleged in the complaint predicated on an alter ego theory must be dismissed. In order to state a claim for alter ego liability plaintiff is generally required to allege: "complete domination of the corporation [here PFLLC] in respect to the transaction attacked" and "that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised (*Matter of Morris v New York State Dept. of Taxation & Fin.*, *supra*).

Provided plaintiff prevails in proving that PFLLC owes it a debt (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141), the further allegations in the complaint are sufficiently pleaded to support plaintiff's claim that defendant is an alter ego of PFLLC. The complaint asserts that with respect to the transaction at issue, defendant dominated and controlled the negotiations on behalf of PFLLC and actually provided the erroneous information which persuaded plaintiff to enter into the agreement. The allegations that plaintiffs paid the full purchase price directly to defendants and not PFLLC, and that before the instant transaction Intimateco directly paid defendant monies owed to PFLLC, sufficiently frame factual issues about whether defendant, as the parent company of PFLLC commingled funds and disregarded corporate formalities (*International Credit Brokerage Co. v Agapov*, 249 AD2d 77 [1st Dept 1998]).

In addition, the allegations that defendant, through its domination of PFLLC, misrepresented the value of the assets sold and then caused PFLLC to become judgment proof, are also sufficient to support claims that defendant perpetrated a wrong or injustice against plaintiff, thus warranting intervention by a court of equity (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]; *Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 AD3d 317, 318 [1st Dept 2007]). Wrongdoing in this context

does not necessarily require allegations of actual fraud. While fraud certainly satisfies the wrongdoing requirement, other claims of inequity or malfeasance will also suffice (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Allegations that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities are sufficient to satisfy the pleading requirement of wrongdoing which is necessary to pierce the corporate veil on an alter ego theory (*Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073 [2d Dept 2012]).

Defendant is correct, however, that the negligent misrepresentation claim asserted against it fails for lack of any special relationship between plaintiff and defendant (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173 [2011]). Concur—Renwick, J.P., Richter, Manzanet-Daniels, Feinman and Gische, JJ.

(August 28, 2014)

1 AMSTERDAM HOSPITALITY GROUP, LLC, Respondent, v MARSHALL-ALAN ASSOCIATES, INC., Appellant. [992 NYS2d 2]—

Dismissal and Nonsuit—Dismissal of Complaint—Documentary Evidence—Emails Submitted to Refute Fraudulent and Negligent Misrepresentation Claims Were Not “Essentially Undeniable”

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 16, 2012, which, insofar as appealed from, denied defendant’s motion to dismiss the third and fourth causes of action for fraudulent misrepresentation and negligent misrepresentation, affirmed, without costs.

Plaintiff alleges that defendant, a senior executive search firm retained by plaintiff to recruit senior level executives to help it develop its hotel division, misrepresented that a potential placement, nonparty David Bowd, was not subject to a nonsolicitation agreement with his former employer. Plaintiff further alleges that it relied on this misrepresentation in hiring Bowd, and subsequently incurred legal expenses to defend a lawsuit brought by his former employer against plaintiff and the employee for breach of a restrictive covenant between the employee and his former employer.

The allegations set forth in the complaint state causes of action for fraudulent misrepresentation and negligent misrepresentation (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In support of its argument that plaintiff cannot establish rea-

sonable reliance on the alleged misrepresentation, defendant submits an affidavit and email showing that Bowd informed plaintiff of the nonsolicitation agreement with his former employer prior to the effective date of his employment with plaintiff. In opposition, plaintiff submits an affidavit and letter showing that the employee had accepted plaintiff's offer of employment days before the email disclosing the restrictive covenant. The dissent contends that the affidavit and email submitted by defendant, taken together, constitute "documentary evidence" that "negates the element of justifiable reliance as a matter of law." As a result, the dissent argues, defendant's motion to dismiss pursuant to CPLR 3211 (a) (1) should have been granted.

The courts of this state have grappled with the issue of what writings do and do not constitute documentary evidence, since the term is not defined by statute. "Judicial records, such as judgments and orders, would qualify as 'documentary', as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 22). To qualify as "documentary," the paper's content must be "essentially undeniable and . . . , assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based. (Neither the affidavit nor the deposition can ordinarily qualify under such a test.)" (*Id.*)

We have held that affidavits that "do no more than assert the inaccuracy of plaintiffs' allegations . . . may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint . . . and do not otherwise conclusively establish a defense to the asserted claims as a matter of law" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]; see also *Fontanetta v John Doe 1*, 73 AD3d 78, 85 [2d Dept 2010]).

The cases cited by the dissent do not require us to reach a different result in this case. In *WFB Telecom. v NYNEX Corp.* (188 AD2d 257, 259 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993]), the documentary evidence submitted by defendants included letters from both parties' counsel, which, taken together, constituted "undisputed proof that defendants' actions were motivated, at least in part, by legitimate business goals" sufficient to defeat plaintiffs' claims for prima facie tort. This is wholly consistent with the rule that to constitute documentary evidence, the papers must be "essentially undeniable" and support the motion on its own (Siegel at 22). Nor is our conclusion

that the email in *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.* (44 AD3d 317, 318 [1st Dept 2007]) did not constitute documentary evidence translate into a blanket rejection of emails as documentary evidence. As Professor Siegel recognizes, “even correspondence” may, under appropriate circumstances, qualify as documentary evidence (Siegel at 22). In our electronic age, emails can qualify as documentary evidence if they meet the “essentially undeniable” test (see *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436 [1st Dept 2014] [decided simultaneously herewith]; see also *Langer v Dadabhoy*, 44 AD3d 425 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]). The email at issue here simply fails this test.

Significantly, we note that a motion to dismiss under CPLR 3211 (a) (1) obliges the court “to accept the complaint’s factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory” (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-271 [1st Dept 2004] [internal quotation marks omitted]). Dismissal is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and “conclusively establishes a defense to the asserted claims as a matter of law” (*Weil, Gotshal*, 10 AD3d at 270-271 [internal quotation marks omitted]).

Schutty v Speiser Krause P.C. (86 AD3d 484, 485 [1st Dept 2011]), also cited by the dissent, is similarly distinguishable. There we found multiple drafts of a contemplated new employment agreement, the parties’ correspondence and plaintiff’s written letter of resignation to be sufficient to undeniably establish “that the parties did not intend to be bound until there was a signed written contract and that there was never a meeting of the minds on all material terms of the new agreement.” (*Id.*)

The emails in this particular case, aside from being not otherwise admissible, are not able to support the motion to dismiss. The “documentary evidence” here, unlike the emails in *Langer*, do not, standing on their own, conclusively establish a defense to the claims set forth in the complaint. While they may indicate that Bowd put defendants on notice of potential employment restrictions, other letters indicate that Bowd had, in fact, accepted the offer of employment days before he sent the emails in question. Because defendant has not “negated beyond substantial question” the allegation of reasonable reliance, and

the submissions raise factual issues concerning the circumstances and communications underlying plaintiff's hiring of Bowd, it cannot be concluded that plaintiff has no causes of action for fraudulent and negligent misrepresentation (*Guggenheimer v Ginzburg*, 43 NY2d at 275). Concur—Sweeny, J.P., Manzanet-Daniels and Clark, JJ.

DeGrasse, J., dissents in a memorandum as follows: As related to this appeal, defendant's motion was for an order pursuant to CPLR 3211 (a) (1) and (7) dismissing the third and fourth causes of action for fraud and negligent misrepresentation, respectively. I agree that the motion was properly denied insofar as it called for a dismissal under CPLR 3211 (a) (7). I respectfully dissent because the motion should have been granted pursuant to CPLR 3211 (a) (1) on the basis of documentary evidence that negates the element of reasonable reliance with respect to each cause of action.

Defendant is an executive search firm. Plaintiff alleges in the complaint that "[a]t the conclusion of the negotiations and discussions, and specifically on the recommendation of [d]efendant, [plaintiff] hired [nonparty David] Bowd as its President of Hotel Operations, effective on or about June 29, 2009." Bowd had been employed by plaintiff's competitor, Morgans Hotel Group Management LLC (MHG), at the time of his negotiations with plaintiff. In support of the instant fraud and negligent misrepresentation causes of action, plaintiff further alleges that it reasonably relied on defendant's false representation that "Bowd did not have any agreements with his employer prior to [plaintiff] that would prohibit or otherwise restrict Bowd's ability to fully perform his anticipated job duties and responsibilities with [plaintiff]." According to plaintiff, those responsibilities included the utilization of Bowd's contacts within MHG to identify potential talent for plaintiff's business.

On September 4, 2009, MHG brought an action against Bowd, plaintiff and its principals in the Supreme Court, New York County. The causes of action alleged against plaintiff sounded in tortious interference with contract, aiding and abetting breach of fiduciary duty and unfair competition. MHG alleged in its complaint that plaintiff wrongfully induced Bowd to breach his employment agreement with MHG by having him recruit two MHG employees to work for plaintiff. The instant complaint cites as damages legal fees plaintiff was forced to incur before MHG's suit was voluntarily discontinued in May 2010.

Justifiable reliance on a misrepresentation or material omission is an element of fraud (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]), as well as negligent misrepresentation.

sentation (*see Murphy v Kuhn*, 90 NY2d 266, 270 [1997]). Reliance, however, is not justified where the true facts have been made known to the party claiming to have been deceived or misled (*see 200 E. End Ave. Corp. v General Elec. Co.*, 5 AD2d 415, 417 [1st Dept 1958], *affd* 6 NY2d 731 [1959]). I submit that documentary evidence consisting of an email sent by Bowd to plaintiff 19 days before Bowd was hired negates the element of justifiable reliance as a matter of law.

A June 10, 2009 email from Bowd to Stuart Podolsky, one of plaintiff's principals, reads as follows:

"Morning Stuart, just wanted to keep you in the loop, Meeting went well yesterday, they are still refusing to accept my resignation and want to counter offer. I have confirmed this is not my intention and I WILL be joining you.

"There are a couple of things that came up yesterday that I wanted you to be aware of:

"1. The Corporate Legal team contacted me to confirm my knowledge of my contract confirming that I cannot approach any member of MHG staff to offer them a role within Amsterdam Hospitality. Obviously you were talking to Blake before me/or without my knowledge so there is no issue there. Although I think once you have done the deal with Blake we need to be strategic on when he resigns as I would like my role announced within MHG before Blake resigns. I am pushing for this to happen today . . ."

One hour later, Podolsky replied: "Good luck. Anything we could do to help the process we are there for you." Twenty minutes later, Bowd responded: "I think that if I give them 1 extra week it would ease the process—how do you feel about me starting with yweou on the 29th?"

A motion pursuant to CPLR 3211 (a) (1) may be appropriately granted where documentary evidence utterly refutes a complaint's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Bowd's first email on June 10, 2009 plainly put plaintiff on notice of the restrictions imposed upon him by his employment agreement with MHG. The email therefore dispels any notion that plaintiff hired Bowd on June 29, 2009 in justifiable reliance on defendant's alleged representation that Bowd was not subject to such restrictions.

I am not persuaded by plaintiff's argument that correspondence such as Bowd's email does not suffice as documentary evidence for purposes of CPLR 3211 (a) (1). Decisions of this Court hold otherwise. For example, in *Schutty v Speiser Krause P.C.*

(86 AD3d 484, 484-485 [1st Dept 2011]), we found drafts of an agreement and correspondence sufficient for purposes of establishing a defense under the statute. In *WFB Telecom. v NYNEX Corp.* (188 AD2d 257, 259 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993]), we granted a CPLR 3211 (a) (1) motion on the basis of a letter from the plaintiff's counsel that contradicted the complaint. Therefore, there is no blanket rule by which email is to be excluded from consideration as documentary evidence under the statute. *Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.* (44 AD3d 317 [1st Dept 2007]), which plaintiff cites, does not warrant a contrary conclusion. In *Advanced* we held that an email could not serve as documentary evidence conclusively establishing a defense simply because it was "not otherwise admissible" (*id.* at 318, citing *Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157 [1st Dept 1996]). Here, by contrast, Bowd's affidavit provided the necessary evidentiary foundation for the motion court's consideration of the email. Moreover, in *Langer v Dadabhoy* (44 AD3d 425, 426 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]), we found "documentary evidence in the form of e-mails" to be sufficient to carry the day for a defendant on a CPLR 3211 (a) (1) motion.

There is also no merit to plaintiff's argument that the email does not establish a defense because it was sent after the parties signed a letter of employment dated June 4, 2009. By its own terms, the "letter is not to be construed as an implied contract of employment." It therefore did not obligate plaintiff to hire Bowd on June 29, 2009. The same limitation set forth in the letter of employment refutes the majority's position that "defendant has not 'negated beyond substantial question' the allegation of reasonable reliance" Accordingly, I would reverse the order entered below and grant defendant's motion for an order dismissing the third and fourth causes of action pursuant to CPLR 3211 (a) (1).

2 ART AND FASHION GROUP CORPORATION et al., Appellants-Respondents, v CYCLOPS PRODUCTION, INC., et al., Respondents-Appellants. [992 NYS2d 7]—

Dismissal and Nonsuit—Dismissal of Complaint—Documentary Evidence—Emails and Affidavits Failed to Conclusively Refute Claim of Oral Joint Venture Agreement

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about February 24, 2012, which granted defendants' CPLR 3211 (a) motion to dismiss the complaint to the extent of dismissing the fraud cause of action and dismissing the complaint as against defendants Cyclops, Albert Watson, Elizabeth Watson and Michael Jurkovic, unanimously modified,

on the law, to reinstate the breach of the joint venture agreement and unjust enrichment causes of action as against the individual defendants, to dismiss the conversion/property damage cause of action, and otherwise affirmed, without costs.

In this action, plaintiffs Art and Fashion Group Corporation (AFG) and Pier 59 Studios L.P. (Pier 59) allege that they entered into an oral joint venture agreement with defendants Cyclops, Cyclops Production, Inc. (CPI), Cyclops, LLC (CL), Albert Watson, Elizabeth Watson and Michael Jurkovic. According to the complaint, plaintiffs and defendants formed 359 Productions, LLC to operate a joint venture to produce defendants' photo shoots and advertising campaigns. The complaint alleges that the parties agreed to operate on a 50/50 basis, to share profits and losses equally, and to pay their respective share of all the expenses of the joint venture, including rents and salaries. Additionally, the parties agreed that all of defendants' campaigns would be produced through 359 Productions and shot exclusively at Pier 59's studios.

The complaint further alleges that defendants breached the joint venture agreement by failing to produce their campaigns through 359 Productions and by conducting the photo shoots at locations other than Pier 59's studios. Plaintiffs allege that Pier 59 paid the salaries of the corporate defendants' employees, and that defendants used plaintiffs' offices, facilities and the services of plaintiffs' employees for their own exclusive benefit. Despite receiving these benefits, plaintiffs allege that defendants failed to remit plaintiffs' share of revenue from the campaigns. The complaint asserts causes of action for breach of the joint venture agreement, unjust enrichment, fraud and conversion/property damage.

Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) for failure to state a claim and as barred by documentary evidence. The motion court dismissed the complaint in its entirety as against the individual defendants and defendant Cyclops, and dismissed the fraud cause of action as against all defendants. The court denied dismissal of the causes of action for breach of the joint venture agreement, unjust enrichment and conversion/property damage as against CPI and CL. This appeal and cross-appeal ensued.

The motion court correctly denied the portion of the motion seeking dismissal of the claim for breach of the joint venture agreement as against CPI and CL. Accepting the facts as alleged in the complaint as true and according plaintiffs the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the complaint sufficiently states a cause of ac-

tion for breach of a joint venture agreement by alleging “acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses” (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 298 [1st Dept 2003]).

The court also properly denied dismissal on the basis of documentary evidence. A cause of action may be dismissed under CPLR 3211 (a) (1) “only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). In other words, the documents relied upon must “definitely dispose of [the] plaintiff’s claim” (*Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211 (a) (1) (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept 2014] [decided simultaneously herewith]). Factual affidavits, however, do not constitute documentary evidence within the meaning of the statute (*Flowers v 73rd Townhouse LLC*, 99 AD3d 431, 431 [1st Dept 2012]).

In support of the motion, defendants submitted three factual affidavits and a series of emails exchanged between the parties. The affidavits, “which do no more than assert the inaccuracy of plaintiffs’ allegations” (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]) cannot be considered, and the emails do not conclusively establish a defense as a matter of law. There is no merit to defendants’ assertion that the emails show, as a matter of law, that no joint venture agreement was reached and that the parties were merely engaging in preliminary negotiations. “Even where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding” (*Richbell*, 309 AD2d at 298; *accord Foster v Kovner*, 44 AD3d 23, 27-28 [1st Dept 2007]).

Although some parts of the emails suggest that all of the details of the joint venture were not fully agreed upon, the emails, when read in their entirety, do not conclusively refute plaintiffs’ allegations that an oral joint venture agreement had in fact been reached. For example, a November 3, 2009 email states that “359 is *already operating* in AFG’s [office] space” (emphasis added) and was expected to be “cashflow positive by the end of 2009.” This same email talks about “formalizing the

establishment of . . . 359 Productions,” suggesting that it was already in existence. Furthermore, in a May 1, 2010 email, plaintiffs’ representative Federico Pignatelli addresses defendant Michael Jurkovic as “[p]artner,” makes reference to “stabiliz[ing] the [c]ompany,” and expresses concern about two managerial changes within the past year.

In a May 13, 2010 email, written six months after the initial email submitted by defendants, Pignatelli informs Jurkovic of his decision “not to proceed anymore with 359P.” Contrary to defendants’ contention, this statement does not unequivocally establish that no joint venture agreement had been reached in the first place. It can just as easily be read as indicating Pignatelli’s decision to terminate an already-established joint venture. The email also discusses 359P’s overhead and notes issues about the extent of the work that was brought into 359P, both of which are consistent with plaintiffs’ claim that a joint venture had been formed. The emails also make reference to other communications, not produced by defendants, identifying issues with 359P’s staff. Thus, it is clear that the emails submitted present only a partial picture of the interactions between the parties.

Finally, although defendants contend that they did not intend to proceed with the alleged joint venture until they executed a formal written agreement, no such express reservation is contained in any of the emails (*see generally Kowalchuk v Stroup*, 61 AD3d 118 [1st Dept 2009]). Because the emails in question fail to definitely refute plaintiffs’ claim that the parties had reached an oral joint venture agreement, dismissal at this stage is not warranted (*see Foster v Kovner*, 44 AD3d at 27-28).

The motion court correctly declined to dismiss the unjust enrichment cause of action as against CPI and CL. In light of defendants’ contention that no joint venture agreement existed, plaintiffs are permitted to plead unjust enrichment as an alternative basis for relief (*see Zuccarini v Ziff-Davis Media*, 306 AD2d 404, 405 [2d Dept 2003] [“(w)here . . . there is a bona fide dispute as to the existence of a contract . . . a plaintiff may proceed upon a theory of quasi contract as well as contract, and will not be required to elect his or her remedies”]).

The complaint was properly dismissed as against defendant Cyclops. In the complaint, plaintiffs identify Cyclops as merely a trade name used by one or more of defendants, and thus it is not a legal entity. However, the motion court should not have dismissed the breach of the joint venture agreement and unjust enrichment claims as against the individual defendants. The complaint alleges that *all* of the defendants, both corporate and

individual, entered into the joint venture agreement and were unjustly enriched. The individual defendants' claim that plaintiffs negotiated only with the corporate entities is contained in affidavits which, as previously noted, cannot be considered on this motion. Furthermore, the emails submitted shed no light on this issue. Thus, dismissal at this preanswer stage is not appropriate.

Plaintiffs' fraud claim was properly dismissed as duplicative of the cause of action for breach of the joint venture agreement (see *Cole, Schotz, Meisel, Forman & Leonard, P.A. v Brown*, 109 AD3d 764, 765 [1st Dept 2013]).

The motion court should have dismissed the claim for conversion since the complaint "[does] not identify the property allegedly converted" (*Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 [2d Dept 2010]). For the same reason, plaintiffs' property damage claim fails. Concur—Moskowitz, J.P., Richter, Manzanet-Daniels, Clark and Kapnick, JJ.

3 RODNEY H. BROWN, Appellant, v DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for Holders of the GSR MORTGAGE LOAN TRUST 2006-OA, et al., Respondents. [991 NYS2d 511]—

Mortgages—Validity—Securitization

Mortgages—Construction—Increased Mortgage Payments Authorized under Loan Documents

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 14, 2013, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court properly rejected plaintiff's claim that securitization of his mortgage notes was improper (see *Stafford v Mortgage Elec. Registration Sys., Inc.*, 2012 WL 1564701, *4, 2012 US Dist LEXIS 61413, *13 [ED Mich, May 2, 2012, No. 12-10798]; *Rodenhurst v Bank of Am.*, 773 F Supp 2d 886, 898 [D Haw 2011]), and aptly discerned that plaintiff's contention that defendants lack standing to enforce the notes was a mere semantic variation of that claim. To the extent plaintiff claimed that the securitization was procedurally improper, and to the extent that such a claim is cognizable (see *Johnson v HSBC Bank USA, N.A.*, 2012 WL 928433, *2, 2012 US Dist LEXIS 36798, *6-7 [SD Cal, Mar. 19, 2012, No. 3:11-CV-2091-JM-WVG]), his allegations were conclusory.

Plaintiff's allegations of improper increased mortgage payments and improper notices of such increases were flatly contradicted by provisions in the loan documents (see *Simkin v*

Blank, 19 NY3d 46, 52 [2012]). The motion court correctly found that plaintiff had failed to allege that his next mortgage payments of the minimum amount authorized under the loan documents would not have triggered defendants' right to increase his monthly payment obligations; his assertion that he had not triggered such right at the time of the notices avoided the issue.

The loan documents lacked any provision imposing on defendants a duty to modify the notes or negotiate a workout (*see New York City Educ. Constr. Fund v Verizon N.Y. Inc.*, 114 AD3d 529 [1st Dept 2014]), and such terms cannot be added pursuant to the covenant of good faith (*see D & L Holdings v Goldman Co.*, 287 AD2d 65, 73 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]).

Plaintiff's cause of action for violation of General Business Law § 349 was properly held untimely, as it accrued upon defendants' first notice of mortgage payment increases in April 2009, more than three years before the July 2012 service of the pleadings in this action (*see* CPLR 214).

We have considered plaintiff's other contentions and find them unavailing. Concur—Tom, J.P., Acosta, Saxe, DeGrasse and Freedman, JJ.

The decision and order of this Court entered herein on April 3, 2014 (116 AD3d 444 [2014]) is hereby recalled and vacated (*see* 2014 NY Slip Op 82040[U] [2014] [decided simultaneously herewith]). **[Prior Case History: 2013 NY Slip Op 30047(U).]**

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JEFFREY MERCADO, Appellant. [992 NYS2d 12]—

Crimes—Unlawful Search and Seizure—Search of Vehicle and Trunk—Founded Suspicion of Criminality Based upon Totality of Known Circumstances

Crimes—Unlawful Search and Seizure—Voluntariness of Consent to Search of Vehicle and Trunk—Defendant was Cooperative, Alert, Offered No Resistance, and Had Prior Contact with Criminal Justice System

Judgment, Supreme Court, New York County (Bruce Allen, J., at suppression hearing; Thomas Farber, J., at plea and sentencing), rendered April 9, 2013, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, affirmed.

The court properly denied defendant's suppression motion. The totality of the information available to the police justified their request to search the trunk of defendant's car, and defendant validly consented to that search.

While patrolling a crime-prone neighborhood, in an unmarked car, nearing midnight on October 4, 2012, the arresting officer and his partner observed defendant in the driver's seat of a vehicle illegally parked near a fire hydrant. Defendant's companion exited the car and went briefly inside a nearby deli. While defendant was alone, an unidentified man approached the car. Defendant immediately exited the car and the officer observed the men having a very brief and seemingly wordless interaction in which they shook hands and either hugged or chest bumped each other. Although the arresting officer did not see anything exchanged between them, his suspicion was aroused about the possibility of a drug transaction.

Defendant's original companion returned and the two men drove off. The police followed the car and they observed defendant's companion lean forward in a manner suggestive of secret-ing something under his seat. They then observed defendant committing a second traffic violation and lawfully stopped the car, asking defendant for his license and registration. Defendant who was "sweating profusely" and crying, told police he did not have a license and that he did not want to go back to jail. Defendant could not produce any form of identification, and the car registration belonged to someone other than defendant or his companion.

At the police officer's request, defendant exited the vehicle; he was still visibly agitated and repeated that he did not want to go back to jail. The arresting officer patted defendant down and found nothing. Defendant was then asked by the officer whether he and the car were "straight." After defendant confirmed that they were, the arresting officer asked for defendant's consent to search the car, which was given. The interior of the car was searched and nothing was found. The arresting officer then asked defendant whether he could search the trunk of the car, and defendant consented to that search as well. Over 120 glassine envelopes of heroin were ultimately discovered in the trunk, and defendant admitted they belonged to him.

Once defendant revealed that his license was suspended, the officer had probable cause to arrest him for a misdemeanor (Vehicle and Traffic Law § 511) and was entitled to conduct a search of his person incident to the arrest (*see People v Troiano*, 35 NY2d 476 [1974]). In order to ask defendant for his consent to search the car, however, the police needed a founded suspicion that criminality was afoot (*People v Garcia*, 20 NY3d 317, 324 [2012]; *People v De Bour*, 40 NY2d 210, 223 [1976]). We conclude that based on the totality of known circumstances, the police had a founded suspicion that criminality was afoot. That

suspicion justified a common-law inquiry in the form of a request for defendant to consent to a search of the car, which also included the subsequent request to search the trunk (see *People v Battaglia*, 86 NY2d 755, 756 [1995]; *People v Loretta*, 107 AD3d 541 [1st Dept 2013], *lv denied* 22 NY3d 1157 [2014]). While nervousness, by itself, does not establish a founded suspicion of criminality (*Garcia*, 20 NY3d at 324), here it was coupled with other relevant factors, including the observed interaction between defendant and an unidentified man, defendant's admission that he was driving with a suspended license, his complete inability to provide any form of identification, that the car's registration was in the name of someone other than defendant or his passenger, and defendant's expressed concern that he would face reincarceration for a Vehicle and Traffic Law infraction (see *People v Devone*, 15 NY3d 106, 114 [2010]; *People v Major*, 115 AD3d 1, 4-5 [1st Dept 2014]).

The request for defendant's consent to search the trunk of the car was reasonably related in scope to the circumstances that justified the interference in the first place (see *People v William II*, 98 NY2d 93, 98 [2002]). Thus, the same founded suspicion that permitted the police to ask for consent to search the car extended to the request to search the trunk (see *Battaglia*, 86 NY2d at 756). The Court of Appeals' decision in *People v Battaglia* is directly on point. In *Battaglia*, the Court of Appeals held that a vehicle stopped at 3:00 a.m. for proceeding the wrong way down a one-way street, coupled with the driver producing a false identification, supported a finding that criminality was afoot sufficient to justify a common-law inquiry in the form of a request for consent to search the defendant's vehicle, including the trunk (*id.*). While defendant is correct that any concern the police may have had about some illegal object hidden under the passenger seat dissipated after the interior of the car was searched by the police, the other factors still present, which included driving without a license, identification and apparent connection to the registered owner of the car, supported a basis to request consent for a more thorough search of the vehicle. Contrary to the conclusion reached by the dissent, there was more than continued nervousness to support the request to search the trunk.

We also find that the People satisfied their heavy burden of proving the voluntariness of defendant's consent (see generally *People v Gonzalez*, 39 NY2d 122, 128 [1976]). In determining whether the consent was voluntary or coerced, the court considers the circumstances present, including whether the consent

was given while the individual was in police custody, how many officers were present, the personal background of the consentor, including his age and prior experience with the law, whether the consentor offered resistance and whether the police advised the consentor of his right to refuse to consent (*id.* at 128-131; *Matter of Daijah D.*, 86 AD3d 521 [1st Dept 2011]). No one circumstance is determinative of the voluntariness of consent (39 NY2d at 128). The suppression court found that the two officers testified credibly. At no time before the searches did either of the only two officers present draw their guns. The officers did not handcuff the defendant or his traveling companion, nor did they threaten defendant with arrest or actually arrest him before obtaining his consents. Defendant admitted to having prior contact with the criminal justice system. Although defendant appeared to be very nervous, he was cooperative, alert and offered no resistance to any of the actions being taken by the police before he gave his consents. The police officer's response that defendant "wasn't necessarily going back to jail" to defendant's repeated expressed concern about going to jail again was not an implicit threat that he would go to jail unless he gave consent to a search of the car (*see People v Sora*, 176 AD2d 1172, 1174 [3d Dept 1991], *lv denied* 79 NY2d 864 [1992]; *People v Fillion*, 160 AD2d 538 [1st Dept 1990], *cert denied* 498 US 1068 [1991]).

We perceive no basis for reducing the sentence. Concur—Friedman, J.P., Saxe, Feinman and Gische, JJ.

Acosta, J., dissents in a memorandum as follows: I would reverse, vacate the plea and sentence, grant defendant's motion to suppress to the extent of suppressing the physical evidence found in the trunk and statements defendant made to the police after the officer asked if he could search the trunk, and remand for further proceedings. While the facts that defendant committed a traffic infraction and hugged another man with no indicia of a drug transaction being committed, that a passenger in the car made somewhat furtive movements, and that defendant was nervous upon being stopped and said he did not want to go back to jail may have justified the request to search the inside of the car, upon finding nothing therein or on the defendant after a frisk, the officers lacked a founded suspicion that criminal activity was afoot to justify the request to search the trunk of the car (*People v Garcia*, 20 NY3d 317 [2012]; *People v Hollman*, 79 NY2d 181, 194 [1992]; *People v Hogencamp*, 295 AD2d 808, 810 [3d Dept 2002] [ordering suppression and dismissing indictment where police continued investigation after initial suspicions were exhausted, notwithstanding the continued nervousness in

the defendant's voice]; *People v Springer*, 92 AD2d 209, 212 [2d Dept 1983] [a fruitless frisk of the defendant's person decreased any objective suspicion of that defendant, contributing to finding that further investigation was unreasonable]; *Sampson v City of Schenectady*, 160 F Supp 2d 336, 344 [ND NY 2001] [“(a)ssuming for purposes of this motion that (the officers) did have reasonable suspicion to believe that (the) (p)laintiff was engaged in a narcotics transaction at the time they stopped him and that their search of (the) (p)laintiff was legally justified, that suspicion evaporated when they discovered that (the) (p)laintiff was not carrying any narcotics”)]. I disagree that *People v Battaglia* (86 NY2d 755 [1995]) is directly on point as the majority asserts. In *Battaglia*, not only was the driver of the car seen driving the wrong way on a one-way street at 3:00 in the morning, when stopped, he gave the police a false name. Under these circumstances an officer could rightfully assume that the occupants of the car were attempting to hide something illegal in the car. The police were therefore justified in asking the defendant, the owner of the car and who was seated in the back seat, for consent to search the trunk. Here, contrary to the majority, the request to search the trunk was not reasonably related in scope to the circumstances which justified the interference in the first place (*People v William II*, 98 NY2d 93, 98 [2002]; *People v Quackenbush*, 88 NY2d 534, 541 [1996]).

Defendant's continued nervousness was simply insufficient indicium that criminal activity was afoot. As we held in *People v Garcia* (85 AD3d 28, 32-33 [1st Dept 2011], *mod on other grounds* 20 NY3d 317 [2012]), “There must be something more than mere nervousness on the part of the people in the stopped vehicle to establish a founded suspicion of criminal activity. Here, by describing unspecified motions as furtive, the officers were making conclusory assertions that the conduct was suspicious. The officers' unspecific testimony does not support a finding of founded suspicion of criminal activity” (citations omitted; *see also People v Irizarry*, 168 AD2d 377 [1st Dept 1990], *affd* 79 NY2d 890 [1992] [finding request to search improper because there was no founded suspicion, even though the record revealed that the defendant's hands were shaking during the police encounter]). In any event, with the information the police possessed at the time, the most plausible explanation for defendant's concern that he did not want to go back to jail was that he was driving without a valid license and feared incarceration for that offense.

Furthermore, consent obtained through an illegal request to perform a search is no consent at all (*Hollman*, 79 NY2d at 194

[ordering suppression “(b)ecause the defendant’s consent was a product of the improper police inquiry”]; *People v Irizarry*, 79 NY2d at 892). In any event, even if the request for consent was authorized, I think the majority ignores the reality of a police stop when it finds that defendant’s consent was voluntary and not coerced (see *People v Packer*, 49 AD3d 184, 187 [1st Dept 2008], *affd* 10 NY3d 915 [2008] [recognizing the “inherent potential for intimidation and coercion in police initiated encounters and the daunting burden to which the People are put when the voluntariness of a defendant’s consent is at issue” (citations omitted)]). As we noted in *People v Turriago* (219 AD2d 383, 389 [1st Dept 1996], *mod on other grounds* 90 NY2d 77 [1997]), a defendant stopped for a traffic infraction can not “reasonably disregard the police and go about his business” (internal quotation marks omitted). Here, defendant, already facing a possible arrest for driving without a license and distraught and crying about the possibility of going back to jail, may have felt compelled to consent to a search of the trunk. Under these circumstances, telling defendant that he “wasn’t necessarily going to back jail,” could be easily construed as “as long as you cooperate and let us search the trunk.”

5 In the Matter of THOMAS B., Respondent, v LYDIA D., Appellant. [991 NYS2d 512]—

Husband and Wife and Other Domestic Relationships—Counsel Fees—Discretion of Court—Appropriateness of Hourly Rate and Amount of Time for Services

Order, Family Court, New York County (Stella Schindler, J.H.O.), entered on or about May 14, 2012, which, upon remand from this Court (89 AD3d 630 [1st Dept 2011], *lv dismissed* 20 NY3d 949 [2012]), clarified its order entered on or about August 30, 2010, concerning the amount of attorneys’ fees awarded respondent and the basis for the award, unanimously modified, on the facts, to increase the monetary award in favor of Lydia D. to the sum of \$114,830, and, as so modified, affirmed, without costs.

The courts have the inherent power to supervise the legal fees charged for services and regulate the practice of law (*Matter of First Natl. Bank of E. Islip v Brower*, 42 NY2d 471, 474 [1977]). Furthermore, the determination of reasonable counsel fees is a matter within the sound discretion of the trial court and, in the absence of an abuse of discretion, will be upheld (see *Shrauger v Shrauger*, 146 AD2d 955, 956 [3d Dept 1989], *appeal dismissed* 74 NY2d 844 [1989]).

In clarifying its prior order, the court properly applied the rel-

evant factors and made an independent determination based on its knowledge and experience as to the appropriate hourly rate for the services rendered and the appropriate amount of time for each category of services (*see Jordan v Freeman*, 40 AD2d 656 [1st Dept 1972]).

However, the trial court, improperly disallowed 20 hours of billing for matters relating to the educational trust. The billings for those services were only 3.9 hours. Consequently, Lydia D. is entitled to an additional \$4,830 in legal fees based upon the improperly excluded 16.1 hours of legal fees at \$300 per hour, the rate set by the trial court.

We have considered respondent's remaining arguments and find them unavailing. Concur—Tom, J.P., Friedman, Renwick, Gische and Clark, JJ.

6 DEBORAH A. GREGOR et al., Respondents, v JOSEPH J. ROSSI et al., Defendants, and BARBARA ALESİ et al., Appellants. [992 NYS2d 17]—

Pleading—Sufficiency of Pleading—Fraud—Failure to Set Forth Words Used and Date of Alleged Fraud

Fraud—Constructive Fraud—Absence of Fiduciary or Special Relationship Fraud—What Constitutes—Aiding and Abetting Fraud—Absence of Actual Knowledge and Substantial Assistance

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 6, 2014, which denied defendants Alesi, Groman and Glascock's motion to dismiss the complaint as against them, unanimously reversed, on the law, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs, investor-shareholders in a corporation that was allegedly part of defendant Rossi's fraudulent scheme, allege that defendants Alesi, Groman and Glascock, who were retained as the attorneys for the corporation, were complicit in the scheme by drafting documents and a shareholder agreement designed to give plaintiffs the impression that the corporation was legitimate and by dealing directly with plaintiffs in reviewing the documents and giving them "accompanying legal advice and counsel."

Fraud and fraudulent inducement are not pleaded with the requisite particularity under CPLR 3016 (b), because the words used by defendants and the date of the alleged false representations are not set forth (*see Brown v Wolf Group Integrated Communications, Ltd.*, 23 AD3d 239 [1st Dept 2005]; *Riverbay Corp. v Thyssenkrupp N. El. Corp.*, 116 AD3d 487 [1st Dept 2014]). While the complaint alleges that defendants' actions constituted representations (*see Brown*, 23 AD3d at 239), those actions—

allegedly drafting corporate documents and explaining them to plaintiffs—do not reasonably support the inference that defendants were placing an imprimatur on the legitimacy of the investment enterprise.

Moreover, plaintiffs allege that they invested the funds they seek to recover between September 2010 and April 2012, encompassing an eight-month period before defendants, who were first retained in May 2011, ever got involved in these matters. There is no specific allegation that plaintiffs made any of their investments after interacting with defendants. The lack of greater specificity about information peculiarly within plaintiffs' knowledge renders conclusory any claim of reliance on anything defendants said or did. The lack of specificity similarly renders any claim of the required loss causation conclusory (*see Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]).

The constructive fraud and negligent misrepresentation causes of action are deficient for failure to allege the requisite fiduciary or special relationship between plaintiffs and defendants (*see J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *Matter of Aoki v Aoki*, 117 AD3d 499 [1st Dept 2014]). The attorneys for a corporation represent the corporate entity, not the shareholders (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]). The parties did not expressly agree otherwise (*see Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 149 [1st Dept 1994], *affd* 87 NY2d 826 [1995]). Plaintiffs' subjective belief did not create an attorney-client relationship or a close relationship approaching privity that imposed upon defendants a duty to them to impart correct information (*see Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [1st Dept 2008]). We note, in addition, that the requisite relationship between the parties must have existed before the transaction from which the alleged wrong emanated, and not as a result of it (*Elghanian v Harvey*, 249 AD2d 206 [1st Dept 1998]; *see also Waterscape Resort LLC v McGovern*, 107 AD3d 571 [1st Dept 2013]).

Plaintiffs do not expressly allege a cause of action against defendants for aiding and abetting the fraud alleged to have been committed by Rossi. Even if the causes of action as pleaded could be fairly interpreted as including liability for aiding and abetting fraud, they are still deficient because they fail to allege that defendants had actual knowledge of the fraud and provided substantial assistance in its commission (*see Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]). The allegation that the attorneys "knew or should have known" of the fraud is conclusory and alleges mere constructive knowledge (*see Global Mins. &*

Metals Corp. v Holme, 35 AD3d 93, 101-102 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]; *Weinberg v Mendelow*, 113 AD3d 485, 488 [1st Dept 2014] [allegation that defendant “knew, or . . . should have known” was sufficient because it was coupled with specific allegations of actual knowledge of fraud]]. The allegations that the attorneys prepared merger documents and a shareholder agreement are allegations of ordinary professional activity, not substantial assistance (*see Roni LLC v Arfa*, 72 AD3d 413 [1st Dept 2010], *affd* 15 NY3d 826 [2010]).

The claims under the North Carolina RICO statute fail to set forth the required predicate act as part of a pattern of racketeering activity, since the common-law torts alleged are not viable and, in any event, are otherwise insufficient for the purpose (*see Cofacredit, S.A. v Windsor Plumbing Supply Co., Inc.*, 187 F3d 229, 242 [2d Cir 1999]).

The conspiracy cause of action is deficient for failure to allege facts supporting a conclusion that there was an agreement among defendants regarding an underlying tort (*see 1766-68 Assoc., LP v City of New York*, 91 AD3d 519 [1st Dept 2012]). The claims for punitive damages cannot stand in the absence of a substantive underlying cause of action (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616-617 [1994]).

Plaintiffs failed to respond to the arguments before the motion court in support of dismissing the claim that defendants are responsible for producing the corporate books and records, and they do not mention the issue on appeal. Accordingly, the claim should be dismissed. Concur—Tom, J.P., Moskowitz, Manzanet-Daniels, Feinman and Gische, JJ. [**Prior Case History: 2013 NY Slip Op 32800(U).**]

SECOND DEPARTMENT, AUGUST, 2014

(August 6, 2014)

1 DAWN M. AVILA, Now Known as DAWN BECHTOLD, Respondent, v DISTINCTIVE DEVELOPMENT Co., LLC, et al., Appellants. [991 NYS2d 89]—

Limitation of Actions—Defendants United in Interest—Relation-Back Doctrine

Judgments—Default Judgment—Vacatur

In an action, inter alia, to recover damages for breach of contract, the defendants appeal from so much of an order of the Supreme Court, Queens County (Weiss, J.), entered October 16, 2012, as denied those branches of their motion which were (a)

pursuant to CPLR 317 to vacate so much of an order of the same court entered April 10, 2012, as granted that branch of the plaintiff's motion which was pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Distinctive Development Co., LLC, and (b) pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against the defendant Alan Schneebaum.

Ordered that the order entered October 16, 2012, is reversed insofar as appealed from, on the law, with costs, that branch of the defendants' motion which was pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against the defendant Alan Schneebaum is granted, and the matter is remitted to the Supreme Court, Queens County, for a hearing on the issue of whether the defendant Distinctive Development Co., LLC, received notice of the certified mail sent to it by the New York Secretary of State and, thereafter, for a new determination on that branch of the defendants' motion which was pursuant to CPLR 317 to vacate that portion of the order entered April 10, 2012, which granted that branch of the plaintiff's motion which was pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Distinctive Development Co., LLC.

The plaintiff commenced this action against Distinctive Development Co., LLC (hereinafter Distinctive), alleging causes of action to recover damages for breach of contract and negligence. In an order entered April 10, 2012, the Supreme Court granted the plaintiff's motion for leave to enter a default judgment against Distinctive and for leave to serve a supplemental summons and amended complaint so as to add Alan Schneebaum, Distinctive's managing member, as an additional defendant.

The Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 3211 (a) to dismiss the amended complaint insofar as asserted against Schneebaum. The defendants demonstrated that the cause of action insofar as asserted against Schneebaum to recover damages for negligence was time-barred (*see* CPLR 3211 [a] [5]). Contrary to the plaintiff's contention, she failed to demonstrate that the relation-back doctrine applied, as she did not establish that her failure to name Schneebaum as a defendant in the original complaint was due to a mistake on her part (*see Buran v Coupal*, 87 NY2d 173, 181 [1995]; *Sally v Keyspan Energy Corp.*, 106 AD3d 894, 897 [2013]; *Cardamone v Ricotta*, 47 AD3d 659, 660-661 [2008]). The amended complaint also failed to state a cause of action against Schneebaum (*see* CPLR 3211 [a]

[7]) under a piercing-the-corporate-veil theory, as the amended complaint did not allege that Schneebaum abused the privilege of doing business in the corporate form (*see Allstate ATM Corp. v E.S.A. Holding Corp.*, 98 AD3d 541, 542 [2012]; *B. Merrick Rd., LLC v Chriso Food Servs., Inc.*, 95 AD3d 913, 914 [2012]; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126-127 [2009], *affd* 16 NY3d 775 [2011]).

The Supreme Court also erred in denying, without a hearing, that branch of the defendants' motion which was pursuant to CPLR 317 to vacate so much of the order entered April 10, 2012, as granted that branch of the plaintiff's motion which was pursuant to CPLR 3215 for leave to enter a default judgment against Distinctive. The defendants demonstrated that Distinctive, which was not served with copies of the summons and complaint by personal delivery, did not personally receive notice of the summons in time to defend the action, and had a potentially meritorious defense (*see* CPLR 317; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141-142 [1986]; *Brickhouse Masonry, LLC v Windward Bldrs., Inc.*, 101 AD3d 919, 920 [2012]; *Maron v Crystal Bay Imports, Ltd.*, 99 AD3d 867, 868 [2012]). The Supreme Court determined that Distinctive deliberately attempted to avoid notice of the summons, based upon the fact that the New York Secretary of State mailed a copy of the summons and complaint to Distinctive by certified mail, in time for it to defend the action, and that this mailing was returned "unclaimed." However, the Supreme Court should not have made this determination without conducting a hearing as to whether Distinctive received notice of the dispatch or delivery of the certified mail from the Secretary of State (*see Rodriguez v Bridge Realty*, 155 AD2d 271, 271-272 [1989]; *Rifenburg v Liffiton Homes*, 107 AD2d 1015, 1016-1017 [1985]). Accordingly, we remit the matter to the Supreme Court, Queens County, for a hearing on the issue of whether Distinctive received notice of the certified mail sent to it by the Secretary of State, and for a new determination thereafter on that branch of the defendants' motion which was pursuant to CPLR 317 to vacate so much of the order entered April 10, 2012, as granted that branch of the plaintiff's motion which was pursuant to CPLR 3215 for leave to enter a default judgment against Distinctive. Mastro, J.P., Chambers, Lott and Duffy, JJ., concur. **[Prior Case History: 2012 NY Slip Op 32581(U).]**

2 BANK OF NEW YORK, as Trustee for the Certificateholders CWALT, INC. ALTERNATE LOAN TRUST 2005-58 MORTGAGE PASS-THROUGH CERTIFICATES, Appellant, v SWENDA A. CEPEDA, Respondent, et al., Defendants. [989 NYS2d 910]—

Mortgages—Foreclosure—Order of Reference**Dismissal and Nonsuit—Dismissal of Complaint—Sua Sponte Dismissal**

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Schack, J.), dated May 2, 2013, as denied that branch of its motion which was pursuant to RPAPL 1321 for an order of reference and, sua sponte, directed dismissal of the complaint and cancellation of the notice of pendency filed against the subject property.

Ordered that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, directed the dismissal of the complaint and the cancellation of the notice of pendency filed against the subject property is deemed an application for leave to appeal from those portions of the order, and leave to appeal from those portions of the order is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order is reversed insofar as appealed from, on the law, without costs or disbursements, and that branch of the plaintiff's motion which was pursuant to RPAPL 1321 for an order of reference is granted; and it is further,

Ordered that the matter is remitted to the Supreme Court, Kings County, for further proceedings consistent herewith before a different justice.

The Supreme Court erred in denying that branch of the plaintiff's motion which was pursuant to RPAPL 1321 for an order of reference. In support of its unopposed motion, the plaintiff submitted documentary proof showing that the defendants failed to answer the complaint within the time allowed, that it was the holder of the mortgage and note, that the mortgagor defaulted thereon, and that, as a preliminary step in obtaining a judgment of foreclosure, the appointment of a referee to compute the amount due on the mortgage would be proper (*see* RPAPL 1321; *HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 816 [2013]; *Bank of N.Y. v Alderazi*, 99 AD3d 837, 837-838 [2012]; *Aurora Loan Servs., LLC v Shahmela Shah Sookoo*, 92 AD3d 705, 707 [2012]).

Moreover, the Supreme Court abused its discretion in, sua sponte, directing dismissal of the complaint and the cancellation of the notice of pendency filed against the subject property for lack of standing. A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*see HSBC Bank USA, N.A. v Taher*, 104 AD3d at 817; *Aurora Loan Servs., LLC v Sobanke*, 101 AD3d 1065, 1066 [2012]; *U.S. Bank, N.A. v Em-*

manuel, 83 AD3d 1047, 1048 [2011]). Here, the Supreme Court was not presented with extraordinary circumstances warranting sua sponte dismissal of the complaint and cancellation of the notice of pendency. Since the defendants did not answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing (see *Freedom Mtge. Corp. v Toro*, 113 AD3d 815 [2014]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821 [2014]; *HSBC Bank USA, N.A. v Taher*, 104 AD3d at 817; *Bank of N.Y. v Alderazi*, 99 AD3d at 838). Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant a sua sponte dismissal of the complaint by the court (see *Wells Fargo Bank, N.A. v Gioia*, 114 AD3d 766, 767 [2014]; *HSBC Bank USA, N.A. v Taher*, 104 AD3d at 817; *Bank of N.Y. v Alderazi*, 99 AD3d at 838; *U.S. Bank, N.A. v Emmanuel*, 83 AD3d at 1048-1049).

Under the circumstances of this case, and in light of our past admonition in *HSBC Bank USA, N.A. v Taher* (104 AD3d 815 [2013]), we deem it appropriate to remit the matter to the Supreme Court, Kings County, for further proceedings before a different justice. Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur.

3 JANEYHSKA BENN, an Infant, by Her Mother and Natural Guardian, ROSA JONES, et al., Respondents, v NEW YORK PRESBYTERIAN HOSPITAL et al., Appellants-Respondents, and CITY OF NEW YORK et al., Respondents-Appellants. [990 NYS2d 584]—

Municipal Corporations—Tort Liability—Emergency Vehicle

Municipal Corporations—Tort Liability—Special Relationship

Municipal Corporations—Tort Liability—Ministerial Governmental Functions

In an action to recover damages for personal injuries, etc., the defendants New York Presbyterian Hospital and Aron Z. Weichbrod appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Velasquez, J.), dated June 1, 2012, as denied their motion for summary judgment dismissing the amended complaint and all cross claims insofar as asserted against them, and the defendants City of New York and New York City Police Department cross-appeal, as limited by their brief, from so much of the same order as denied that branch of their cross motion which was for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed and cross-appealed from, with one bill of costs.

On May 19, 2008, at approximately 8:30 a.m., the injured plaintiff, then 13 years old, exited a city bus at the northeast

corner of Coney Island Avenue and Avenue K in Brooklyn, on her way to her school, P.S. 99. To get to P.S. 99 from the bus stop, the injured plaintiff had to cross Coney Island Avenue, a two-way, north-south street with two lanes of traffic traveling in each direction and left-turn lanes for each direction of travel, and Avenue K, a two-way east-west street with one lane of traffic traveling in each direction. A school crossing guard, employed by the defendant New York City Police Department and assigned to the intersection of Coney Island Avenue and Avenue K, was standing at the southwest corner of the subject intersection. A traffic light controlled traffic at this intersection. There were also crosswalks with pedestrian signals at each corner.

The injured plaintiff crossed over Avenue K on the east side of Coney Island Avenue before attempting to go across Coney Island Avenue from the southeast corner to the southwest corner. When she entered the crosswalk, the pedestrian signal was in her favor and there were vehicles stopped at the traffic light on Coney Island Avenue. As the injured plaintiff was in the process of crossing Coney Island Avenue and had passed the two northbound vehicles stopped at the light on Coney Island Avenue, an ambulance owned by the defendant New York Presbyterian Hospital and operated by the defendant Aron Z. Weichbrod (hereinafter together the hospital defendants), was traveling north on Coney Island Avenue responding to an emergency call.

As the ambulance approached the intersection of Coney Island Avenue and Avenue K, Weichbrod drove to the left of the two northbound vehicles which were stopped at the light and entered the left-turn lane. Before the ambulance reached the crosswalk, the traffic light turned green in its favor. While the injured plaintiff was in the middle of the crosswalk, the ambulance struck her.

The injured plaintiff, and her mother suing derivatively, commenced this action against the hospital defendants and the defendants City of New York and New York City Police Department (hereinafter together the city defendants) to recover damages for, inter alia, the injured plaintiff's personal injuries.

The hospital defendants moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, contending that since Weichbrod was responding to an emergency, he could only be held liable for the accident if he acted in reckless disregard for the safety of others pursuant to Vehicle and Traffic Law § 1104. The city defendants cross-moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against them on the basis that

they were entitled to absolute immunity, since traffic control is a discretionary governmental function, or, in the alternative, because they did not owe a duty to the injured plaintiff. The Supreme Court denied the motion and the cross motion.

The hospital defendants did not establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them. Vehicle and Traffic Law § 1104 (b), which applies to an authorized emergency vehicle involved in an emergency operation, provides, in part, that the driver may:

“(b) . . . 1. Stop, stand or park irrespective of the provisions of this title;

“2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;

“3. Exceed the maximum speed limits so long as he does not endanger life or property;

“4. Disregard regulations governing directions of movement or turning in specified directions. . . .

“(e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.”

“[T]he reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence” (*Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; see *Fajardo v City of New York*, 95 AD3d 820, 820 [2012]; *Katanov v County of Nassau*, 91 AD3d 723 [2012]). “A driver is negligent when an accident occurs because he or she failed to see that which through the proper use of his or her senses he or she should have seen” (*Katanov v County of Nassau*, 91 AD3d at 725; see *Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2013]).

Here, evidence submitted by the hospital defendants in support of their motion demonstrated that the injured plaintiff entered the subject crosswalk with the pedestrian signal in her favor and was still within that crosswalk when the ambulance entered the crosswalk, upon the traffic control device turning green. Pursuant to Vehicle and Traffic Law § 1112, a pedestrian

facing a steady WALK signal has the right of way (see Vehicle and Traffic Law § 1112 [a]). Thus, “any pedestrians who have partially completed their crossing on the WALK or flashing DON’T WALK signal shall proceed to a sidewalk or safety island while the steady DON’T WALK signal is showing” (Vehicle and Traffic Law § 1112 [c]). Moreover, Vehicle and Traffic Law § 1111 (a) (1) provides that a vehicle with a green traffic light “may proceed straight through or turn right or left.” However, “[a]lthough a driver facing a steady green light is entitled to proceed, he or she has a duty to yield the right-of-way to pedestrians lawfully within a crosswalk” (*Barbieri v Vokoun*, 72 AD3d 853, 855 [2010]).

Failure to abide by the provisions set forth in Vehicle and Traffic Law §§ 1111 and 1112, which was the injury-causing conduct at issue here, is not privileged conduct pursuant to Vehicle and Traffic Law § 1104 (b). As the injury-producing conduct was not specifically exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b), the principles of ordinary negligence apply (see *Fajardo v City of New York*, 95 AD3d at 820). The hospital defendants submitted the deposition testimony of the school crossing guard and an eyewitness, both of whom testified that the ambulance did not slow down when the accident occurred, along with Weichbrod’s deposition testimony that his vision was obstructed on his right so that his view of the crosswalk was obstructed. Therefore, the hospital defendants failed to eliminate all triable issues of fact with respect to whether Weichbrod negligently operated the ambulance. Thus, the hospital defendants did not meet their prima facie burden (see *id.* at 821; *Katanov v County of Nassau*, 91 AD3d at 725).

Further, the city defendants did not establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them.

“To impose liability [upon a municipality], there must be a duty that runs from the municipality to the plaintiff. We have recognized a narrow class of cases in which a duty is born of a special relationship between the plaintiff and the governmental entity” (*Pelaez v Seide*, 2 NY3d 186, 198-199 [2004]; see *Flagstar Bank, FSB v State of New York*, 114 AD3d 138 [2013]). One of the ways that a special relationship arises is when the municipality “assumes a duty that generates justifiable reliance by the person who benefits from the duty” (*Pelaez v Seide*, 2 NY3d at 199). The issue of whether a municipality has assumed an affirmative duty that resulted in justifiable reliance by the plaintiff requires: “(1) an assumption by a municipality, through

promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Pelaez v Seide*, 2 NY3d at 202; see *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *Matican v City of New York*, 94 AD3d 826, 828 [2012]; *Vandewinckel v Northport/East Northport Union Free School Dist.*, 24 AD3d 432 [2005]).

Here, in support of their cross motion, the city defendants submitted the crossing guard's deposition testimony, in which she averred that she observed the injured plaintiff get off the bus with her friends the morning of the accident just as the crossing guard observed every morning, that she was "[r]ight there watching" the injured plaintiff when the accident occurred, that she observed the injured plaintiff crossing Coney Island Avenue slowly with the light in her favor when the crossing guard heard the ambulance coming and knew that she "needed to stop the kid," and that when she saw the ambulance approaching, it was moving as the other northbound vehicles were stopped, so she "blew [her] whistle," and when the injured plaintiff failed to stop, the crossing guard put up her right hand. Based on the city defendants' submissions, they failed to demonstrate, prima facie, the absence of a special relationship with the injured plaintiff (see *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; see also *Florence v Goldberg*, 44 NY2d 189 [1978]).

Further, "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*McLean v City of New York*, 12 NY3d 194, 203 [2009]; see *Valdez v City of New York*, 18 NY3d 69, 76-77 [2011]; *Kircher v City of Jamestown*, 74 NY2d 251, 253 [1989]; *Cuffy v City of New York*, 69 NY2d at 260). Here, the city defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them on the basis that the crossing guard's actions were discretionary. Based on their submissions in support of their cross motion, and under the circumstances here, the city defendants failed to eliminate all triable issues of fact as to whether the crossing guard's actions constituted ministerial governmental functions (see e.g. *Kupferstein v City of New York*, 101 AD3d 952, 953 [2012]).

Since neither the hospital defendants nor the city defendants met their prima facie burden, we need not address the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, the Supreme Court properly denied the hospital defendants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them and that branch of the city defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them. Skelos, J.P., Dickerson, Austin and Cohen, JJ., concur. [**Prior Case History: 35 Misc 3d 1237(A), 2012 NY Slip Op 51034(U).**]

4 DANIEL H. BENNETT et al., Appellants, v PATEL CATSKILLS, LLC, Respondent. [990 NYS2d 594]—

Judgments—Default Judgment
Process—Service of Process

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Dutchess County (Rosa, J.), dated January 30, 2013, which denied their motion pursuant to CPLR 3215 for leave to enter judgment on the issue of liability against the defendant upon its failure to appear or answer the complaint, and granted the defendant's cross motion pursuant to CPLR 3012 (d) to compel them to accept service of the answer.

Ordered that the order is reversed, on the law, with costs, and the matter is remitted to the Supreme Court, Dutchess County, for a hearing on the issue of whether the defendant received notice of the certified mail sent to it by the New York Secretary of State, and thereafter, for a new determination of the plaintiffs' motion for leave to enter a default judgment on the issue of liability against the defendant, and of the defendant's cross motion pursuant to CPLR 3012 (d) to compel the plaintiffs to accept service of the answer.

The process server's affidavit of service created a rebuttable presumption that the plaintiffs served the defendant by delivering a copy of the summons and complaint to the Secretary of State (*see* CPLR 311-a [a]; Limited Liability Company Law § 303; *Kolonkowski v Daily News, L.P.*, 94 AD3d 704, 705 [2012]; *Thas v Dayrich Trading, Inc.*, 78 AD3d 1163, 1164 [2010]; *Trini Realty Corp. v Fulton Ctr. LLC*, 53 AD3d 479 [2008]). In opposition, the defendant denied receipt of the summons and complaint. The fact that the summons and complaint, which had been sent by certified mail, return receipt requested, to the address on file with the New York Secretary of State, had been returned to the Secretary of State as "unclaimed," raised a triable issue of fact as to whether the defendant received notice of the certified mail sent to it by the Secretary of State, and the matter must be remitted for a hearing and new determination

of that issue and of the motion and cross motion (see *Avila v Distinctive Dev. Co., LLC*, 120 AD3d 449 [2014] [decided here-with]; *Henniger v L.B.X. Excavating*, 176 AD2d 917, 918 [1991]; *Rodriguez v Bridge Realty*, 155 AD2d 271, 272 [1989]; *Rifenburg v Liffiton Homes*, 107 AD2d 1015, 1016 [1985]).

Contrary to the defendant's contention, the plaintiffs did not waive the issue of the late service of the answer and the alleged default when they failed to reject the answer in a timely manner. Since the plaintiffs notified the defendant that it was in default prior to service of an answer and promptly moved for leave to enter a default judgment after receiving the answer, the plaintiffs could not be deemed to have thereafter waived the issue of late service and the alleged default (see *Hosten v Oladapo*, 44 AD3d 1006, 1007 [2007]; *Katz v Perl*, 22 AD3d 806, 807 [2005]). Mastro, J.P., Hall, Austin, Sgroi and Duffy, JJ., concur.

5 SCOTT BISCUP, Respondent, v E.W. HOWELL, CO., INC., Defendant/Third-Party Plaintiff-Appellant. SBS STEEL, INC., Third-Party Defendant-Appellant, and SUPER STEEL STRUCTURES, LLC, Third-Party Defendant-Appellant-Respondent. [991 NYS2d 108]—

Labor—Safe Place to Work—Fall from Flatbed Truck—Elevation-Related Risk

In an action to recover damages for personal injuries, the third-party defendants appeal from so much of an order of the Supreme Court, Nassau County (Brandveen, J.), entered April 1, 2013, as denied those branches of their motion which were for summary judgment dismissing the plaintiff's causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6), and the defendant/third-party plaintiff cross-appeals, as limited by its brief, from so much of the same order as denied those branches of its separate motion which were for summary judgment dismissing the complaint and on the issue of liability on its third-party cause of action for contractual indemnification against the third-party defendant Super Steel Structures, LLC.

Ordered that the order is modified, on the law, by deleting the provisions thereof denying those branches of the motions of the defendant/third-party plaintiff and the third-party defendants which were for summary judgment dismissing the plaintiff's causes of action alleging violation of Labor Law §§ 240 (1) and 241 (6), and substituting therefor provisions granting those branches of the motions; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The defendant/third-party plaintiff, E.W. Howell Co., Inc. (hereinafter Howell), and the third-party defendants established their prima facie entitlement to judgment as a matter of law

dismissing the cause of action alleging a violation of Labor Law § 241 (6) by showing that the Industrial Code provision relied upon by the plaintiff as a predicate for liability under that statute was inapplicable to the facts of this case. On appeal, the plaintiff concedes that the Industrial Code provision upon which he relied was inapplicable, and that he failed to raise a triable issue of fact in opposition to the motions. Accordingly, the Supreme Court should have granted those branches of the motions of Howell and the third-party defendants which were for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6). Moreover, those branches of the motions Howell and the third-party defendants which were for summary judgment dismissing the plaintiff's cause of action alleging a violation of Labor Law § 240 (1) should have been granted. The plaintiff's accident occurred when he jumped from the back of a flatbed truck and slipped in mud. "A four-to-five-foot descent from a flatbed trailer or similar surface does not present the sort of elevation-related risk that triggers Labor Law § 240 (1)'s coverage" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408 [2005]; see *Bond v York Hunter Constr.*, 95 NY2d 883, 884-885 [2000]).

However, contrary to Howell's contention, the Supreme Court properly denied that branch of its motion which was for summary judgment dismissing the plaintiff's common-law negligence and Labor Law § 200 causes of action, which were based on allegations of a dangerous work site, as Howell failed to establish the absence of triable issues of fact as to whether it had control over the work site or constructive or actual notice of a dangerous condition there (see *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 52 [2011]), and whether it was free from negligence in the happening of the plaintiff's accident. Since Howell did not establish that it was free from negligence, that branch of its motion which was for summary judgment on its third-party cause of action for contractual indemnification against the third-party defendant Super Steel Structures, LLC, was properly denied as premature (see *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 616 [2011]). Dillon, J.P., Lott, Austin and Barros, JJ., concur.

6 MARIO BUONVIAGGIO, Respondent, v PARKSIDE ASSOCIATES, L.P., et al., Appellants. [990 NYS2d 595]—

Negligence—Sidewalks—Liability of Abutting Landowner—Trip and Fall

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Richmond County (Fusco, J.), dated June 25, 2013, which denied their motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

At approximately 4:00 p.m. on December 22, 2010, the plaintiff allegedly was injured when he tripped and fell on or around the sidewalk located adjacent to the premises owned by the defendant Parkside Associates, L.P., known as Parkside Senior Apartments in Staten Island.

“Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on the owner of the abutting land” (*James v Blackmon*, 58 AD3d 808, 808 [2009]; see *Crawford v City of New York*, 98 AD3d 935 [2012]; *Smirnova v City of New York*, 64 AD3d 641 [2009]). The exceptions to this rule are when the landowner actually created the dangerous condition, made negligent repairs that caused the condition, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance imposing liability on the abutting landowner for failing to maintain the sidewalk (see *Crawford v City of New York*, 98 AD3d at 936; *Smirnova v City of New York*, 64 AD3d at 641-642; *James v Blackmon*, 58 AD3d at 808).

“Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner” (*Pevzner v 1397 E. 2nd, LLC*, 96 AD3d 921, 922 [2012]; see *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]; *Stoloyvitskaya v Dennis Boardwalk, LLC*, 101 AD3d 1106 [2012]; *Fusco v City of New York*, 71 AD3d 1083, 1084 [2010]). “[T]he language of section 7-210 mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code sections 19-152 and 16-123” (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d at 521 [internal quotation marks omitted]; see *Stoloyvitskaya v Dennis Boardwalk, LLC*, 101 AD3d at 1107; *Harakidas v City of New York*, 86 AD3d 624, 626 [2011]). Although section 7-210 of the Administrative Code does not define the term “sidewalk,” section 19-101 (d) of the Administrative Code describes a sidewalk as “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians” (*Stoloyvitskaya v Dennis Boardwalk, LLC*, 101 AD3d at 1107).

Contrary to the Supreme Court’s determination, the defendants’ motion was not premature. However, we affirm the order appealed from on a different ground. The defendants failed to make a prima facie showing of entitlement to judgment as a matter of law, as they offered no evidence to demonstrate that the alleged defective or dangerous condition which allegedly

caused the plaintiff to fall was located exclusively on the curb, rather than on the sidewalk abutting their property (*see Lanhan v City of New York*, 69 AD3d 678 [2010]; *see also Vigil v City of New York*, 110 AD3d 986 [2013]; *Pevzner v 1397 E. 2nd, LLC*, 96 AD3d 921 [2012]). Since the defendants failed to meet their prima facie burden, we need not address the sufficiency of the plaintiff's papers submitted in opposition thereto (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The defendants' remaining contentions concerning the applicability of, inter alia, 34 RCNY 2-07 (b), are not properly before this Court (*see Chia v City of New York*, 109 AD3d 865 [2013]; *Tobias v DiFazio Elec.*, 288 AD2d 209 [2001]).

In light of the foregoing, we need not reach the plaintiff's remaining contentions. Dillon, J.P., Hall, Sgroi and Barros, JJ., concur.

7 THOMAS CALABRO, Appellant, v HARBOUR AT BLUE POINT HOME OWNERS ASSOCIATION, INC., et al., Respondents, et al., Defendant. [991 NYS2d 101]—

Negligence—Snow and Ice—Summary Judgment

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Martin, J.), dated March 27, 2013, as granted the motion of the defendants Harbour at Blue Point Home Owners Association, Inc., and Alexander Wolf & Company, Inc., for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the motion of the defendants Harbour at Blue Point Home Owners Association, Inc., and Alexander Wolf & Company, Inc., for summary judgment dismissing the complaint insofar as asserted against them is denied.

The plaintiff allegedly sustained personal injuries when he slipped and fell on black ice in the parking lot of a townhouse complex. He commenced this action against, among others, the owner of the premises, the defendant Harbour at Blue Point Home Owners Association, Inc., and the managing agent, the defendant Alexander Wolf & Company, Inc. (hereinafter together the Harbour defendants). The Harbour defendants moved for summary judgment, contending that they did not create the alleged hazardous condition or have actual or constructive notice of it. They also contended that the managing agent owed no duty to the plaintiff.

As a general rule, liability for a dangerous or defective condi-

tion on real property must be predicated upon ownership, occupancy, control, or special use of that property (*see Suero-Sosa v Cardona*, 112 AD3d 706 [2013]; *Wheaton v East End Commons Assoc., LLC*, 50 AD3d 675, 676-677 [2008]; *Schwalb v Kulaski*, 29 AD3d 563, 564 [2006]). A duty of care on the part of a managing agent may arise where there is a comprehensive and exclusive management agreement between the agent and the owner that displaces the owner's duty to safely maintain the premises (*see Fung v Japan Airlines Co., Ltd.*, 51 AD3d 861, 863 [2008]; *Roveccio v Ry Mgt. Co., Inc.*, 29 AD3d 562 [2006]). Here, in moving for summary judgment, the Harbour defendants failed to submit a copy of the written management agreement. Consequently, they failed to establish, prima facie, that the managing agent owed no duty of care to the plaintiff (*see generally L'Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692 [2013]; *Cendant Car Rental Group v Liberty Mut. Ins. Co.*, 48 AD3d 397 [2008]).

In order to prevail on their motion for summary judgment dismissing the complaint insofar as asserted against them, the Harbour defendants were required to demonstrate that they neither created the allegedly dangerous condition nor had actual or constructive notice of it (*see Samuels v Chap A Nosh of Cedarhurst, Inc.*, 62 AD3d 857, 858 [2009]). The Harbour defendants failed to submit evidence sufficient to establish, prima facie, that they did not have constructive notice of the dangerous condition that allegedly caused the plaintiff to fall. Rather, triable issues of fact exist as to whether the alleged condition that caused the plaintiff to fall was visible and apparent and whether it had existed for a sufficient length of time before the accident such that it could have been discovered and corrected by the Harbour defendants (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Mignogna v 7-Eleven, Inc.*, 76 AD3d 1054 [2010]; *Baines v G&D Ventures, Inc.*, 64 AD3d 528, 529 [2009]; *Totten v Cumberland Farms, Inc.*, 57 AD3d 653, 654 [2008]).

Since the Harbour defendants did not meet their initial burden as the movants, it is not necessary to review the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Accordingly, the Supreme Court should have denied the Harbour defendants' motion for summary judgment dismissing the complaint insofar as asserted against them. Rivera, J.P., Balkin, Leventhal and Roman, JJ., concur. **[Prior Case History: 2013 NY Slip Op 30643(U).]**

8 COUNTRY BANK, Respondent, v THOMAS BRODERICK, Appellant. [991 NYS2d 100]—

Execution—Exemptions—Out-of-State College Savings Accounts

In an action pursuant to CPLR 5240 to enforce a deficiency judgment in the principal sum of \$364,366.64, which had been awarded in a foreclosure action entitled *Country Bank v Georgetown Land Dev. Co., LLC*, docket No. CV-10-6005228S, commenced in the Superior Court of the State of Connecticut, in and for the Judicial District of Danbury, the defendant appeals from an order of the Supreme Court, Westchester County (Smith, J.), entered January 3, 2013, which granted the plaintiff's motion for a determination that the funds held in certain college savings accounts owned by the defendant are not exempt from levy in connection with the satisfaction of the money judgment, and directed that nonparty Fidelity Brokerage Services, LLC, doing business as Fidelity Investments, turn over the funds to the plaintiff's counsel.

Ordered that the order is affirmed, with costs.

"CPLR 5240 grants the courts broad discretionary power to control and regulate the enforcement of a money judgment under CPLR article 52 to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court" (*Matter of Sanders v Manufacturers Hanover Trust Co.*, 229 AD2d 544, 544 [1996]; see *Guardian Loan Co. v Early*, 47 NY2d 515, 519 [1979]; *Paz v Long Is. R.R.*, 241 AD2d 486, 487 [1997]).

The Supreme Court providently exercised its discretion in granting the plaintiff's motion pursuant to CPLR 5240 for a determination that the funds sought to be levied upon—college savings accounts established under the laws of the State of New Hampshire (see NH Rev Stat Ann, ch 195-H)—are not exempt from levy in connection with the satisfaction of an underlying Connecticut money judgment that was docketed in New York pursuant to CPLR 5402.

The parties do not dispute that the protection from creditors afforded by CPLR 5205 (j) (2) to college tuition savings program accounts defined in 26 USC § 529 (hereinafter 529 savings plans) does not apply where, as here, the accounts are not qualified college savings program accounts established pursuant to the New York State College Choice Tuition Saving Program, as set forth in Education Law article 14-A. The Supreme Court correctly concluded that the distinction made in CPLR 5205 (j) between 529 savings plans established under the laws of New York, and those established in other states, or under the laws of other states, does not violate the equal protection clause of the United States Constitution. Since the classification "is not based

on an inherently suspect characteristic and does not impermissibly interfere with the exercise of a fundamental right, it need only rationally further a legitimate state interest to be upheld as constitutional” (*Affronti v Crosson*, 95 NY2d 713, 718-719 [2001]; see *Nordlinger v Hahn*, 505 US 1, 10 [1992]; *New Orleans v Dukes*, 427 US 297, 303 [1976]; *Archbishop Walsh High School v Section VI of N.Y. State Pub. High School Athletic Assn.*, 88 NY2d 131, 136 [1996]). Applying this standard of rational basis review, the court properly determined that CPLR 5205 (j) was not unconstitutional, as the disparate treatment is not “‘so unrelated to the achievement of any combination of legitimate purposes’” as to be irrational (*Affronti v Crosson*, 95 NY2d at 719, quoting *Kimel v Florida Bd. of Regents*, 528 US 62, 84 [2000]).

Contrary to the defendant’s contention, the statute is not antithetical to the public policy of the State of New York, and “the choice between conflicting policy values is best made by the Legislature” (*Anonymous v Bureau of Professional Med. Conduct/State Bd. for Professional Med. Conduct*, 2 NY3d 663, 669 [2004] [internal quotation marks omitted]). Rivera, J.P., Balkin, Leventhal and Roman, JJ., concur.

9 DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee under the Pooling and Servicing Agreement Relating to IMPAC SECURED ASSETS CORP., MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-1, Appellant, v NOOR MEAH, Respondent, et al., Defendants. [991 NYS2d 92]—

Dismissal and Nonsuit—Dismissal of Complaint—Sua Sponte Dismissal

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (Brathwaite Nelson, J.), entered July 16, 2013, as, in effect, denied that branch of its motion which was for a new order of reference and, sua sponte, directed dismissal of the complaint and the cancellation of a certain notice of pendency.

Ordered that on the Court’s own motion, the notice of appeal from so much of the order as, sua sponte, directed dismissal of the complaint and directed the cancellation of a certain notice of pendency is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (see CPLR 5701 [c]); and it is further,

Ordered that the order is reversed insofar as appealed from, on the law and in the exercise of discretion, without costs or disbursements, that branch of the plaintiff’s motion which was for a new order of reference is granted, and the matter is remit-

ted to the Supreme Court, Queens County, for further proceedings, including the settlement of a new order appointing a referee to compute.

In this mortgage foreclosure action, the Supreme Court, in an order dated June 19, 2009, directed a reference to “ascertain and compute the amount due to the plaintiff.” That order was based, in part, on an affidavit submitted by the plaintiff that had been executed by one Keri Selman and had been sworn to on May 8, 2008.

Counsel for the plaintiff, upon review of the documents that had previously been submitted, subsequently determined that the plaintiff was unable to confirm either the validity of the process by which the Selman affidavit had been notarized or that Selman had undertaken a “proper review of the records,” as required by Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge. The plaintiff then submitted the motion now under review, in which it sought, inter alia, a new order of reference to compute the amount owed to it based on new papers. The Supreme Court, inter alia, in effect, denied that branch of the motion which was for a new order of reference and, sua sponte, directed dismissal of the complaint and the cancellation of a certain notice of pendency.

“A court’s power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal” (*U.S. Bank, N.A. v Emmanuel*, 83 AD3d 1047, 1048 [2011]; see *U.S. Bank, N.A. v Razon*, 115 AD3d 739 [2014]; *Wells Fargo Bank, N.A. v Gioia*, 114 AD3d 766 [2014]; *Onewest Bank, FSB v Fernandez*, 112 AD3d 681 [2013]). The fact that the plaintiff’s attorney attempted to comply, in good faith, with an Administrative Order of the Chief Administrative Judge that did not exist at the time that the action was commenced, or at the time of the plaintiff’s prior motion for a reference, does not qualify as such an “extraordinary circumstance.” Nothing in the Administrative Orders requires the dismissal of an action merely because the plaintiff’s attorney discovers that there was some irregularity or defect in a prior submission, nor is the plaintiff effectively required to commence an entirely new action (see generally *U.S. Bank N.A. v Eaddy*, 109 AD3d 908 [2013]). Accordingly, the plaintiff is entitled to the issuance of a new order of reference. Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

10 SOULEYMAN DOUGHIM, Respondent, v M & US PROPERTY, INC., et al., Appellants. [990 NYS2d 816]—

Negligence—Maintenance of Premises—Trip and Fall

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Richmond County (Fusco, J.), dated December 4, 2013, which denied their motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

On July 9, 2010, the plaintiff allegedly was injured when he tripped and fell over a lock that was affixed to a set of sidewalk-level cellar doors. It is undisputed that the cellar doors were adjacent to the front of a store located at 442 86th Street, in Brooklyn. At the time of the accident, the defendant General Nutrition Center, Inc., doing business as GNC Live Well, leased the store, and the defendant M & US Property, Inc., owned the premises. The plaintiff commenced this action alleging that the defendants were negligent in the maintenance of their property. The defendants subsequently moved for summary judgment dismissing the complaint, contending that the lock over which the plaintiff allegedly tripped was not a dangerous condition, was trivial as a matter of law and therefore not actionable, or was open and obvious. The Supreme Court denied the defendants' motion.

An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition (*Boudreau-Grillo v Ramirez*, 74 AD3d 1265 [2010]; *Cupo v Karfunkel*, 1 AD3d 48, 51 [2003]; *Farrar v Teicholz*, 173 AD2d 674, 676 [1991]). “[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted]; see *Nagin v K.E.M. Enters., Inc.*, 111 AD3d 901 [2013]). However, liability will not be imposed for trivial defects which do not constitute a trap or nuisance (see *Dery v K Mart Corp.*, 84 AD3d 1303, 1304 [2011]; *Richardson v JAL Diversified Mgt.*, 73 AD3d 1012, 1013 [2010]; *Joseph v Villages at Huntington Home Owners Assn., Inc.*, 39 AD3d 481 [2007]). “In determining whether a defect is trivial as a matter of law, a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury” (*Fontana v Winery*, 84 AD3d 863, 864-865 [2011] [internal quotation marks omitted]; see *Trincere v County of Suffolk*, 90 NY2d at 978).

While a possessor of real property has a duty to maintain that property in a reasonably safe condition (see *Basso v Miller*, 40 NY2d 233, 241 [1976]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 854 [2011]), there is no duty to protect or warn

against an open and obvious condition, which as a matter of law is not inherently dangerous (*see Mathew v A.J. Richard & Sons*, 84 AD3d 1038, 1039 [2011]; *Katz v Westchester County Healthcare Corp.*, 82 AD3d 712, 713 [2011]; *Tyz v First St. Holding Co., Inc.*, 78 AD3d 818, 819 [2010]; *Cupo v Karfunkel*, 1 AD3d at 52). “Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances” (*Katz v Westchester County Healthcare Corp.*, 82 AD3d at 713). “A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted” (*Katz v Westchester County Healthcare Corp.*, 82 AD3d at 713; *see Stoppeli v Yacenda*, 78 AD3d 815, 816 [2010]; *Villano v Strathmore Terrace Homeowners Assn., Inc.*, 76 AD3d 1061, 1062 [2010]).

Here, the defendants failed to establish, *prima facie*, that the lock, over which the plaintiff allegedly tripped and fell, was not a dangerous condition (*see Jelle v Etfried Realty Corp.*, 266 App Div 981 [1943]; *cf. Kempe v Concourse Realty Corp.*, 237 App Div 708 [1933]). Furthermore, the defendants failed to make a *prima facie* showing that the lock was trivial and therefore not actionable (*see Deviva v Bourbon St. Fine Foods & Spirit*, 116 AD3d 654 [2014]; *Nagin v K.E.M. Enters., Inc.*, 111 AD3d at 901), or that the lock was open and obvious and not inherently dangerous (*see Stoppeli v Yacenda*, 78 AD3d at 816; *Gradwohl v Stop & Shop Supermarket Co., LLC*, 70 AD3d 634, 637 [2010]). Since the defendants failed to demonstrate their *prima facie* entitlement to judgment as a matter of law, we need not consider the sufficiency of the plaintiff’s opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Accordingly, the Supreme Court properly denied the defendants’ motion for summary judgment dismissing the complaint. Eng, P.J., Leventhal, Sgroi and Maltese, JJ., concur.

11 WILLIAM FAJARDO, Respondent, v MORDECHAI SCHAPIRO et al., Appellants. [990 NYS2d 269]—

Negligence—Maintenance of Premises—Fall Down Staircase

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Bayne, J.), dated February 8, 2013, which denied their motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants’ motion for summary judgment dismissing the complaint is granted.

The plaintiff allegedly slipped on construction debris, lost his balance, and fell on the landing at the top of an interior staircase

connecting the basement to the first floor of a premises owned by the defendants. According to the plaintiff, the staircase was not equipped with any handrails, and when he reached out as he began to fall, there was nothing to grab. The plaintiff commenced this action to recover damages for personal injuries. The defendants moved for summary judgment dismissing the complaint, contending, inter alia, that they did not create or have actual or constructive notice of the alleged hazardous condition and that the subject staircase was not in violation of any applicable statute, code, or regulation. The Supreme Court denied the motion.

The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating, inter alia, that they did not create the alleged hazardous condition or have actual or constructive notice of it (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]), and that Administrative Code of the City of New York § 27-375 was not applicable to the subject staircase, since the staircase merely connected the basement to the first floor and did not serve as a required exit from the building (*see* Administrative Code §§ 27-232, 27-375; *Cusumano v City of New York*, 15 NY3d 319, 324 [2010]; *Kociecki v EOP-Midtown Props., LLC*, 66 AD3d 967, 968 [2009]; *Schwartz v Hersh*, 50 AD3d 1011, 1012 [2008]; *Dooley v Vornado Realty Trust*, 39 AD3d 460 [2007]; *Mansfield v Dolcemasclo*, 34 AD3d 763, 764 [2006]). In opposition, the plaintiff failed to raise a triable issue of fact.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court should have granted the defendants' motion for summary judgment dismissing the complaint. Hall, J.P., Roman, Duffy and LaSalle, JJ., concur.

12 FLAGSTAR BANK, FSB, Respondent, v STANLEY TITUS et al., Appellants, et al., Defendants. [991 NYS2d 110]—

Mortgages—Foreclosure—Motion to Restore Action to Mortgage Foreclosure Settlement Conference Part Calendar

In an action to foreclose a mortgage, the defendants Stanley Titus and Rose M. Andre-Fleurisma appeal from an order of the Supreme Court, Nassau County (Adams, J.), dated June 27, 2012, which, after settlement conferences pursuant to CPLR 3408, denied their motion, inter alia, to restore the action to the mortgage foreclosure settlement conference part calendar.

Ordered that the order is affirmed, with costs.

The Supreme Court did not improvidently exercise its discretion in denying the appellants' motion, inter alia, to restore the

action to the mortgage foreclosure settlement conference part calendar. Although CPLR 3408 (f) provides that “[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible” (see *US Bank N.A. v Sarmiento*, 121 AD3d 187 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 11 [2013]), the record does not support the appellants’ contention that the plaintiff failed to act in good faith. Since the financial documents relied upon by the appellants in support of their application for a loan modification to establish their monthly income surplus were not submitted to the Supreme Court in support of the instant motion, the appellants cannot rely upon these documents on appeal (see CPLR 5526, 2214 [c]; *Broida v Bancroft*, 103 AD2d 88, 93 [1984]; see also *Biscione v JetBlue Airways Corp.*, 103 AD3d 158, 179-180 [2012]; *Sheedy v Pataki*, 236 AD2d 92, 97-98 [1997]; *Loeb v Tanenbaum*, 124 AD2d 941, 942 [1986]). Nor did the affirmation of the appellants’ attorney suffice as evidentiary proof of their income, as it was not based upon personal knowledge (see *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2006]).

Moreover, the appellants’ contentions that the plaintiff’s counsel did not have knowledge about the case, the proper authority to settle the matter, or the appropriate documents at the conferences are improperly raised for the first time on appeal and, thus, are not properly before this Court (see *Arnold v New City Condominiums Corp.*, 88 AD2d 578, 579 [1982]). Mastro, J.P., Leventhal, Lott and Miller, JJ., concur.

13 JUSTIN GORENKOFF, Respondent, v JOSEPH NAGAR et al., Appellants. [990 NYS2d 604]—

Motor Vehicles—Injuries to Passengers—Summary Judgment

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Kings County (Lewis, J.), dated May 10, 2013, which granted the plaintiff’s motion for summary judgment on the issue of liability.

Ordered that the order is reversed, on the law, with costs, and the plaintiff’s motion for summary judgment on the issue of liability is denied.

On November 21, 2011, the plaintiff allegedly was injured as he alighted from a taxicab owned by the defendant Joseph Nagar and operated by the defendant Ismail A. Girgin. The plaintiff claims that as he was exiting the taxicab, the vehicle suddenly moved, and he was struck by the frame of its rear-left door, causing him to fall to the ground and sustain injuries. The Supreme Court granted the plaintiff’s motion for summary judgment on the issue of liability. We reverse.

In a personal injury action, to prevail on a motion for summary judgment on the issue of liability, a plaintiff has the burden of establishing, prima facie, not only that the defendant was negligent, but that the plaintiff was free from comparative fault (see *Thoma v Ronai*, 82 NY2d 736, 737 [1993]; *Pollack v Margolin*, 84 AD3d 1341, 1342 [2011]; *Mackenzie v City of New York*, 81 AD3d 699, 700 [2011]), since there can be more than one proximate cause of an accident (see *Lanigan v Timmes*, 111 AD3d 797, 798 [2013]; *Allen v Echols*, 88 AD3d 926, 926 [2011]; *Bonilla v Calabria*, 80 AD3d 720, 720 [2011]).

Here, in support of his motion for summary judgment on the issue of liability, the plaintiff relied, inter alia, upon his own deposition testimony and that of the defendant taxicab driver. The plaintiff argued that the taxicab driver violated Vehicle and Traffic Law § 1162 by moving the taxicab before it was safe to do so and thus, the defendants were per se negligent. However, according to the deposition testimony of the taxicab driver, when the taxicab had reached the requested location, the plaintiff asked to be dropped off near the curb. According to the defendant taxicab driver, as he was in the process of acceding to this request, the plaintiff opened the door and attempted to exit the vehicle while it was still moving. Given the conflicting versions in the proffered testimony as to how the accident occurred, the plaintiff failed to demonstrate his prima facie entitlement to judgment as a matter of law (see *Thoma v Ronai*, 82 NY2d at 737; *Burnett v Reisenauer*, 107 AD3d 656 [2013]; *Maiello v Kirchner*, 98 AD3d 481, 483 [2012]; *Reyes v Marchese*, 96 AD3d 926, 927 [2012]; *Fogel v Rizzo*, 91 AD3d 706, 707 [2012]). Accordingly, the Supreme Court should have denied the plaintiff's motion for summary judgment on the issue of liability regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The plaintiff's remaining contention is without merit. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

14 GROVICK PROPERTIES, LLC, Appellant, v 83-10 ASTORIA BOULEVARD, LLC, et al., Respondents, et al., Defendant. [990 NYS2d 601]—

Attorney and Client—Disqualification—Waiver of Conflict of Interest

In an action, inter alia, to recover damages for the costs incurred in removing petroleum contamination and restoring the subject property to levels satisfactory to the New York State Department of Environmental Conservation, the plaintiff appeals from an order of the Supreme Court, Nassau County (Driscoll, J.), dated February 27, 2012, which granted the mo-

tion of the defendants 83-10 Astoria Boulevard, LLC, Jane Perlow, individually and as trustee of the Sidney Esikoff Grat #1, Grace Havasy, individually and as trustee of the Sidney Esikoff Grat #1, and Marion Sternberg, individually and as trustee of the Sidney Esikoff Grat #1, to disqualify attorney Jon Schuyler Brooks and the law firm of Phillips Nizer, LLP, as counsel for the plaintiff.

Ordered that the order is reversed, on the law, with costs, and the respondents' motion to disqualify attorney Jon Schuyler Brooks and the law firm of Phillips Nizer, LLP, as counsel for the plaintiff is denied.

In April 2004, the plaintiff, Grovick Properties, LLC (hereinafter Grovick), purchased the subject commercial property located at 83-10 Astoria Boulevard, in East Elmhurst (hereinafter the property), from the defendant 83-10 Astoria Boulevard, LLC (hereinafter Astoria). The law firm of Ruskin Moscou Faltischek, P.C. (hereinafter RMF), to which attorney Jon Schuyler Brooks was of counsel, represented Grovick on the purchase of the property. The property had been previously contaminated by petroleum. At the time of the closing, the plaintiff and Astoria learned that the State of New York "desired to place an environmental lien" upon the property resulting from the costs of remedial efforts in abating the discharge of petroleum. Apparently, if the parties closed title prior to the lien being filed, the State threatened to seek reimbursement from the plaintiff of those costs. In an effort to timely close title, Astoria and the plaintiff entered into an escrow agreement, whereby Astoria placed \$500,000 of the purchase price in escrow, in effect, to protect the plaintiff against any action by the State.

Thereafter, Astoria and the defendants Jane Perlow, Grace Havasy, and Marion Sternberg, all individually and as trustees of the Sidney Esikoff Grat #1 (hereinafter collectively with Astoria, the Astoria defendants), retained Brooks and RMF to represent them in connection with certain claims made by the State for reimbursement of the cleanup and removal costs. The Astoria defendants signed a retainer agreement and a waiver. The waiver stated, in relevant part:

"Astoria now desires to engage this firm to represent it against potential claims made by the State arising from or relating to the discharge of petroleum at or from the [property]. Prior to accepting this engagement, we informed you that we continue to represent GROVICK with regard to the now-closed transaction between Astoria and GROVICK, as well as other matters. Notwithstanding this information, and the potential conflict contained therein, you requested and instructed this

firm to proceed in its representation of Astoria and each of its members for the purposes stated in the letter of engagement.

“In connection therewith, Astoria and each of its Members hereby waive any and all claims of conflict of interest or potential conflict of interest that may arise out of the [sic] our representation of Astoria on the one hand, and any work we have performed, now perform, or may perform for GROVICK or its principals (including Jeffrey Novick). Furthermore, in the event Astoria at any time for any reason elects to discontinue its engagement of this firm, or should an adverse relationship arise between ASTORIA and GROVICK, you acknowledge and agree that we may continue without restriction to represent GROVICK and its principals in any and all matters, including those that arise from or relate to the [property].”

In 2009, the State commenced a cost-recovery action against the Astoria defendants seeking approximately \$657,000 in clean-up costs. Brooks continued to represent the Astoria defendants in the claims by the State. In January, 2010, the Astoria defendants terminated Brooks’s representation.

On or about February 17, 2010, Brooks, as counsel for the plaintiff, sought the release of the escrow funds. The Astoria defendants and the State objected to such release.

On or about September 14, 2010, the plaintiff, represented by Brooks, commenced this action to recover its costs in the amount of \$534,292 for removing the petroleum contamination. In a letter dated June 2, 2011, the Astoria defendants demanded that Brooks withdraw as counsel for the plaintiff. Thereafter, in November 2011, the Astoria defendants moved to disqualify Brooks and the law firm of Phillip Nizer, LLP, where Brooks is now a partner, as counsel for the plaintiff. The Supreme Court granted that motion. We reverse.

“ ‘[T]he disqualification of an attorney is a matter which rests within the sound discretion of the court. A party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted, and the movant bears the burden on the motion’ ” (*Matter of Aaron W. v Shannon W.*, 96 AD3d 960, 962 [2012], quoting *Campolongo v Campolongo*, 2 AD3d 476, 476 [2003]). Here, the Supreme Court improvidently exercised its discretion in granting the motion to disqualify Brooks and Phillip Nizer, LLP, as counsel for the plaintiff. Pursuant to the written waiver, the Astoria defendants specifically waived any conflict of interest that might arise from Brooks’s representation of the plaintiff. The waiver fully informed the Astoria defendants of the potential conflict of

interest and, by executing the waiver, the Astoria defendants consented to have Brooks represent them notwithstanding that conflict (see *St. Barnabas Hosp. v New York City Health & Hosps. Corp.*, 7 AD3d 83, 90-91 [2004]). Under the facts of this case, the Astoria defendants should not be permitted to compel the disqualification of Brooks and Phillips Nizer, LLP, simply because the representation to which they consented now involves litigation (see *Centennial Ins. Co. v Apple Bldrs. & Renovators, Inc.*, 60 AD3d 506 [2009]). Rivera, J.P., Leventhal, Austin and Roman, JJ., concur. **[Prior Case History: 2012 NY Slip Op 30593(U).]**

15 CAROL A. HECHT, Respondent, v KIM P. SACCOCCIO, as Executrix of ROSEMARIE A. COLONNA, Deceased, Appellant. [989 NYS2d 913]—

Negligence—Maintenance of Premises—Summary Judgment

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Suffolk County (Garguilo, J.), dated May 31, 2013, which denied her motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, without costs or disbursements.

The plaintiff alleges that she tripped and fell over a dislodged or loose piece of slate tile on an exterior step abutting premises owned by the defendant's decedent. After the completion of discovery, the defendant moved for summary judgment dismissing the complaint. The Supreme Court denied the motion.

To demonstrate prima facie entitlement to judgment as a matter of law in a premises liability case, a defendant owner must establish that it did not create the condition that allegedly caused the fall or have actual or constructive notice of that condition (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Only after the defendant has satisfied his or her threshold burden will the court examine the sufficiency of the plaintiff's opposition (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). On a defendant's motion for summary judgment, it is not the plaintiff's burden in opposing the motion to establish that the defendants had actual or constructive notice of the hazardous condition; rather, it is the defendant's burden to establish the lack of notice as a matter of law (see *Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [2001]). Thus, a defendant seeking summary judgment dismissing the complaint based on the lack of notice must establish, prima facie, the absence of notice (see *Goldin v Riker*, 273 AD2d 197, 198 [2000]).

Here, the defendant failed to establish, as a matter of law, that her decedent had neither actual nor constructive notice of the allegedly defective condition (*see Garriss v Lindemann*, 117 AD3d 785 [2014]; *Seabury v County of Dutchess*, 38 AD3d 752 [2007]). Furthermore, contrary to the defendant's alternate contention, the defendant's submissions on the motion failed to establish that the condition complained of was neither defective nor dangerous as a matter of law (*see Pellegrino v Trapasso*, 114 AD3d 917 [2014]).

Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint. Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur.

16 INTA-BORO ACRES, INC., Respondent, v MATTOO & BHAT MEDICAL ASSOCIATES, P.C., Doing Business as AV CARE, Appellant, et al., Defendants. [989 NYS2d 905]—

Motions and Orders—Motion to Vacate Default

In an action to recover damages for breach of contract, the defendant Mattoo & Bhat Medical Associates, P.C., doing business as AV Care, appeals from so much of an order of the Supreme Court, Queens County (Gavrin, J.), dated July 24, 2013, as denied that branch of its motion which was to vacate so much of a judgment of the same court entered April 11, 2012, as was entered against it upon its failure to appear or answer the complaint and for leave to serve a late answer.

Ordered that the order is reversed insofar as appealed from, on the facts and in the exercise of discretion, without costs or disbursements, and that branch of the appellant's motion which was to vacate so much of the judgment entered April 11, 2012, as was entered against it upon its failure to appear or answer the complaint and for leave to serve a late answer is granted.

Considering, inter alia, the absence of prejudice to the plaintiff, the potentially meritorious nature of the defense, and the public policy in favor of resolving cases on the merits, the Supreme Court should have granted that branch of the appellant's motion which was to vacate so much of a judgment entered April 11, 2012, as was entered against it upon its failure to appear or answer the complaint and for leave to serve a late answer (*see Albin v First Nationwide Network Mtge. Co.*, 188 AD2d 575 [1992]; *see also I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]). Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur. **[Prior Case History: 2013 NY Slip Op 32076(U).]**

17 PATRICIA KEIZER, Respondent, v SCO FAMILY OF SERVICES, Appellant, et al., Defendant. [991 NYS2d 103]—

Social Services—Foster Care—Liability of Agency for Negligent Placement and Supervision

In an action to recover damages for personal injuries, the defendant SCO Family of Services appeals from an order of the Supreme Court, Kings County (Martin, J.), dated December 19, 2012, which denied its motion for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendant SCO Family of Services for summary judgment dismissing the complaint insofar as asserted against it is granted.

The plaintiff, the subject infant's biological mother, commenced this action on behalf of the infant, alleging that, while placed in the foster home of the defendant Freda Humphrey, a foster parent selected and certified by the defendant SCO Family of Services (hereinafter the appellant), Humphrey failed to seek medical attention for the infant's abdominal complaints which resulted in his hospitalization for a ruptured appendix. The Supreme Court denied the appellant's motion for summary judgment dismissing the complaint insofar as asserted against it.

Counties and foster care agencies cannot be vicariously liable for the negligent acts of foster parents, who are essentially contract service providers (*see Blanca C. v County of Nassau*, 103 AD2d 524, 530-532 [1984], *aff'd* 65 NY2d 712 [1985]). Accordingly, the appellant was entitled to judgment as a matter of law dismissing so much of the complaint as alleged that it is vicariously liable for Humphrey's actions or inactions (*see Blanca C. v County of Nassau*, 65 NY2d 712 [1985]; *Sinkler v County of Monroe*, 127 AD2d 1006 [1987]).

However, counties and foster care agencies may be sued to recover damages for negligence in the selection of foster parents and in supervision of the foster home (*see Liang v Rosedale Group Home*, 19 AD3d 654, 655 [2005]; *Merice v County of Westchester*, 305 AD2d 383, 384 [2003]; *Bartels v County of Westchester*, 76 AD2d 517, 521-522 [1980]). In order to establish its prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as alleged that it engaged in negligent placement and supervision, the appellant had to establish, prima facie, that it did not have sufficiently specific knowledge or notice of the alleged dangerous conduct which caused the infant's injuries (*see Andrew S. v Gristina*, 97 AD3d 651, 652 [2012]; *McCabe v Dutchess County*, 72 AD3d 145, 151 [2010]; *M.S. v County of Orange*, 64 AD3d 560, 561 [2009]). In other words, the appellant had to show that the third-party acts

could not have been reasonably anticipated (*see Andrew S. v Gristina*, 97 AD3d at 652; *M.S. v County of Orange*, 64 AD3d at 561; *Liang v Rosedale Group Home*, 19 AD3d at 655).

Here, the appellant sustained its initial burden of demonstrating that it did not have specific knowledge or notice of the infant's illness and it was not foreseeable that Humphrey would fail to seek medical attention for the infant's abdominal complaints (*see McCabe v Dutchess County*, 72 AD3d at 151; *M.S. v County of Orange*, 64 AD3d at 561; *Simpson v County of Dutchess*, 35 AD3d 712 [2006]; *Liang v Rosedale Group Home*, 19 AD3d at 655; *Lillian C. v Administration for Children's Servs.*, 48 AD3d 316 [2008]; *Ung v City of New York*, 279 AD2d 425 [2001]). In opposition, the plaintiff failed to raise a triable issue of fact. The affidavits of the plaintiff and the infant, which contained statements claiming that the infant told his caseworker about his abdominal pain and the caseworker did nothing, contradicted the infant's earlier deposition testimony that he did not know if he told his caseworker about his abdominal pain. Thus, the statements contained in the affidavits appear to have been an attempt to create a feigned issue of fact specifically designed to avoid the consequences of the infant's earlier deposition testimony (*see Nai Ren Jiang v Shane Yeh*, 95 AD3d 970, 972 [2012]; *Kokin v Key Food Supermarket, Inc.*, 90 AD3d 850, 851 [2011]; *Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD3d 1307, 1308-1309 [2011]).

Accordingly, the Supreme Court should have granted the appellant's motion for summary judgment dismissing the complaint insofar as asserted against it. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

18 BEVERLY MIDDLETON, as Administratrix of the Estate of VIRGINIA BOYD, Deceased, Respondent, v HOWARD RUSSELL et al., Appellants. [989 NYS2d 906]—

Disclosure—Scope of Disclosure

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Nassau County (Phelan, J.), dated January 2, 2014, which denied their motion to vacate the note of issue and to compel certain disclosure, on the ground that the defendants did not request a conference before making the motion in accordance with the court's part rules.

Ordered that the order is reversed, on the facts and in the exercise of discretion, without costs or disbursements, and the matter is remitted to the Supreme Court, Nassau County, for a determination of the defendants' motion on the merits.

“The Supreme Court has broad discretion in supervising disclosure and in resolving discovery disputes” (*Clarke v Clarke*, 113 AD3d 646, 646 [2014]; see *Friel v Papa*, 87 AD3d 1108, 1110 [2011]). “However, the Appellate Division is vested with its own discretion and corresponding power to substitute its own discretion for that of the trial court” (*Flynn v City of New York*, 101 AD3d 803, 804 [2012] [internal quotation marks omitted]).

Here, the Supreme Court improvidently exercised its discretion by denying the defendants’ motion to compel certain disclosure, on the ground that the defendants neglected to comply with its part rules requiring advance notice of the motion so that the court could determine whether the matter should be conferenced. While such rules are permissible for the purpose of assisting the court in its supervision of disclosure, the application of the subject rule to the instant matter so as to deny the defendants’ motion was improper in view of the strong indication that the defendants are entitled to additional disclosure (see *Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]; *Bravo v Vargas*, 113 AD3d 577 [2014]; *Amoroso v City of New York*, 66 AD3d 618 [2009]) and the demonstrated inability of the parties to reach an agreement regarding the requested disclosure. Accordingly, the Supreme Court should have decided the defendants’ motion on the merits, and we remit the matter for that purpose. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

19 MMI TRADING, INC., Appellant, v NATHAN H. KELMAN, INC., et al., Respondents. [989 NYS2d 911]—

Corporations—Capacity to Sue—Winding Up Affairs Following Dissolution

In an action to recover damages for fraud and breach of contract, the plaintiff appeals from an order of the Supreme Court, Nassau County (Janowitz, J.), entered October 1, 2013, which granted that branch of the defendants’ motion which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint.

Ordered that the order is reversed, on the law, with costs, that branch of the defendants’ motion which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint is denied, and the matter is remitted to the Supreme Court, Nassau County, for a determination of that branch of the defendants’ motion which was pursuant to CPLR 510 (3) to change venue from Nassau County to Albany County.

The plaintiff was incorporated in 2003. Both the plaintiff and the defendants were in the business of scrap metal recycling and entered into two agreements, on or about June 18, 2009, and August 5, 2009, respectively, pursuant to which the defend-

ants agreed to sell and ship certain scrap metal to the plaintiff for subsequent export to the plaintiff's customer in India. Sometime in early October 2009, after the containers shipped by the defendants had arrived in India, the plaintiff notified the defendants that it deemed the delivered goods to be nonconforming.

One year later, by Proclamation/Annulment of Authority dated October 27, 2010 (hereinafter the October 2010 proclamation), the New York Secretary of State dissolved the plaintiff on the ground that the plaintiff had failed to pay its franchise taxes. Subsequently, in April 2013, the plaintiff commenced this action against the defendants in the Supreme Court, Nassau County, to recover damages for fraud and breach of contract. In July 2013, the defendants moved pursuant to CPLR 3211 (a) (3) to dismiss the complaint on the ground that the plaintiff did not have the legal capacity to commence this action, or alternatively, pursuant to CPLR 510 (3) to change venue from Nassau County to Albany County.

The Supreme Court granted that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint, and did not reach the alternative branch of the defendants' motion which was pursuant to CPLR 510 (3) to change venue from Nassau County to Albany County. We reverse and remit the matter to the Supreme Court, Nassau County, for a determination of that branch of the defendants' motion which was to change venue.

Pursuant to Tax Law § 203-a, a corporation can be dissolved by proclamation of the Secretary of State for failure to pay its franchise taxes. A dissolved corporation may not carry on new business (*see* Business Corporation Law § 1005 [a] [1]) and no longer has the right to commence an action in the courts of this State, except in specific circumstances permitted by statute (*see De George v Yusko*, 169 AD2d 865, 867 [1991]; *Lorisa Capital Corp. v Gallo*, 119 AD2d 99, 109 [1986]). Business Corporation Law § 1006 provides, in relevant part, that a dissolved corporation "may continue to function for the purpose of winding up the affairs of the corporation . . . The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 . . . or 1008."

A corporation therefore "continues to exist after dissolution for the winding up of its affairs, and a dissolved corporation may sue or be sued on its obligations, including contractual obligations and contingent claims, until its affairs are fully

adjusted” (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 661 [2009]; see *Wells v Ronning*, 269 AD2d 690, 692 [2000]; *Matter of Rodgers v Logan*, 121 AD2d 250, 253 [1986]). The Business Corporation Law requires that the claim was to have existed before dissolution (see *Matter of Ford v Pulmosan Safety Equip. Corp.*, 52 AD3d 710, 711 [2008]; *Gutman v Club Mediterranee Intl.*, 218 AD2d 640, 641 [1995]).

Here, the plaintiff’s claims against the defendants were existing as of October 2009 when the plaintiff notified the defendants that it had deemed the goods they had sent to be nonconforming. Thus, although the plaintiff had been dissolved by the October 2010 proclamation, it had retained the capacity to maintain this action against the defendants to adjudicate its pre-dissolution claims (see Business Corporation Law § 1006 [b]; *Moran Enters., Inc. v Hurst*, 66 AD3d 972, 975 [2009]; *Matter of Rodgers v Logan*, 121 AD2d at 253). Moreover, the 2½ years between the time of the plaintiff’s dissolution and the filing of the complaint was still a reasonable time period under the circumstances of this case, including the fact that the claims against the defendants accrued prior to the dissolution (*cf. Lance Intl., Inc. v First Natl. City Bank*, 86 AD3d 479, 480 [2011]; *Moran Enters., Inc. v Hurst*, 66 AD3d at 973-975).

The Supreme Court did not reach that branch of the defendants’ motion which was pursuant to CPLR 510 (3) to change venue from Nassau County to Albany County since it had granted that branch of the defendants’ motion which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint. However, in light of this Court’s determination, the matter must be remitted to the Supreme Court, Nassau County, for a determination of that branch of the defendants’ motion which was to change venue. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

20 ANNE MARIE MURTHA, Respondent, v TOWN OF HUNTINGTON et al., Defendants, and COUNTY OF SUFFOLK, Appellant. [991 NYS2d 98]—

Municipal Corporations—Notice of Claim—Amendment

In an action to recover damages for personal injuries, the defendant County of Suffolk appeals from an order of the Supreme Court, Suffolk County (Molia, J.), dated October 22, 2013, which granted the plaintiff’s motion for leave to serve an amended notice of claim.

Ordered that the order is reversed, on the facts and in the exercise of discretion, with costs, and the plaintiff’s motion for leave to serve an amended notice of claim is denied.

On or about August 16, 2012, the plaintiff served a notice of claim alleging that, on June 3, 2012, she was walking along the north crosswalk on Larkfield Road at its intersection with Pulaski Road in the Town of Huntington, Suffolk County, when she tripped and fell, sustaining personal injuries. In her verified complaint dated April 23, 2013, approximately eight months after service of the notice of claim, the plaintiff again alleged that she was injured at that same specific location. The plaintiff subsequently moved, on July 17, 2013, for leave to serve an amended notice of claim, conceding that the original notice of claim contained incorrect information as to the location of her accident. The defendant County of Suffolk opposed the motion, contending that the incorrect information about the location of the accident in the notice of claim and verified complaint prejudiced the County by depriving it of the opportunity to conduct a proper and meaningful investigation “while the facts surrounding the incident were still fresh” (*Charleston v Incorporated Vil. of Cedarhurst*, 62 AD3d 641, 642 [2009]; see *Pelaez v City of New York*, 79 AD3d 1115 [2010]). By order dated October 22, 2013, the Supreme Court granted the plaintiff’s motion.

A court may, in its discretion, grant a motion for leave to amend a notice of claim which has been served where it determines that two conditions have been met: first, the mistake, omission, irregularity, or defect must have been made in good faith; and second, it must appear that the public corporation has not been prejudiced thereby (see *Canelos v City of New York*, 37 AD3d 637, 638 [2007]). Since bad faith by the plaintiff was not asserted, the only issue presented here is whether service of the amended notice of claim would prejudice the County. The record indicates that the plaintiff’s incorrect information as to the accident location prejudiced the County in its ability to conduct a prompt and meaningful investigation of the accident site (see *id.*; *Serrano v City of New York*, 143 AD2d 652, 653 [1988]; *Matter of Malla v City of New York*, 129 AD2d 580 [1987]), especially since the County notified the plaintiff by letter dated August 31, 2012, that it did not own or maintain the crosswalk located on Larkfield Road, the location of the accident provided in the notice of claim (see *Pelaez v City of New York*, 79 AD3d at 1116; *Rivera v New York City Hous. Auth.*, 235 AD2d 296 [1997]).

Moreover, the record does not support the plaintiff’s assertion that the notice of claim, which included attached photographs of an unidentified crosswalk and a circular pavement defect, as well as her testimony at the General Municipal Law § 50-h hear-

ing, provided the County with accurate information sufficient to allow for a proper inspection (*see Austin v City of Yonkers*, 243 AD2d 597 [1997]). Finally, the plaintiff's contention that the circular pavement defect was essentially unchanged since the date of the accident did not constitute a satisfactory substitute for the County's opportunity to conduct a meaningful investigation (*see Pelaez v City of New York*, 79 AD3d at 1116; *see Eherts v County of Orange*, 215 AD2d 524, 525 [1995]; *Serrano v City of New York*, 143 AD2d at 653).

Considering the prejudice resulting from the inaccurate information as to the location of the plaintiff's accident set forth in the original notice of claim, the Supreme Court improvidently exercised its discretion in granting the plaintiff's motion for leave to serve an amended notice of claim (*see Austin v City of Yonkers*, 243 AD2d 597 [1997]; *Setton v City of New York*, 174 AD2d 723, 724 [1991]). Chambers, J.P., Austin, Hinds-Radix and Duffy, JJ., concur.

21 AGNES ANN PEPE, Appellant, v SBCL, INC., Doing Business as ZACHARY'S, Respondent. [989 NYS2d 916]—In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Iannacci, J.), entered March 15, 2013, which granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

In support of its motion for summary judgment, the defendant established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not have actual or constructive notice of the defective condition alleged (*see Mauge v Barrow St. Ale House*, 70 AD3d 1016, 1017 [2010]; *Perlongo v Park City 3 & 4 Apts., Inc.*, 31 AD3d 409, 410-411 [2006]). There is no claim on this appeal that the defendant created the condition.

In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendant had actual or constructive notice of the condition alleged (*see Sinclair v Chau*, 117 AD3d 713 [2014]; *see also Warren v Walmart Stores, Inc.*, 105 AD3d 732, 733 [2013]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

22 BARRY S. ROSEMAN, Individually and as Administrator of the Estate of SHIRLEY ROSEMAN, Deceased, Appellant, v ROBERT BARANOWSKI, M.D., et al., Respondents, et al., Defendants. [990 NYS2d 621]—

Limitation of Actions—Defendants United in Interest—Relation-Back

Doctrine

In a consolidated action, inter alia, to recover damages for medical malpractice, etc., the plaintiff appeals from an order of the Supreme Court, Suffolk County (Whelan, J.), dated June 27, 2012, which denied his motion pursuant to CPLR 203 and 3025 (b) for leave to serve a supplemental summons and amended complaint adding Seth Persky as a defendant.

Ordered that the order is reversed, on the law and the facts, with costs, and the plaintiff's motion pursuant to CPLR 203 and 3025 (b) for leave to serve a supplemental summons and amended complaint adding Seth Persky as a defendant is granted.

On March 12, 2008, the plaintiff's decedent underwent a colonoscopy at Long Island Digestive Disease Consultants, P.C. (hereinafter Long Island Digestive). The following day, she was admitted to John T. Mather Memorial Hospital (hereinafter the hospital) with internal bleeding. She was discharged from the hospital on March 15, 2008, but, three days later, after experiencing additional bleeding, she was readmitted to the hospital. The decedent's condition continued to deteriorate during this second admission and, on March 20, 2008, she died.

The plaintiff commenced an action against the physician Robert Baranowski, Long Island Digestive, and the hospital on or about November 30, 2009. Thereafter, on or about March 15, 2010, he commenced an action against Port Jefferson Internal Medicine Associates, P.C., and the physicians Eugene Coman and Richard Balter. The two actions were consolidated by order dated July 1, 2010.

On or about March 20, 2012, after conducting depositions of Baranowski and Coman, among others, the plaintiff moved for an order pursuant to CPLR 3025 (b) for leave to serve a supplemental summons and amended complaint adding the physician Seth Persky as a defendant. Recognizing that the limitations period for commencing a medical malpractice action against Persky had expired (*see* CPLR 214-a), the plaintiff also requested that, pursuant to CPLR 203 (b), the claims asserted against Persky be deemed timely since they related back to the claims interposed against the previously-named defendants. The Supreme Court denied the motion and the plaintiff appeals. We reverse.

"The relation-back doctrine, which is codified in CPLR 203 (b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are 'united in interest' " (*Shapiro v Good Samaritan*

Regional Hosp. Med. Ctr., 42 AD3d 443, 444 [2007], quoting *Buran v Coupal*, 87 NY2d 173, 177 [1995]; see *Stevens v Winthrop S. Nassau Univ. Health Sys., Inc.*, 89 AD3d 835, 836 [2011]). In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him or her as well (see *Buran v Coupal*, 87 NY2d at 178; *Mondello v New York Blood Ctr.—Greater N.Y. Blood Program*, 80 NY2d 219 [1992]; *Stevens v Winthrop S. Nassau Univ. Health Sys., Inc.*, 89 AD3d at 836; *Lopez v Wyckoff Hgts. Med. Ctr.*, 78 AD3d 664, 665 [2010]; *Cardamone v Ricotta*, 47 AD3d 659 [2008]). “The ‘linchpin’ of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period” (*Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 982 [2009]; see *Stevens v Winthrop S. Nassau Univ. Health Sys., Inc.*, 89 AD3d at 836).

Here, as the Supreme Court properly concluded, it is clear that the first prong of the three-part test was satisfied. The claims all arose out the same conduct, to wit, the alleged negligence in treating the decedent and, particularly as the complaint relates to the conduct of the physicians employed by Long Island Digestive, including Persky, in discharging her from the hospital on March 15, 2008. Similarly, the Supreme Court properly found that the second prong of the test, requiring unity of interest, was satisfied. Indeed, the defendants do not raise any challenge regarding this criterion.

However, we disagree with the Supreme Court’s conclusion that the plaintiff failed to satisfy the third prong of the test, which focuses, inter alia, on “whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all ‘and that the matter has been laid to rest as far as he [or she] is concerned’ ” (*Buran v Coupal*, 87 NY2d at 181 [emphasis omitted], quoting *Brock v Bua*, 83 AD2d 61, 70 [1981]). The decedent’s medical records include several notes signed by Persky, and clearly reference him as the physician who discharged the decedent from the hospital on March 15, 2008.

Given such facts, it was not reasonable for Persky to conclude that the plaintiff intended to proceed only against the defendants named in the original summons and complaint, especially since the decedent died soon after she was discharged from the hospital, and the complaint asserted specific allegations of negligence relating to the decedent's premature hospital discharge (*cf. Nani v Gould*, 39 AD3d 508, 510 [2007]). In addition, contrary to the conclusion of the Supreme Court, the plaintiff demonstrated that the failure to originally name Persky as a defendant was the result of a mistake, and there was no need to show that such mistake was excusable (*see Buran v Coupal*, 87 NY2d at 179-180).

Accordingly, the Supreme Court should have granted the plaintiff's motion pursuant to CPLR 203 and 3025 (b) for leave to serve a supplemental summons and amended complaint adding Persky as a defendant. Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

23 SARAH TOBY SOBEL, Respondent, v CITY OF NEW YORK et al., Respondents, and PHOENIX GIFT SHOP, Appellant, et al., Defendant. [991 NYS2d 93]—

**Negligence—Maintenance of Premises—Summary Judgment
Indemnity—Contractual Indemnification**

In an action to recover damages for personal injuries, the defendant Phoenix Gift Shop appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Ash, J.), dated November 15, 2012, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and granted that branch of the cross motion of defendants Midwood 11, LLC, and DMYI Realty Corporation which was for conditional summary judgment on the cross claim of the defendant Midwood 11, LLC, for contractual indemnification against the defendant Phoenix Gift Shop.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

On December 5, 2007, the plaintiff allegedly tripped while attempting to get into a car parked at a curb adjacent to a corner parcel of real property located in Brooklyn. That parcel was owned by the defendant Midwood 11, LLC (hereinafter Midwood), and leased by the defendant Phoenix Gift Shop (hereinafter Phoenix). The plaintiff testified at a hearing held pursuant to General Municipal Law § 50-h that she was injured because her left foot became caught on a broken part of the sidewalk as well as on a piece of broken metal that was part of a metal

sewer/catch basin that was embedded into the curb. After joinder of issue, Phoenix moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. Midwood and its property manager, the defendant DMYI Realty Corporation (hereinafter DMYI), cross-moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them and for conditional summary judgment on Midwood's cross claim for contractual indemnification against Phoenix. The Supreme Court denied Phoenix's motion and granted that branch of Midwood and DMYI's cross motion which was for conditional summary judgment on Midwood's cross claim for contractual indemnification against Phoenix. Phoenix appeals.

"Imposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the premises" (*Velez v Captain Luna's Mar.*, 74 AD3d 1191, 1192 [2010]; see *LaGuarina v Metropolitan Tr. Auth.*, 109 AD3d 793 [2013]; *Logatto v City of New York*, 51 AD3d 984 [2008]; *Canaan v Costco Wholesale Membership, Inc.*, 49 AD3d 583, 584-585 [2008]; *Schwalb v Kulaski*, 29 AD3d 563, 564 [2006]). " 'Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property' " (*Velez v Captain Luna's Mar.*, 74 AD3d at 1192, quoting *Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 957 [1992]; see *LaGuarina v Metropolitan Tr. Auth.*, 109 AD3d at 793; *Usman v Alexander's Rego Shopping Ctr., Inc.*, 11 AD3d 450, 451 [2004]). Phoenix alleges that the plaintiff fell on the curb and that it was not responsible for maintaining it. Nonetheless, Phoenix failed to meet its prima facie burden of demonstrating its entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it. The precise location of the plaintiff's fall cannot be determined from the record, and there are triable issues of fact as to whether Phoenix was responsible, under its written lease with Midwood, for the maintenance and repair of the curb and sidewalk adjacent to its property. Accordingly, the Supreme Court properly denied Phoenix's motion for summary judgment.

The Supreme Court properly granted that branch of the cross motion of Midwood and DMYI which was for conditional summary judgment on Midwood's cross claim against Phoenix for contractual indemnification. "A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no is-

sues of fact concerning the indemnitee's active negligence'' (*George v Marshalls of MA, Inc.*, 61 AD3d 931, 932 [2009]; see *Rodriguez v Tribeca 105, LLC*, 93 AD3d 655 [2012]). Midwood and DMYI established their prima facie entitlement to judgment as a matter of law by showing that they were not actively negligent. In opposition, Phoenix failed to raise a triable issue of fact.

Phoenix's remaining contentions are without merit. Dillon, J.P., Hall, Sgroi and Barros, JJ., concur.

24 3615-15 REALTY I, LLC, Respondent, v BEDFORD AVENUE ASSOCIATES I, LLC, et al., Appellants, et al., Defendant. [990 NYS2d 624]—

Motions and Orders—Motion to Dismiss—Documentary Evidence

In an action, inter alia, in effect, to compel the defendants to accept a certain bid allegedly offered by the plaintiff at a foreclosure auction of certain real property, and to direct the defendant auctioneer Andrea Blair to sell the subject real property to the plaintiff at that bid price, the defendants Bedford Avenue Associates I, LLC, and Mendel Group, Inc., appeal from (1) an order of the Supreme Court, Kings County (Bayne, J.), dated May 18, 2012, which, after a hearing (Kurtz, Ct. Atty. Ref.), denied their motion pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them and, in effect, directed judgment in favor of the plaintiff, and (2) a judgment of the same court dated July 31, 2012, which, upon the order, is in favor of the plaintiff and against them on the issue of liability.

Ordered that the appeal from the order dated May 18, 2012, is dismissed; and it is further,

Ordered that the judgment is reversed, on the law, the order dated May 18, 2012, is vacated, an order of reference dated February 10, 2012 (Bayne, J.), is vacated, an order of reference also dated February 10, 2012 (Hinds-Radix, J.), is vacated, and the matter is remitted to the Supreme Court, Kings County, for a new determination of the motion of the defendants Bedford Avenue Associates I, LLC, and Mendel Group, Inc., pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them in accordance herewith; and it is further,

Ordered that one bill of costs is awarded to the defendants Bedford Avenue Associates I, LLC, and Mendel Group, Inc., payable by the plaintiff.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with

the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

Pursuant to a judgment of foreclosure and sale dated January 13, 2011, certain real property was offered for sale at a public auction, conducted on July 14, 2011. The plaintiff alleged in its complaint that, at the auction, the defendant Mendel Group, Inc. (hereinafter Mendel), which was the judgment creditor in the underlying foreclosure action, announced an “upset price” of \$1,400,000, that is, Mendel announced that it would not entertain a bid lower than \$1,400,000, but nonetheless made an opening bid of \$100. The plaintiff further alleged in its complaint that its representative, nonparty Judy Lebovits, was the highest bidder, with a bid of \$950,000, that the bid was improperly disregarded, and that the subject property was sold to Mendel for the opening bid price of \$100. Thereafter, Mendel assigned its bid to the defendant Bedford Avenue Associates I, LLC (hereinafter Bedford), which obtained a deed for the property.

The plaintiff commenced this action against Mendel and Bedford (hereinafter together the Mendel defendants), as well as the defendant auctioneer Andrea Blair seeking, *inter alia*, to set aside the transfer of title to the property to Bedford, in effect, to compel the defendants to accept its alleged bid to purchase the property for \$950,000, and to compel Blair, who was appointed to sell the subject property at the public auction, to sell the subject property to it at the alleged \$950,000 bid price. The Mendel defendants moved pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them, arguing, among other things, that any statement made by Lebovits at the auction did not constitute a bid.

In an order dated February 10, 2012, the Supreme Court (Bayne, J.), referred the matter to a referee “to determine issues of fact and hold a hearing regarding the issues raised in the motion and opposition.” A second order of reference, also dated February 10, 2012, issued by the Administrative Judge for Civil Matters (Hinds-Radix, J.), made upon the order of Judge Bayne, referred the matter to a Court Attorney Referee to hear and determine the issues raised in the motion to dismiss. In the referee’s determination dated March 26, 2012, made after a hearing, the referee determined that there was no valid bid by Lebovits, and that there was no evidence that the auction was conducted improperly. In an order dated May 18, 2012, the Supreme Court, contrary to the conclusion reached by the

referee, denied the Mendel defendants' motion to dismiss the complaint insofar as asserted against them and, in effect, directed the entry of judgment in favor of the plaintiff on the issue of liability. In that order, the Supreme Court determined that Lebovits made a \$950,000 bid on behalf of the plaintiff at the auction. In a judgment dated July 31, 2012, the Supreme Court, *inter alia*, rejected the findings and determinations of the referee, and, upon the order dated May 18, 2012, directed that the deed to Bedford be vacated and the subject property be sold to the plaintiff for the sum of \$950,000.

"A motion to dismiss on the basis of CPLR 3211 (a) (1) should be granted only where the documentary evidence that forms the basis of the defense is such that it refutes the plaintiff's factual allegations or conclusively disposes of the plaintiff's claims as a matter of law" (*Schiller v Bender, Burrows & Rosenthal, LLP*, 116 AD3d 756, 757 [2014]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]). On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court should accept the facts alleged in the complaint as true and afford the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Schiller v Bender, Burrows & Rosenthal, LLP*, 116 AD3d at 756; *Baron v Galasso*, 83 AD3d 626, 628 [2011]).

Here, the primary issues before the court on the defendants' motion were whether the plaintiff stated a cause of action to set aside the auction sale (*see* CPLR 3211 [a] [7]), based on its allegations that its representative tendered a proper bid for the subject property and that Mendel improperly disregarded this bid, and whether documentary evidence established a defense to the action as a matter of law (*see* CPLR 3211 [a] [1]). Neither of these issues warranted a hearing to determine disputed facts (*see Furman v Wells Fargo Home Mtge., Inc.*, 105 AD3d 807, 810 [2013]). Nonetheless, prior to the exchange of any disclosure, and in the absence of an answer from the Mendel defendants, the matter was referred to a referee, who essentially conducted a trial on the ultimate factual issues that were to be determined in the action—whether Lebovits made a proper bid, whether Mendel improperly disregarded the bid, and whether the auction sale was properly conducted. These disputed factual issues should have not have been resolved in connection with that branch of the defendants' motion which was to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, and no testimony adduced at the hearing could

properly be relied upon in determining whether the defendants established their entitlement to dismissal of the action pursuant to CPLR 3211 (a) (1) (*see id.*; *see also Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 589 [2014]).

Accordingly, the orders of reference directing that a referee was to hear and determine the facts must be vacated, and the matter must be remitted to the Supreme Court, Kings County, for a new disposition of the Mendel defendants' motion, to be decided on the motion papers alone.

In light of our determination, we need not reach the parties' remaining contentions. Rivera, J.P., Dickerson, Hall and Miller, JJ., concur.

25 ROBERT J. WERTHNER, Appellant, v PAUL D. LEWIS et al., Respondents. [990 NYS2d 267]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Summary Judgment

In a consolidated action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (LaSalle, J.), dated March 8, 2013, as granted the motion of the defendants Paul D. Lewis and Michelle L. Lewis and the cross motion of the defendants Christa I. Shiffer and Anthony J. DiMartini for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident, and, upon denying, as academic, the motion of the defendant Miream Cruz and the cross motion of the defendants Christa I. Shiffer and Anthony J. DiMartini for summary judgment on the issue of liability, and the separate motion of the defendant Miream Cruz to compel certain discovery, and, in effect, upon searching the record, awarded summary judgment to the defendant Miream Cruz dismissing the complaint insofar as asserted against her on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs payable by the defendants appearing separately and filing separate briefs, the motion of the defendants Paul D. Lewis and Michelle L. Lewis and the cross motion of the defendants Christa I. Shiffer and Anthony J. DiMartini for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the

plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) are denied, and the matter is remitted to the Supreme Court, Suffolk County, to determine, on the merits, the motion of the defendant Miream Cruz and the cross motion of the defendants Christa I. Shiffer and Anthony J. DiMartini for summary judgment on the issue of liability, and the separate motion of the defendant Miream Cruz to compel certain discovery.

On November 30, 2009, the plaintiff was a passenger in a vehicle involved in a three-car accident and, thereafter, commenced this action alleging that he suffered an accident-related “serious injury.” The defendants Paul D. Lewis and Michelle L. Lewis moved, and the defendants Christa I. Shiffer and Anthony J. DiMartini (hereinafter collectively the moving defendants) cross-moved, for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. The Supreme Court granted the motion and cross motion and, upon denying, as academic, the motion of the defendant Miream Cruz for summary judgment on the issue of liability, in effect, searched the record and awarded summary judgment to Cruz, dismissing the complaint insofar as asserted against her.

The moving defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]; *Little v Ajah*, 97 AD3d 801 [2012]; *Rodgers v Duffy*, 95 AD3d 864 [2012]; *Edouazin v Champlain*, 89 AD3d 892 [2011]; *Keenum v Atkins*, 82 AD3d 843 [2011]). The report of the moving defendants’ expert orthopedic surgeon submitted in support of the motion attributed the plaintiff’s surgery to increased postaccident symptomology, which is inconsistent with his other findings that the plaintiff’s injuries were attributable to pre-existing degenerative changes.

Since the moving defendants failed to meet their prima facie burden, it is unnecessary to consider whether the plaintiff’s opposition papers were sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Keenum v Atkins*, 82 AD3d 843 [2011]). Furthermore, the Supreme Court erred in awarding summary judgment to Cruz dismissing the complaint insofar as asserted against her on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

In light of our determination, we remit the matter to the Supreme Court, Suffolk County, to determine, on the merits, Cruz's motion and the cross motion of Shiffer and DiMartini for summary judgment on the issue of liability, and that branch of Cruz's motion which was to compel the plaintiff to provide certain documents and information (*see Windisch v Fasano*, 105 AD3d 1039 [2013]; *Edouazin v Champlain*, 89 AD3d 892 [2011]; *Alvarez v Dematas*, 65 AD3d 598 [2009]). Dillon, J.P., Hall, Sgroi and Barros, JJ., concur. **[Prior Case History: 2013 NY Slip Op 30505(U).]**

26 In the Matter of LUCINDA A. ADMINISTRATION FOR CHILDREN'S SERVICES, Respondent; LUBA A., Appellant. (Proceeding No. 1.) In the Matter of MANUEL A., Respondent, v LUBA A., Appellant. (Proceeding No. 2.) [990 NYS2d 627]—

Trial—Adjournment

Parent, Child and Family—Abused or Neglected Child

In a child neglect proceeding pursuant to Family Court Act article 10 and a related custody and visitation proceeding pursuant to Family Court Act article 6, the mother appeals (1) from an order of disposition of the Family Court, Queens County (McGowan, J.), dated March 13, 2013, and entered in proceeding No. 1, which, upon an order of fact-finding dated December 14, 2012, made after a hearing, finding that she neglected the subject child, and upon her failure to appear at the dispositional hearing, released the subject child to the custody of the father, with supervised visitation to her, and (2), as limited by her brief, from so much of a final order of custody of the same court dated March 13, 2013, and entered in proceeding No. 2, as, upon her failure to appear at the hearing to determine the best interests of the child, awarded the father custody of the subject child.

Ordered on the Court's own motion, the notice of appeal dated April 10, 2013, is deemed to be a notice of appeal from the order of disposition and the final order of custody (*see* CPLR 5520 [c]), and it is further,

Ordered that the appeals are dismissed, without costs or disbursements, except insofar as they bring up for review the finding that the mother neglected the subject child and the denial of the mother's application for an adjournment of the combined dispositional hearing and hearing to determine the best interests of the child (*see Matter of Duane S., Jr.* [Duane S.], 88 AD3d 727 [2011]); and it is further,

Ordered that the orders are affirmed insofar as reviewed, without costs or disbursements.

Where, as here, the orders appealed from were made upon the appellant's default, "review is limited to matters which were the subject of contest below" (*Brown v Data Communications*, 236 AD2d 499, 499 [1997]; see *James v Powell*, 19 NY2d 249, 256 n 3 [1967]; *Matter of Constance P v Avraam G.*, 27 AD3d 754, 755 [2006]). Accordingly, on these appeals, review is limited to the finding that the mother neglected the subject child and the denial of the mother's application for an adjournment, which was made by her attorney (see *Matter of Paulino v Camacho*, 36 AD3d 821, 822 [2007]; *Tun v Aw*, 10 AD3d 651, 651-652 [2004]; *Brown v Data Communications*, 236 AD2d at 499; see also *Matter of Willie Ray B. [Deanna W.B.]*, 77 AD3d 657, 657-658 [2010]; *Matter of Amber Megan D.*, 54 AD3d 338, 338-339 [2008]).

"The granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court" (*Matter of Anthony M.*, 63 NY2d 270, 283 [1984]; see *Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Matter of Paulino v Camacho*, 36 AD3d at 822). "In making such a determination, the court must undertake a balanced consideration of all relevant factors" (*Matter of Sicurella v Embro*, 31 AD3d 651, 651 [2006]; see *Matter of Paulino v Camacho*, 36 AD3d at 822).

Here, in light of the failure of the mother's attorney to offer any explanation for her absence at the combined dispositional hearing and hearing to determine the best interests of the child, the Family Court providently exercised its discretion in denying the application for an adjournment (see *Matter of Kinara C. [Jerome C.]*, 89 AD3d 839, 841 [2011]; *Matter of Willie Ray B. [Deanna W.B.]*, 77 AD3d at 658; *Matter of Amber Megan D.*, 54 AD3d at 338; *Matter of Paulino v Camacho*, 36 AD3d at 822; *Tun v Aw*, 10 AD3d at 651-652; *Brown v Data Communications*, 236 AD2d at 499).

The mother's challenge to the Family Court's denial of her motion to vacate her default is not properly before this Court because the mother did not appeal from the order denying that motion (see Family Ct Act § 1113; *Matter of Mark P. v Jamie Q.*, 64 AD3d 921 [2009]; *Matter of Sanders v Slater*, 53 AD3d 716 [2008]).

While the credible testimony before the Family Court did not support a finding that the mother neglected the child by failing to provide adequate shelter (*cf. Matter of Baby Girl E.*, 306 AD2d 343 [2003]; *Matter of Michael W.*, 123 AD2d 874 [1986]), the Family Court's findings that the mother subjected the child to emotional neglect (see *Matter of Regina HH. [Lenore HH.]*, 79 AD3d 1205 [2010]) and medical neglect (see *Matter of Deanna R.G. [Rajkumare B.]*, 83 AD3d 1064 [2011]), are supported by a preponderance of the credible evidence.

The mother failed to preserve for appellate review her challenge to the Family Court's active participation at the fact-finding hearing by failing to timely object to the court's conduct (see *Matter of Keaghn Y. [Heaven Z.]*, 84 AD3d 1478 [2011]; *Matter of Borggreen v Borggreen*, 13 AD3d 756 [2004]). In any event, the court properly confined its participation at the fact-finding hearing to the clarification of confusing issues and testimony (see *Matter of Kyle FF*, 85 AD3d 1463 [2011]; see also *People v Arnold*, 98 NY2d 63, 67 [2002]).

The mother's remaining contention is without merit. Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

27 In the Matter of JOCELYN CRUZ et al., Respondents, v NEW YORK STATE UNIFIED COURT SYSTEM et al., Appellants. [990 NYS2d 633]—

Courts—Nonjudicial Personnel—Displacement

In a proceeding pursuant to CPLR article 78, inter alia, to review two determinations of the New York State Unified Court System and New York State Office of Court Administration dated April 3, 2012, and April 5, 2012, respectively, displacing the petitioner John Ferguson and the petitioner Jocelyn Cruz from their positions of employment, the appeal is from a judgment of the Supreme Court, Nassau County (Cozzens, Jr., J.), entered October 1, 2012, which, upon an order of the same court dated June 27, 2012, denying the motion of the New York State Unified Court System and New York State Office of Court Administration to dismiss the petition, in effect, granted those branches of the petition which were to annul the determinations and to permanently enjoin the displacement of both of the individual petitioners from their positions of employment.

Ordered that the judgment is modified, on the law, by deleting the provisions thereof, in effect, granting those branches of the petition which were to annul the determination dated April 3, 2012, displacing the petitioner John Ferguson from his position of employment and to permanently enjoin the displacement of both of the individual petitioners from their positions of employment, and substituting therefor provisions denying those branches of the petition and dismissing so much of the proceeding as sought to annul the determination dated April 3, 2012, and to permanently enjoin the displacement of both of the individual petitioners from their positions of employment; as so modified, the judgment is affirmed, with costs to the appellants.

The individual petitioners are employees of the New York State Unified Court System (hereinafter the UCS), hired and promoted to their positions, respectively, on a contingent per-

manent basis. On April 3, 2012, the petitioner John Ferguson received notice that he was going to be displaced from his position as Associate Court Clerk, replaced by someone on a preferred list, and returned to a lower-titled permanent position as Senior Court Clerk. On April 5, 2012, the petitioner Jocelyn Cruz received notice that she was going to be displaced from her position as a Court Office Assistant, and replaced by someone from a preferred list.

The petitioners commenced this proceeding pursuant to CPLR article 78 to review these adverse employment determinations. The petition further sought injunctive relief, based upon the petitioners' contention that their appointments had matured into permanent positions. The UCS and the New York State Office of Court Administration (hereinafter together the UCS respondents) moved to dismiss the petition, arguing that the determinations were made in accordance with valid Rules of the Chief Judge of the State of New York (hereinafter the Chief Judge) that govern employment with the UCS. In an order dated June 27, 2012, the Supreme Court denied the motion. In a judgment entered October 1, 2012, the court determined that the adverse employment determinations were arbitrary and capricious and, in effect, granted those branches of the petition which were to annul the determinations and to permanently enjoin the displacement of the two individual petitioners from their positions of employment.

The Chief Judge has plenary constitutional authority over the administration of the UCS (*see* NY Const, art VI, § 28; *Matter of Met Council v Crosson*, 84 NY2d 328, 334-335 [1994]). Judiciary Law § 211 (1) (d) gives the Chief Judge the authority to establish statewide standards and administrative policies concerning nonjudicial personnel, including job classifications and removal, provided that the standards and policies "shall be consistent with the civil service law" (Judiciary Law § 211 [1] [d]; *see Matter of Conigland v Rosenblatt*, 171 AD2d 864 [1991]). Under the rules promulgated by the Chief Judge, positions left temporarily vacant by the leave of absence of the permanent incumbent may be filled on a contingent permanent basis (*see* 22 NYCRR 25.24 [a], [d]). When the permanent incumbent's encumbrance on the position, i.e., his or her right to return to that position, expires due to the attainment by the permanent incumbent of nonprobationary, permanent status in a higher title (*see* 22 NYCRR 25.22 [d]; 25.24 [b] [1]), the position then held by the contingent permanent appointee becomes permanently vacant and subject to being permanently filled pursuant to the Rules of the Chief Judge (*see* 22 NYCRR 25.24 [b] [8]; 25.31 [a] [1]). The

Rules of the Chief Judge require that such a permanent vacancy be filled first by reference to an applicable preferred list (*see* 22 NYCRR 25.24 [c]; 25.31 [a] [1]). The Chief Administrator of the Courts is required to establish statewide preferred lists of the names of those persons who have been demoted or suspended, including those who were demoted or suspended by virtue of a workforce reduction in June 2011 (*see* 22 NYCRR 25.31 [a] [1]). If, however, no preferred list exists for a particular position, then any permanent vacancy in that position is to be filled in accordance with 22 NYCRR 25.24 (b) (8), which provides for the selection “of one of such employees of the promotion unit having such contingent permanent status in such position or a similar position,” provided that, if the eligible list from which the employee acquired the contingent permanent position is still in existence, the employee is then eligible for permanent appointment or promotion from such list.

Accordingly, contrary to the individual petitioners’ contention, their contingent permanent appointments did not mature into permanent appointments by virtue of their completion of probation or the positions becoming unencumbered. Moreover, the use of statewide preferred lists to fill permanently vacant positions is not arbitrary and capricious, even where such use results in the displacement of contingent permanent appointees who were not themselves subject to the workforce reduction (*see* 22 NYCRR 25.30 [d]; *Matter of Roberts v Gavin*, 96 AD3d 669, 672 [2012]; *Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 79 AD3d 630, 635-636 [2010], *affd* 18 NY3d 446 [2012]).

Specifically, the UCS’s actions with regard to Ferguson were in compliance with the Rules of the Chief Judge, as the expiration of the permanent incumbent’s encumbrance created a permanent vacancy subject to being lawfully filled (*see* 22 NYCRR 25.24 [c]; 25.31 [a] [1]). Accordingly, as to Ferguson, the Supreme Court erred in annulling the adverse employment determination and in permanently enjoining his displacement from the subject position.

As to Cruz, the UCS concedes that the termination notice dated April 5, 2012, was sent to her in error since the relevant employment position had not yet become unencumbered, and since application of the Rules of the Chief Judge might indeed result in her permanent appointment. Accordingly, the Supreme Court properly granted that branch of the petition which was to annul the determination dated April 5, 2012, displacing Cruz from her position of employment. However, the Supreme Court erred in permanently enjoining her displacement from the posi-

tion. Cruz holds her position on a contingent permanent basis (see 22 NYCRR 25.24 [d]). Since the record reveals that, during the pendency of this proceeding, the position became unencumbered, and no preferred list exists for the position, the position must be filled permanently from the existing regular eligible list, in accordance with 22 NYCRR 25.24 (b) (8).

The petitioners' remaining contentions are without merit. Rivera, J.P., Balkin, Dickerson and Cohen, JJ., concur.

28 In the Matter of KATHRYN L. FERGUSON, Appellant, v NEW YORK STATE DIVISION OF HUMAN RIGHTS et al., Respondents. [989 NYS2d 907]—

Civil Rights—State Division of Human Rights

In a proceeding pursuant to Executive Law § 298 to review a determination of the New York State Division of Human Rights dated November 16, 2011, which dismissed the petitioner's administrative complaint, upon a finding that there was no probable cause to believe that the respondent Long Island Home, doing business as South Oaks Hospital, engaged in unlawful discriminatory practices, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Garguilo, J.), entered August 8, 2012, which denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed, with costs.

After an investigation, the New York State Division of Human Rights determined that there was no probable cause to believe that the respondent Long Island Home, doing business as South Oaks Hospital, had engaged in unlawful discriminatory practices with respect to its treatment of the petitioner. In reviewing that determination, the Supreme Court properly concluded that it was not arbitrary and capricious or lacking a rational basis in the record (see *Matter of Romain v State Div. of Human Rights*, 103 AD3d 730, 730 [2013]; *Matter of Maltsev v New York State Div. of Human Rights*, 31 AD3d 641, 641 [2006]). Accordingly, the court properly denied the petition and dismissed the proceeding (see *Matter of Romain v State Div. of Human Rights*, 103 AD3d at 730). Balkin, J.P., Austin, LaSalle and Barros, JJ., concur.

29 In the Matter of GOVERNMENT EMPLOYEES INSURANCE COMPANY, Appellant, v KUMAN LEE, Respondent. [991 NYS2d 105]—

Insurance—Automobile Insurance—Underinsured Motorist Endorsement—Comparison of Liability Limits

In a proceeding pursuant to CPLR article 75 to permanently

stay arbitration, the petitioner appeals from a judgment of the Supreme Court, Queens County (Rios, J.), entered December 2, 2013, which denied the petition and directed the parties to proceed to arbitration.

Ordered that the judgment is affirmed, with costs.

The respondent, Kuman Lee, was a passenger in a vehicle operated by Soon Park, when it was involved in a collision with a vehicle driven by the alleged tortfeasor, Pilman Song. The petitioner, Government Employees Insurance Company (hereinafter GEICO), had issued a policy of insurance (hereinafter the GEICO policy) to Park, covering Park's vehicle. Song's vehicle was covered by a policy of insurance (hereinafter the Allstate policy) issued by Allstate Insurance Company.

The GEICO policy set forth bodily injury liability limits in the amount of \$300,000 per person and \$300,000 per accident. The GEICO policy also contained a supplementary uninsured/underinsured motorist (hereinafter SUM) coverage provision that was subject to the same single liability limit of \$300,000 per person and \$300,000 per accident.

In contrast to the single liability limit of \$300,000 provided for in the GEICO policy, the Allstate policy was a "split limit" policy, since it provided for a bodily injury liability limit of \$100,000 per person and \$300,000 per accident.

Lee received \$100,000 under the Allstate policy, representing the maximum permissible sum recoverable under the per-person liability limit of that policy. Lee then made a demand for arbitration under the SUM provision of Park's GEICO policy, arguing that the per-person liability coverage afforded under the alleged tortfeasor's Allstate policy was less than the per-person liability coverage afforded under the GEICO policy. GEICO thereafter commenced this proceeding pursuant to CPLR article 75 to permanently stay arbitration, contending that the SUM provision of the GEICO policy was not triggered because both the GEICO policy and the Allstate policy provided for aggregate liability limits of \$300,000 per accident and that, accordingly, the alleged tortfeasor Song was not an underinsured motorist within the meaning of the applicable statute. The Supreme Court denied the petition.

"Insurance Law § 3420 (f) (2) was enacted to allow an insured to 'obtain the same level of protection for himself [or herself] and his [or her] passengers which he [or she] purchased to protect himself [or herself] against liability to others' " (*Matter of Prudential Prop. & Cas. Co. v Szeli*, 83 NY2d 681, 686 [1994], quoting Mem of St Exec Dept, 1977 McKinney's Session Laws of NY at 2446). "[T]he essential purpose of the statute [is] to

provide the insured with the same level of protection he or she would provide to others were the insured a tortfeasor in a bodily injury accident” (*Matter of Prudential Prop. & Cas. Co. v Szeli*, 83 NY2d at 687).

Benefits under a SUM policy, when SUM coverage is purchased at the option of the insured, are available “if the limits of liability under all bodily injury liability bonds and insurance policies of another motor vehicle liable for damages are in a lesser amount than the bodily injury liability insurance limits of coverage” provided by the insured’s policy (Insurance Law § 3420 [f] [2] [A]; see *Matter of Prudential Prop. & Cas. Co. v Szeli*, 83 NY2d at 685). “The necessary analytical step, then, is to place the insured in the shoes of the tortfeasor and ask whether the insured would have greater bodily injury coverage under the circumstances than the tortfeasor actually has” (*Matter of Prudential Prop. & Cas. Co. v Szeli*, 83 NY2d at 687). The determination of whether SUM benefits are available “requires a comparison of each policy’s bodily injury liability coverage as it in fact operates under the policy terms applicable to that particular coverage” (*id.* at 688). “Only by doing that comparison is it possible to make the required determination: whether the tortfeasor has less bodily injury liability coverage than the insured” (*id.*).

Here, a comparison of the two policies at issue, in light of the particular circumstances of this case, demonstrates that an individual such as Lee would be afforded greater per-person bodily liability injury coverage under the GEICO policy than under the Allstate policy. Under the Allstate policy, Lee was limited by the “per person” bodily injury liability limit to the recovery, in tort, of \$100,000. The GEICO policy—a single limit policy—provided \$300,000 of liability coverage for bodily injury to any one injured person. Since the per-person bodily injury liability insurance limits of coverage provided by the Allstate policy are in a lesser amount than the per-person bodily injury liability insurance limits of coverage provided by the GEICO policy, the SUM provision of the GEICO policy was triggered (see Insurance Law § 3420 [f] [2]; *Matter of Prudential Prop. & Cas. Co. v Szeli*, 83 NY2d 681 [1994]; *Matter of Government Empls. Ins. Co. v An-namantadoo*, 302 AD2d 460, 462 [2003]; cf. *Matter of Automobile Ins. Co. of Hartford v Ray*, 51 AD3d 788, 789-790 [2008]).

Accordingly, the Supreme Court properly denied GEICO’s petition to stay arbitration of Lee’s claim for SUM benefits, and directed the parties to proceed to arbitration. Mastro, J.P., Leventhal, Lott and Miller, JJ., concur.

30 In the Matter of LISA IRVING, Petitioner, v GLADYS CARRION, Commissioner of the New York State Office of Children and Family Services, et al., Respondents. [991 NYS2d 96]—

Social Services—Register of Child Abuse and Maltreatment—Children's Exposure to Domestic Violence

Proceeding pursuant to CPLR article 78 to review a determination of the New York State Office of Children and Family Services dated June 22, 2012, which, after a hearing, denied the petitioner's application to amend and seal an indicated report maintained by the New York State Register of Child Abuse and Maltreatment.

Adjudged that the determination is confirmed, the petition is denied, and the proceeding is dismissed on the merits, with costs.

At an administrative expungement hearing to determine whether a report of child abuse or maltreatment is substantiated, the allegations in the report must be established by a preponderance of the evidence (*see Matter of Lee T.T. v Dowling*, 87 NY2d 699, 703 [1996]; *Matter of Esteva v New York State Cent. Register of Child Abuse & Maltreatment*, 82 AD3d 978, 979 [2011]; *Matter of Blythe v Carrion*, 63 AD3d 1059, 1059 [2009]). "It is the function of the administrative agency, not the reviewing court, to weigh the evidence or assess the credibility of the witnesses" (*Matter of Bullock v State of N.Y. Dept. of Social Servs.*, 248 AD2d 380, 382 [1998]).

Judicial review of a determination that a report of maltreatment has been substantiated is limited to whether the determination is supported by substantial evidence in the record (*see Matter of Reed v Carrion*, 84 AD3d 1094, 1094 [2011]; *Matter of Benjamin v Carrion*, 79 AD3d 744, 744 [2010]). Substantial evidence "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180 [1978]).

To establish that maltreatment occurred, the agency must show that the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of the person legally responsible for his or her care to exercise a minimum degree of care (*see* 18 NYCRR 432.1 [b] [1]). Here, the Commissioner of the New York State Office of Children and Family Services determined that a fair preponderance of the evidence established that the subject children's physical, mental, or emotional condition was in imminent danger of becoming impaired, as a result

of the petitioner's failure to exercise a minimum degree of care in providing proper guardianship by allowing them to be exposed to an ongoing pattern of domestic violence. That determination is supported by substantial evidence (*see* 18 NYCRR 432.1 [b] [1] [ii]; *Matter of Martin MM. v New York State Off. of Children & Family Servs.*, 110 AD3d 1285, 1286 [2013]; *Matter of Anthony S. [Dawn N.]*, 98 AD3d 519, 520 [2012]; *Matter of Armani KK. [Deborah KK.]*, 81 AD3d 1001, 1002 [2011]; *Matter of Angelique L.*, 42 AD3d 569, 572 [2007]).

Accordingly, the determination denying the petitioner's application to amend and seal the report maintained by the New York State Office of Children and Family Services must be confirmed, the petition denied, and the proceeding dismissed on the merits. Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

31 In the *Matter of LATIN EVENTS, LLC, Respondent, v HAROLD DOLEY, Appellant*. [990 NYS2d 600]—

Frauds, Statute of—Oral Modification of Written Agreement—Part Performance

In a proceeding, *inter alia*, pursuant to RPAPL 721 (10) to recover possession of certain leased premises and the return of rent and a security deposit, Harold Doley appeals from a judgment of the Supreme Court, Westchester County (Giacomo, J.), dated May 23, 2013, which, upon two orders of the same court dated September 28, 2012, and April 1, 2013, is in favor of the petitioner and against him for the return of rent and the security deposit in the principal sum of \$50,000.

Ordered that the judgment is reversed, on the law, with costs, the orders dated September 28, 2012, and April 1, 2013, are vacated, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings in accordance herewith.

“Generally, a written agreement which prohibits oral modification can only be changed by an ‘executory agreement . . . in writing’ ” (*Calica v Reisman, Peirez & Reisman*, 296 AD2d 367, 368 [2002], quoting General Obligations Law § 15-301 [1]). “However, an oral modification is enforceable if the party seeking enforcement can demonstrate partial performance of the oral modification, which performance must be unequivocally referable to the modification” (*Calica v Reisman, Peirez & Reisman*, 296 AD2d at 369; *see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343-344 [1977]; *Healy v Williams*, 30 AD3d 466, 467 [2006]).

In this summary proceeding, the petitioner, a lessee, demonstrated, *prima facie*, that it was entitled to recover the security deposit and rent it paid in the sum of \$50,000 pursuant to the

parties' lease in anticipation of possession of the premises (see *Donald v Barbato*, 27 AD3d 414 [2006]). However, in opposition, the appellant, the landlord, submitted sufficient evidence to raise a triable issue of fact as to whether there was partial performance of an oral modification of the lease and, therefore, whether the parties validly modified their agreement (see CPLR 409 [b]; *Rose v Spa Realty Assoc.*, 42 NY2d at 343-344; *Donald v Barbato*, 27 AD3d at 414). Accordingly, the Supreme Court erred in summarily granting the petition to the extent of awarding the petitioner \$50,000, and the matter must be remitted to the Supreme Court, Westchester County, for an evidentiary hearing in connection with this issue, and for a new determination of the petition thereafter (see CPLR 409 [a]; *Matter of Jurnove v Lawrence*, 38 AD3d 895, 896 [2007]). Rivera, J.P., Balkin, Leventhal and Roman, JJ., concur.

32 In the Matter of RUTH RADOW et al., Appellants, et al., Petitioners, v BOARD OF APPEALS OF TOWN OF HEMPSTEAD, Respondent, and ATLANTIC BEACH LAND COMPANY, LLC, Intervenor-Respondent. [989 NYS2d 914]—

Parties—Standing—Zoning Variance

In a proceeding pursuant to CPLR article 78 to review certain determinations by the Board of Appeals of the Town of Hempstead issuing certain zoning variances, the petitioners Ruth Radow and Seymour Radow appeal, as limited by their brief, from so much of an order and judgment (one paper) of the Supreme Court, Nassau County (Sher, J.), dated August 10, 2012, as granted that branch of the motion of the intervenor Atlantic Beach Land Company, LLC, which was to dismiss the petition insofar as asserted by them on the ground of lack of standing, and dismissed the proceeding insofar as asserted by them.

Ordered that the order and judgment is affirmed insofar as appealed from, with costs.

The Supreme Court properly determined that petitioners Ruth Radow and Seymour Radow (hereinafter together the appellants) lack standing to contest the issuance of certain zoning variances to beach club owner Atlantic Beach Land Company, LLC, by the Board of Appeals of the Town of Hempstead. To establish standing, a petitioner must show that he or she “would suffer direct injury different from that suffered by the public at large, and that the injury asserted falls within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted” (*Matter of Riverhead PGC, LLC v Town of Riverhead*, 73 AD3d 931, 933

[2010]; see *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773-774 [1991]). “Injury-in-fact may arise from the existence of a presumption established by the allegations demonstrating close proximity to the subject property or, in the absence of such a presumption, the existence of an actual and specific injury” (*Matter of Powers v De Groodt*, 43 AD3d 509, 513 [2007] [citation omitted]; see *Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 414 [1987]). Here, the appellants failed to satisfy these requirements.

The appellants live .69 miles away from the subject beach club. Thus, they are not entitled to a presumption of injury (see *Matter of Riverhead Neighborhood Preserv. Coalition, Inc. v Town of Riverhead Town Bd.*, 112 AD3d 944, 944-945 [2013]; *Matter of Rediker v Zoning Bd. of Appeals of Town of Philipstown*, 280 AD2d 548, 549 [2001]). Their allegations of injury-in-fact due to overcrowding and congestion are purely speculative (see *Matter of Powers v De Groodt*, 43 AD3d at 513; *Matter of Long Is. Bus. Aviation Assn., Inc. v Town of Babylon*, 29 AD3d 794, 795 [2006]). Moreover, the alleged injuries are not specific to the appellants and distinguishable from those suffered by the public at large (see *Matter of Harris v Town Bd. of Town of Riverhead*, 73 AD3d 922, 923-924 [2010]; *Matter of Powers v De Groodt*, 43 AD3d at 513; *Matter of Rediker v Zoning Bd. of Appeals of Town of Philipstown*, 280 AD2d at 550). Accordingly, the appellants lack standing.

Since the petitioners Mildred Beck and Alan Rosenbloom did not file notices of appeal, the arguments presented on their behalf are not properly before this Court (see *GMAC, LLC v Ray*, 110 AD3d 1030, 1031 [2013]; *Weinstein v Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 644 [2011]). Rivera, J.P., Balkin, Dickerson and Cohen, JJ., concur.

33 In the *Matter of STONEWALL CONTRACTING CORP.*, Appellant, v *NEW YORK CITY SCHOOL CONSTRUCTION AUTHORITY*, Respondent. [992 NYS2d 27]—In a proceeding pursuant to CPLR article 78 to review a determination of the New York City School Construction Authority dated April 13, 2011, which, inter alia, disqualified the petitioner from bidding, contracting, and subcontracting on any future project of the New York City School Construction Authority for a period of five years, the petitioner appeals, as limited by its brief, from so much of a judgment of the Supreme Court, Queens County (Pineda-Kirwan, J.), entered June 11, 2012, as, upon a decision of the same court entered March 20, 2012, denied the petition and dismissed the proceeding.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

Judicial review in this CPLR article 78 proceeding is limited to whether the challenged determination “was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion” (CPLR 7803 [3]; see *Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 [2004]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]; cf. *Abiele Contr. v New York City School Constr. Auth.*, 91 NY2d 1, 8 [1997]). Contrary to the appellant’s contention, the challenged determination of the New York City School Construction Authority was not irrational, arbitrary and capricious, or affected by an error of law (cf. *Matter of Pile Found. Constr. Co., Inc. v New York City Dept. of Envtl. Protection*, 84 AD3d 963, 964 [2011]).

The petitioner’s remaining contentions are without merit.

Accordingly, the Supreme Court properly denied the petition and dismissed the proceeding. Dillon, J.P., Hall, Sgroi and Barros, JJ., concur.

34 In the Matter of JAMEL T. ADMINISTRATION FOR CHILDREN’S SERVICES, Respondent; GEMAYEL T., Appellant, et al., Respondents. (Proceeding No. 1.) In the Matter of ANAYA H. ADMINISTRATION FOR CHILDREN’S SERVICES, Respondent; GEMAYEL T., Appellant, et al., Respondents. (Proceeding No. 2.) [989 NYS2d 908]—

Parent, Child and Family—Abused or Neglected Child—Derivative Neglect

In two related child neglect proceedings pursuant to Family Court Act article 10, Gemayel T. appeals (1) from an order of fact-finding of the Family Court, Kings County (White, J.), dated March 29, 2012, which, after a fact-finding hearing, found that he derivatively neglected the subject children, and (2), an order of disposition of the same court dated March 1, 2013, which, upon the order of fact-finding and after a dispositional hearing, placed the subject children in the custody of the Commissioner of Social Services of the City of New York through the next permanency hearing.

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as that order was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

Ordered that the appeal from so much of the order of disposi-

tion as placed the subject children in the custody of the Commissioner of Social Services of the City of New York through the next permanency hearing is dismissed as academic, as that permanency hearing has already been conducted (*see Matter of Diamonte O. [Tiffany R.]*, 116 AD3d 866 [2014]); and it is further,

Ordered that the order of disposition is affirmed insofar as reviewed, without costs or disbursements.

Contrary to the appellant's contention, the allegations that he abused or neglected a child who was not the subject of these proceedings may form the basis of a finding that he derivatively neglected the children who are the subject of these proceedings (*see* Family Ct Act § 1012 [f] [i]; *Matter of Kennedie M. [Kimberly M.]*, 89 AD3d 1544 [2011]; *Matter of Kole HH.*, 61 AD3d 1049, 1053 [2009]; *Matter of Ian H.*, 42 AD3d 701 [2007]). Further, the Family Court's determination to accept as credible the testimony of the nonsubject child that, in July 2010, the appellant had inappropriate sexual contact with her, and to reject as not credible the appellant's testimony that he did not engage in inappropriate sexual contact with the nonsubject child, is entitled to deference and is accorded great weight (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Kyanna T. [Winston R.]*, 99 AD3d 1011, 1013 [2012]; *Matter of Candacy C. [Clairmonte C.]*, 96 AD3d 836, 837 [2012]; *Matter of Taylor T. [Darren T.]*, 73 AD3d 1075 [2010]; *Matter of Cassandra C.*, 300 AD2d 303 [2002]). The appellant's conduct toward the nonsubject child, as well as his regular drug use, was sufficiently proximate in time to the birth of the two subject children to demonstrate, by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]), that the appellant derivatively neglected the two subject children (*see* Family Ct Act § 1012 [f] [i]; *Matter of Chanel T. [Guillaume T.]*, 104 AD3d 953 [2013]; *Matter of Kylani R. [Kyreem B.]*, 93 AD3d 556, 557 [2012]; *Matter of Jamarra S. [Jessica S.]*, 85 AD3d 803, 804 [2011]; *Matter of Amber C.*, 38 AD3d 538, 541 [2007]; *Matter of Baby Boy W.*, 283 AD2d 584, 585 [2001]).

The appellant's remaining contentions are without merit. Mastro, J.P., Chambers, Lott and Roman, JJ., concur.

35 In the Matter of GONY WEISS, Respondent, v JARED ROSENTHAL, Appellant. [989 NYS2d 909]—

Parent, Child and Family—Visitation—Modification

In a child custody and visitation proceeding pursuant to Family Court Act article 6, the father appeals, as limited by his brief, from stated portions of an order of the Family Court,

Rockland County (Eisenpress, J.), entered February 27, 2013, which, after a hearing, inter alia, granted the mother's petition to modify a prior order of the same court dated July 13, 2011, entered on consent of the parties, so as to change the father's visitation with the subject child.

Ordered that the order entered February 27, 2013, is affirmed insofar as appealed from, with costs payable by the appellant to the petitioner.

In order to modify an existing custody or visitation arrangement, there must be a showing that there has been a change in circumstances such that modification is required to protect the best interests of the child (*see Matter of Kortlang v Kortlang*, 92 AD3d 785, 785 [2012]; *Matter of Manzella v Milano*, 82 AD3d 1242, 1242 [2011]; *Matter of Arduino v Ayuso*, 70 AD3d 682, 682 [2010]). Here, the mother established that the father's unwillingness to communicate appropriately with the mother about the subject child's health and welfare, and the unchecked and persistent denigration of the mother in the child's presence by the paternal grandparents with whom the father resides, and the father's failure to discourage such conduct as well as his participation in such conduct, constituted a change in circumstances warranting a modification of the existing visitation order. The court's determination with respect to custody and visitation depends to a great extent upon its assessment of the credibility of the witnesses and upon the character, temperament, and sincerity of the parents (*see Matter of Kortlang v Kortlang*, 92 AD3d at 785; *Matter of Manzella v Milano*, 82 AD3d at 1242; *Matter of Blanco v Corbett*, 8 AD3d 374 [2004]). As such, the hearing court's credibility determinations are entitled to great weight and should not be disturbed unless they lack a sound and substantial basis in the record (*see Matter of Kortlang v Kortlang*, 92 AD3d at 785; *Matter of Manzella v Milano*, 82 AD3d at 1242; *Matter of Thomas v Thomas*, 35 AD3d 868 [2006]). The Family Court properly determined that it was in the child's best interests to change the father's visitation schedule. Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

36 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CASEY FITZGERALD, Appellant. [991 NYS2d 112]—

Crimes—Harmless and Prejudicial Error

Crimes—Right to Counsel—Effective Representation

Crimes—Sentence—Concurrent and Consecutive Terms

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (McCormack, J.), rendered January 17, 2012, convicting him of manslaughter in the first degree, crimi-

nal possession of a weapon in the second degree pursuant to Penal Law § 265.03 (1) (b), and criminal possession of a weapon in the second degree pursuant to Penal Law § 265.03 (3), and sentencing him to a determinate term of imprisonment of 25 years on the conviction of manslaughter in the first degree and determinate terms of imprisonment of five years on each of the convictions of criminal possession of a weapon, with the term imposed upon the conviction of criminal possession of a weapon in the second degree pursuant to Penal Law § 265.03 (1) (b) to run consecutively to the term imposed upon the conviction of manslaughter, and the terms imposed upon the convictions of criminal possession of a weapon in the second degree to run concurrently with each other. The appeal brings up for review the denial, after a hearing pursuant to a stipulation in lieu of motions, of the suppression of the defendant's statements to law enforcement officials.

Ordered that the judgment is modified, on the law, by directing that the term of imprisonment imposed on the conviction of criminal possession of a weapon in the second degree pursuant to Penal Law § 265.03 (1) (b) shall run concurrently with the term of imprisonment imposed on the conviction of manslaughter in the first degree, and that all terms of imprisonment are to run concurrently; as so modified, the judgment is affirmed.

Contrary to the defendant's contention, the evidence adduced at the suppression hearing established that his statements to law enforcement officials were made after he knowingly, voluntarily, and intelligently waived his *Miranda* rights (see *Miranda v Arizona*, 384 US 436 [1966]).

The defendant's challenge to the Supreme Court's charge on the issue of justification is unpreserved for appellate review, and we decline to review this issue in the exercise of our interest of justice jurisdiction (see *People v Gueye*, 81 AD3d 974, 974 [2011]; *People v Barreto*, 70 AD3d 574, 575 [2010]; *People v Ware*, 36 AD3d 838, 839 [2007], *mod* 10 NY3d 457 [2008]; *People v Palmer*, 34 AD3d 701, 703-704 [2006]; *People v Soto*, 31 AD3d 793, 793 [2006]; *People v Peterkin*, 23 AD3d 678, 679 [2005]; *cf. People v Feuer*, 11 AD3d 633, 634 [2004]).

Although it was improper for the People to elicit, from one of the defendant's witnesses, that the defendant was incarcerated pending trial, the error was harmless, as there was overwhelming evidence of the defendant's guilt, and no significant probability that the error contributed to his convictions (see *People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Thomas*, 65 AD3d 1170, 1171 [2009]).

The defendant's contention that he was deprived of the effec-

tive assistance of counsel is without merit. Defense counsel was not ineffective in failing to ask for a charge on manslaughter in the second degree, since there is no reasonable view of the evidence that would have supported a finding that the defendant acted recklessly in repeatedly shooting the victim (see *People v Henderson*, 41 NY2d 233, 235 [1976]; *People v Etienne*, 250 AD2d 776 [1998]).

The Supreme Court erred in directing that the term of imprisonment imposed on the conviction of criminal possession of a weapon in the second degree with the intent to use it unlawfully against another, pursuant to Penal Law § 265.03 (1) (b), was to run consecutively to the term of imprisonment imposed on the conviction of manslaughter in the first degree. The evidence adduced at trial did not demonstrate that the defendant possessed the gun with a purpose unrelated to his intent to use it against the victim (see Penal Law § 70.25 [2]; *People v Hamilton*, 4 NY3d 654 [2005]; *People v Jackson*, 83 AD3d 962, 962-963 [2011]; *People v Hernandez*, 46 AD3d 574, 576-577 [2007]; *People v Ivory*, 27 AD3d 664 [2006]; cf. *People v Salcedo*, 92 NY2d 1019 [1998]). Therefore, the sentence imposed on the conviction of criminal possession of a weapon in the second degree with the intent to use it unlawfully against another, pursuant to Penal Law § 265.03 (1) (b), must run concurrently with the sentence imposed on the conviction of manslaughter in the first degree.

The Supreme Court failed to expressly specify the manner in which the sentence imposed on the conviction of criminal possession of a weapon in the second degree, arising from conduct engaged in outside of the defendant's home or place of business, pursuant to Penal Law § 265.03 (3), was to run with the sentence imposed on the conviction of manslaughter in the first degree. Accordingly, the sentences imposed upon the convictions of those two crimes are deemed to run concurrently with each other (see Penal Law § 70.25 [1] [a]), and there is no merit to the People's contention that the Supreme Court intended that those terms of imprisonment were to run consecutively. Consequently, all terms of imprisonment are to run concurrently.

The defendant failed to preserve for appellate review his contention that the Supreme Court, in imposing sentence, relied on purportedly misleading information contained in the presentence report, and we decline to review this issue in the exercise of our interest of justice jurisdiction (see CPL 470.05 [2]; *People v Mathieu*, 83 AD3d 735, 737 [2011]; *People v Baez*, 52 AD3d 840 [2008]; *People v Butler*, 10 AD3d 368, 368-369 [2004]). Mastro, J.P., Leventhal, Lott and Miller, JJ., concur.

37 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANDRE FORDE, Appellant. [990 NYS2d 637]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Del Giudice, J.), rendered January 6, 2012, convicting him of manslaughter in the first degree, assault in the first degree, and assault in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant fired four shots while standing near a basketball court in a park in Brooklyn, where a basketball tournament was taking place. The gun he fired was handed to him by codefendant Bryant Gibbs, who urged him to shoot at another individual who was among the crowd of people present at the park. The shots fired by the defendant missed that individual, but hit three bystanders. One person was killed, and the other two were injured, but survived. The defendant and codefendant were arrested and tried jointly, before separate juries. The defendant's jury found him guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), assault in the first degree (Penal Law § 120.10 [1]), and assault in the second degree (Penal Law § 120.05 [2]). The codefendant's jury found him guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) (*see People v Gibbs*, 120 AD3d 510 [2014] [decided herewith]).

As relevant here, a person is guilty of manslaughter in the first degree when, “[w]ith intent to cause serious physical injury to another person, he [or she] causes the death of such person or of a third person” (Penal Law § 125.20 [1]). “A person is guilty of assault in the first degree when: [w]ith intent to cause serious physical injury to another person, he [or she] causes such injury to such person or to a third person by means of a deadly weapon” (Penal Law § 120.10 [1]). “A person is guilty of assault in the second degree when: [w]ith intent to cause physical injury to another person, he [or she] causes such injury to such person or to a third person by means of a deadly weapon” (Penal Law § 120.05 [2]).

“A person acts intentionally with respect to a result . . . when his [or her] conscious objective is to cause such result or to engage in such conduct” (Penal Law § 15.05 [1]). Intent may be inferred from conduct as well as the surrounding circumstances (*see People v Steinberg*, 79 NY2d 673, 682 [1992]; *People v Alexander*, 50 AD3d 816, 817 [2008]).

Upon our independent review pursuant to CPL 470.15 (5), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]). We

accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see id.* at 644). Contrary to the defendant's contention, the evidence supported the jury's implicit finding that, with respect to the convictions of manslaughter in the first degree, assault in the first degree, and assault in the second degree, the defendant acted with the requisite intent. Hall, J.P., Roman, Duffy and LaSalle, JJ., concur.

38 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRYANT GIBBS, Appellant. [989 NYS2d 904]—

Crimes—Fair Trial

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Del Giudice, J.), rendered January 5, 2012, convicting him of criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

There is no merit to the defendant's contention that he was deprived of a fair trial by the Supreme Court's grant of the People's request to hold an independent source hearing after jury selection. Although the defendant had a right to a determination of a pretrial motion prior to the commencement of trial (*see* CPL 710.40 [3]), he waived this right by consenting to the court's deviation from the statutory procedure (*see People v Yousef*, 236 AD2d 868, 869 [1997]; *People v Ramirez*, 229 AD2d 452, 452 [1996]; *People v Orkabi*, 160 AD2d 644, 645 [1990]).

Upon our independent review of the evidence pursuant to CPL 470.15 (5), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

Contrary to the defendant's contention, the Supreme Court did not improperly sentence him based on the offenses of which his codefendant was convicted (*see People v McGrath*, 20 AD3d 574, 575 [2005]; *see also People v Forde*, 120 AD3d 509 [2014] [decided herewith]). Moreover, the sentence imposed was not improper merely because it exceeded a pretrial plea offer (*see People v Johnson*, 76 AD3d 1103, 1104-1105 [2010]), and the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Hall, J.P., Roman, Duffy and LaSalle, JJ., concur.

39 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v REGINALD HODGE, Appellant. [990 NYS2d 592]—

Crimes—Sentence—Resentence

Appeal by the defendant from an order of the Supreme Court,

Richmond County (Collini, J.), dated October 19, 2011, which denied his motion to be resentenced pursuant to CPL 440.46 on his convictions of criminal sale of a controlled substance in the third degree (four counts), which sentence was originally imposed on February 25, 2005, and modified by this Court on July 1, 2008.

Ordered that the order is reversed, on the facts and in the exercise of discretion, and the matter is remitted to the Supreme Court, Richmond County, for further proceedings in accordance with the resentencing procedure set forth in CPL 440.46.

A defendant who is eligible for resentencing pursuant to CPL 440.46 enjoys a statutory presumption in favor of resentencing (*see People v Gonzalez*, 96 AD3d 875, 876 [2012]; *People v Beasley*, 47 AD3d 639, 641 [2008]; CPL 440.46 [3]; L 2004, ch 738, § 23). Here, the Supreme Court improvidently exercised its discretion in denying the defendant's motion to be resentenced. The specific facts relied on by the Supreme Court, including the details of the defendant's criminal history, his disciplinary infractions while incarcerated, and what the court concluded was the insincerity of the defendant's acceptance of responsibility, were insufficient to overcome the statutory presumption in favor of resentencing (*see People v Simmons*, 112 AD3d 654, 655 [2013]; *People v Green*, 110 AD3d 826, 827 [2013]). Most of the crimes in the defendant's criminal history, however, far predated the defendant's commission of the crimes for which he was serving his current sentence (*see People v Green*, 110 AD3d 826, 827 [2013]; *People v Berry*, 89 AD3d 954, 956 [2011]). Additionally, the defendant's institutional record was, on the whole, favorable. Under all the circumstances of this case, the defendant's motion should have been granted (*see People v Simmons*, 112 AD3d at 655).

Accordingly, we remit the matter to the Supreme Court, Richmond County, for further proceedings in accordance with the resentencing procedure set forth in CPL 440.46. Skelos, J.P., Balkin, Hall and Maltese, JJ., concur. **[Prior Case History: 33 Misc 3d 1212(A), 2011 NY Slip Op 51901(U).]**

40 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SEAN JOHN, Appellant. [990 NYS2d 597]—

Crimes—Unlawful Search and Seizure—Plain View Doctrine

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Parker, J.), rendered December 16, 2011, convicting him of criminal possession of a weapon in the second degree and menacing in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the

denial, after a hearing (Gary, J.), of that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the judgment is affirmed.

The hearing court properly denied that branch of the defendant's omnibus motion which was to suppress physical evidence based on the plain view doctrine. That doctrine "rests on the premise that police should be able to seize incriminating evidence in plain view if they had the right to be where they were when they saw it" (*People v Brown*, 96 NY2d 80, 88 [2001]; see *People v Diaz*, 81 NY2d 106, 111 [1993]; *People v Velasquez*, 110 AD3d 835 [2013]). "[L]aw enforcement officers may properly seize an item in 'plain view' without a warrant if (i) they are lawfully in a position to observe the item; (ii) they have lawful access to the item itself when they seize it; and (iii) the incriminating character of the item is immediately apparent" (*People v Brown*, 96 NY2d 80, 89 [2001]; see *Horton v California*, 496 US 128, 136-137 [1990]; *People v Velasquez*, 110 AD3d 835 [2013]).

Here, the evidence at the suppression hearing established that a police officer was lawfully present in the apartment building where the defendant resided (see *People v Church*, 217 AD2d 444 [1995]). The officer discovered the challenged physical evidence, a handgun and ammunition, in a gun box located in a common storage area accessible to anyone in the building. The box was not locked, and there was no indication that the defendant's name or other personal identification, such as his apartment number, was on the box which would lead one who observed it to understand that it belonged to the defendant or a person living in his apartment (see *People v Funches*, 89 NY2d 1005, 1007 [1997]). The box was clearly marked "Smith and Wesson." Under these circumstances, the distinctive label on the outside of the box "proclaim[ed] its contents" and, as such, made it immediately apparent to the officer that the box contained a firearm (*Robbins v California*, 453 US 420, 427 [1981]), thus authorizing the officer to seize the box without a warrant (see *People v Velasquez*, 110 AD3d at 836; *People v Batista*, 261 AD2d 218 [1999]; *People v Aqudelo*, 150 AD2d 284 [1989]; cf. *People v Dobson*, 41 AD3d 496, 496-497 [2007]). Furthermore, since the gun box, "by its very nature, could not support any reasonable expectation of privacy because its content could be inferred from its outward appearance" (*People v Dobson*, 41 AD3d at 497; see *Arkansas v Sanders*, 442 US 753, 764-765 [1979], *overruled in part by California v Acevedo*, 500 US 565 [1991]), the officer lawfully opened the box, and discovered the handgun and ammunition inside.

The defendant's contention that certain summation remarks

made by the prosecutor deprived him of due process is unpreserved for appellate review (*see* CPL 470.05 [2]), and, in any event, without merit.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80, 83 [1982]).

The defendant's remaining contentions are without merit. Skelos, J.P., Dillon and Roman, JJ., concur.

Hall, J., concurs in the result, with the following memorandum: I concur with my colleagues that the hearing court properly denied that branch of the defendant's omnibus motion which was to suppress physical evidence, but only on constraint of this Court's precedent in *People v Velasquez* (110 AD3d 835 [2013]). I write separately to express my view that the police should have obtained a search warrant prior to seizing and searching the gun box located in the common area of the subject building.

The Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, the United States Supreme Court has inferred that a warrant must generally be secured (*see Kentucky v King*, 563 US —, —, 131 S Ct 1849, 1856 [2011]; *Mincey v Arizona*, 437 US 385, 390 [1978]). While I recognize the several exceptions to the warrant requirement, such as "[when] the exigencies of the situation" render a warrantless search objectively reasonable (*Mincey v Arizona*, 437 US at 394 [internal quotation marks omitted]), I fear that the exceptions to the warrant requirement have swallowed the rule.

In my view, the police should have obtained a warrant prior to seizing and opening the gun box in the common area of the subject building (*see People v McLawrence*, 114 AD3d 964 [2014]). There was no emergency or exigent circumstances to justify the search and seizure of the gun box without first obtaining a warrant. The defendant was already under arrest at the time the gun box was searched, and no clear threat to public safety was present. If the police perceived any danger by leaving the gun box in the common area of the building, the police could have secured the area while obtaining a properly executed search warrant. Thus, while I concur in the result reached

herein with respect to the suppression of physical evidence, I do so only on constraint of this Court's precedent.

I agree with all other determinations made by the majority.

41 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MARK PALLATERI, Appellant. [989 NYS2d 905]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Zayas, J.), imposed May 24, 2013, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's purported waiver of his right to appeal was invalid (*see People v Bradshaw*, 18 NY3d 257, 265 [2011]; *People v DeSimone*, 80 NY2d 273, 283 [1992]) and, thus, does not preclude review of his excessive sentence claim. However, contrary to the defendant's contention, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Skelos, Leventhal, Roman and Duffy, JJ., concur.

42 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JUAN PEREZ, Appellant. [990 NYS2d 590]—

Crimes—Proof of Prior Convictions

Appeal by the defendant from a judgment of the County Court, Westchester County (Hubert, J.), rendered June 2, 2011, convicting him of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (two counts), and criminal possession of a controlled substance in the seventh degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is modified, on the law, by vacating the convictions of criminal possession of a controlled substance in the seventh degree (two counts), and dismissing those counts of the indictment; as so modified, the judgment is affirmed.

The County Court did not err in permitting the People to cross-examine the defendant as to certain prior bad acts, some of which the court, after a pretrial *Sandoval/Ventimiglia* hearing (*see People v Sandoval*, 34 NY2d 371 [1974]; *People v Ventimiglia*, 52 NY2d 350 [1981]), had previously ruled would be precluded, as the defendant opened the door to such testimony on direct examination (*see People v Fardan*, 82 NY2d 638, 646 [1993]). The defendant's further contention that he was prejudiced by the language employed by the County Court in advising the jury that he would testify out of sequence is unpreserved for appellate review, as defense counsel did not

object at trial on the constitutional grounds raised now (*see People v Ford*, 69 NY2d 775, 776 [1987]). In any event, that contention is without merit.

The defendant's contention that the County Court erred in permitting repeated testimony by a police officer and detectives as to their knowledge of, and familiarity with, him from prior occasions is unpreserved for appellate review (*see* CPL 470.05 [2]) and, in any event, is without merit. The County Court limited the testimony so that no references to the nature of the defendant's prior interactions with the law enforcement officers were elicited. In any event, even if testimony as to prior interactions with the defendant could have constituted evidence of uncharged crimes, such evidence would properly have been admissible as highly probative of the defendant's identity in light of his misidentification defense, and to provide necessary context for the officers' testimony regarding the circumstances of the investigation (*see People v Jones*, 101 AD3d 1241, 1242 [2012]; *People v Torres*, 19 AD3d 732, 734 [2005]).

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to support the defendant's convictions of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (two counts), and criminal possession of a controlled substance in the seventh degree (two counts). Moreover, upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see* CPL 470.15 [5]). However, as the People correctly concede, the defendant's convictions of two counts of criminal possession of a controlled substance in the seventh degree must be vacated, and those counts of the indictment dismissed, as they are inclusory concurrent counts of criminal possession of a controlled substance in the third degree (*see* CPL 300.40 [3] [b]; *People v Anderson*, 91 AD3d 789, 790 [2012]; *People v Bilal*, 79 AD3d 900, 902 [2010]).

"The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions" (*People v Rivera*, 71 NY2d 705, 708 [1988]; *see* US Const Sixth Amend; NY Const, art I, § 6; *People v Fields*, 109 AD3d 553, 554 [2013]). Here, the defendant was not deprived of the effective assistance of counsel under the New York Constitution because, viewing defense counsel's performance in totality, counsel provided meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Fields*, 109 AD3d at 554). Further, the defendant was not deprived of the

effective assistance of counsel under the United States Constitution (see *Strickland v Washington*, 466 US 668 [1984]).

The defendant's contention that the prosecutor made improper summation comments is unpreserved for appellate review (see CPL 470.05 [2]; *People v Gopaul*, 112 AD3d 966, 967 [2013]; *People v Thompson*, 99 AD3d 819, 819 [2012]) and, in any event, is without merit, as the remarks constituted fair response to the defense summation (see *People v Rich*, 78 AD3d 1200, 1201 [2010]; *People v Martinez*, 58 AD3d 754, 755 [2009]).

The defendant's contention that he was deprived of a fair trial by the cumulative effect of the alleged errors is unpreserved for appellate review (see *People v Diaz*, 30 AD3d 436, 437 [2006]) and, in any event, is without merit (see *People v Sandoval*, 100 AD3d 1025, 1027 [2012]).

The defendant's remaining contentions are without merit. Dillon, J.P., Lott, Austin and Barros, JJ., concur.

43 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RAYMOND PEREZ, Appellant. [989 NYS2d 914]—Appeal by the defendant from a judgment of the Supreme Court, Westchester County (Cacace, J.), rendered October 9, 2012, convicting him of driving while intoxicated in violation of Vehicle and Traffic Law § 1192 (3), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (see *People v Romero*, 7 NY3d 633 [2006]).

The defendant's remaining contention is without merit. Hall, J.P., Roman, Duffy and LaSalle, JJ., concur.

44 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v YAMANI RAVENELL, Appellant. [989 NYS2d 917]—Appeal by the defendant from a resentence of the Supreme Court, Kings County (Brennan, J.), imposed January 26, 2012, upon his conviction of robbery in the first degree (three counts), upon a jury verdict, the resentence being a period of postrelease supervision in addition to the determinate term of imprisonment previously imposed by the same court (Kreindler, J.), on January 4, 2001.

Ordered that the resentence is affirmed.

Contrary to the defendant's contentions, his resentencing to a term that included the statutorily required period of postrelease supervision did not subject him to double jeopardy or violate his right to due process of law, since, at the time he was resentenced, he had not yet completed the sentence of imprisonment originally imposed upon him (*see People v Brinson*, 21 NY3d 490, 492-495 [2013]; *People v Lingle*, 16 NY3d 621, 630 [2011]; *People v Rogers*, 108 AD3d 683, 684 [2013]; *People v Marhoney*, 107 AD3d 743, 743-744 [2013]). Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

45 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v DAVID SANT, Respondent. [990 NYS2d 630]—

Crimes—Right to Speedy Trial

Appeal by the People, as limited by their brief, from so much of an order of the County Court, Suffolk County (Weber, J.), dated February 21, 2012, as, after a hearing, granted that branch of the defendant's motion pursuant to CPL 30.30 which was to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial.

Ordered that the order is modified, on the law and the facts, by deleting the provision thereof granting that branch of the defendant's motion pursuant to CPL 30.30 which was to dismiss counts three through six of the indictment on the ground that he was deprived of his statutory right to a speedy trial, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, counts three through six of the indictment are reinstated, and the matter is remitted to the County Court, Suffolk County, for further proceedings on those counts of the indictment.

On February 6, 2009, the defendant was charged and arraigned by felony complaint (hereinafter the February 2009 docket) as to crimes arising from his alleged possession, on October 10, 2008, of a stolen all-terrain vehicle (hereinafter ATV). On August 7, 2009, the defendant was charged and arraigned by felony complaints (hereinafter the August 2009 dockets) as to crimes arising from his alleged possession, on February 5, 2009, of two other stolen ATVs. On May 18, 2010, the defendant was arraigned on an indictment containing six counts. Counts one and two charged the defendant with the criminal transactions alleged in the felony complaint previously pending under the February 2009 docket, and counts three through six charged him with the criminal transactions alleged in the felony complaints previously pending under the August 2009 dockets. On that day, May 18, 2010, the People announced their readiness for trial.

On or about October 25, 2010, the defendant moved, *inter alia*, pursuant to CPL 30.30, to dismiss the indictment on the ground that he was deprived of his statutory right to a speedy trial. In an order dated January 31, 2012, the County Court determined that two time periods were chargeable to the People, July 15, 2009, to September 16, 2009, and January 13, 2010, to March 17, 2010. The court directed that a hearing be held as to whether there were any other periods chargeable to the People that were not charged pursuant to its order.

Following a hearing, the County Court issued an order dated February 21, 2012, which is the subject of this appeal, in which it concluded that the defendant was deprived of his statutory right to a speedy trial. The court determined that the People were chargeable with 194 days of delay between the commencement date of the defendant's prosecution, February 6, 2009, and his arraignment on the indictment on May 18, 2010, and dismissed the indictment in its entirety.

Contrary to the defendant's position, the People's contention that a separate speedy trial time period should have been applied to counts three through six of the indictment is preserved for appellate review (*see* CPL 470.05 [2]).

Where a defendant is charged with a felony, CPL 30.30 requires the People to be ready for trial within six months of the commencement of the criminal action (*see* CPL 30.30 [1] [a]; *People v Cortes*, 80 NY2d 201, 208 [1992]). A criminal action is commenced when the first accusatory instrument is filed, and "includes the filing of all further accusatory instruments directly derived from the initial one" (CPL 1.20 [16] [b]; *see People v Sinistaj*, 67 NY2d 236, 239 [1986]). Therefore, subsequent accusatory instruments that are "directly derived" from the first instrument will relate back to the first instrument for purposes of assessing the People's compliance with their speedy trial obligations (*People v Sinistaj*, 67 NY2d at 241 n 4 [internal quotation marks omitted]; *see People v Lomax*, 50 NY2d 351, 356 [1980]; *People ex rel. Greenstein v Sheriff of Schenectady County*, 220 AD2d 190, 193 [1996]). The filing of a felony complaint signals the commencement of a criminal action (*see* CPL 1.20 [1], [17]). Where, however, "the felony complaint and subsequently filed indictment allege separate and distinct criminal transactions, the speedy trial time clock commences to run upon the filing of the indictment with respect to the new charges" (*People v Dearstyne*, 230 AD2d 953, 955 [1996]; *see People v Nelson*, 68 AD3d 1252, 1254 [2009]).

As the People correctly contend, counts three through six of the indictment did not directly derive from the felony complaint

filed on February 6, 2009, under the February 2009 docket, for the purpose of calculating the six-month speedy trial limitation prescribed by CPL 30.30 (1) (a). Although counts one and two of the indictment directly derive from the charges in the February 2009 docket, counts three through six of the indictment do not. Counts three through six charge the defendant with crimes based upon acts alleged to have occurred on February 5, 2009, and allege that the defendant possessed two ATVs different from the ATV that the February 2009 docket alleges that the defendant possessed. Counts three through six allege separate and distinct criminal transactions from those that were charged in the February 2009 docket, and thus do not directly derive from the felony complaint filed on February 6, 2009 (*see People v Dearstyne*, 230 AD2d at 955; *People v Schaffer*, 200 AD2d 695, 695 [1994]; *People v Murray*, 127 AD2d 704, 705 [1987]). Counts three through six of the indictment relate back to the felony complaints filed on August 7, 2009. Accordingly, the speedy trial time clock for these counts commenced to run on August 7, 2009. As a result, as to counts three through six of the indictment, the People should not have been charged with any speedy trial time prior to August 7, 2009. Since, pursuant to the County Court's January 31, 2012, order, the People were charged with a delay of 41 days from August 7, 2009, to September 16, 2009, and 63 days from January 13, 2010, to March 17, 2010, for a total of 104 days, the People complied with their speedy trial obligations under CPL 30.30 (1) (a) (*see People v Anderson*, 252 AD2d 399, 401 [1998]). Accordingly, counts three through six were improperly dismissed.

The People's remaining contentions are without merit. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

46 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHAUN STEWART, Appellant. [989 NYS2d 918]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated June 13, 2012 (*People v Stewart*, 96 AD3d 880 [2012]), affirming a judgment of the Supreme Court, Kings County, rendered June 17, 2010.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Mastro, J.P., Chambers, Lott and Roman, JJ., concur.

47 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KAMELL TAYLOR, Appellant. [990 NYS2d 635]—

Crimes—Argument and Conduct of Counsel

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Aloise, J.), rendered April 17, 2012, convicting him of criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of those branches of the defendant's omnibus motion which were to suppress physical evidence and statements made by him to law enforcement officials.

Ordered that the judgment is affirmed.

The defendant contends that the hearing court improperly denied that branch of his omnibus motion which was to suppress physical evidence because the testimony of the arresting officer at the pretrial suppression hearing was incredible and patently tailored to overcome constitutional objections. However, this contention is unpreserved for appellate review, as the defendant failed to raise this specific claim before the hearing court (*see* CPL 470.05 [2]; *People v Inge*, 90 AD3d 675, 676 [2011]; *People v Rivera*, 27 AD3d 489, 490 [2006]). In any event, the defendant's contention is without merit. "The credibility determinations of a hearing court are entitled to great deference on appeal, and will not be disturbed unless clearly unsupported by the record" (*People v Inge*, 90 AD3d at 676; *see People v Moran*, 68 AD3d 786, 787 [2009]; *People v Martinez*, 58 AD3d 870, 870-871 [2009]). As the arresting officer testified that he saw a gun in plain view in the defendant's waistband, the officer had probable cause to arrest him (*see People v Madrid*, 52 AD3d 530, 531 [2008]; *People v Haynes*, 16 AD3d 434, 435 [2005]). On appeal, the defendant asserts no independent ground for the suppression of his statements to law enforcement officials. Accordingly, the hearing court properly denied those branches of the defendant's omnibus motion which were to suppress both physical evidence and his statements to law enforcement officials.

The defendant's claim that prosecutorial misconduct deprived him of a fair trial is unpreserved for appellate review, as he failed to object to most of the allegedly improper summation comments, and made only general objections as to others (*see* CPL 470.05 [2]; *People v Wright*, 90 AD3d 679 [2011]). A general objection to a remark made during a summation is insufficient to preserve a claim for appellate review; a party must specify a basis for the objection (*see People v Tonge*, 93 NY2d 838, 839-840 [1999]; *People v Tevaha*, 84 NY2d 879, 881 [1994]). In any event, the contention is without merit. The challenged remarks were either permissible rhetorical comment (*see People*

v Galloway, 54 NY2d 396 [1981]; *People v Macuil*, 67 AD3d 1025, 1026 [2009]), fair response to the arguments and issues raised by the defense (see *People v Halm*, 81 NY2d 819, 821 [1993]), fair comment on the evidence (see *People v Ashwal*, 39 NY2d 105, 109 [1976]), cured by the trial court's charge to the jury, to which the defendant did not object (see *People v Pocesta*, 71 AD3d 920 [2010]), or, if improper, were not so egregious as to deprive the defendant of a fair trial (see *People v Persaud*, 98 AD3d 527, 529 [2012]; *People v Pocesta*, 71 AD3d at 921).

The sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contention is without merit. Rivera, J.P., Balkin, Leventhal and Roman, JJ., concur.

48 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KEITH WILKINSON, Appellant. [990 NYS2d 270]—

Crimes—Confession

Crimes—Evidence—Hearsay—Past Recollection Recorded

Appeal by the defendant from a judgment of the County Court, Westchester County (Cacace, J.), rendered March 29, 2011, convicting him of murder in the second degree (two counts), robbery in the first degree, burglary in the first degree (two counts), criminal possession of a weapon in the second degree, and assault in the second degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

Ordered that the judgment is reversed, on the law, and a new trial is ordered.

The hearing court properly denied that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials. Although the defendant refused to sign the *Miranda* warning form (see *Miranda v Arizona*, 384 US 436 [1966]), a defendant who refuses to sign a written waiver of his rights, including a *Miranda* rights card, may nevertheless orally waive his or her rights (see *People v Saunders*, 71 AD3d 1058, 1059 [2010]; *People v Robinson*, 287 AD2d 398 [2001]; *People v Spencer*, 279 AD2d 539, 540 [2001]; see also *People v Thornton*, 87 AD3d 663, 664 [2011]). Here, a detective testified, and the hearing court found, that the defendant said that he would not sign the form, but that he would talk to the detectives. A review of the totality of the circumstances demonstrates that the defendant's statements were voluntarily made (see *People v Winkfield*, 90 AD3d 959, 960 [2011]; *People v Seabrooks*,

82 AD3d 1130, 1130-1131 [2011]; *People v Saunders*, 71 AD3d at 1059-1060).

At trial, the County Court erred in admitting into evidence portions of a witness's grand jury testimony recounting inculpatory statements allegedly made by the defendant, under the past recollection recorded exception to the hearsay rule. "The requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his [or her] knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (*People v Taylor*, 80 NY2d 1, 8 [1992]; *Matter of Saperston v Holdaway*, 93 AD3d 1271, 1275 [2012]; *Morse v Colombo*, 31 AD3d 916, 917 [2006]). In light of the one-year gap between the time the witness allegedly heard the defendant's alleged inculpatory statements and the witness's grand jury testimony, the People failed to establish that the witness's recollection of the matter was "fairly fresh when recorded or adopted" during the grand jury proceeding (*People v Taylor*, 80 NY2d at 8; see *Calandra v Norwood*, 81 AD2d 650, 651 [1981]; see also *Morse v Colombo*, 31 AD3d at 917). Moreover, the witness's trial testimony was equivocal as to whether her testimony in the grand jury correctly represented her knowledge and recollection when given (see *People v Fields*, 89 AD3d 861 [2011]; *People v Pacheco*, 38 AD3d 686, 689 [2007]).

Since the proof of the defendant's guilt, without reference to the inadmissible grand jury testimony, was not overwhelming, "there is no occasion for consideration of any doctrine of harmless error" (*People v Crimmins*, 36 NY2d 230, 241 [1975]; *People v Parchment*, 92 AD3d 699, 700 [2012]).

In light of our determination, we need not reach the defendant's remaining contentions. Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

49 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v GREGORY ZALEVSKY, Appellant. [989 NYS2d 917]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated March 22, 2011 (*People v Zalevsky*, 82 AD3d 1136 [2011]), determining an appeal from a judgment of the Supreme Court, Kings County, rendered June 18, 2007.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (see *Jones v Barnes*, 463

US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Eng, P.J., Dickerson, Sgroi and Hinds-Radix, JJ., concur.

50 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v GUY ZAPPULLA, Appellant. [989 NYS2d 916]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated February 13, 2013 (*People v Zappulla*, 103 AD3d 759 [2013]), affirming a judgment of the Supreme Court, Kings County, rendered July 21, 2008.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Rivera, J.P., Hall, Roman and Miller, JJ., concur.

(August 8, 2014)

1 THE PEOPLE OF THE STATE OF NEW YORK ex rel. MICHAEL MARCUS, Petitioner, v WARDEN, Respondent. [990 NYS2d 416]—

Crimes—Right to Speedy Trial

Writ of habeas corpus in the nature of an application to set bail upon Queens County indictment No. 2154/09, pursuant to CPL 30.30 (2) (a), or to release the petitioner on his own recognizance. Application by the petitioner to waive the filing fee.

Ordered that the application is granted and the filing fee is waived; and it is further,

Adjudged that the writ is sustained, without costs or disbursements, to the extent that the matter is remitted to the Supreme Court, Queens County, to set reasonable bail or to release the petitioner on his own recognizance, and to fix such other terms and conditions upon the petitioner's release as may seem to it to be just and proper, in accordance with the holding of the Court of Appeals in *People ex rel. Chakwin v Warden, N.Y. City Correctional Facility, Rikers Is.* (63 NY2d 120 [1984]).

As the respondent concedes, since more than 90 days of delay in bringing the petitioner to the retrial on Queens County indictment No. 2154/09 are chargeable to the prosecution, CPL 30.30 (2) (a) commands that the detainee be released on bail, which he is capable of meeting, or upon his own recognizance (*see People ex rel. Chakwin v Warden, N.Y. City Correctional Facility, Rikers Is.*). Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

(August 13, 2014)

1 AIR & POWER TRANSMISSION, INC., et al., Appellants, v
ROBIN S. WEINGAST et al., Respondents. [992 NYS2d 46]—

**Dismissal and Nonsuit—Dismissal of Complaint—Documentary Evidence
Consumer Protection—Deceptive Acts and Practices**

In an action, inter alia, to recover damages for fraud, breach of fiduciary duty, and violation of General Business Law § 349, the plaintiffs appeal from (1) an order of the Supreme Court, Suffolk County (Whelan, J.), dated June 6, 2012, which granted the separate motions of the defendants Robin S. Weingast and Robin S. Weingast & Associates, Inc., and the defendant Designs For Finance, Inc., to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211 (a), and (2) an order of the same court dated September 25, 2012, which granted the separate motion of the defendant Massachusetts Mutual Life Insurance Company to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a).

Ordered that the orders are affirmed, with one bill of costs to the respondents appearing separately and filing separate briefs.

The plaintiff Air & Power Transmission, Inc., is a small business owned by the plaintiff John F. Barone. The plaintiffs Richard F. Barone and Kenneth Barone were employees of Air & Power Transmission, Inc. In August 2011, the plaintiffs commenced this action, alleging that the defendants Robin S. Weingast and Robin S. Weingast & Associates, Inc., insurance brokers and consultants, marketed an Internal Revenue Code § 419 (e) Single Employer Trust Employee Welfare Benefits Plan (hereinafter the BETA Plan), to them. The defendant Massachusetts Mutual Life Insurance Company issued the life insurance policies that funded the subject BETA Plan. The defendant Designs For Finance, Inc., was the sponsor of the subject BETA Plan. According to the complaint, the plaintiffs relied upon the defendants' representations that the insurance premiums were fully tax deductible. However, in October 2007, the Internal Revenue Service published a ruling that effectively disallowed deductions for payment of premiums under the BETA Plan. Thereafter, the plaintiffs were audited and became subject to federal and state tax adjustments on their tax returns. Additionally, the plaintiffs alleged that, without the tax deductions, they were unable to afford the policies and were forced to sell them at a substantial loss.

The Supreme Court properly directed the dismissal of the causes of action to recover damages for fraud, breach of fiduciary duty, and negligence pursuant to CPLR 3211 (a) (1). A mo-

tion to dismiss a complaint based on documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Harris v Barbera*, 96 AD3d 904, 905 [2012]; *Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2010]). Here, the documentary evidence submitted by the defendants included forms signed by or on behalf of the plaintiffs that contained specific disclaimer provisions, pursuant to which the plaintiffs expressly acknowledged that the defendants were not authorized to provide tax advice, and that they would not rely on any such advice provided. These forms conclusively established the defendants' defense to the fraud, breach of fiduciary duty, and negligence causes of action (see *Cathy Daniels, Ltd. v Weingast*, 91 AD3d 431, 433 [2012]; *Jeffrey Rapaport M.D., P.A. v Robin S. Weingast & Assoc., Inc.*, 859 F Supp 2d 706, 716-717 [D NJ 2012]; *Eaves v Designs for Finance, Inc.*, 785 F Supp 2d 229, 249-250 [SD NY 2011]; see also *Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959]; *Natoli v NYC Partnership Hous. Dev. Fund Co., Inc.*, 103 AD3d 611, 612-613 [2013]). Additionally, the Supreme Court properly directed the dismissal of the cause of action for rescission, as it was asserted pursuant to CPLR 3002 (e) as alternative relief for the alleged fraud (see *Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 369-370 [2007]).

Additionally, the complaint failed to state a viable cause of action against the defendants to recover damages for a violation of General Business Law § 349. The elements of a cause of action to recover damages for deceptive business practices under General Business Law § 349 are that the defendant engaged in a deceptive act or practice, that the challenged act or practice was consumer-oriented, and that the plaintiff suffered an injury as a result of the deceptive act or practice (see *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). Accepting the facts as alleged in the complaint as true, and according the plaintiffs the benefit of every possible favorable inference, as required on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) (see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the conduct complained of was not consumer-oriented, as it did not affect consumers at large (see *Cathy Daniels, Ltd. v Weingast*, 91 AD3d at 435; *Eaves v Designs for Finance, Inc.*, 785 F Supp 2d at 266; see also *Yellow Book Sales & Distrib. Co., Inc. v Hillside Van Lines, Inc.*, 98 AD3d 663, 665 [2012]; *Vescon*

Constr., Inc. v Gerelli Ins. Agency, Inc., 97 AD3d 658, 659 [2012]).

Further, the cause of action to recover damages for unjust enrichment is a quasi contract claim and, therefore, is not viable against the defendants where, as here, the parties entered into express agreements (*see Woss, LLC v 218 Eckford, LLC*, 102 AD3d 860, 862 [2013]; *Shovak v Long Is. Commercial Bank*, 50 AD3d 1118, 1120 [2008]).

The parties' remaining contentions either are without merit or need not be addressed in light of our determination. Mastro, J.P., Chambers, Lott and Roman, JJ., concur.

2 MARTIN AMADOR, Respondent, v CITY OF NEW YORK et al., Appellants. [991 NYS2d 637]—

Motor Vehicles—Collision—Rear-End Collision—Summary Judgment

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Richmond County (Aliotta, J.), dated August 21, 2012, which granted the plaintiff's motion for summary judgment on the issue of liability.

Ordered that the order is reversed, on the law, with costs, and the motion is denied.

The plaintiff allegedly sustained personal injuries when a vehicle he was driving was struck in the rear by a vehicle owned by the defendants City of New York and New York City Department of Sanitation (hereinafter together the municipal defendants) and operated by the defendant Joseph R. Esposito, Jr. The plaintiff commenced this action against the municipal defendants and Esposito to recover damages for his personal injuries. The plaintiff moved for summary judgment on the issue of liability and the Supreme Court granted the motion.

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Raimondo v Plunkitt*, 102 AD3d 851, 852 [2013]; *Kertesz v Jason Transp. Corp.*, 102 AD3d 658 [2013]). "One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle" (*Chepel v Meyers*, 306 AD2d 235, 237 [2003]; *see Ramos v TC Paratransit*, 96 AD3d 924 [2012]; *Vargas v Luxury Family Corp.*, 77 AD3d 820 [2010]; *Foti v Fleetwood Ride, Inc.*, 57 AD3d 724 [2008]). There can be more than one proximate cause of an accident, and the proponent of a summary judgment motion has the burden of establishing freedom from comparative fault as a

matter of law (*see Burnett v Reisenauer*, 107 AD3d 656 [2013]; *Jones v Vialva-Duke*, 106 AD3d 1052, 1053 [2013]).

The Supreme Court erred in granting the plaintiff's motion for summary judgment on the issue of liability. Although the transcript of the plaintiff's General Municipal Law § 50-h hearing testimony, which was submitted in support of the motion, demonstrated that his vehicle was struck in the rear as it was coming to a stop, the transcript of the deposition testimony of Esposito, which the plaintiff also submitted in support of the motion, failed to eliminate triable issues of fact as to whether the plaintiff was free from comparative fault. According to Esposito, the plaintiff's vehicle came to an abrupt stop for no apparent reason as it was approaching an intersection with the traffic light in its favor (*see Kertesz v Jason Transp. Corp.*, 102 AD3d 658 [2013]; *Pollard v Independent Beauty & Barber Supply Co.*, 94 AD3d 845 [2012]; *Harris v Auto Palace Truck Rental & Leasing, Inc.*, 81 AD3d 691 [2011]). Since the plaintiff failed to meet his prima facie burden, we need not review the sufficiency of the defendants' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur. [**Prior Case History: 2012 NY Slip Op 32665(U).**]

3 DANIEL AUGUSTIN, Appellant, v PARK SLOPE ASSOCIATES NY, LLC, et al., Respondents. [990 NYS2d 831]—

Fraud—What Constitutes

In an action, inter alia, for a judgment declaring the plaintiff to be the owner of certain real property, in effect, to set aside a deed, and to recover damages for fraud, the plaintiff appeals from an order of the Supreme Court, Kings County (Schack, J.), dated July 16, 2012, which denied his motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Park Slope Associates NY, LLC, upon that defendant's failure to appear or answer the complaint and, in effect, for summary judgment declaring him to be the owner of certain real property and to set aside a deed, and vacated all stays in the action.

Ordered that the order is affirmed, without costs or disbursements.

We affirm the Supreme Court's denial of the plaintiff's motion, but on grounds different from those relied upon by the Supreme Court. The plaintiff claims that the defendants obtained title to the subject premises from him through fraud. In support of those branches of his motion which were, in effect, for summary judgment declaring him to be the owner of

the subject real property and to set aside a deed, the plaintiff failed to establish a prima facie case of fraud so as to satisfy his initial burden (*see generally Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785 [2009]). In light of the plaintiff's failure to satisfy his prima facie burden, these branches of the plaintiff's motion were properly denied, regardless of the sufficiency of the papers submitted by the defendant Steve Casholo, Inc., in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Moore v Great Atl. & Pac. Tea Co., Inc.*, 117 AD3d 695, 696 [2014]).

That branch of the plaintiff's motion which was pursuant to CPLR 3215 for leave to enter a default judgment against the defendant Park Slope Associates NY, LLC, also was properly denied. The plaintiff failed to demonstrate his entitlement to enter a default judgment against that defendant (*see GMAC v Minewiser*, 115 AD3d 707 [2014]). Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur.

4 ROBERT BARNES, Appellant, v INCORPORATED VILLAGE OF PORT JEFFERSON, Respondent, et al., Defendants. [990 NYS2d 841]—

Municipal Corporations—Snow and Ice—Prior Written Notice

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Pitts, J.), dated June 11, 2013, as granted that branch of the motion of the defendant Incorporated Village of Port Jefferson which was for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff alleges that on December 29, 2010, at approximately 9:30 p.m., he slipped and fell on a mound of snow in a municipal parking lot located at 99A Main Street, in the defendant Incorporated Village of Port Jefferson. The plaintiff testified at his deposition that he and his wife left a local sports bar through a back door, which led to a parking lot. The plaintiff observed that snow had been cleared and plowed to the sides of the lot, and there was a mound of snow running perpendicular to the route he and his wife wanted to walk. The plaintiff recalled there was no visible path or spot in that perpendicular line of snow that permitted him to pass into the parking lot. At his deposition, he described the snow mound as being eight feet across and 3½ feet wide. He was unable to estimate its height. According to the plaintiff, there was no other way around the

mound, so he climbed over it. He took one step with his right foot into the mound of snow, and then followed with a second step with his left foot. Upon taking the second step, his left ankle buckled and he began to fall. He was able to catch his wife's arm, which prevented him from falling to the ground.

As a result of this incident, the plaintiff commenced this action against, among others, the Village, which owned and maintained the subject parking lot, alleging that the mound existed as a result of the Village's snow removal operations. The Village moved, *inter alia*, for summary judgment dismissing the complaint insofar as asserted against it, contending, among other things, lack of prior written notice. The Supreme Court, *inter alia*, granted that branch of the motion.

A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies (*see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Keating v Town of Oyster Bay*, 111 AD3d 604 [2013]; *Masotto v Village of Lindenhurst*, 100 AD3d 718, 718 [2012]; *Albano v Suffolk County*, 99 AD3d 741 [2012]). Recognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it (*see Keating v Town of Oyster Bay*, 111 AD3d at 604; *Masotto v Village of Lindenhurst*, 100 AD3d at 718; *Albano v Suffolk County*, 99 AD3d at 742).

Contrary to the plaintiff's assertions on appeal, the Village established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not receive prior written notice of the snow mound, and that it did not create a dangerous condition through an affirmative act of negligence (*see Keating v Town of Oyster Bay*, 111 AD3d at 604; *Forman v City of White Plains*, 5 AD3d 434 [2004]; *Davis v City of New York*, 270 App Div 1047 [1946], *affd* 296 NY 869 [1947]). The plaintiff did not allege that the subject condition was created by the Village's special use, and thus, the Village was not required to address this exception (*see Perez v City of New York*, 116 AD3d 1019, 1020 [2014]). In opposition, the plaintiff failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted that branch of the Village's motion which was for summary judgment dismissing the complaint insofar as asserted against it. Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

5 MELVIN BLUM, Appellant, v RUDOLPH ROSENBERG, Respondent. [990 NYS2d 844]—

Motions and Orders—Motion to Dismiss—Complaint

In an action, inter alia, to dissolve a partnership, the plaintiff appeals from an order of the Supreme Court, Nassau County (Bucaria, J.), entered July 15, 2013, which granted the defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a).

Ordered that the order is reversed, on the law, with costs, and the defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) is denied.

In June 2010, the plaintiff commenced an arbitration proceeding against the defendant seeking the dissolution of Accurate Chemical & Scientific Corp. (hereinafter Accurate), a company jointly owned by the parties and a third shareholder. In the arbitration, the defendant asserted claims against certain businesses owned by the plaintiff, and the plaintiff asserted claims against certain other businesses owned by the defendant. These claims were largely based on a "Tripartite Agreement," wherein the plaintiff, the defendant, and a nonparty agreed to share their various business enterprises.

To resolve the disputes between the parties and to narrow the issues for arbitration, the parties entered into a so-ordered stipulation dated September 21, 2010. In the stipulation, the parties agreed that the Tripartite Agreement was "void for all purposes, in this and any other proceeding." The parties also agreed to "waive any claims, counterclaims, or actions either party may have, or may have had, regarding any business or other entity owned by the other," except as necessary to determine (1) the number of Accurate shares held by the defendant, and (2) the fair value of the plaintiff's Accurate shares.

After the arbitration proceeding had concluded, and the defendant had "bought out" the plaintiff's interest in Accurate, the plaintiff commenced this action, inter alia, to dissolve an alleged partnership between the parties, in which they purchased certain Rolls Royces in 1965 for investment purposes (hereinafter the alleged automobile partnership). The defendant moved to dismiss the complaint pursuant to CPLR 3211 (a), and the Supreme Court granted the motion. The plaintiff appeals.

The waiver provision of the parties' stipulation is ambiguous regarding whether the parties intended to waive any claims relating to the subject Rolls Royces and the alleged automobile partnership, which they allegedly jointly owned. Since the waiver does not utterly refute the factual allegations of the complaint and conclusively establish a defense to the claims asserted as a matter of law, dismissal of the complaint was inap-

propriate pursuant to CPLR 3211 (a) (1) (*see Kappa Dev. Corp. v Queens Coll. Point Holdings, LLC*, 95 AD3d 1178, 1179 [2012]).

The defendant's remaining contentions are without merit. Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

6 CESAR CARRASCO, Respondent, v NEIL WEISSMAN, ESQ., et al., Defendants, and 102 PARTNERS, LLC, et al., Respondents, and NCJ DEVELOPMENT, INC., Appellant. [992 NYS2d 36]—

Judgments—Collateral Estoppel
Labor—Safe Place to Work

In an action to recover damages for personal injuries, the defendant NCJ Development, Inc., appeals from an order of the Supreme Court, Kings County (Schmidt, J.), dated May 22, 2012, which denied its motion for summary judgment dismissing the amended complaint and all cross claims insofar as asserted against it, and conditionally granted that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it.

Ordered the order is modified, on the law, (1) by deleting the provision thereof denying that branch of the appellant's motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it, and substituting therefor a provision granting that branch of the appellant's motion, and (2) by deleting the provision thereof conditionally granting that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against the appellant, and substituting therefor a provision denying that branch of the plaintiff's cross motion; as so modified, the order is affirmed, without costs or disbursements, upon searching the record, the determination conditionally granting that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against the defendants 102 Partners, LLC, Bellerose Builders, Inc., and Jackson Development Group, Ltd., is vacated, and summary judgment is awarded to the defendants 102 Partners, LLC, Bellerose Builders, Inc., and Jackson Development Group, Ltd., dismissing the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against them.

The plaintiff allegedly was injured while he and a coworker were installing plate glass window panes in a building under

construction. According to the plaintiff's deposition testimony, while he was standing on the ground, and while his coworker was standing on the second step of a ladder, they jointly lifted a glass window pane in order to install it in a storefront window frame. At that moment, the plaintiff tripped or stepped on a piece of brick and his body shifted slightly, causing the pane to split in half. The pieces of glass struck both the plaintiff and his coworker, injuring them.

The plaintiff commenced this personal injury action against the defendant NCJ Development, Inc. (hereinafter NCJ), the alleged general contractor, and the defendants 102 Partners, LLC, Bellerose Builders, Inc., and Jackson Development Group, Ltd., the owners of the subject property (hereinafter collectively the owners). NCJ moved for summary judgment dismissing the amended complaint and all cross claims asserted against it, and the plaintiff cross-moved for summary judgment on the issue of liability against NCJ and the owners on his cause of action alleging a violation of Labor Law § 240 (1).

In support of its motion, NCJ contended that the doctrine of collateral estoppel barred the plaintiff from asserting causes of action against it, relying on an order of the Supreme Court granting its motion for summary judgment dismissing the complaint asserted against it by the plaintiff's coworker. The Supreme Court properly rejected NCJ's contention.

The doctrine of collateral estoppel “ ‘precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party . . . , whether or not the tribunals or causes of action are the same’ ” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *M.V.B. Collision, Inc. v Rovt*, 101 AD3d 830, 831 [2012]). The doctrine applies only if, inter alia, “ ‘the plaintiff had a full and fair opportunity to litigate the issue in the earlier action’ ” (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128 [2007], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 349). Although the action commenced by the plaintiff and that commenced by his coworker were joined for trial, the plaintiff was not a party to his coworker's action and, thus, he did not have an opportunity to oppose NCJ's motion in that action. Accordingly, the plaintiff did not have a full and fair opportunity to litigate the issue of NCJ's liability in the coworker's action and, thus, the doctrine of collateral estoppel is inapplicable.

The Supreme Court properly denied that branch of NCJ's motion which was for summary judgment dismissing the cause

of action alleging a violation of Labor Law § 241 (6) insofar as asserted against it. In support of that branch of its motion, NCJ argued that it could not be held liable under that statute because it was neither the general contractor nor the statutory agent of the owner. However, NCJ's own submissions raised triable issues of fact as to whether it was the general contractor on the project or had the ability to control the activity which brought about the injury (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Gonzalez v TJM Constr. Corp.*, 87 AD3d 610, 611 [2011]; *Aranda v Park E. Constr.*, 4 AD3d 315, 316 [2004]).

The Supreme Court also properly denied that branch of NCJ's motion which was for summary judgment dismissing the causes of action to recover damages for common-law negligence and a violation of Labor Law § 200 insofar as asserted against it, since, in this action founded upon an alleged dangerous condition at the work site, NCJ failed to eliminate all triable issues of fact as to whether it had control over the work site and whether it created or had actual or constructive notice of the alleged dangerous condition (*see Eversfield v Brush Hollow Realty, LLC*, 91 AD3d 814, 816 [2012]; *Dalvano v Racanelli Constr. Co., Inc.*, 86 AD3d 550, 551 [2011]).

However, NCJ demonstrated its prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it. In this regard, NCJ's evidence established the absence of a causal nexus between the plaintiff's injury and a lack or failure of a device prescribed by section 240 (1) (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 9 [2011]; *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490-491 [1995]; *Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d 677 [2012]; *see generally Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603-604 [2009]). The report of the plaintiff's expert failed to raise a triable issue of fact in opposition, since the expert's opinion was conclusory and unsubstantiated (*see Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 958-959 [2012]; *Laskowski v 525 Park Ave. Condominium*, 93 AD3d 822, 825 [2012]; *Crawford v Jefferson House Assoc., LLC*, 57 AD3d 822, 823 [2008]). The expert did not opine as to the necessity of any particular safety device to perform the specific task the plaintiff was performing at the time of the accident, and, in fact, incorrectly stated that the plaintiff was injured when he was required to lift a heavy object over his head while climbing a ladder.

Therefore, the Supreme Court should have granted that branch of NCJ's motion which was for summary judgment dismissing the Labor Law § 240 (1) cause of action insofar as

asserted against it. For the same reason, the plaintiff failed to make a prima facie showing in support of that branch of his cross motion which was for summary judgment on the issue of liability on this cause of action insofar as asserted against NCJ, and, therefore, the Supreme Court should have denied that branch of the plaintiff's cross motion. Further, under the circumstances presented here, we exercise our authority to search the record and both deny that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action insofar as asserted against the owners, and award summary judgment to the owners dismissing the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against them (*see* CPLR 3212 [b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111 [1984]; *Parker v 205-209 E. 57th St. Assoc., LLC*, 100 AD3d 607, 608-609 [2012]; *Lopez-Dones v 601 W. Assoc., LLC*, 98 AD3d 476, 479-480 [2012]).

NCJ's remaining contentions are without merit. Skelos, J.P., Chambers, Hall and Miller, JJ., concur.

7 CESAR CARRASCO, Respondent, v NEIL J. WEISSMAN, ESQ., et al., Defendants, and 102 PARTNERS, LLC, et al., Appellants. [992 NYS2d 268]—

**Labor—Safe Place to Work—Summary Judgment
Judgments—Summary Judgment—Timeliness of Motion
Motions and Orders—Reargument or Renewal**

In an action to recover damages for personal injuries, the defendants 102 Partners, LLC, Bellerose Builders, Inc., and Jackson Development Group, Ltd., appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Schmidt, J.), dated April 30, 2013, as (a), in effect, granted that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against them, (b) granted that branch of the plaintiff's cross motion which was for leave to renew that branch of his prior cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against them, and, upon renewal, vacated the determination in a prior order of the same court dated May 22, 2012, conditionally granting that branch of the plaintiff's prior cross motion, and thereupon unconditionally granted that branch of the plaintiff's prior cross motion, and (c) denied their motion for leave to serve and file a late motion for summary judgment dismissing the complaint insofar as asserted against them and thereupon award them summary

judgment dismissing the complaint insofar as asserted against them, and the defendant NCJ Development, Inc., separately appeals, as limited by its brief, from so much of the same order dated April 30, 2013, as (a), in effect, granted that branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against it, (b) granted that branch of the plaintiff's cross motion which was for leave to renew that branch of his prior cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it and, upon renewal, vacated the determination in the order dated May 22, 2012, conditionally granting that branch of the plaintiff's prior cross motion, and thereupon unconditionally granted that branch of the plaintiff's prior cross motion, and (c) denied its separate motion for leave to renew its prior motion for summary judgment dismissing the amended complaint and all cross claims insofar as asserted against it, which had been denied in the order dated May 22, 2012.

Ordered that the order dated April 30, 2013, is modified, on the law, (1) by deleting the provision thereof, in effect, granting that branch of the plaintiff's cross motion which was for summary judgment on the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against the appellants, and substituting therefor a provision denying that branch of the plaintiff's cross motion, and (2) by deleting the provision thereof granting that branch of the plaintiff's cross motion which was for leave to renew his prior cross motion, and substituting therefor a provision denying that branch of the plaintiff's cross motion which was for leave to renew; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court erred in, in effect, granting that branch of the plaintiff's cross motion which was for summary judgment on the cause of action alleging a violation of Labor Law § 241 (6) against the defendants 102 Partners, LLC, Bellerose Builders, Inc., and Jackson Development Group, Ltd., and the defendant NCJ Development, Inc. (hereinafter collectively the appellants), since the plaintiff failed to establish his prima facie entitlement to judgment as a matter of law on that cause of action. Further, the Supreme Court erred in granting that branch of the plaintiff's cross motion which was for leave to renew his prior cross motion for unconditional summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) against the appellants, which had been

conditionally granted in an order dated May 22, 2012. That branch of the plaintiff's cross motion which was for leave to renew was not based on new facts or a change in the law that would change the prior determination (*see* CPLR 2221 [e] [2]; *Frenchman v Lynch*, 97 AD3d 632, 633 [2012]; *Elbaz v New York City Hous. Auth.*, 90 AD3d 986, 987 [2011]). We note that, in a related appeal, this Court, among other things, awarded summary judgment to the defendant NCJ Development, Inc. (hereinafter NCJ), dismissing the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it and, upon searching the record, awarded summary judgment dismissing that cause of action insofar as asserted against the defendants 102 Partners, LLC, Bellerose Builders, Inc., and Jackson Development Group, Ltd. (*see Carrasco v Weissman*, 120 AD3d 531 [2d Dept 2014] [decided herewith]). Accordingly, NCJ's contention that the Supreme Court should have granted it leave to renew that branch of its motion which was for summary judgment dismissing the Labor Law § 240 (1) cause of action insofar as asserted against it has been rendered academic.

The Supreme Court properly denied the motion of the defendants 102 Partners, LLC, Bellerose Builders, Inc., and Jackson Development Group, Ltd., which was for leave to serve and file a late motion for summary judgment and thereupon award them summary judgment dismissing the complaint insofar as asserted against them. Those defendants failed to establish good cause for not timely serving the motion as required by CPLR 3212 (a) (*see Brill v City of New York*, 2 NY3d 648 [2004]; *Demacopoulos v City of New York*, 73 AD3d 842 [2010]). Accordingly, those defendants were not entitled to consideration of their request for summary judgment dismissing the complaint insofar as asserted against them, although we note that, by virtue of our determination in the related appeal, they have already been awarded summary judgment dismissing the Labor Law § 240 (1) cause of action insofar as asserted against them.

There is no merit to NCJ's contentions that the Supreme Court should have granted it leave to renew those branches of its prior motion which were for summary judgment dismissing the causes of action alleging a violation of Labor Law §§ 241 (6) and 200, and common-law negligence insofar as asserted against it. As to the cause of action alleging a violation of Labor Law § 241 (6), NCJ cites to a purported change in the law, to wit, this Court's decision and order in *Mendez v Jackson Dev. Group, Ltd.* (99 AD3d 677 [2012]), an action commenced by the plaintiff's coworker, who was injured in the same accident as

the plaintiff. In that decision and order, this Court concluded that the regulation cited by the coworker, Johnny Mendez, in support of his Labor Law § 241 (6) cause of action was inapplicable because the regulation—12 NYCRR 23-1.7 (e) (2)—was “designed to protect against tripping hazards and sharp projections on floors and platforms,” and Mendez did not testify that he tripped on a tripping hazard (*Mendez v Jackson Dev. Group, Ltd.*, 99 AD3d at 679 [internal quotation marks omitted]). In the present case, however, the plaintiff testified at his deposition that the accident occurred when he tripped on a brick. Thus, this Court’s decision in *Mendez* did not constitute a change in the law that would have changed the Supreme Court’s prior determination in connection with the Labor Law § 241 (6) cause of action. Further, NCJ did not identify any new facts or change in the law pertaining to those branches of its prior motion which were for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence and the cross claims asserted against it. Skelos, J.P., Chambers, Hall and Miller, JJ., concur.

8 JACK CATTAN, a Infant, by His Father and Natural Guardian, JUDAH CATTAN, et al., Respondent, v ISAAC A. SUTTON et al., Respondents, and V. KONSTANTINOVSKY et al., Appellants. [990 NYS2d 848]—

Motor Vehicles—Collision—Summary Judgment

In an action to recover damages for personal injuries, etc., the defendants V. Konstantinovsky and Zack Konstantinovsky appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Knipel, J.), dated August 6, 2013, as denied their motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs.

On the morning of November 17, 2010, the infant plaintiff allegedly was injured when he was involved in a motor vehicle accident as a rear seat passenger in a motor vehicle operated by the defendant Louise F. Sutton (hereinafter Louise) and owned by the defendant Isaac A. Sutton. The other motor vehicle involved in the accident was operated by the defendant Zack Konstantinovsky (hereinafter Zack) and owned by the defendant V. Konstantinovksy (hereinafter together the Konstantinovsky defendants). The accident occurred in the intersection of Avenue K and East 17th Street in Brooklyn, as the Sutton vehicle was making a left turn onto East 17th Street from the eastbound lane of Avenue K and the Konstantinovsky

vehicle was traveling straight in the westbound lane of Avenue K.

The Konstantinovsky defendants moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. The Supreme Court denied their motion.

Although a driver with the right-of-way is entitled to anticipate that the other driver will obey the traffic laws requiring him or her to yield (see *Moreno v Gomez*, 58 AD3d 611, 612 [2009]), a driver is bound to see what is there to be seen through the proper use of his or her senses and is negligent for failure to do so (see *Lu Yuan Yang v Howsal Cab Corp.*, 106 AD3d 1055, 1056 [2013]; *Katanov v County of Nassau*, 91 AD3d 723, 725 [2012]; *Wilson v Rosedom*, 82 AD3d 970 [2011]). Moreover, there can be more than one proximate cause of a motor vehicle accident and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative fault as a matter of law (see *Simmons v Canady*, 95 AD3d 1201, 1202-1203 [2012]; *Pollack v Margolin*, 84 AD3d 1341, 1342 [2011]). The issue of comparative fault is generally a question for the trier of fact (see *Fogel v Rizzo*, 91 AD3d 706 [2012]; *Gause v Martinez*, 91 AD3d 595 [2012]; *Allen v Echols*, 88 AD3d 926, 926 [2011]).

Here, the Konstantinovsky defendants failed to meet their prima facie burden of demonstrating their entitlement to judgment as a matter of law. In support of their motion, the Konstantinovsky defendants submitted, inter alia, excerpts of the deposition testimony of Zack and the infant plaintiff. Although this testimony demonstrated that Zack had the right of way when his vehicle came into contact with the vehicle driven by Louise, it was insufficient to establish, prima facie, that Zack's actions did not contribute to the happening of the accident and that Louise's alleged negligence was the sole proximate cause of the accident (see *Tapia v Royal Tours Serv., Inc.*, 67 AD3d 894, 895 [2009]; *Gray v Dembeck*, 48 AD3d 748, 749-750 [2008]; *Casaregola v Farkouh*, 1 AD3d 306, 307 [2003]; *Siegel v Sweeney*, 266 AD2d 200, 201-202 [1999]; see also *Guzman v Bowen*, 38 AD3d 837, 838 [2007]).

Since the Konstantinovsky defendants did not establish their prima facie entitlement to judgment as a matter of law, the Supreme Court properly denied their motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, and we need not examine the sufficiency of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Chambers, J.P., Austin, Hinds-Radix and Duffy, JJ., concur.

9 COMMISSIONERS OF STATE INSURANCE FUND, Respondent, v KAYWOOD PROPERTIES, LTD., Appellant. [990 NYS2d 847]—

Judgments—Summary Judgment

In an action, inter alia, to recover allegedly unpaid premiums for a workers' compensation insurance policy, the defendant appeals from an order of the Supreme Court, Suffolk County (LaSalle, J.), dated July 26, 2013, which denied its motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The defendant had a workers' compensation insurance policy issued by the plaintiff and the State Insurance Fund. The plaintiff commenced this action, alleging that the defendant had failed to pay \$11,648.43 in premiums due over a specified period of time. The defendant moved for summary judgment dismissing the complaint, claiming that, during the relevant time periods, it had no employees on its payroll. The defendant maintained that, in the absence of any employees on its payroll, it did not owe premiums on its policy. The Supreme Court denied the defendant's motion, and the defendant appeals.

Under the circumstances of this case, to establish its prima facie entitlement to judgment as a matter of law, the defendant was required to demonstrate that, during the relevant time periods, it did not have any employees on its payroll. The affidavit of Anthony J. Kaywood, principal of the defendant, contained only conclusory assertions to the effect that the defendant did not have any employees during the relevant time period, without any evidentiary support, and was therefore insufficient to establish, prima facie, that the defendant did not have employees on its payroll during the relevant time period (*see Wells Fargo Bank, N.A. v Cean Owens, LLC*, 110 AD3d 872, 873 [2013]; *Garal Wholesalers, Ltd. v Raven Brands, Inc.*, 82 AD3d 1041, 1042 [2011]; *see also Bistre v Rongrant Assoc.*, 109 AD3d 778, 779 [2013]). Accordingly, the Supreme Court properly denied the defendant's motion, regardless of the sufficiency of the papers submitted by the plaintiff in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Moore v Great Atl. & Pac. Tea Co., Inc.*, 117 AD3d 695 [2014]; *Gray v Lifetitz*, 83 AD3d 780, 781 [2011]). Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur.

10 THOMAS F. CONLON, Appellant, v JAMES C. CONLON et al., Respondents, et al., Defendant. [990 NYS2d 825]—

Judgments—Res Judicata

In an action, inter alia, to set aside a deed dated August 9,

1996, on the ground of fraud, the plaintiff appeals (1) from so much of an order of the Supreme Court, Kings County (Solomon, J.), dated July 5, 2012, as granted those branches of the motion of the defendants James C. Conlon and Susan Conlon which were for summary judgment dismissing the causes of action seeking to set aside the deed and seeking a judgment declaring that the plaintiff, the defendant James C. Conlon, and the defendant John L. Conlon each are seized and possessed in fee of an undivided one-third part of the subject premises as tenants in common, and (2) as limited by his brief, from so much of an order of the same court dated January 4, 2013, as, upon reargument, adhered to the original determination.

Ordered that the appeal from the order dated July 5, 2012, is dismissed, as the portions of the order appealed from were superseded by the order dated January 4, 2013, made upon reargument; and it is further,

Ordered that the order dated January 4, 2013, is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the defendants James C. Conlon and Susan Conlon.

Upon reargument, the Supreme Court properly granted those branches of the motion of the defendants James C. Conlon and Susan Conlon which were for summary judgment dismissing the causes of action seeking to set aside a deed dated August 9, 1996, and seeking a judgment declaring that the plaintiff, the defendant James C. Conlon, and the defendant John L. Conlon are each seized and possessed in fee of an undivided one-third part of the subject premises as tenants in common. The moving defendants demonstrated, *prima facie*, that these causes of action could have been raised in a probate proceeding in the Florida Circuit Court, which was resolved in an order dated July 20, 1999, and were thus barred by the doctrine of *res judicata* (*see O'Connell v Corcoran*, 1 NY3d 179, 184-185 [2003]; *In re Senate Joint Resolution of Legislative Apportionment 2-B*, 89 So 3d 872, 883-884 [Fla 2012]; *Caiazza v Merola*, 90 AD3d 491 [2011]; *see also Baker v General Motors Corp.*, 522 US 222, 235 [1998]; *Robertson v Howard*, 229 US 254, 261 [1913]). In opposition, the plaintiff failed to raise a triable issue of fact. Skelos, J.P., Lott, Roman and Cohen, JJ., concur.

11 SHARON DAHAN, Appellant, v MICHELLE WEISS et al., Respondents. [991 NYS2d 119]—

Frauds, Statute of—Conveyances and Contracts Concerning Real Property

In an action to recover damages for breach of contract, the plaintiff appeals, as limited by his brief, (1) from so much of an

order of the Supreme Court, Queens County (Taylor, J.), entered May 25, 2012, as granted the defendants' cross motion to dismiss the complaint, inter alia, pursuant to CPLR 3211 (a), and (2) from so much of an order of the same court entered November 23, 2012, as, in effect, denied that branch of his motion which was for leave to amend the complaint.

Ordered that the orders are affirmed insofar as appealed from, with one bill of costs.

The defendant Michelle Weiss is the principal of the defendant Gateever, LLC (hereinafter Gateever). In August 2009, Gateever purchased seven properties in Far Rockaway, Queens, from the Alaska Group, Inc. (hereinafter the Alaska Group). The plaintiff alleges that he held a mortgage in the sum of \$650,000 on the seven properties pursuant to an oral loan agreement with the Alaska Group. The plaintiff further claims that as part of the purchase price for the properties, the defendants orally agreed to assume the mortgage held by him, and repay the debt within four months. When the defendants allegedly failed to comply with the plaintiff's demand for payment, he commenced this action to recover damages for breach of contract.

Upon commencement of the action, the plaintiff moved for a preliminary injunction barring the defendants, inter alia, from selling or mortgaging the properties. The defendants then cross-moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7), asserting that the plaintiff's claim to recover damages for breach of contract, i.e., the oral agreement to assume the mortgage, was not viable as a matter of law, since the alleged agreement violated the statute of frauds. In opposition to the motion, the plaintiff argued that handwritten statements from the closing, and certain email messages, all of which had been attached to the complaint as exhibits, were sufficient evidence of a binding written agreement to satisfy the statute of frauds. The Supreme Court denied the plaintiff's motion and granted the defendants' cross motion. Thereafter, the plaintiff moved, inter alia, for leave to amend the complaint to assert a cause of action alleging breach of an oral note rather than breach of an oral agreement to assume a mortgage. The Supreme Court, among other things, in effect, denied that branch of the plaintiff's motion.

To satisfy the statute of frauds, a memorandum, subscribed by the party to be charged, must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement (*see TR-One, Inc. v Lazz Dev. Co., Inc.*, 95 AD3d 1303 [2012]; *Nesbitt v Penalver*, 40 AD3d

596, 597 [2007]; *Cohen v Swenson*, 140 AD2d 407 [1988]; *Schuman v Strauss*, 139 AD2d 502, 503 [1988]). A writing is not a sufficient memorandum unless the “full intention of the parties can be ascertained from it alone[,] without recourse to parol evidence” (*Cooley v Lobdell*, 153 NY 596, 600 [1897]; *Conway v Maher*, 185 AD2d 570, 572 [1992]). However, “the statutorily required writing need not be contained in one single document, but rather may be furnished by ‘piecing together other, related writings’ ” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 477 [2013], quoting *Henry L. Fox Co. v Kaufman Org.*, 74 NY2d 136, 140 [1989]).

General Obligations Law § 5-705 provides, in relevant part, that “[n]o grantee of real property shall be liable upon any indebtedness secured by a mortgage” unless, “simultaneously with the conveyance,” the grantee executes a writing before a notary agreeing to assume and pay the mortgage debt. Here, it is clear from the allegations in the complaint and attached exhibits that the defendants did not execute a notarized written agreement to assume the mortgage allegedly held by the plaintiff at the time the properties were conveyed to Gateever. Thus, General Obligations Law § 5-705 bars the plaintiff from recovering on the theory that the defendants agreed to assume his existing mortgage on the properties as alleged in the complaint. Furthermore, to the extent that the allegations set forth in the complaint can be liberally construed to allege the existence of an agreement by which the defendants were to repay the Alaska Group’s debt to the plaintiff as part of the purchase price, it is also barred by the statute of frauds because an agreement to answer for the debt of another must be in writing (*see* General Obligations Law § 5-701 [a] [2]). Contrary to the plaintiff’s contention, the various writings attached to the complaint, taken together, were insufficient to memorialize the existence of an agreement by which the defendants were to repay the Alaska Group’s debt to the plaintiff. Indeed, an email message dated September 1, 2009, indicated that Weiss was not willing to guarantee repayment of the plaintiff’s \$650,000 loan to the Alaska Group, and that the material terms of the agreement were not settled. The additional email messages submitted by the plaintiff also failed to express the full intention of the parties (*see MP Innovations, Inc. v Atlantic Horizon Intl., Inc.*, 72 AD3d 571, 572 [2010]; *Mullany v Munchkin Enters., Ltd.*, 69 AD3d 1271, 1273 [2010]). The email messages, at best, showed that there were negotiations for an agreement (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). Accordingly, the Supreme Court properly granted the defendants’ cross motion to dismiss the complaint.

The Supreme Court providently exercised its discretion by, in effect, denying that branch of the plaintiff's motion which was for leave to amend the complaint, as the proposed amendment is patently devoid of merit (*see Longo v Long Is. R.R.*, 116 AD3d 676 [2014]; *Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v Lauter Dev. Group*, 77 AD3d 1219, 1222 [2010]).

The plaintiff's remaining contentions are without merit. Eng, P.J., Dillon, Maltese and Duffy, JJ., concur.

12 DUTCHESS TRUCK REPAIR, INC., et al., Appellant, v JOE BOYCE et al., Respondents, et al., Defendant. [991 NYS2d 639]—

Disclosure—Penalty for Failure to Disclose

Pleading—Reply—Extension of Time to Reply

Trial—Note of Issue and Statement of Readiness—Striking of Note of Issue

In an action, inter alia, to recover damages for breach of a commercial lease, the plaintiffs appeal, as limited by their brief, (1) from so much of an order of the Supreme Court, Dutchess County (Pagones, J), dated December 14, 2011, as denied their motion to strike the answer of the defendants Joe Boyce, Sally Boyce, and Trans Star Enterprises, Inc., pursuant to CPLR 3126, to vacate their default in serving a timely reply to the counterclaim of the defendants Joe Boyce, Sally Boyce, and Trans Star Enterprises, Inc., and to compel those defendants to accept the plaintiffs' reply, and (2) from so much of an order of the same court dated September 21, 2012, as granted those branches of the motion of the defendants Joe Boyce, Sally Boyce, and Trans Star Enterprises, Inc., which were to strike the plaintiffs' note of issue and to dismiss the complaint insofar as asserted against them pursuant to CPLR 3216 for failure to prosecute.

Ordered that the orders are affirmed insofar as appealed from, with one bill of costs.

Where a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, strike that party's pleadings or portions thereof (CPLR 3126 [3]). However, "[t]he striking of a party's pleading is a drastic remedy only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious" (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 210 [2012]; *see Silberstein v Maimonides Med. Ctr.*, 109 AD3d 812, 814 [2013]; *Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 739 [2012]; *Romeo v Barrella*, 82 AD3d 1071, 1075 [2011]; *Howe v Jeremiah*, 51 AD3d 975 [2008]). Because the plaintiffs

failed to demonstrate that the conduct of the defendants Joe Boyce and Sally Boyce was willful and contumacious, the Supreme Court properly denied that branch of the plaintiffs' motion which was to strike their answer pursuant to CPLR 3126.

"Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default" (CPLR 3012 [d]; see *EHS Quickstops Corp. v GRJH, Inc.*, 112 AD3d 577, 578 [2013]). Similarly, a court may relieve a party from an order on the basis of "excusable default, if such motion is made within one year after service of a copy of the . . . order with written notice of its entry upon the moving party" (CPLR 5015 [a] [1]). However, relief from a default is proper only where the party seeking relief demonstrates a reasonable excuse for the default and a potentially meritorious defense (see *Farhadi v Qureshi*, 105 AD3d 990, 991 [2013]; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825 [2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 725 [2013]).

Here, even assuming that the plaintiffs' excuse of law office failure was sufficient to excuse their failure to serve a timely reply to the counterclaim of the defendants Joe Boyce, Sally Boyce, and Trans Star Enterprises, Inc. (hereinafter collectively the defendants) (see *Michaels v Sunrise Bldg. & Remodeling, Inc.*, 65 AD3d 1021, 1023 [2009]; CPLR 2005), the Supreme Court properly declined to vacate their default and to compel acceptance of their reply. The record establishes that, after the defendants' rejection of the plaintiffs' reply to the counterclaim and the court's finding that they were in default, the plaintiffs waited nearly two years before moving to vacate their default and to compel the defendants to accept their reply. Because the plaintiffs proffered no reasonable excuse for their failure to promptly seek relief, the court providently exercised its discretion in denying those branches of the plaintiffs' motion (see *Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 226 [2013]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 708 [2013]).

"Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms" (CPLR 3216 [a]). Before doing so, the court or the party seeking such relief must serve a written demand to resume prosecution and to serve and file a note of issue within

90 days of receipt of such demand, and further advise the party upon whom such notice was served that failure to do so may result in dismissal of the action (*see* CPLR 3216 [b] [3]). Pursuant to 22 NYCRR 202.21 (a), an action will not be deemed ready for trial or inquest unless a note of issue is first filed, accompanied by a certificate of readiness stating that there are no outstanding requests for discovery and the case is ready for trial (*see* 22 NYCRR 202.21 [a], [b]; *Furrukh v Forest Hills Hosp.*, 107 AD3d 668, 669 [2013]).

On March 26, 2012, the Supreme Court, on its own initiative, and based upon the plaintiffs' repeated failure to file a compliant note of issue as directed, issued a 90-day notice requiring the plaintiffs to produce all outstanding discovery and file a note of issue. Although the plaintiffs filed a note of issue on June 9, 2012, the accompanying certificate of readiness, which stated that an appeal was pending with respect to discovery issues, did not comply with 22 NYCRR 202.21 (a) and (b) (*see Furrukh v Forest Hills Hosp.*, 107 AD3d at 669; *Brown v Astoria Fed. Sav.*, 51 AD3d 961, 962 [2008]; *Blackwell v Long Is. Coll. Hosp.*, 303 AD2d 615, 615-616 [2003]). The plaintiffs also failed to demonstrate that the complaint should not be dismissed based upon their failure to prosecute the action by proffering "a justifiable excuse for the delay and a meritorious cause of action" (*Blackwell v Long Is. Coll. Hosp.*, 303 AD2d at 616; *see Sharpe v Osorio*, 21 AD3d 467, 468 [2005]). Accordingly, the court properly granted that branch of the defendants' motion which was to strike the note of issue and, upon so doing, providently exercised its discretion granting that branch of the defendants' motion which was to dismiss the complaint insofar as asserted against them pursuant to CPLR 3216 for failure to prosecute (*see Blackwell v Long Is. Coll. Hosp.*, 303 AD2d at 616; *Perez v Long Is. Jewish-Hillside Med. Ctr.*, 173 AD2d 530, 530-531 [1991]).

In light of the foregoing, we need not reach the plaintiffs' remaining contentions. Balkin, J.P., Chambers, Cohen and Duffy, JJ., concur.

13 HUGO FERNANDEZ, Appellant, v SARA RUTMAN, Respondent. [990 NYS2d 845]—

Negligence—Maintenance of Premises—Fall into Sewer Trap

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Partnow, J.), dated May 24, 2013, as granted that branch of the defendant's motion which was for summary judgment dismissing the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

The defendant owned a home in Brooklyn that sustained water damage in the basement. Serv Pro, also known as Service Alliance, Inc. (hereinafter Serv Pro), was hired to provide flood remediation services to the property. The plaintiff, a Serv Pro employee, was removing damaged carpeting and other debris from the basement, and was working together with his “boss,” whom he knew only as David. Upon their arrival to her home, the defendant warned the plaintiff’s supervisor that there was a sewer trap in the floor of her basement, which was concealed by a rug and covered by a couch. The plaintiff testified at his deposition that his boss warned him that there was a hole. Despite those warnings, the plaintiff contended that he did not know the location of the sewer trap and that he fell into it and allegedly sustained certain injuries as a result. He then commenced this personal injury action, alleging negligence.

A property owner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the attendant circumstances (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). Encompassed within this duty is the concomitant duty to warn those lawfully on the premises of potentially dangerous conditions that are not readily observable (*see Martino v Stolzman*, 18 NY3d 905, 908 [2012]; *Galindo v Town of Clarkstown*, 2 NY3d 633, 636 [2004]; *Doyle v State of New York*, 271 AD2d 394, 395-396 [2000]). Landowners who have or should have reason to expect that persons will find it necessary to encounter the danger, owe a duty of reasonable care to either warn such persons of the danger or to take other reasonable steps to protect them from it (*see Galindo v Town of Clarkstown*, 2 NY3d at 636; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]).

Here, the defendant established, *prima facie*, that she exercised reasonable care in warning the workers that there was a hidden danger (*see Rivero v Spillane Enters., Corp.*, 95 AD3d 984, 985 [2012]). Since, in opposition, the plaintiff failed to raise a triable issue of fact, the Supreme Court properly granted that branch of the defendant’s motion which was for summary judgment dismissing the complaint. Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

14 NIMIA GARCIA, Respondent, v TOWN OF BABYLON INDUSTRIAL DEVELOPMENT AGENCY et al., Defendants, and CREATIVE JUICES PRINTING & GRAPHICS et al., Appellants. [990 NYS2d 849]—

Negligence—Maintenance of Premises—Liability of Out-of-Possession Land-

lord

Negligence—Maintenance of Premises—Ownership, Occupancy or Control of Premises

In a consolidated action to recover damages for personal injuries, etc., the defendant Creative Juices Printing & Graphics appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Martin, J.), entered October 24, 2012, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the defendant Gazzilla Corp. separately appeals from so much of the same order as denied that branch of its cross motion, made jointly with the defendant Town of Babylon, which was for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs, and the motion of the defendant Creative Juices Printing & Graphics for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and that branch of the cross motion of the defendant Gazzilla Corp. which was for summary judgment dismissing the complaint insofar as asserted against it are granted.

The Supreme Court improperly denied that branch of the motion of the defendant Gazzilla Corp, made jointly with the defendant Town of Babylon, which was for summary judgment dismissing the complaint insofar as asserted against it. An out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord has retained control over the premises, and if the landlord has a duty imposed by statute or assumed by contract or a course of conduct (see *Wenzel v 16302 Jamaica Ave., LLC*, 115 AD3d 852 [2014]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2011]; *Healy v Bartolomei*, 87 AD3d 1112, 1113 [2011]). Here, Gazzilla Corp. established, prima facie, that it was an out-of-possession landlord with no such duty, such that liability could not be imposed upon it (see *Chapman v MCS Realty, LLC*, 92 AD3d 913 [2012]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d at 18-19; *Travers v RCPI Landmark Props., LLC*, 74 AD3d 956, 957-958 [2010]). In opposition, the plaintiff failed to raise a triable issue of fact as to whether Gazzilla Corp. retained control over the premises or had a contractual duty to maintain and repair the premises (see *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d at 19). Inasmuch as Gazzilla Corp. did not owe a duty to the plaintiff, we need not address the issue of whether it had notice of the alleged dangerous condition (see *id.*).

The Supreme Court also improperly denied the motion of the

defendant Creative Juices Printing & Graphics (hereinafter Creative) for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. “Premises liability, as with liability for negligence generally, begins with duty” (*id.* at 13), the extent and existence of which is a question of law (*see id.*; *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Generally, “liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property” (*Suero-Sosa v Cardona*, 112 AD3d 706, 707 [2013]; *Sanchez v 1710 Broadway, Inc.*, 79 AD3d 845, 846 [2010]). Where none of those factors exist, a party cannot be held liable for injuries caused by the allegedly defective condition (*see Sanchez v 1710 Broadway, Inc.*, 79 AD3d at 846).

Here, Creative established that it was another tenant of the premises and did not own, occupy, or control the area where the plaintiff’s accident allegedly occurred. Therefore, it established, *prima facie*, that it did not owe the plaintiff a duty of care (*Suero-Sosa v Cardona*, 112 AD3d 706 [2013]; *Alami v 215 E. 68th St., L.P.*, 88 AD3d 924 [2011]). In opposition, the plaintiff failed to raise an issue of fact.

Therefore, the Supreme Court should have granted Creative’s motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and that branch of Gazzilla Corp.’s cross motion which was for summary judgment dismissing the complaint insofar as asserted against it. Rivera, J.P., Balkin, Dickerson and Cohen, JJ., concur. **[Prior Case History: 2012 NY Slip Op 32687(U).]**

15 ARTHUR GERSHFELD, Respondent, v MOZER ARCHITECT DESIGN, P.C., Appellants. [990 NYS2d 830]—In an action, inter alia, to recover damages for breach of contract, the defendants appeal from a judgment of the Supreme Court, Kings County (Kurtz, Ct. Atty. Ref.), dated August 28, 2012, which, upon a decision of the same court dated July 3, 2012, made after a nonjury trial, is in favor of the plaintiffs and against them in the principal sum of \$24,000.

Ordered that the judgment is affirmed, with costs.

In reviewing a determination made after a nonjury trial, this Court’s power is as broad as the trial court’s power, and this Court may render the judgment it finds warranted by the facts, taking into account in a close case that the trial judge had the advantage of seeing the witnesses (*see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). Here, the Supreme Court’s determination that the de-

fendants breached the subject contract was warranted by the facts. Thus, we decline to disturb that determination. Rivera, J.P., Balkin, Leventhal and Roman, JJ., concur.

16 *GMS BATCHING, INC., Respondent-Appellant, v TADCO CONSTRUCTION CORPORATION et al., Appellants-Respondents, et al., Defendants.* [990 NYS2d 843]—In an action, inter alia, to recover damages for breach of contract, the defendants TADCO Construction Corporation and Frank DeMartino appeal from stated portions of an order of the Supreme Court, Queens County (Schulman, J.), entered August 25, 2011, and the plaintiff cross-appeals from stated portions of the same order.

Ordered that the appeal and cross appeal are dismissed, without costs or disbursements.

The appeal and cross appeal from the order must be dismissed because the right of direct appeal and cross appeal therefrom terminated with the entry of the judgment in the action on June 13, 2012 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal and cross appeal from the order are brought up for review (*see* CPLR 5501 [a] [1]) and have been considered on the companion appeal from the judgment (*see GMS Batching, Inc. v TADCO Constr. Corp.*, 120 AD3d 549 [2d Dept 2014] [decided herewith]). Eng, P.J., Leventhal, Lott and Roman, JJ., concur.

17 *GMS BATCHING, INC., Respondent, v TADCO CONSTRUCTION CORPORATION et al., Appellants, et al., Defendants.* [992 NYS2d 264]—

Contracts—Construction Contracts

Corporations—Individual Liability of Officers—Contract Signed on Behalf of Principal

In an action, inter alia, to recover damages for breach of contract, the defendants TADCO Construction Corporation and Frank DeMartino appeal from a judgment of the Supreme Court, Queens County (Kitzes, J.), entered June 13, 2012, which, upon a decision of the same court dated February 28, 2012, made after a nonjury trial, is in favor of the plaintiff and against them in the sum of \$231,982.

Ordered that the judgment is modified, on the law, by deleting the award in favor of the plaintiff and against the defendant Frank DeMartino, and substituting therefor a provision dismissing the complaint insofar as asserted against that defendant; as so modified, the judgment is affirmed, without costs or disbursements.

On September 20, 2005, the plaintiff, GMS Batching, Inc.,

delivered to the defendant TADCO Construction Corporation (hereinafter TADCO) a proposal to provide ready-mix concrete for TADCO's use in a construction project. The plaintiff alleged that, as part of the proposal setting forth its prices for concrete and delivery charges, it supplied TADCO with a credit agreement, which specified the terms of payment. The credit agreement was executed by TADCO's president, the defendant Frank DeMartino, on October 18, 2005. After TADCO failed to make payment on certain invoices for concrete provided and delivered to the project site, the plaintiff commenced this action seeking, *inter alia*, to recover damages against TADCO for breach of contract, and against DeMartino on his alleged personal guaranty of TADCO's obligations. In their answer to the plaintiff's second amended complaint, TADCO and DeMartino (hereinafter together the TADCO defendants) admitted that TADCO and the plaintiff had entered into an agreement pursuant to which the plaintiff agreed to furnish and deliver materials to TADCO for its use in the subject construction project. The TADCO defendants also asserted a counterclaim against the plaintiff, alleging that the plaintiff breached the parties' contract by delivering defective and nonconforming materials and by failing to timely deliver materials.

The action was initially referred to a judicial hearing officer (hereinafter the J.H.O.), as referee, to hear and report. After taking testimony on July 30, 2010, the referee issued a decision that concluded that the causes of action against the TADCO defendants should be resolved in favor of the TADCO defendants, and recommending dismissal of the complaint insofar as asserted against them. However, the J.H.O. thereafter noted that the order of reference directed her to hear and report, and not to hear and determine, and that she had inadvertently issued a decision determining the merits of the plaintiff's claims in the absence of the plaintiff's consent to do so. Thus, on September 30, 2010, the referee issued a brief report vacating her prior decision, and summarizing the parties' contentions, without making any findings of fact or recommendations. The plaintiff subsequently moved pursuant to CPLR 4403 to compel the Supreme Court to make new and additional findings, and the defendants cross-moved to compel the Supreme Court to make findings consistent with those made by the J.H.O. in her July 2010 decision. In an order entered August 25, 2011, the Supreme Court (Schulman, J.) denied the motion and cross motion, and directed a new trial, noting that the J.H.O. had vacated her July 2010 decision, and had declined to make any findings or come to any conclusions in her September 2010 report. Thereafter, at the conclusion of a nonjury trial, the Supreme Court

(Kitzes, J.) found in favor of the plaintiff on its causes of action against the TADCO defendants, concluding that the plaintiff and TADCO had entered into an enforceable contract, and that DeMartino had personally guaranteed TADCO's obligations pursuant to the terms set forth in the credit agreement.

Contrary to the TADCO defendants' contention, the Supreme Court did not improvidently exercise its discretion in directing a new trial instead of making findings and conclusions based upon the testimony and evidence presented to the J.H.O. Pursuant to CPLR 4403, the Supreme Court has the power to "confirm or reject, in whole or in part . . . the report of a referee" and may "make new findings with or without taking additional testimony" or "order a new trial or hearing" (see *Matter of Frontier Ins. Co.*, 73 AD3d 36, 42-43 [2010]; *Stein v American Mtge. Banking*, 216 AD2d 458 [1995]). In light of the J.H.O.'s failure to make findings or conclusions in her September 2010 report, including findings as to the credibility of witnesses, the Supreme Court, which had the ultimate responsibility for determining the matter, properly directed a new trial, as authorized by CPLR 4403.

In reviewing a determination made after a nonjury trial, this Court's power is as broad as the trial court's power, and this Court may render the judgment it finds warranted by the facts, taking into account in a close case that the trial judge had the advantage of seeing the witnesses (see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]). Applying this standard here, we find no basis to disturb the Supreme Court's determination in favor of the plaintiff on its breach of contract causes of action against TADCO. Although the TADCO defendants maintained at trial that TADCO did not enter into a contract to purchase concrete from the plaintiff, they admitted in their answer to the second verified complaint and in their counterclaim that the parties had indeed entered into such a contract. Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made (see *Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2010]; *Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363, 364 [2007]; *Falkowski v 81 & 3 of Watertown.*, 288 AD2d 890 [2001]; Jerome Prince, Richardson on Evidence § 8-215, at 523-524 [Farrell 11th ed 1995]). Moreover, the evidence presented at trial supports the conclusion that the plaintiff and TADCO entered into a contract pursuant to which the plaintiff agreed to provide concrete to TADCO in accordance with the terms set forth in the plaintiff's September 20, 2005, proposal, and a credit agree-

ment attached thereto (*see Cranesville Block Co., Inc. v Spring Apts., LLC*, 53 AD3d 998, 999, 1001 [2008]; *Florida Infusion Servs., Inc. v Alden Surgical Co.*, 23 AD3d 614, 615 [2005]). Further, although TADCO made payment to the plaintiff on some of its invoices, it was uncontroverted that other invoices were not paid, and the TADCO defendants offered no evidence that the concrete supplied was either defective and nonconforming, or untimely delivered.

However, the Supreme Court should have dismissed the complaint insofar as asserted against DeMartino. “A corporate officer who executes a contract acting as an agent for a disclosed principal is not liable for a breach of the contract unless it clearly appears that he or she intended to bind himself or herself personally” (*Stamina Prods., Inc. v Zintec USA, Inc.*, 90 AD3d 1021, 1022 [2011]; *see Salzman Sign Co. v Beck*, 10 NY2d 63, 65 [1961]; *Yellow Book Sales & Distrib. Co., Inc. v Mantini*, 85 AD3d 1019, 1021 [2011]). “There must be clear and explicit evidence of the agent’s intention to substitute or superadd his [or her] personal liability for, or to, that of his [or her] principal” (*Stamina Prods., Inc. v Zintec USA, Inc.*, 90 AD3d at 1022 [internal quotation marks omitted]; *see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]; *Star Video Entertainment v J & I Video Distrib.*, 268 AD2d 423, 423-424 [2000]). Here, it does not clearly appear from the evidence offered by the plaintiff that DeMartino intended to bind himself personally by signing the credit agreement in his capacity as TADCO’s president (*see Ho Sports, Inc. v Meridian Sports, Inc.*, 92 AD3d 915, 917 [2012]; *Stamina Prods., Inc. v Zintec USA, Inc.*, 90 AD3d at 1022; *Star Video Entertainment v J & I Video Distrib.*, 268 AD2d at 423-424; *cf. Key Equip. Fin. v South Shore Imaging, Inc.*, 69 AD3d 805, 807 [2010]). Further, contractual provisions permitting the prevailing party to recover an award of legal fees must be strictly construed (*see Pickett v 992 Gates Ave. Corp.*, 114 AD3d 740 [2014]; *214 Wall St. Assoc., LLC v Medical Arts-Huntington Realty*, 99 AD3d 988, 990 [2012]; *Duane Reade v Highpoint Assoc. IX, LLC*, 36 AD3d 496, 497 [2007]), and the clause at issue in the credit agreement does not impose personal liability on DeMartino for payment of legal fees.

The parties’ remaining contentions are without merit. Eng, P.J., Leventhal, Lott and Roman, JJ., concur.

18 NIKOLAOS KARANIKOLAS et al., Respondents, v ELIAS TAVERNA, LLC, Doing Business as BREAD & OLIVE THE MIDDLE EASTERN PLACE, Defendant/Third-Party Plaintiff-Respondent-Appellant, and 20 JOHN STREET, LLC, Appellant-Respondent.

CASTELLO GENERAL CONSTRUCTION CORP., Third-Party Defendant-Respondent. [992 NYS2d 31]—

Labor—Safe Place to Work—Fall from Ladder

Labor—Safe Place to Work—Liability of Lessee

Indemnity—Contractual Indemnification

Contracts—Breach or Performance of Contract—Failure to Procure Insurance

In an action to recover damages for personal injuries, etc., the defendant 20 John Street, LLC, appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (Brathwaite Nelson, J.), entered October 5, 2012, as granted that branch of the plaintiffs' motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it, denied its cross motion for summary judgment dismissing the causes of action insofar as asserted against it alleging common-law negligence and violations of Labor Law §§ 200 and 241 (6) insofar as predicated on alleged violations of 12 NYCRR 23-1.2, 23-1.4 (b) (16); 23-1.7 (a) and (b); 23-1.8 (c); 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.21 (a), (c), (d), (e) and (f); 23-1.25 (a); 23-3.1, 23-3.2, 23-3.3 (c) and (h), and subparts 23-5 and 23-6, and denied its separate cross motion for summary judgment on its cross claims against the defendant Elias Taverna, LLC, doing business as Bread & Olive the Middle Eastern Place, for contractual and common-law indemnification and to recover damages for breach of contract for failure to procure insurance, and the defendant Elias Taverna, LLC, doing business as Bread & Olive the Middle Eastern Place, separately appeals, as limited by its brief, from so much of the same order as granted that branch of the plaintiffs' motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against it and denied its cross motion for summary judgment dismissing the complaint, the cross claims of the defendant 20 John Street, LLC, for contractual and common-law indemnification and contribution, and the counterclaim of the third-party defendant Castello General Construction Corp. for common-law indemnification and contribution insofar as asserted against it, and on its cross claim against the defendant 20 John Street, LLC, for common-law indemnification.

Ordered that order is modified, on the law, (1) by deleting the provision thereof granting that branch of the plaintiffs' motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), and substituting therefor a provision denying that branch of the motion, (2) by deleting the provisions thereof denying those

branches of the respective cross motions of the defendants 20 John Street, LLC, and Elias Taverna, LLC, doing business as Bread & Olive the Middle Eastern Place, which were for summary judgment dismissing the causes of action insofar as asserted against each of them alleging a violation of Labor Law § 241 (6) insofar as predicated on alleged violations of 12 NYCRR 23-1.2, 23-1.4 (b) (16); 23-1.7 (a) and (b); 23-1.8 (c); 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.21 (a), (c), (d), (e) and (f); 23-1.25 (a); 23-3.1, 23-3.2, 23-3.3 (c) and (h), and subparts 23-5 and 23-6, and substituting therefor provisions granting those branches of the respective cross motions, (3) by deleting the provision thereof denying that branch of the cross motion of the defendant 20 John Street, LLC, which was for summary judgment on its cross claim for contractual indemnification against the defendant Elias Taverna, LLC, doing business as Bread & Olive the Middle Eastern Place, and substituting therefor a provision granting that branch of the cross motion, and (4) by deleting the provisions thereof denying those branches of the cross motion of the defendant Elias Taverna, LLC, doing business as Bread & Olive the Middle Eastern Place, which were for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200, the cross claims of the defendant 20 John Street, LLC, for common-law indemnification and contribution, and the counterclaim of the third-party defendant Castello General Construction Corp. for common-law indemnification and contribution insofar as asserted against it, and substituting therefor provisions granting those branches of the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The injured plaintiff fell from a six-foot-high, A-frame ladder while he was performing construction work in a building owned by the defendant 20 John Street, LLC (hereinafter 20 John Street), in a space leased by the defendant Elias Taverna, LLC, doing business as Bread & Olive the Middle Eastern Place (hereinafter Elias Taverna). The injured plaintiff, and his wife suing derivatively, commenced this action against 20 John Street and Elias Taverna, asserting causes of action alleging common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6).

The Supreme Court should have denied the plaintiffs' motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1). "Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices nec-

essary to protect workers from risks inherent in elevated work sites” (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). “The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided” (*Hugo v Sarantakos*, 108 AD3d 744, 745 [2013] [internal quotation marks omitted]). “There must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff’s injuries” (*id.*). Here, in opposition to the plaintiffs’ prima facie showing of entitlement to judgment as a matter of law on the cause of action alleging a violation of Labor Law § 240 (1), the defendants raised a triable issue of fact as to whether the ladder used by the injured plaintiff was, in fact, defective or inadequately secured (*see id.*; *Gaspar v Pace Univ.*, 101 AD3d 1073, 1074 [2012]; *Chin-Sue v City of New York*, 83 AD3d 643, 644 [2011]).

The Supreme Court should have granted those branches of the defendants’ respective cross motions which were for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against each of them insofar as predicated on alleged violations of 12 NYCRR 23-1.2, 23-1.4 (b) (16); 23-1.7 (a) and (b); 23-1.8 (c); 23-1.15, 23-1.16, 23-1.17, 23-1.19, 23-1.20, 23-1.21 (a), (c), (d), (e) and (f); 23-1.25 (a); 23-3.1, 23-3.2, 23-3.3 (c) and (h) and subparts 23-5 and 23-6. The defendants established, prima facie, that those sections of the Industrial Code are either not specific enough to give rise to the duty imposed by Labor Law § 241 (6), or are inapplicable to the facts of this case (*see Gasques v State of New York*, 15 NY3d 869, 870 [2010]; *Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799, 801 [2013]). In opposition, the plaintiffs failed to raise a triable issue of fact.

The Supreme Court should have granted that branch of the cross motion of Elias Taverna which was for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against it. In this action, arising from the means and manner of the work performed, Elias Taverna established, prima facie, that it lacked the authority to control the manner in which the injured plaintiff’s work was performed, and that it did not lend the injured plaintiff the allegedly defective ladder from which he fell (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Chowdhury v Rodriguez*, 57 AD3d 121, 131-132 [2008]). In opposition, the plaintiffs failed to raise a triable issue of fact.

The Supreme Court should have granted that branch of 20

John Street's cross motion which was for summary judgment on its cross claim against Elias Taverna for contractual indemnification. 20 John Street established its prima facie entitlement to judgment as a matter of law by submitting the lease between itself and Elias Taverna, which required Elias Taverna to indemnify 20 John Street with respect to any personal injury claims arising out of any occurrence in the demised premises (see *Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 995-996 [2009]). Contrary to the contention of Elias Taverna, the indemnification provision in the lease agreement is not rendered unenforceable by General Obligations Law § 5-321, which provides that an agreement that purports to exempt a lessor from its own negligence is void and unenforceable. "[W]here, as here, the liability is to a third party, General Obligations Law § 5-321 does not preclude enforcement of an indemnification provision in a commercial lease negotiated at arm's length between two sophisticated parties when coupled with an insurance procurement requirement" (*DiBuono v Abbey, LLC*, 95 AD3d 1062, 1064 [2012] [internal quotation marks omitted]; see *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 418-419 [2006]). "Under such circumstances, the purpose of the indemnity clause is not to exempt the lessor from liability to the victim, but to allocate the risk of liability to third parties between the lessor and the lessee" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 653 [2011]). In opposition, Elias Taverna failed to raise a triable issue of fact.

The Supreme Court properly denied that branch of 20 John Street's cross motion which was for summary judgment on its cross claim against Elias Taverna to recover damages for breach of contract for failure to procure insurance. 20 John Street failed to demonstrate, prima facie, that Elias Taverna failed to comply with the lease provision requiring it to procure commercial liability insurance protecting and indemnifying 20 John Street (see *Mathey v Metropolitan Transp. Auth.*, 95 AD3d 842, 845 [2012]; *DiBuono v Abbey, LLC*, 83 AD3d at 653).

The Supreme Court should have granted those branches of Elias Taverna's cross motion which were for summary judgment dismissing the cross claims of 20 John Street, and the counterclaim of the third-party defendant Castello General Construction Corp. (hereinafter Castello) against it for common-law indemnification and contribution. Elias Taverna established, prima facie, that it was not negligent, and did not have the authority to direct, supervise, or control the work giving rise to the injury (see *Posa v Copiague Pub. School Dist.*, 84 AD3d 770, 774 [2011]; *Kielty v AJS Constr. of L.I., Inc.*, 83 AD3d 1004,

1005 [2011]). In opposition, 20 John Street and Castello failed to raise a triable issue of fact.

The appellants' remaining contentions either are without merit or are not properly before this Court. Rivera, J.P., Lott, Roman and Cohen, JJ., concur.

19 KI TAK SONG, Appellant, v DANIEL OIZUMI et al., Respondents. [990 NYS2d 639]—

Trial—Verdict—Setting Verdict Aside

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Kings County (Bayne, J.), entered June 7, 2012, which, upon a jury verdict in favor of the defendants and against him, dismissed the complaint.

Ordered that the judgment is reversed, on the law, with costs, the complaint is reinstated, and the matter is remitted to the Supreme Court, Kings County, for a new trial.

The plaintiff allegedly was injured when the vehicle which he was driving was struck in the rear by a vehicle owned by the defendant Yoko Oizumi and driven by the defendant Daniel Oizumi. After a trial, the jury returned a verdict finding that, while the defendants were negligent, their negligence was not a substantial factor in causing the accident.

After the jury was discharged, the court informed the parties that the verdict read into the record was based on a second copy of the verdict sheet that the court had given to the jury. The court told the parties that it provided the jury with the second copy after the court was told by a court officer that the jury had made a mistake. The court explained to the parties that the jury was “scratching out on the first page.” The court informed the parties that it had directed the court officer to let the members of the jury “all initial what [sic] mistake they made” and gave the court officer a new verdict sheet to give to the jury. Prior to doing so, the court did not convene the jury. Instead, without advising counsel or otherwise seeking counsels' input as to the procedures to be employed, the court conveyed instructions to the jury through the court officer, who delivered the second copy of the verdict sheet to the jury.

The plaintiff appeals, contending, in effect, that the judgment should be reversed as the first verdict sheet evidences that the verdict upon which the judgment was granted was the product of jury confusion and is inherently inconsistent as a matter of law. We agree and remit the matter to the Supreme Court, Kings County, for a new trial.

As an initial matter, the defendants' contention that the plaintiff failed to preserve for appellate review his argument that the jury's verdict was inconsistent is without merit, as the court failed to inform counsel as to the problems with the first verdict sheet prior to the close of the trial and the jury being discharged (*cf. Bodge v Red Hook Senior Hous. Dev. Fund Co., Inc.*, 85 AD3d 1073, 1074 [2011]).

Contrary to the court's description, the record also shows that the first verdict sheet contains more than just a "scratching out" on the first page. Rather, in connection with question number one, "Were the defendants negligent?" there is a handwritten "x" next to the response "Yes" and a handwritten check mark that is crossed out next to the response "No." In addition, each juror's initials appear next to that crossed out check mark. Also, below those responses there appears to be a crossed out signature on one of the six signature lines; no other signature appears. Neither the jurors' initials nor their signatures appear anywhere else on the verdict sheet. However, there are responses to each of the next several questions. With respect to question number two, "Was the negligence of the defendants a substantial factor in causing the accident?" there is a handwritten "x" next to the response "No." Although the verdict sheet indicates that, if the members of the jury answered "no," to this question, their deliberations should end, the next three questions contain handwritten responses including question number five, which states, "State the percent of negligence attributed to each party." The handwritten response allocates 20% of the fault for the happening of the accident to the defendants despite the earlier response that the defendants' negligence was not a substantial factor in causing the accident (*see Palmer v Walters*, 29 AD3d 552, 553 [2006]; *Cortes v Edoo*, 228 AD2d 463, 465-466 [1996]).

Although the jury's second verdict sheet was internally consistent (*see Palmer v Walters*, 29 AD3d at 553), the first verdict sheet indicates that the jury may have been confused as to the meanings of "substantial factor" and "fault" (*id.*). The court erred in failing to either direct reconsideration by the jury before providing the second verdict sheet to them or to direct a new trial (*see CPLR 4111 [c]; Palmer v Walters*, 29 AD3d at 553; *Ledogar v Forbes*, 84 AD3d 749, 751 [2011]; *Cortes v Edoo*, 228 AD2d at 465-466) as there is no evidence that the jury exercised its right to "'substantively alter its original [verdict] so as to conform to its real intention'" (*Palmer v Walters*, 29 AD3d at 553, quoting *Ryan v Orange County Fair Speedway*, 227 AD2d 609, 611 [1996]). Even if the parties had known of, or consented

to, the court's instruction to the members of the jury, via the court officer, to initial their mistake on the first verdict sheet (see e.g. *Boothe v Manhattan & Bronx Surface Tr. Operating Auth.*, 68 AD3d 513, 513-514 [2009]), the members of the jury initialed neither their response of "no" to the question regarding whether the defendants' negligence was a substantial factor in causing the accident nor their response allocating 20% of the fault for the happening of the accident to the defendants (see *Palmer v Walters*, 29 AD3d at 553). As the record does not evidence that the members of the jury recognized the inconsistency in their responses on the first verdict sheet, the court erred in failing to direct the jury to reconsider its original verdict before giving the second verdict sheet to the jury.

Accordingly, the judgment must be reversed and a new trial ordered.

In view of our determination, we do not reach the plaintiff's remaining contention that the verdict was against the weight of the evidence. Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

20 WENDY ANN LURRIE et al., Respondents, v DENISE ATWOOD, Appellant. [990 NYS2d 833]—

Motor Vehicles—Injuries to Bicyclist

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Bunyan, J.), dated February 13, 2013, which denied her renewed motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

On September 4, 2010, the plaintiff Wendy Ann Lurrie and her husband, the plaintiff Nick Calise, were riding their bicycles eastbound along Rockaway Beach Boulevard in the designated bicycle lane. In the vicinity of 126-11 Rockaway Beach Boulevard, the defendant's vehicle allegedly was stopped in the bicycle lane. As Lurrie tried to pass the defendant's vehicle on the left, the vehicle moved to the left, causing Lurrie to brake hard and fall from her bicycle. Lurrie, and Calise suing derivatively, commenced this action against the defendant.

The Supreme Court properly denied the defendant's renewed motion for summary judgment dismissing the complaint. The defendant failed to establish, prima facie, that she was not the driver of the vehicle involved in the subject accident in which Lurrie allegedly was injured (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d

557, 562 [1980]). Since the defendant did not sustain her prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiffs in opposition were sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

21 ANGELA MARIE MACCHIO, Respondent, v DOMINIC ROCCO MACCHIO, Appellant. [990 NYS2d 641]—

Parent, Child and Family—Custody—Modification

In an action for a divorce and ancillary relief, the father appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Kent, J.), dated May 6, 2013, as, without a hearing, denied that branch of his motion which was to modify the custody provisions set forth in a separation agreement dated May 29, 2010, which was incorporated but not merged into the parties' judgment of divorce entered December 7, 2012, so as to award him residential custody of the parties' children.

Ordered that the order is affirmed insofar as appealed from, with costs.

On May 29, 2010, the parties entered into a separation agreement pursuant to which the mother would have residential custody of the parties' children. The separation agreement was incorporated but not merged into the judgment of divorce, which was entered on December 7, 2012. By order to show cause dated December 18, 2012, the father moved to modify the separation agreement to award him residential custody of the parties' children. The Supreme Court, without a hearing, denied the motion. Since neither party objects to the procedure employed by the Supreme Court in resolving the parties' contentions, we reach the merits thereof (*cf. Barany v Barany*, 71 AD3d 613, 614-615 [2010]).

A parent who seeks a change of custody is not automatically entitled to a hearing, but must make an evidentiary showing sufficient to warrant a hearing (*see Connor v Connor*, 104 AD3d 638, 639 [2013]; *Salick v Salick*, 66 AD3d 757 [2009]; *Jean v Jean*, 59 AD3d 599, 600 [2009]). Here, the father failed to show that there had been a change in circumstances which could support a finding that it was in the children's best interest to change residential custody to himself and, thus, failed to meet his threshold burden. He made his motion only two weeks after the issuance of the judgment of divorce, which incorporated the terms of the parties' separation agreement. Accordingly, the Supreme Court providently exercised its discretion in denying

that branch of the father's motion without a hearing (*see Connor v Connor*, 104 AD3d 638, 639 [2013]; *Peterson v Peterson*, 73 AD3d 1005 [2010]; *Salick v Salick*, 66 AD3d at 758; *Jean v Jean*, 59 AD3d at 600). Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

22 MOUNT SINAI HOSPITAL, as Assignee of Ana Rodriguez, Appellant, v NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, Respondent. [991 NYS2d 634]—

Insurance—No-Fault Automobile Insurance—Recovery of Assigned First-Party No-Fault Benefits—Summary Judgment

In an action to recover no-fault benefits under a policy of automobile insurance, the plaintiff appeals from an order of the Supreme Court, Nassau County (McCormack, J.), dated October 16, 2012, which denied its motion for summary judgment on the complaint and granted the defendant's cross motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, the plaintiff's motion for summary judgment on the complaint is granted, and the defendant's cross motion for summary judgment dismissing the complaint is denied.

In March 2011, Ana Rodriguez, who was insured under a policy of automobile insurance issued by the defendant, New York Central Mutual Fire Insurance Company (hereinafter New York Central), allegedly was injured in an automobile accident. In November 2011, she received treatment at a hospital facility of the plaintiff, Mount Sinai Hospital (hereinafter Mount Sinai). In early December 2011, a few days after Mount Sinai rendered this treatment, it sought payment for it. Mount Sinai's third-party biller, The Outsource Group (hereinafter Outsource), sent a Form UB-04 and a letter requesting payment to New York Central. Twenty days after New York Central received the request, it requested verification of Mount Sinai's claim. Approximately one week after New York Central sent the verification request, it received from Outsource more than 100 pages of documents, including records of Rodriguez's treatment at Mount Sinai and various forms Rodriguez had completed there. New York Central did not request further verification. On January 27, 2012, less than 30 days after it received these records, New York Central issued a denial of the claim on a Form NF-10. The Form NF-10 was, in all substantial respects, complete.

Two months later, on March 26, 2012, Mount Sinai, which was now represented by a different third-party biller, issued another request for payment of its bill for the treatment it had rendered to Rodriguez. This time, Mount Sinai's third-party

billor issued the request on a Form NF-5. New York Central ignored this request for payment, and, in May 2012, Mount Sinai, as assignee of Rodriguez, commenced this action seeking payment. Mount Sinai eventually moved for summary judgment on the complaint, and New York Central cross-moved for summary judgment dismissing the complaint. The Supreme Court denied Mount Sinai's motion and granted New York Central's cross motion. Mount Sinai appeals. We reverse.

In *Sound Shore Med. Ctr. v New York Cent. Mut. Fire Ins. Co.* (106 AD3d 157 [2013]), this Court summarized the claim procedure under New York's "no-fault" insurance scheme:

"Pursuant to the regulations promulgated by the Superintendent of Insurance to implement the No-Fault Law (Insurance Law art 51), an injured party, or that person's assignee, must submit a written notice of claim to an insurer no later than 45 days after services are rendered (11 NYCRR 65-2.4). The written notice required to obtain first party benefits 'shall be deemed to be satisfied by the insurer's receipt of a completed prescribed application for motor vehicle no-fault benefits (NYS Form N-F 2) . . . or by the insurer's receipt of a completed hospital facility form (NYS Form N-F 5)' (11 NYCRR 65-3.3 [d]). '[P]roof of claim . . . shall include verification of all of the relevant information requested' (11 NYCRR 65-3.8 [a] [1]). 'An insurer must accept proof of claim submitted on a form other than a prescribed form if it contains substantially the same information as the prescribed form' (11 NYCRR 65-3.5 [f]). However, 11 NYCRR 65-3.5 (g) provides that '[i]n lieu of a prescribed application for motor vehicle no-fault benefits submitted by an applicant [NYS Form N-F 2] and a verification of hospital treatment (NYS form NF-4), an insurer shall accept a completed hospital facility form (NYS form NF-5) (or an NF-5 and uniform billing form [UBF-1] which together supply all the information requested by the NF-5) submitted by a provider of health services with respect to the claim of such provider.'

"Within 30 calendar days after receipt of the proof of claim for no-fault benefits, an insurer can either pay the claim, in whole or in part, deny it, or seek verification of it (*see* Insurance Law § 5106 [a]; 11 NYCRR 65-3.8 [c]). A no-fault insurance carrier waives its defenses, other than those based on the complete absence of coverage (e.g., a defense to the effect that it never wrote a policy for the claimant), if it fails to deny a no-fault claim, or seek verification, within 30 calendar days after having received proof of claim (*see* Insurance Law § 5106 [a]; 11 NYCRR 65-3.8 [a] [1]; [c] . . .).

“When a no-fault claim has been assigned to a hospital or medical provider and the hospital or medical provider sends an N-F 5 form to the no-fault insurer, the no-fault insurer’s receipt of an N-F 5 form triggers the running of the 30-day period within which the insurer has a duty to pay or to deny the claim, or to seek verification of it. Subsequent to the receipt of the N-F 5 form, if the insurer requires any additional information to evaluate the proof of claim, such request for verification must be made within 15 business days of the receipt of the N-F 5 form in order to toll the 30-day period (*see* 11 NYCRR 65-3.5 [b]). Where there is a timely original request for verification, but no response to the request for verification is received within 30 calendar days thereafter, or the response to the original request for verification is incomplete, then the insurer, within 10 calendar days after the expiration of that 30-day period, must follow up with a second request for verification (*see* 11 NYCRR 65-3.6 [b]). If there is no response to the second, or follow-up, request for verification, the time in which the insurer must decide whether to pay or deny the claim is indefinitely tolled. Thus, when a no-fault medical service provider fails to respond to the requests for verification, the 30 days in which to pay or deny the claim is tolled and does not begin to run. Accordingly, any claim for payment by the medical service provider after two timely requests for verification have been sent by the insurer subsequent to its receipt of an N-F 5 form from the medical service provider is premature, if the provider has not responded to the requests. Nothing in the rules requires a second follow-up, that is, a third request for verification.

“However, a request for verification that *precedes* a no-fault insurer’s receipt of the prescribed N-F 5 claim form does not trigger the tolling of the 30-day period within which an insurer must determine whether to pay or deny such a claim. The ‘UBF-1’ form referred to in 11 NYCRR 65-3.5 (g) is the predecessor of the current ‘UB-04’ form. Under 11 NYCRR 65-3.5 (g), a UBF-1/UB-04 form *together with* an N-F 5 form must be accepted by a no-fault insurer. The regulation does not state that a UBF-1/UB-04 form *alone* must be treated as the ‘functional equivalent’ of an N-F 5 form” (*id.* at 162-164 [citations omitted]).

Here, in reliance on *Sound Shore*, Mount Sinai contends that its billing through Outsource in December 2011 on a Form UB-04 did not commence the 30-day period in which New York Central was required to pay, deny, or request verification of Mount Sinai’s claim. Instead, Mount Sinai contends, the 30-day period commenced in March 2012, when Mount Sinai submitted

a billing request on a Form NF-5. In effect, Mount Sinai contends, New York Central's denial of claim in January 2012 did not deny anything; there was no claim submitted in December to deny. Finally, inasmuch as Mount Sinai established, prima facie, that New York Central did not pay, deny, or request verification of the March claim within 30 days after receiving it, New York Central had waived its defenses, so summary judgment on the complaint was required (*see Viviane Etienne Med. Care, PC. v Country-Wide Ins. Co.*, 114 AD3d 33, 41 [2013]).

New York Central, by contrast, contends that the 30-day period commenced when it received the Form UB-04 in December 2011, that it timely requested verification of the claim, and that, after it received the medical records, it timely denied the claim in January 2012. Mount Sinai could not commence the 30-day clock anew by submitting the same claim several months later (*see Hospital for Joint Diseases v Allstate Ins. Co.*, 5 AD3d 441, 442 [2004]).

We conclude that the Supreme Court erred in denying Mount Sinai's motion for summary judgment on the complaint and in granting New York Central's cross motion for summary judgment dismissing the complaint. Under our decision in *Sound Shore*, the 30-day period for New York Central to pay or deny the claim did not begin to run until March 26, 2012, when Mount Sinai submitted the Form NF-5, which contained the information needed. Because New York Central did not pay or deny the claim within 30 days thereafter, it was precluded from raising defenses. In other words, the defective "claim" submitted in December 2011 did not start the 30-day clock, so New York Central's denial in January 2012 was of no effect (*see Mount Sinai Hosp. v Dust Tr., Inc.*, 117 AD3d 921, 921 [2014]).

In summary, in support of its motion for summary judgment on the complaint, Mount Sinai satisfied its prima facie burden of establishing that New York Central received its Form NF-5 in March 2012 and that payment of the no-fault benefits was overdue because the claim was neither paid nor denied within 30 days (*see Westchester Med. Ctr. v Allstate Ins. Co.*, 114 AD3d 672, 672-673 [2014]; *Viviane Etienne Med. Care, PC. v Country-Wide Ins. Co.*, 114 AD3d at 40-41). In opposition, New York Central failed to raise a triable issue of fact (*see Westchester Med. Ctr. v Allstate Ins. Co.*, 114 AD3d at 672-673).

Moreover, the Supreme Court should have denied New York Central's cross motion for summary judgment dismissing the complaint. Mount Sinai's complaint was predicated solely upon New York Central's failure to pay or deny the March 2012 claim within 30 days of receipt. New York Central failed to establish,

prima facie, that it paid or denied that claim within 30 days after receipt. Accordingly, New York Central was not entitled to summary judgment dismissing the complaint (*see New York & Presbyt. Hosp. v Allstate Ins. Co.*, 31 AD3d 512, 513 [2006]; *cf. Hospital for Joint Diseases v Allstate Ins. Co.*, 5 AD3d at 442).

In light of our determination, we need not address Mount Sinai's remaining contention. Rivera, J.P., Balkin, Hinds-Radix and Maltese, JJ., concur.

23 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v PATRICIO FITZPATRICK, Appellant. [990 NYS2d 838]—

Crimes—Sex Offenders—Sex Offender Registration Act

Appeal by the defendant from an order of the Supreme Court, Kings County (Foley, J.), dated October 16, 2012, which, after a hearing, designated him a level two sex offender pursuant to Correction Law article 6-C.

Ordered that the order is affirmed, without costs or disbursements.

Correction Law § 168-n (3) requires a court making a risk level determination pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C [hereinafter SORA]) to “render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based” (Correction Law § 168-n [3]). Here, the Supreme Court failed to adequately set forth its findings of fact and conclusions of law in its order. However, since the record is sufficient for this Court to make its own findings of fact and conclusions of law, remittal is not required (*see People v Grubbs*, 107 AD3d 771, 772 [2013]; *People v Lacewell*, 103 AD3d 784, 784-785 [2013]; *People v Finizio*, 100 AD3d 977, 977 [2012]).

The Supreme Court providently exercised its discretion in denying the defendant's request for a downward departure from his presumptive designation as a risk level two sex offender, as the record does not reflect the existence of special circumstances warranting a downward departure (*see generally People v Wyatt*, 89 AD3d 112, 118-122 [2011]). In asserting that the Supreme Court improvidently exercised its discretion in denying his application for a downward departure, the defendant's contentions are almost exclusively based on matter that is dehors the record which may not be reviewed on direct appeal (*see People v Roache*, 110 AD3d 776, 777 [2013]; *see also People v Sivals*, 114 AD3d 708, 709 [2014]). To the extent that the defendant's contentions may be reviewed, they are without merit. On the record presented, the defendant failed to identify a mitigating circumstance which is of a kind or to a degree not adequately

taken into account by the SORA guidelines (*see People v Gyllotti*, 23 NY3d 841 [2014]; *People v Wyatt*, 89 AD3d at 128).

The defendant's remaining contention, that he was improperly assessed 15 points under risk factor 11, is unpreserved for appellate review, and, in any event, without merit. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

24 PHOENIX LIFE INSURANCE COMPANY, Respondent, v JACOB P ILIT A et al., Appellants. [992 NYS2d 28]—

Insurance—Representations by Insured

Insurance—Life Insurance—Breach of Contract

In an action to rescind three life insurance policies and for a judgment declaring that the policies are null and void, the defendants appeal from an order of the Supreme Court, Kings County (Rothenberg, J.), dated August 9, 2012, which denied their motion for summary judgment, in connection with the second cause of action, declaring that the policies are not null and void since they made no financial misrepresentations to induce the plaintiff to issue the policies and, in connection with the third cause of action, that the policies are not null and void solely by virtue of their lack of an insurable interest in the subject of the policies, and granted the plaintiff's cross motion for summary judgment on the first cause of action, which was for rescission of the policies, and, in connection with the second cause of action, declaring that the policies are null and void since the defendants made financial misrepresentations to induce the plaintiff to issue the policies.

Ordered that the order is modified, on the law, (1) by deleting the provision thereof denying that branch of the defendants' motion which was for summary judgment, in connection with the third cause of action, declaring that the subject life insurance policies are not null and void solely by virtue of their lack of an insurable interest in the subject of the policies, and substituting therefor a provision granting that branch of the motion, and (2) by deleting the provisions thereof granting the plaintiff's cross motion for summary judgment on the first cause of action, which was for rescission of the policies, and in connection with the second cause of action, declaring that the policies are null and void since the defendants made financial misrepresentations to induce the plaintiff to issue the policies, and substituting therefor a provision denying those branches of the cross motion; as so modified, the order is affirmed, with costs to the defendants, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment, inter alia,

declaring that the subject insurance policies are not null and void solely by virtue of the defendants' lack of an insurable interest in the subject of the policies.

In 2007, Phoenix Life Insurance Company (hereinafter the plaintiff) issued one \$5 million life insurance policy insuring the life of Jacob Pinkesz and two \$5 million life insurance policies insuring the life of Jacob's twin brother, Julius Pinkesz. At the very end of the statutorily mandated two-year contestability period (*see* Insurance Law § 3203 [a] [3]), the plaintiff commenced this action, naming various trusts and trustees as defendants. The plaintiff sought to rescind the policies on the grounds that the Pinkesz brothers made material misrepresentations with respect to their criminal histories (first cause of action), and a judgment declaring that the policies are null and void because the Pinkesz brothers made material misrepresentations with respect to their finances in order to induce the plaintiff to issue the policies (second cause of action), and because the Pinkesz brothers participated in an impermissible "stranger-owned" life insurance scheme, inasmuch as they procured the policies for the sole purpose of reselling them to outside investors, thus lacking the necessary interest in the insurability of the ultimate subjects of the policies (third cause of action).

The defendants moved for summary judgment in connection with the second and third causes of action, in effect, declaring that the policies are not null and void since they made no material financial misrepresentation to induce the plaintiff to issue the policies, and that the policies are not null and void solely by virtue of their lack of an insurable interest in the subjects of the policies. The plaintiff cross-moved for summary judgment in its favor on the first and second causes of action. The Supreme Court denied the defendants' motion and granted the plaintiff's cross motion. The defendants appeal.

The Supreme Court erred in granting that branch of the plaintiff's cross motion which was for summary judgment on the first cause of action, as the plaintiff failed to make a prima facie showing of entitlement to judgment as a matter of law (*see Novick v Middlesex Mut. Assur. Co.*, 84 AD3d 1330, 1331 [2011]). The plaintiff's own submissions reveal the existence of a triable issue of fact as to whether any alleged misrepresentations made by the Pinkesz brothers with respect to their criminal histories was material (*see* Insurance Law § 3105 [b] [1]; *Christophersen v Allstate Ins. Co.*, 34 AD3d 515, 516 [2006]; *cf. Shapiro v Allstate Life Ins. Co. of N.Y.*, 202 AD2d 659, 660 [1994]).

Neither the plaintiff nor the defendants were entitled to summary judgment with respect to the second cause of action, since

neither the plaintiff nor the defendants established their prima facie entitlement to judgment as a matter of law in connection with that cause of action. Triable issues of fact exist as to whether any alleged misrepresentations made by the Pinkesz brothers with respect to their finances were material (*see Ashkenazi v AXA Equit. Life Ins. Co.*, 91 AD3d 576, 577 [2012]; *Kirkpatrick v State Farm Fire & Cas. Co.*, 255 AD2d 363, 363-364 [1998]). Moreover, the motion and cross motion for summary judgment were made before discovery was complete. Many of the essential issues of fact are within the knowledge of individuals who have not yet been deposed (*see Corrado v East End Pool & Hot Tub, Inc.*, 69 AD3d 900, 901 [2010]; *Yerushalmi & Assoc., LLP v Westland Overseas Corp.*, 21 AD3d 1098, 1099 [2005]). Further, certain information pertaining to when the plaintiff learned that the Pinkesz brothers allegedly misrepresented their finances (*see United States Life Ins. Co. in the City of N.Y. v Blumenfeld*, 92 AD3d 487, 488-490 [2012]; *Scalia v Equitable Life Assur. Socy. of U.S.*, 251 AD2d 315 [1998]), and the plaintiff's underwriting practices with respect to applicants with similar histories (*see Insurance Law* § 3105 [c]; *Ashkenazi v AXA Equit. Life Ins. Co.*, 91 AD3d at 577), has not yet been exchanged.

As the plaintiff concedes on appeal, its third cause of action is no longer viable in light of the Court of Appeals' ruling in *Kramer v Phoenix Life Ins. Co.* (15 NY3d 539, 545 [2010]). Accordingly, the defendants are entitled to summary judgment declaring that the policies are not null and void solely by virtue of their alleged lack of an insurable interest in the subjects of the policies.

The plaintiff's remaining contentions are without merit.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Kings County, for the entry of a judgment, inter alia, declaring that the subject policies are not null and void solely by virtue of the defendants' alleged lack of an insurable interest in the subjects of the policies (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Eng, P.J., Leventhal, Lott and Roman, JJ., concur.

25 SALT CONSTRUCTION CORP., Respondent, v FARM FAMILY CASUALTY INSURANCE COMPANY, Appellant. [990 NYS2d 837]—

Insurance—Duty to Defend and Indemnify

In an action, inter alia, for a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff in an underlying action entitled *Giacoa v Salt Construction Corp.*, pending in the Supreme Court, Suffolk County, under index No.

13902/08, the defendant appeals from an order of the Supreme Court, Suffolk County (Martin, J.), entered December 26, 2012, which granted the plaintiff's motion for summary judgment declaring that the defendant is obligated to defend the plaintiff in the underlying action.

Ordered that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Suffolk County, for the entry of a judgment, inter alia, declaring that the defendant is obligated to defend the plaintiff in the underlying action entitled *Giacoia v Salt Construction Corp.*, pending in the Supreme Court, Suffolk County, under index No. 13902/08.

An insurer's duty to defend is broader than the duty to indemnify and arises whenever the allegations of the complaint against the insured, liberally construed, potentially fall within the scope of the risks undertaken by the insurer (*see Barkan v New York Schools Ins. Reciprocal*, 65 AD3d 1061, 1063 [2009]). "The duty of an insurer to defend its insured arises whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (*Physicians' Reciprocal Insurers v Loeb*, 291 AD2d 541, 542 [2002]). If any of the claims against the insured arguably arise from covered events, the insurer is required to defend the entire action (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61 [1991]). Nonetheless, "an insurer can be relieved of its duty to defend if it establishes as a matter of law that there is no possible factual or legal basis on which it might eventually be obligated to indemnify its insured under any policy provision" (*Allstate Ins. Co. v Zuk*, 78 NY2d 41, 45 [1991]).

The plaintiff established, prima facie, its entitlement to judgment as a matter of law declaring that the defendant insurer has an obligation to defend the plaintiff in the underlying action. The plaintiff demonstrated that the allegations of the complaint in the underlying action potentially give rise to a claim covered by the policy (*see e.g. Barkan v New York Schools Ins. Reciprocal*, 65 AD3d at 1063-1064), and, in opposition, the defendant failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

The defendant's remaining contentions are without merit.

Accordingly, the Supreme Court properly granted the plaintiff's motion for summary judgment declaring that the defendant is obligated to defend it in the underlying action.

Since this is a declaratory judgment action, the matter must be remitted to the Supreme Court, Suffolk County, for the entry of a judgment, inter alia, declaring that the defendant is obligated to defend the plaintiff in the underlying action (*see Lanza*

v Wagner, 11 NY2d 317, 334 [1962]). Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

26 YAKIMA TINGLING, Respondent, *v* C.I.N.H.R., INC., Appellant, and THYSSENKRUPP ELEVATOR CORPORATION, Defendant/Third-Party Plaintiff-Appellant. CENTRAL ISLAND NURSING HOME, INC., Third-Party Defendant-Respondent. [992 NYS2d 43]—

Judgments—Summary Judgment—Successive Motions for Summary Judgment

Judgments—Summary Judgment—Failure to Procure Insurance

Indemnity—Contractual Indemnification

Negligence—Maintenance of Premises—Liability of Out-of-Possession Landlord

In an action to recover damages for personal injuries and a third-party action to recover damages, inter alia, for breach of a contract to procure insurance, the defendant C.I.N.H.R., Inc., appeals from so much of an order of the Supreme Court, Queens County (Hart, J.), dated October 15, 2012, as denied its renewed motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the defendant/third-party plaintiff, Thyssenkrupp Elevator Corporation, separately appeals from so much of the same order as denied its motion for summary judgment on its third-party causes of action for contractual indemnification and to recover damages for breach of contract, and granted the cross motion of the third-party defendant, Central Island Nursing Home, Inc., for summary judgment dismissing the third-party complaint.

Ordered that the order is modified, on the law, by deleting the provision thereof granting the cross motion of the third-party defendant, Central Island Nursing Home, Inc., for summary judgment dismissing the third-party complaint and substituting therefor a provision denying, as premature, the cross motion; as so modified, the order is affirmed insofar as appealed from, with one bill of costs to the defendant/third-party plaintiff, Thyssenkrupp Elevator Corporation, payable by the third-party defendant, Central Island Nursing Home, Inc.

Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause (*see Vinar v Litman*, 110 AD3d 867, 868 [2013]; *Coccia v Liotti*, 101 AD3d 664, 666 [2012]; *Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845 [2010]). Here, there was no showing of newly discovered evidence or other sufficient cause to warrant entertaining that branch of the motion of the defendant/third-party plaintiff, Thyssenkrupp Elevator Corporation (hereinafter the elevator company), which was for summary judgment on its third-party cause of action for

contractual indemnification, which was raised for the first time on the elevator company's third motion for summary judgment. However, under the circumstances of this case, there was sufficient cause to entertain that branch of the elevator company's motion which was for summary judgment on its third-party cause of action to recover damages for breach of contract. As to the merits of that branch of the motion, "[a] party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2011], quoting *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739 [2003]; see *Kinney v Lisk Co.*, 76 NY2d 215 [1990]). On this record, even upon consideration of its additional submissions, the elevator company failed to establish, prima facie, that it was a successor-in-interest to the corporation that the third-party defendant, Central Island Nursing Home, Inc. (hereinafter the nursing home), was contractually obligated to name as an additional insured on such an insurance policy, or that it was otherwise entitled to the benefit of the insurance procurement provision. Since the elevator company failed to meet its initial burden, we need not review the sufficiency of the opposition papers submitted by the nursing home (see *Moore v Great Atl. & Pac. Tea Co., Inc.*, 117 AD3d 695 [2014]). Accordingly, the Supreme Court properly denied that branch of the elevator company's motion which was for summary judgment on its third-party cause of action to recover damages for breach of contract.

Contrary to the Supreme Court's determination, in support of its cross motion for summary judgment dismissing the third-party complaint, the nursing home failed to establish which, if either, of the two elevator maintenance agreements was operative at the applicable time, and whether the operative agreement violated General Obligations Law § 5-322.1, which generally renders void a clause in a construction contract purporting to indemnify a party for its own negligence. Moreover, a contractual clause that purports to do so "may be enforced where the party to be indemnified is found to be free of any negligence" (*Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796, 798 [2014], quoting *Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641, 643 [2006]). Here, since there has been no determination as to negligence, granting the nursing home's motion for summary judgment dismissing the third-party action would be premature (see *Brennan v R.C. Dolner, Inc.*, 14 AD3d 639, 639 [2005]; *Marano v Commander Elec., Inc.*, 12 AD3d 571,

573 [2004]). Accordingly, the Supreme Court should have denied, as premature, the nursing home's cross motion for summary judgment dismissing the third-party complaint.

The Supreme Court properly denied the renewed motion of the defendant C.I.N.H.R., Inc. (hereinafter the owner), for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. "An out-of-possession landlord is not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute [or regulation] imposing liability, a contractual provision placing the duty to repair on the landlord, or by a course of conduct by the landlord giving rise to a duty" (*Lugo v Austin-Forest Assoc.*, 99 AD3d 865, 866 [2012]; see *Repetto v Alblan Realty Corp.*, 97 AD3d 735, 737 [2012]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 18 [2011]; *Mercer v Hellas Glass Works Corp.*, 87 AD3d 987, 988 [2011]). In support of its renewed motion, the owner failed to establish, prima facie, that it was an out-of-possession landlord with no such duty, such that liability could not be imposed upon it (see *Healy v Bartolomei*, 87 AD3d 1112, 1113 [2011]). Moreover, while the owner established, prima facie, that it neither created nor had actual or constructive notice of any defect which allegedly caused the plaintiff's injuries (see *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]), in opposition, the plaintiff raised a triable issue of fact as to whether the owner had actual or constructive notice of such a defect (cf. *Healy v Bartolomei*, 87 AD3d at 1113; *Urman v S & S, LLC*, 85 AD3d 897 [2011]). Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

27 MARIA DE LOURDES TORRES, Appellant, v POLICE OFFICER JONES et al., Defendants, and CITY OF NEW YORK, Respondent. (Action No. 1.) MARIA DE LOURDES TORRES, Appellant, v NEW YORK CITY POLICE DEPARTMENT et al., Respondents, et al., Defendants. (Action No. 2.) [992 NYS2d 39]—

Torts—Malicious Prosecution—Probable Cause

Civil Rights—Federal Civil Rights Claim—Unreasonable Seizure

Civil Rights—Federal Civil Rights Claim—Action against Municipality

In two related actions, inter alia, to recover damages for violation of civil and constitutional rights pursuant to 42 USC § 1983, false arrest, and malicious prosecution, the plaintiff appeals (1), as limited by her brief, from so much of an order of the Supreme Court, Queens County (Kerrigan, J.), entered August 10, 2012, as granted the motion of the defendant City of New York for summary judgment dismissing the complaint in action No. 1 insofar as asserted against it, (2), as limited by her brief, from so much of an order of the same court entered August 9, 2012,

as granted the motion of the defendants New York City Police Department, Irma Santiago, Denitor Guerra, and Erik Hendriks for summary judgment dismissing the complaint in action No. 2 insofar as asserted against them, and (3) from a judgment of the same court entered November 30, 2012, which, upon the order entered August 9, 2012, is in favor of the defendants New York City Police Department, Irma Santiago, Denitor Guerra, and Erik Hendriks and against her dismissing the complaint in action No. 2 insofar as asserted against them.

Ordered that the appeal from the order entered August 9, 2012, is dismissed; and it is further,

Ordered that the order entered August 10, 2012, is affirmed insofar as appealed from; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the respondents.

The appeal from the intermediate order entered August 9, 2012, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in action No. 2 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

The plaintiff commenced action No. 1 against, among others, the City of New York and police detectives Irma Santiago, Denitor Guerra, and Erik Hendriks, asserting a cause of action pursuant to 42 USC § 1983 to recover damages for violations of her civil and constitutional rights under color of state law. She also asserted a cause of action to recover damages for false arrest and false imprisonment against those defendants, and a cause of action to recover damages against the City for negligent training and supervision of its police officers. The plaintiff thereafter commenced action No. 2 against, among others, the New York City Police Department (hereinafter the NYPD), Santiago, Guerra, and Hendriks, asserting causes of action against them pursuant to 42 USC § 1981 to recover damages for the impairment of her right to the equal benefit of laws enacted for the security of persons and property, pursuant to 42 USC § 1983 to recover damages for violation of her rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and to recover damages for malicious prosecution, abuse of process, false arrest, and false imprisonment.

The City moved for summary judgment dismissing the complaint insofar as asserted against it in action No. 1. The City, on behalf of the NYDP, moved, together with Santiago,

Guerra, and Hendriks (hereinafter collectively the movants), for summary judgment dismissing the complaint in action No. 2 insofar as asserted against them. The Supreme Court granted the motions.

The movants made a prima facie showing of entitlement to judgment as a matter of law dismissing the causes of action to recover damages for false arrest and false imprisonment insofar as asserted against them in both action No. 1 and action No. 2 by establishing that there was probable cause for the plaintiff's arrest (see *MacDonald v Town of Greenburgh*, 112 AD3d 586 [2013]). The plaintiff failed to raise a triable issue of fact in opposition to that showing (see *Chetrick v Cohen*, 52 AD3d 449, 450 [2008]).

Moreover, a grand jury's indictment of the plaintiff subsequent to her arrest gave rise to a presumption of probable cause to prosecute the plaintiff, which established the movants' prima facie entitlement to judgment as a matter of law dismissing the malicious prosecution cause of action insofar as asserted against them in action No. 2 (see *Rodgers v City of New York*, 106 AD3d 1068, 1070 [2013]). The plaintiff failed to overcome that presumption with a showing that "the conduct of the police deviated so egregiously from acceptable police activity as to demonstrate an intentional or reckless disregard for proper procedures, or, alternatively, by presenting evidence of fraud, perjury or suppression of evidence by the police" (*Harris v State of New York*, 302 AD2d 716, 717 [2003] [internal quotation marks and citations omitted]). Furthermore, the plaintiff also failed to raise a triable issue of fact in opposition to the movants' prima facie showing that her arrest and prosecution were not motivated by actual malice, defined, in the context of actions to recover damages for malicious prosecution, as "a wrong or improper motive, something other than a desire to see the ends of justice served" (*Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]).

The causes of action asserted pursuant to 42 USC § 1983 against the individual movants to recover damages for violation of the plaintiff's civil and constitutional rights are premised primarily on the plaintiff's contention that she was subject to an unreasonable seizure of her person because the seizure was effected in the absence of probable cause. Like the state common-law causes of action to recover damages for false arrest and malicious prosecution, those causes of action are subject to dismissal based on the determination that the arrest and prosecution of the plaintiff were supported by probable cause (see *Rodgers v City of New York*, 106 AD3d at 1071). As an additional

ground for dismissal of the cause of action in action No. 1 alleging the violation of the plaintiff's civil and constitutional rights pursuant to 42 USC § 1983 insofar as asserted against the City, and the cause of action in action No. 2 alleging "municipal liability" against the NYPD, the City and the NYPD established their prima facie entitlement to judgment as a matter of law by demonstrating that the criminal charges brought against the plaintiff did not arise from the implementation or application of an unlawful or unconstitutional municipal policy, regulation, custom, or practice (see *Monell v New York City Dept. of Social Servs.*, 436 US 658, 694 [1978]; *Pendleton v City of New York*, 44 AD3d 733, 736 [2007]). Apart from the conclusory assertions of her expert, the plaintiff offered no evidence of the existence of any policy or custom, or a determination by a policy-making official that resulted in a violation of her rights and, therefore, she did not raise a triable issue of fact (see *Brogdon v City of New Rochelle*, 200 F Supp 2d 411, 427 [SD NY 2002]).

The plaintiff's remaining contentions are without merit.

Accordingly, the Supreme Court correctly granted the motions for summary judgment dismissing the complaints in action Nos. 1 and 2 insofar as asserted against the movants. Eng, P.J., Leventhal, Lott and Roman, JJ., concur.

28 US BANK NATIONAL ASSOCIATION, as Trustee for CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-1, Appellant, v JAHANARA FARUQUE, Respondent, et al., Defendants. [991 NYS2d 630]—

Mortgages—Foreclosure—Standing

In an action to foreclose a mortgage, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (Taylor, J.), entered June 27, 2013, as, in effect, denied that branch of its motion which was for summary judgment on the complaint insofar as asserted against the defendant Jahanara Faruque, and, in effect, granted that branch of the cross motion of that defendant which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint insofar as asserted against her on the ground that the plaintiff lacked standing to commence the action.

Ordered that the order is modified, on the law, by deleting the provision thereof, in effect, granting that branch of the cross motion of the defendant Jahanara Faruque which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint insofar as asserted against her on the ground that the plaintiff lacked standing to commence the action, and substituting therefor a provision denying that branch of the cross motion; as so modified,

the order is affirmed insofar as appealed from, without costs or disbursements.

In December 2005, the defendant Jahanara Faruque executed a note, pursuant to which she promised to repay the sum of \$630,000 that she borrowed from Fairmont Funding, Ltd. (hereinafter Fairmont Funding). The note was secured by a mortgage on Faruque's real property, located in Richmond Hill, Queens. The mortgage provided, inter alia, that Mortgage Electronic Registration Systems, Inc. (hereinafter MERS), was acting as a nominee for Fairmont Funding and its successors and assigns. On August 7, 2009, MERS assigned the mortgage to US Bank National Association, as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-1 (hereinafter the plaintiff). In September 2009, the plaintiff commenced this action to foreclose the mortgage, alleging that Faruque defaulted on her loan repayment obligations. Faruque answered the complaint and, inter alia, specifically denied that the note was delivered to the plaintiff or that an assignment from Fairmont Funding to the plaintiff had been recorded. The plaintiff moved, among other things, for summary judgment on the complaint insofar as asserted against Faruque. Faruque cross-moved, inter alia, to dismiss the complaint insofar as asserted against her on the ground that the plaintiff lacked standing to commence the action (*see* CPLR 3211 [a] [3]). The Supreme Court, in effect, denied that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against Faruque and, in effect, granted that branch of Faruque's motion which was to dismiss the complaint insofar as asserted against her on the ground that the plaintiff lacked standing to commence the action. The plaintiff appeals.

In order to commence a foreclosure action, a plaintiff must have a legal or equitable interest in the mortgage (*see HSBC Bank USA v Hernandez*, 92 AD3d 843, 843 [2012]). Where standing is put into issue by a defendant's answer, a plaintiff must prove its standing if it is to be entitled to relief (*see Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931, 932 [2013]; *Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]). Contrary to the plaintiff's contention, Faruque put the plaintiff's standing into issue by the specific denials in her answer regarding the note and mortgage and, under such circumstances, she was not required to plead lack of standing as an affirmative defense (*see* CPLR 3018 [b]). Thus, in order for the plaintiff to be entitled to relief, it had to prove its standing (*see Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]).

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced (*see Kondaur Capital Corp. v McCary*, 115 AD3d 649, 650 [2014]; *HSBC Bank USA v Hernandez*, 92 AD3d at 843; *Bank of N.Y. v Silverberg*, 86 AD3d at 279). Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014]; *HSBC Bank USA v Hernandez*, 92 AD3d at 844; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754). As a general matter, once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (*see Bank of N.Y. v Silverberg*, 86 AD3d at 280). However, the transfer of the mortgage without the debt is a nullity, and no interest is acquired by it (*see Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]; *Bank of N.Y. v Silverberg*, 86 AD3d at 280), because a mortgage is merely security for a debt or other obligation and cannot exist independently of the debt or obligation (*see Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 911 [2013]).

Here, the evidence submitted by the plaintiff in support of that branch of its motion which was for summary judgment on the complaint insofar as asserted against Faruque did not establish that the note was physically delivered to it prior to the commencement of the action (*see Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]). The affidavit of the plaintiff's servicing agent contained conclusory statements regarding the plaintiff's possession of the note, and did not give any factual details of a physical delivery and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing the action (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 682 [2012]; *cf. Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627 [2014]; *Deutsche Bank Natl. Trust Co. v Whalen*, 107 AD3d 931 [2013]). Regarding the purported assignment of the note and mortgage, the assignment from MERS to the plaintiff dated August 7, 2009, transferred only the mortgage and, thus, the plaintiff failed to demonstrate that the note had also been assigned at that time (*cf. Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2007]). Further, the plaintiff's contention that the unsigned excerpt from a Pooling and Servicing Agreement dated May 1, 2006, constituted a written assignment of the note is improperly raised for the first time on appeal and, thus, is not properly before this Court (*see HSBC Bank USA, N.A. v Calderon*, 115 AD3d 708 [2014]). Accordingly, the

Supreme Court properly, in effect, denied that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against Faruque, since the plaintiff failed to establish, *prima facie*, that it had standing to commence the action (*see Homecomings Fin., LLC v Guldi*, 108 AD3d 506, 509 [2013]).

The Supreme Court erred, however in, in effect, granting that branch of Faruque's cross motion which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint insofar as asserted against her on the ground that the plaintiff lacked standing to commence the action. Although the plaintiff failed to establish its entitlement to judgment as a matter of law on the complaint insofar as asserted against Faruque, the Supreme Court should not have directed the dismissal of the complaint. The issue of standing cannot be determined as a matter of law on this record, since a question of fact remains with respect to the issue of whether the plaintiff was the lawful holder of the note when it commenced the action (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d at 683; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061 [2012]).

The parties' remaining contentions either are without merit, are raised for the first time on appeal, or have been rendered academic by our determination. Dillon, J.P., Lott, Austin and Barros, JJ., concur.

29 In the Matter of JOHN GARBARINO, Respondent, v LINDA GARBARINO, Appellant. [990 NYS2d 853]—

Crimes—Family Offense

In a family offense proceeding pursuant to Family Court Act article 8, Linda Garbarino appeals from an order of disposition of the Family Court, Orange County (Kiedaisch, J.), dated August 22, 2013, which, upon a finding that she committed the family offense of harassment in the second degree, made after a hearing, and upon the issuance of an order of protection dated August 22, 2013, directed her to comply with the conditions set forth in the order of protection dated August 22, 2013.

Ordered that the order of disposition is affirmed, without costs or disbursements.

The allegations asserted in a petition in a family offense proceeding must be supported by "a fair preponderance of the evidence" (Family Ct Act § 832; *see Matter of Patton v Torres*, 38 AD3d 667, 668 [2007]; *Matter of Dabbene v Dabbene*, 297 AD2d 812 [2002]; *Matter of Hogan v Hogan*, 271 AD2d 533 [2000]). The Family Court's determination regarding the credibility of witnesses is entitled to great weight on appeal unless

clearly unsupported by the record (*see Matter of Santiago v Friedman*, 35 AD3d 482 [2006]; *Matter of Phillips v Laland*, 4 AD3d 529, 530 [2004]). Here, contrary to the appellant's contention, a fair preponderance of the credible evidence supports the Family Court's determination that she committed the family offense of harassment in the second degree, warranting the issuance of an order of protection against her (*see Family Ct Act* § 832; *Penal Law* § 240.26 [3]; *Matter of Oakes v Oakes*, 115 AD3d 956 [2014]; *Matter of Santiago v Friedman*, 35 AD3d at 482; *Matter of Abbott v Burnes*, 27 AD3d 555 [2006]). Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

30 In the Matter of GUILLERMO GRIBELUK, Respondent, v KELLY GRIBELUK, Appellant. [991 NYS2d 117]—

Parent, Child and Family—Custody

In a proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Rockland County (Eisenpress, J.), entered April 23, 2013, which, after a hearing, denied her petition for custody of the parties' children, and granted the father's petition for custody of the parties' children, with certain visitation to her.

Ordered that the order is affirmed, with costs.

When making a decision in custody matters, the primary concern is the best interests of the child (*see Domestic Relations Law* § 70; *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 93-95 [1982]). Custody determinations depend to a great extent upon the court's assessment of the credibility of the witnesses, as well as the parties' character, temperament, and sincerity (*see Matter of Venette v Rhodes*, 301 AD2d 608 [2003]). These determinations are entitled to great deference and should not be disturbed unless they lack a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d at 173; *Matter of Brass v Otero*, 40 AD3d 752 [2007]; *Matter of Shehata v Shehata*, 31 AD3d 773, 774 [2006]; *Kaplan v Kaplan*, 21 AD3d 993, 994 [2005]).

The courts may consider religion as one of the factors in determining the best interests of a child, but religion alone may not be the determinative factor (*see Matter of Gago v Acevedo*, 214 AD2d 565, 566 [1995]; *Aldous v Aldous*, 99 AD2d 197 [1984]). New York courts will consider religion in a custody dispute when a child has developed actual religious ties to a specific religion and those needs can be served better by one parent than the other (*see Aldous v Aldous*, 99 AD2d at 199; *Spring v Glawon*, 89 AD2d 980 [1982]).

Here, contrary to the mother's contentions, the Family Court

did not rely solely on religion and the mother's decision to leave the Hasidic Jewish community in making the determination to award the father custody of the parties' children. The Family Court expressly stated that it passed no judgment on either parent's religious beliefs and practices. The children's need for stability, and the potential impact of uprooting them from the only lifestyle which they have known, are important factors in making a custody determination (*see Matter of Larkin v White*, 64 AD3d 707, 709 [2009]).

The Family Court also found the mother's repeated allegations of sexual abuse of the children by the father to be unfounded, which subjected the children to numerous interviews and examinations, casting doubt upon her fitness to be the custodial parent (*see Young v Young*, 212 AD2d 114, 121 [1995]; *see also Matter of Martinez v Hyatt*, 86 AD3d 571, 572 [2011]).

Although the children expressed a preference to reside with the mother, and the attorney for the children advocated awarding custody to the mother, the children's preference and the recommendation of the attorney for the children are not determinative and do not usurp the judgment of the Family Court (*see Dintruff v McGreevy*, 34 NY2d 887, 888 [1974]; *Matter of Chery v Richardson*, 88 AD3d 788, 789 [2011]).

Considering the totality of the circumstances, there was a sound and substantial basis in the record for the Family Court's determination that it was in the best interests of the children to award custody to the father, with certain visitation to the mother. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

31 In the Matter of NANCY LUK, Deceased. DENNIS LEE, Respondent; CHUN KA LUK et al., Appellants. [990 NYS2d 843]—

Appeal—Academic and Moot Questions

In a proceeding for the administration of a decedent's estate, in which the respondent Dennis Lee petitioned pursuant to SCPA 1804 for an order directing a reservation of estate assets, Chun Ka Luk, the administrator of the estate, Bernice Luk, and Albert Luk appeal from an order of the Surrogate's Court, Nassau County (McCarty III, S.), dated December 17, 2012, which granted the petition and directed the administrator of the estate to reserve estate assets in the sum of \$51,000,000, for a period of one year from the date of the order.

Ordered that the appeal is dismissed as academic, without costs or disbursements.

As the order directing the administrator of the decedent's

estate to reserve estate assets in the sum of \$51,000,000 expired by its terms on December 17, 2013, any determination by this Court will not directly affect the rights of the parties (see *Matter of Weiner v State of New York*, 89 AD3d 953, 953-954 [2011]; *Festa v Festa*, 76 AD3d 1047, 1047-1048 [2010]; *Matter of Bucaro v Morales*, 62 AD3d 994, 995 [2009]). Since the matter does not warrant the invocation of the exception to the mootness doctrine (see *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]), we dismiss the appeal as academic (see *Matter of Weiner v State of New York*, 89 AD3d 953 [2011]; *Festa v Festa*, 76 AD3d 1047 [2010]; *Matter of Bucaro v Morales*, 62 AD3d at 995). Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

32 In the Matter of LUIS R., Appellant, v MARIA ELENA G., Respondent. [990 NYS2d 851]—

Aliens—Immigration—Special Immigrant Juvenile Status

In a guardianship proceeding pursuant to Family Court Act article 6, the petitioner appeals from an order of the Family Court, Nassau County (Singer, J.), dated July 31, 2013, which, upon the granting of the guardianship petition in an order of the same court dated April 16, 2013, and after a hearing, in effect, denied his motion for the issuance of an order declaring that the subject child, Cristian F.M.G., is dependent on the Family Court and making specific findings that he is unmarried and under 21 years of age, that reunification with one or both of his parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law, and that it would not be in his best interests to be returned to his previous country of nationality or last habitual residence, so as to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile status pursuant to 8 USC § 1101 (a) (27) (J).

Ordered that the order is reversed, on the law and the facts, without costs or disbursements, the petitioner's motion is granted, it is declared that Cristian F.M.G. is dependent on the Family Court, and it is found that he is unmarried and under 21 years of age, that reunification with one or both of his parents is not viable due to parental abuse, neglect, abandonment, or similar parental conduct defined under state law, and that it would not be in his best interest to return to El Salvador, his previous country of nationality and last habitual residence.

In August 2012, the petitioner filed a petition pursuant to Family Court Act article 6 for custody of his nephew, Cristian F.M.G. (hereinafter the child), for the purpose of obtaining an order declaring that the child is dependent on the Family Court

and making specific findings that he is unmarried and under 21 years of age, that reunification with one or both of his parents is not viable due to parental abuse, neglect, abandonment, or similar parental conduct defined under state law, and that it would not be in his best interests to be returned to El Salvador, his previous country of nationality and last habitual residence, so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101 (a) (27). Thereafter, the petitioner moved for the issuance of an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS. In an order dated April 16, 2013, the Family Court granted the guardianship petition. In an order dated July 31, 2013, made after a hearing, the Family Court, in effect, denied the petitioner's motion.

Pursuant to 8 USC § 1101 (a) (27) (J) (as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 [Pub L 110-457, 122 US Stat 5044]) and 8 CFR 204.11, a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for special immigrant juvenile status, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law (*see* 8 USC § 1101 [a] [27] [J] [i]; *Matter of Maria P.E.A. v Sergio A.G.G.*, 111 AD3d 619, 620 [2013]; *Matter of Trudy-Ann W. v Joan W.*, 73 AD3d 793, 795 [2010]), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence (*see* 8 USC § 1101 [a] [27] [J] [ii]; 8 CFR 204.11 [c] [6]; *Matter of Maria P.E.A. v Sergio A.G.G.*, 111 AD3d at 620; *Matter of Trudy-Ann W. v Joan W.*, 73 AD3d at 795).

This Court's power to review the evidence is as broad as that of the hearing court, and where, as here, the record is sufficiently complete to make our own factual determinations, we may do so (*see Matter of Gabriel H.M. [Juan B.F.]*, 116 AD3d 855, 857 [2014]; *Matter of Kamaljit S.*, 114 AD3d 949 [2014]). Based upon our independent factual review, the record establishes that the child's father is deceased, and therefore, reunification is not possible (*see Matter of Cristal M.R.M.*, 118 AD3d 889 [2014]). Since the statutory reunification requirement may be satisfied upon a finding that reunification is not viable with just one parent, we need not address the petitioner's

contention that the record supports the conclusion that the child's reunification with his mother was not a viable option (see *Matter of Gabriel H.M. [Juan B.F.]*, 116 AD3d at 857; *Matter of Marcelina M.-G. v Israel S.*, 112 AD3d 100, 110-113 [2013]). We further find that the record reflects that it would not be in the child's best interests to be returned to El Salvador.

Thus, the Family Court erred by, in effect, denying the petitioner's motion for the issuance of an order making the requisite declaration and special findings so as to enable the child to petition for SIJS. Since the record is sufficient for this Court to make its own findings of fact and conclusions of law, we declare that the child is dependent on a juvenile court, and we find that the child is unmarried and under 21 years of age, that reunification of the child with one or both of his parents is not viable due to the death of his father, and that it would not be in the best interests of the child to be returned to El Salvador. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

33 In the Matter of RICHARD WEINBERGER, Respondent, v TERRI MONROE, Appellant. [990 NYS2d 819]—

Parent, Child and Family—Custody

In a child custody proceeding pursuant to Family Court Act article 6, the maternal grandmother appeals, as limited by her brief, from so much of an order of the Family Court, Orange County (Kiedaisch, J.), entered March 22, 2013, as, after a hearing, granted the father's petition to modify a prior order of custody so as to award him sole legal and residential custody of the subject child.

Ordered that the order entered March 22, 2013, is affirmed insofar as appealed from, without costs or disbursements.

In a custody proceeding between a parent and a nonparent, the parent has the superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persisting neglect, unfitness, or other like extraordinary circumstances (see *Matter of Male Infant L.*, 61 NY2d 420, 427 [1984]; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]; *Matter of Noonan v Noonan*, 109 AD3d 827, 827-828 [2013]; *Matter of DiBenedetto v DiBenedetto*, 108 AD3d 531, 532 [2013]). The nonparent has the burden of establishing extraordinary circumstances even where, as here, there is a prior order awarding physical custody of a child to the nonparent that had been issued on the consent of the parties (see *Matter of DiBenedetto v DiBenedetto*, 108 AD3d at 532; *Matter of Wright v Wright*, 81 AD3d 740, 741 [2011]).

Once the preferred status of the birth parent has been lost by a judicial determination of extraordinary circumstances, the appropriate standard in addressing the possible modification of the prior order is whether there has been a change of circumstances requiring a modification of custody to ensure the best interests of the child (see *Matter of Fleischman v Hall*, 88 AD3d 1000, 1000 [2011]; *Matter of Metcalf v Odums*, 35 AD3d 865, 866 [2006]; *Matter of Guinta v Doxtator*, 20 AD3d 47, 51 [2005]). The best interests of the child are determined by a review of the totality of the circumstances (see *Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]; *Friederwitzer v Friederwitzer*, 55 NY2d 89, 95-96 [1982]; *Matter of Sparacio v Fitzgerald*, 73 AD3d 790, 791 [2010]). In doing so, the court must weigh several factors of varying degrees of importance, including, inter alia, (1) the original placement of the child, (2) the length of that placement, (3) the child's desires, (4) the relative fitness of the parties, (5) the quality of the home environment, (6) the guidance given to the child, (7) the parties' financial status, (8) the parties' ability to provide for the child's emotional and intellectual development, and (9) the willingness of one party to assure meaningful contact between the child and the other party (see *Matter of Mingo v Belgrave*, 69 AD3d 859, 859-860 [2010]).

On appeal, we accord great deference to the fact-finder's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *Matter of Noonan v Noonan*, 109 AD3d at 828). However, in custody matters, this Court's authority is as broad as that of the hearing court, and this Court will not uphold the hearing court's determination where it lacks a sound and substantial basis in the record (see *id.*; *Matter of Sparacio v Fitzgerald*, 73 AD3d at 791).

Here, the Family Court's determination that the maternal grandmother failed to sustain her burden of demonstrating extraordinary circumstances is not supported by a sound and substantial basis in the record (see Domestic Relations Law § 72 [2] [b]; *Matter of DiBenedetto v DiBenedetto*, 108 AD3d at 532-533; *Matter of Ruiz v Travis*, 84 AD3d 1242 [2011]; *Matter of Carton v Grimm*, 51 AD3d 1111, 1113 [2008]; cf. *Matter of Hyde v King*, 47 AD3d 813, 815 [2008]; *Matter of Tolbert v Scott*, 42 AD3d 548, 549 [2007]). However, notwithstanding the existence of extraordinary circumstances, the father established a change in circumstances requiring modification of custody to ensure the best interests of the child, and the totality of the circumstances in this case (see *Eschbach v Eschbach*, 56 NY2d at 172; *Friederwitzer v Friederwitzer*, 55 NY2d at 95-96) warrants the conclusion that it was in the subject child's best interest to

award sole legal and residential custody of the child to the father. Thus, the Family Court's determination will not be disturbed on appeal. Mastro, J.P., Chambers, Lott and Roman, JJ., concur.

34 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DENZEE BLAS, Appellant. [990 NYS2d 826]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Gubbay, J.), imposed July 26, 2012, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's valid waiver of his right to appeal precludes review of his contention that the period of postrelease supervision imposed was excessive (*see People v Bradshaw*, 18 NY3d 257, 264-267 [2011]; *People v Ramos*, 7 NY3d 737, 738 [2006]; *People v Lopez*, 6 NY3d 248, 255-256 [2006]). Eng, P.J., Rivera, Chambers and Austin, JJ., concur.

35 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v HIPOLITO CESPEDES, Appellant. [990 NYS2d 823]—

Crimes—Arrest—Probable Cause

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Chun, J.), rendered May 16, 2012, convicting him of criminal possession of a controlled substance in the third degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Brennan, J.), of that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, the hearing court properly denied that branch of his omnibus motion which was to suppress physical evidence, consisting of large amounts of narcotics and currency, that was seized as the result of his arrest. The record of the suppression hearing revealed that police personnel with extensive training and experience in observing narcotics transactions, and who were assigned to a "buy and bust operation" in a drug-prone area, observed a disheveled man standing by the curb, looking up and down the block. The man then spoke to someone on his cell phone and took some money out of his wallet. Minutes later, the defendant drove up in a nonlivery automobile, and the man entered the rear seat of the defendant's vehicle and handed the money to the defendant. As the defendant drove away, the police followed in their car and observed the defendant's shoulder dip back as though he

was reaching for something. The defendant then handed something to the passenger, made a right turn, and stopped in the middle of the street, where the passenger exited the vehicle and placed something in his pants pocket. The police blocked the defendant's vehicle with their car and detained the defendant, placing him under arrest after illegal narcotics were recovered from the passenger. Currency and additional prepackaged bags of narcotics were recovered from the defendant and his vehicle.

A forcible stop of a suspect is permissible where police have a reasonable suspicion that he or she has committed, is committing, or is about to commit a crime (*see People v De Bour*, 40 NY2d 210, 223 [1976]), and a determination of the propriety of such action requires an evaluation of the totality of the circumstances (*see generally People v Williams*, 69 AD3d 663, 664 [2010]). Here, according due deference to the hearing court's credibility determinations (*see People v Mateo*, 2 NY3d 383, 414 [2004]; *People v Green*, 100 AD3d 654, 654-655 [2012]; *People v Blinker*, 80 AD3d 619, 620 [2011]), we conclude that the suspicious behavior observed by the police officers, including the passenger's initial conduct, his passing of money in apparent exchange for an object, and the short distance the vehicle traveled (*cf. People v Loper*, 115 AD3d 875 [2014]), when viewed in the context of the officers' training and experience and the drug-prone location where it occurred (*see People v Smalls*, 111 AD3d 582, 583 [2013]; *People v Garcia*, 96 AD3d 481, 482 [2012]), provided reasonable suspicion that the defendant had engaged in illegal drug activity. Since the defendant raises no additional issue regarding the legality of his arrest or the admissibility of the physical evidence introduced at his trial, there is no basis to disturb the hearing court's suppression determination.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80, 85-86 [1982]). Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

36 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MICHAEL CUMMINGS, Appellant. [990 NYS2d 826]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order on motion of this Court dated May 13, 1996, which granted the motion of assigned counsel for leave to withdraw an appeal from a judgment of the Supreme Court, Kings County, rendered January 3, 1995, and to be relieved of the assignment to prosecute that appeal.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the

effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

37 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAMES GOODMAN, Appellant. [990 NYS2d 836]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Tomei, J.), rendered February 28, 2011, convicting him of robbery in the first degree and unlawful imprisonment in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that the identification evidence was legally insufficient to support his convictions of robbery in the first degree and unlawful imprisonment in the second degree is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Shearer*, 114 AD3d 708 [2014]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the defendant's identity beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383 [2004]; *People v Bleakley*, 69 NY2d 490 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

Upon our review of the issues preserved for appellate review that relate to the alleged failure of the People to properly authenticate certain recordings of telephone calls made by the defendant while he was incarcerated, we find the defendant's contentions with respect to those issues to be without merit (*see People v Vasser*, 97 AD3d 767 [2012]; *People v Collins*, 90 AD3d 1069 [2011]).

The defendant's remaining contentions are unpreserved for appellate review. Dillon, J.P., Hall, Sgroi and Barros, JJ., concur.

38 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v NOEL GORIS, Appellant. [990 NYS2d 824]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Foley, J.), imposed January 29, 2013, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant did not validly waive his right to appeal his sentence (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Thus, review of his excessive sentence claim is not precluded. However, the sentence imposed was not excessive (*see People v Hayes*, 91 AD3d

792 [2012]). Eng, P.J., Dillon, Lott, Sgroi and Maltese, JJ., concur.

39 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v EARL HALL, Appellant. [991 NYS2d 114]—

Crimes—Right to Counsel—Effective Representation

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Aloise, J.), rendered February 2, 2009, convicting him of robbery in the first degree, criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree, and resisting arrest, upon a jury verdict, and imposing sentence.

Ordered that the judgment is reversed, on the law, and the matter is remitted to the Supreme Court, Queens County, for further proceedings consistent herewith.

The defendant's contention that the evidence was legally insufficient to support his conviction of resisting arrest is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the defendant's guilt of that crime beyond a reasonable doubt.

However, we agree with the defendant that, under the particular circumstances of this case, he was deprived of the effective assistance of counsel. A criminal defendant is guaranteed the right to effective assistance of counsel by the United States and New York Constitutions (*see* US Const Amend VI; NY Const, art I, § 6; *People v Turner*, 5 NY3d 476, 479 [2005]; *People v Bodden*, 82 AD3d 781, 783 [2011]). "Under the federal standard for ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness, and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' " (*People v Bodden*, 82 AD3d at 783, quoting *Strickland v Washington*, 466 US 668, 694 [1984]; *see People v McArthur*, 101 AD3d 752, 753 [2012]). Under the state standard, which has been called " 'somewhat more favorable to defendants' " (*People v Bodden*, 82 AD3d at 783, quoting *People v Turner*, 5 NY3d at 480), the defendant must show that the defense attorney failed to provide "meaningful representation" (*People v Stultz*, 2 NY3d 277, 279 [2004]; *see People v Baldi*, 54 NY2d 137, 147 [1981]).

In this case, based solely on the complainant's identification, the defendant and his codefendant were charged with robbery in the first degree and robbery in the second degree in connection with a robbery that occurred on November 6, 2005. The same indictment also separately charged the defendant with

four drug offenses and resisting arrest, stemming from his arrest at his mother's home on January 16, 2006, despite the fact that the drug and resisting arrest charges had no connection to the November 6, 2005, robbery. Defense counsel failed to make an on-the-record pretrial motion to sever the robbery charges from the other charges and did not raise the issue at trial, and the defendant was tried on all counts in the indictment. It was only at sentencing, after the defendant was convicted of robbery in the first degree, two drug counts, and resisting arrest, that defense counsel argued on the record that the defendant should not have been charged in the same indictment with both the robbery and drug counts. Contrary to the People's contention, the charges stemming from the robbery were not joinable, pursuant to CPL 200.20 (2) (b), to the charges stemming from the defendant's arrest, as the proof relating to the robbery was not material and admissible as evidence upon the trial of the charges stemming from the defendant's arrest (*cf. People v Salnave*, 41 AD3d 872, 873 [2007]). As a result of defense counsel's error, the same jury that heard evidence regarding the robbery also heard voluminous evidence concerning the defendant's arrest and the large quantity of drugs found in his mother's home. Consequently, the jury could have inferred that the robbery at issue was committed for a drug-related purpose, and it is probable that the improper joinder tainted the jury's evaluation of the separate, unrelated incidents (*see People v Chestnut*, 19 NY3d 606, 613 [2012]). Under the circumstances presented here, the defendant was deprived of the effective assistance of counsel, based on defense counsel's failure to make a proper pretrial motion to sever the charges of robbery from the drug charges.

Accordingly, the judgment must be reversed and the matter remitted to the Supreme Court, Queens County, for a new trial.

The defendant's remaining contentions are without merit. Eng, P.J., Leventhal, Lott and Roman, JJ., concur.

40 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MIKHAIL ISAKOV, Also Known as MIKHAIL IZAIKOV, Also Known as MIKHAIL IZRAIKOV, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ARTHUR IBRAGIMOV, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DAVID IBRAGIMOV, Also Known as DAVID IBRAGMCHAYEV, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MB GLOBUS, LLC, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v AN INTERNATIONAL, LLC, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MA CONCORD, LLC, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v NA CONTINENTAL GROUP, LLC, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SI PREMIER ENTERPRISES, LLC, Appellant. THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAN GILBERT, DDS, Appellant. [990 NYS2d 828]—

Crimes—Offering False Instrument for Filing

Appeals (1) by the defendants Mikhail Isakov, also known as Mikhail Izaikov, also known as Mikhail Izraikov, Arthur Ibragimov, and David Ibragimov, also known as David Ibragmchayev, respectively, from three judgments (one as to each defendant) of the Supreme Court, Kings County (Reichbach, J.), rendered April 4, 2012, as amended April 5, 2012, convicting each of them of violating Social Services Law § 366-f (1) (b) and offering a false instrument for filing in the second degree (eight counts), after a nonjury trial, and imposing sentence, (2) by the defendant MB Globus, LLC, from a judgment of the same court rendered April 5, 2012, convicting it of violating Social Services Law § 366-f (1) (b) and offering a false instrument for filing in the second degree (six counts), after the same nonjury trial, and imposing sentence, (3) by the defendant MA Concord, LLC, from a judgment of the same court rendered April 5, 2012, convicting it of violating Social Services Law § 366-f (1) (b) and offering a false instrument for filing in the second degree (two counts), after the same nonjury trial, and imposing sentence, (4) by the defendants NA Continental Group, LLC, AN International, LLC, and SI Premier Enterprises, LLC, respectively, from three judgments of the same court (one as to each defendant), rendered April 5, 2012, convicting each of them of violating Social Services Law § 366-f (1) (b), after the same nonjury trial, and imposing sentence, and (5) by the defendant Jan Gilbert from a judgment of the same court rendered February 28, 2012, convicting him of offering a false instrument for filing in the second degree (two counts), after the same nonjury trial, and imposing sentence.

Ordered that the judgments, as amended, and the judgments are affirmed.

The defendants' contention that the convictions of violating Social Services Law § 366-f (1) (b) were not supported by legally sufficient evidence is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to support the convictions.

Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 346 [2007]), we nevertheless accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdicts of guilt as to all of the crimes were not against the weight of the evidence (*see People v Romero*,

7 NY3d 633 [2006]).

The defendants' contention that the verdicts are repugnant is without merit (*see People v Tucker*, 55 NY2d 1, 4 [1981]; *People v Payne*, 40 AD3d 660 [2007]), since the acquittals on the counts of offering a false instrument for filing in the first degree (Penal Law § 175.35) did not necessarily negate an essential element of the crime of violating Social Services Law § 366-f (1) (b) (*see People v Muhammad*, 17 NY3d 532, 542-543 [2011]).

The defendants contend that the convictions of offering a false instrument for filing in the second degree (Penal Law § 175.30) cannot stand because the written instruments at issue, bills for medical care submitted to the New York State Medicaid program, contained a certain certification that, while required by the State, was not mandated by an administrative rule promulgated pursuant to the State Administrative Procedure Act. However, this contention is without merit. Penal Law § 175.30 merely requires the knowing submission of a false "written instrument." The statute does not require that the language contained in the "written instrument" be mandated pursuant to a duly promulgated rule or regulation.

The defendants' remaining contentions are without merit. Rivera, J.P., Sgroi, Hinds-Radix and Maltese, JJ., concur.

41 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RONALD JOHN, Appellant. [990 NYS2d 827]—

Crimes—Sentence—Resentence

Appeal by the defendant from an order of the Supreme Court, Kings County (Ingram, J.), entered September 24, 2012, which denied, without a hearing, his motion to be resentenced pursuant to CPL 440.46 on his convictions of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, which sentence was originally imposed, upon a jury verdict, on March 26, 2002.

Ordered that the order is affirmed.

Contrary to the defendant's contention, the Supreme Court did not improvidently exercise its discretion in denying his motion for resentencing pursuant to CPL 440.46. In light of the defendant's extensive criminal history and pattern of violating his parole, including, most recently, when he forcibly entered his father's home, which resulted in his conviction for reckless endangerment in the second degree, substantial justice dictated that his motion be denied (*see People v Quintero*, 86 AD3d 582, 583 [2011]; *People v Rivera*, 84 AD3d 980, 981 [2011]; *People v Curry*, 52 AD3d 732 [2008]). Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

42 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KYUNG EUN SUNG, Appellant. [990 NYS2d 831]—Appeal by the de-

fendant from a judgment of the Supreme Court, Kings County (Reichbach, J.), rendered February 8, 2012, convicting her of offering a false instrument for filing in the second degree (two counts), after a nonjury trial, and imposing sentence.

Ordered that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]). Rivera, J.P., Sgroi, Hinds-Radix and Maltese, JJ., concur.

43 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SERGE MOISE, Appellant. [990 NYS2d 846]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Foley, J.), imposed April 9, 2013, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's valid waiver of his right to appeal precludes review of his contention that the sentence imposed was excessive (*see People v Bradshaw*, 18 NY3d 257, 264-267 [2011]; *People v Lopez*, 6 NY3d 248, 255-256 [2006]). Eng, P.J., Rivera, Lott and Cohen, JJ., concur.

44 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TIRONE MOORE, Appellant. [990 NYS2d 836]—

Crimes—Appeal—Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Riviezzo, J.), imposed April 11, 2012, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's purported waiver of his right to appeal was invalid (*see People v Lopez*, 6 NY3d 248, 256 [2006]). The record does not demonstrate that the defendant "grasped the concept of the appeal waiver and the nature of the right he was forgoing" (*People v Bradshaw*, 18 NY3d 257, 267 [2011]; *see People v*

Johnson, 113 AD3d 635, 635 [2014]). Therefore, notwithstanding the defendant's execution of the written appeal waiver form, it cannot be said that he knowingly, intelligently, and voluntarily waived his right to appeal (see *People v Pressley*, 116 AD3d 794 [2014]). Accordingly, review of the defendant's excessive sentence claim is not precluded.

Nevertheless, the sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Dillon, Austin, Sgroi and Maltese, JJ., concur.

45 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TONY ROSA, Appellant. [990 NYS2d 842]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated April 6, 1998 (*People v Rosa*, 249 AD2d 334 [1998]), affirming a judgment of the Supreme Court, Kings County, rendered May 15, 1995.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (see *Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Rivera, J.P., Leventhal, Austin and Roman, JJ., concur.

46 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ROOSEVELT ROSE, Appellant. [990 NYS2d 832]—

Crimes—Verdict—Sufficiency of Evidence

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kron, J.), rendered October 1, 2012, convicting him of robbery in the second degree and assault in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is modified, on the law, by vacating the sentence; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for resentencing in accordance herewith.

The defendant's convictions of robbery in the second degree and assault in the third degree required proof of physical injury (see Penal Law §§ 120.00 [1]; 160.10 [2] [a]). Physical injury is defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]). Although "substantial pain" must be "more than slight or trivial pain" it need not be "severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Impairment of physical condition," moreover, does not require "a victim's incapacitation" (*People v Tejada*, 78 NY2d 936, 938 [1991] [internal quotation marks omitted]).

Contrary to the defendant's contention, viewing the evidence

in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), the evidence was legally sufficient to establish that the complainant suffered the requisite physical injury (*see People v Chiddick*, 8 NY3d at 447; *People v Guidice*, 83 NY2d 630, 636 [1994]; *People v Martinez*, 116 AD3d 983 [2014]; *People v Valencia*, 50 AD3d 1163, 1164 [2008]). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt of robbery in the second degree and assault in the third degree was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]). The complainant testified that the defendant punched him in the face numerous times while someone else grabbed his shoulder from behind and tried to reach into his pocket for his wallet. The complainant sustained swelling and bleeding to his face, nose, and mouth, and the complainant's blood was found on his shirt and on the defendant's pants. The complainant was examined by an emergency medical technician and treated with ice, and for the next two weeks took antibiotics and painkillers (*see People v Chiddick*, 8 NY3d at 447-448; *People v Stapleton*, 33 AD3d 464, 465 [2006]).

Contrary to the defendant's arguments, the trial court did not improvidently exercise its discretion in permitting the People to adduce rebuttal testimony and declining the defendant's request for an adjournment to investigate the subject raised by the rebuttal (*see People v Wilson*, 297 AD2d 298, 299 [2002]; *People v Grindley*, 243 AD2d 580 [1997]; *People v Gross*, 171 AD2d 810, 811 [1991]).

As the People correctly concede, the Supreme Court failed to pronounce sentence on the conviction of assault in the third degree in the defendant's presence in violation of its obligation under CPL 380.20 (*see People v Guerrero*, 12 NY3d 45, 47 [2009]; *People v Sparber*, 10 NY3d 457, 472 [2008]; *People v Hernandez*, 107 AD3d 1016, 1016-1017 [2013]). Accordingly, the sentence must be vacated and the matter remitted to the Supreme Court, Queens County, for resentencing on all counts upon which the defendant was convicted. Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur.

47 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v LANSANA SAM-KABBA, Appellant. [990 NYS2d 845]—Appeals by the

defendant, as limited by his motion, from two sentences of the Supreme Court, Suffolk County (Kahn, J.), both imposed June 25, 2009, upon his pleas of guilty, on the ground that the sentences were excessive.

Ordered that the sentences are affirmed.

The sentences imposed were not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Rivera, Lott and Cohen, JJ., concur.

48 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KEVIN TOWNSEND, Appellant. [990 NYS2d 823]—

Crimes—Right to Counsel—Effective Representation

Appeal by the defendant, by permission, from an order of the Supreme Court, Kings County (Marrus, J.), dated July 11, 2012, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of the same court rendered April 7, 2009, convicting him of murder in the second degree and criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the order is affirmed.

Contrary to the defendant's contention on his motion pursuant to CPL 440.10 to vacate his prior judgment of conviction, he was not deprived of the effective assistance of counsel (*see Strickland v Washington*, 466 US 668 [1984]; *People v Caban*, 5 NY3d 143 [2005]). Although his counsel failed to object to the trial court's improper participation in the reading back of testimony requested by the jury (*see People v Feurtado*, 112 AD3d 962, 962 [2013]; *People v Facey*, 104 AD3d 788, 789 [2013]; *People v Brockett*, 74 AD3d 1218, 1221 [2010]), the court's error was harmless under the circumstances of this case, and counsel's failure to object did not deprive the defendant of a fair trial (*see People v Caban*, 5 NY3d at 155-156; *People v Pedraza*, 56 AD3d 390, 392 [2008]). Upon consideration of the entire record, trial counsel provided meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]), and the defendant's motion pursuant to CPL 440.10 was properly denied without a hearing. Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

49 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ROGER WOODS, Appellant. [990 NYS2d 827]—

Crimes—Vacatur of Judgment of Conviction

Appeal by the defendant, by permission, from an order of the Supreme Court, Kings County (McKay, J.), dated June 30, 2011,

which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of conviction of the same court rendered October 18, 2005, convicting him of murder in the second degree, assault in the first degree, and assault in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the order is affirmed.

The defendant contends that the Supreme Court should have held a hearing on his claim, raised in his motion pursuant to CPL 440.10 to vacate his judgment of conviction, that he is “actually innocent” of murder in the second degree. “A prima facie showing of actual innocence [requiring a hearing] is made out when there is ‘a sufficient showing of possible merit to warrant a fuller exploration’ by the court” (*People v Hamilton*, 115 AD3d 12, 27 [2014], quoting *Goldblum v Klem*, 510 F3d 204, 219 [3d Cir 2007]). Here, the defendant failed to make a prima facie showing of actual innocence sufficient to warrant a hearing (see *People v Caldavado*, 116 AD3d 877 [2014]; cf. *People v Hamilton*, 115 AD3d at 27).

Contrary to the defendant’s contention, also raised on his motion pursuant to CPL 440.10, he was not deprived of the effective assistance of counsel under either the New York Constitution or the United States Constitution (see *Strickland v Washington*, 466 US 668 [1984]; *People v Benevento*, 91 NY2d 708 [1998]).

Accordingly, the Supreme Court properly denied, without a hearing, the defendant’s motion pursuant to CPL 440.10 to vacate his judgment of conviction. Rivera, J.P., Balkin, Leventhal and Roman, JJ., concur. **[Prior Case History: 2011 NY Slip Op 32049(U).]**

(August 20, 2014)

1 AIDA AYALA et al., Respondents, v JOHNSON CONTROLS, INC., Respondent, and DIEBOLD, INCORPORATED, Appellant. [990 NYS2d 893]—

Negligence—Duty—Contractor Owed No Duty to Injured Third Party

In an action to recover damages for personal injuries, etc., the defendant Diebold, Incorporated, appeals, as limited by its brief, from so much of an order of the Supreme Court, Rockland County (Loehr, J.), dated January 30, 2013, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from,

on the law, with one bill of costs payable by the plaintiffs-respondents and the defendant-respondent, and the motion of the defendant Diebold, Incorporated, for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted.

The injured plaintiff, an employee of the nonparty KeyBank National Association (hereinafter KeyBank), allegedly tripped and fell when a metal ramp separated from the threshold of a door leading to the vault at KeyBank's branch in Haverstraw. She, and her husband suing derivatively, commenced this action against the defendant Johnson Controls, Inc. (hereinafter Johnson), a maintenance services provider, and the defendant Diebold, Incorporated (hereinafter Diebold), which had been retained by KeyBank to repair and maintain certain bank equipment.

Diebold moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. In support of its motion, Diebold submitted, among other things, the deposition testimony of one of its employees, who testified that Diebold did not perform any work on the ramp at KeyBank's branch in Haverstraw, and that he would work on a ramp leading to a vault at a KeyBank location only upon KeyBank's request. The plaintiffs opposed Diebold's motion, submitting, inter alia, excerpts from the deposition testimony of Diebold's employee and a sworn affidavit of the injured plaintiff, in which she averred that she had complained to a maintenance person employed by Johnson about the condition of the ramp. She also stated that no one made repairs to the ramp prior to her accident.

The Supreme Court erred in denying that branch of Diebold's motion which was for summary judgment dismissing the complaint insofar as asserted against it. Diebold established its prima facie entitlement to judgment as a matter of law by demonstrating that the injured plaintiff was not a party to its services contract with KeyBank, and that, thus, it owed her no duty of care (*see Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 810-811 [2013]; *Petito v City of New York*, 95 AD3d 1095, 1096 [2012]; *Knox v Sodexo Am., LLC*, 93 AD3d 642, 642 [2012]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2010]). In opposition, the plaintiffs failed to raise a triable issue of fact as to whether Diebold launched a force or instrument of harm, whether the injured plaintiff detrimentally relied on the continued performance of Diebold's duties, or whether Diebold entirely displaced KeyBank's duty to maintain the premises safely (*see Espinal v Melville Snow Contrs.*, 98 NY2d

136, 138-140 [2002]; *Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 902 [2011]; *Foster v Herbert Slepoy Corp.*, 76 AD3d at 215).

Moreover, Diebold was entitled to summary judgment dismissing Johnson's cross claims (*see Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1104 [2010]; *cf. Foster v Herbert Slepoy Corp.*, 76 AD3d at 215).

Accordingly, the Supreme Court should have granted Diebold's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

2 BANK OF NEW YORK, Appellant, v WILLIAM F. CASTILLO, Respondent, et al., Defendants. [991 NYS2d 446]—

Dismissal and Nonsuit—Failure to Appear—Dismissal Not Warranted Where Plaintiff Actively Participated in Subsequent Litigation

Mortgages—Foreclosure—Duty to Negotiate in Good Faith

Mortgages—Foreclosure—Improper Sua Sponte Dismissal—Plaintiff Not Given Fair Warning—Court Improperly Relied upon Personal Opinion and Facts Outside Record

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Orange County (Bartlett, J.), entered March 30, 2012, which granted the motion of the defendant William F. Castillo to dismiss the complaint insofar as asserted against him pursuant to 22 NYCRR 202.27 (b) upon its failure to appear at a scheduled conference and for failure to negotiate in good faith pursuant to CPLR 3408 (f) and, sua sponte, directed dismissal of the action in its entirety with prejudice “in the interests of justice.”

Ordered that on the Court's own motion, the plaintiff's notice of appeal from so much of the order as, sua sponte, directed dismissal of the action in its entirety with prejudice, is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order is reversed, on the law, the motion of the defendant William F. Castillo is denied, and the matter is remitted to the Supreme Court, Orange County, for further proceedings consistent herewith before a different Justice; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

In 2009, the plaintiff commenced this action against the defendant William F. Castillo (hereinafter the borrower) and additional defendants to foreclose a mortgage. No defendant has answered the complaint. However, the borrower appeared and participated in settlement conferences pursuant to CPLR 3408.

In November 2009, the borrower moved to dismiss the complaint insofar as asserted against him pursuant to 22 NYCRR 202.27 (b), on the grounds that the plaintiff failed to appear at a CPLR 3408 settlement conference on October 29, 2009, and failed to negotiate with him in good faith, as required by CPLR 3408 (f). The borrower's motion was not decided at that time, and further CPLR 3408 negotiations ensued.

On October 3, 2011, the borrower's counsel told the Supreme Court that the plaintiff failed to respond appropriately to the borrower's application for a mortgage modification, and noted that the borrower's motion to dismiss, made almost two years prior, remained pending and undecided. After briefly questioning the plaintiff's counsel about the plaintiff's negotiations with the borrower, the court concluded that dismissal of the complaint with prejudice was warranted "not only on [the borrower's] motion, but on the Court's own motion in the interest of justice." The court based this conclusion upon, among other things, its assessment that the plaintiff failed to negotiate with the borrower in good faith. The court's determination also appeared to rest in part on the fact that the plaintiff participated in the federal Troubled Asset Relief Program bailout (*see* 12 USC § 5201 *et seq.*), and the court's opinion that the plaintiff should, therefore, have worked harder to provide the borrower with an affordable loan modification. Based upon the reasons stated on the record, the court granted the borrower's motion and, *sua sponte*, directed dismissal of the action in its entirety with prejudice. The plaintiff appeals.

22 NYCRR 202.27 (b) gives a court the discretion to dismiss a plaintiff's complaint where the plaintiff fails to appear at any scheduled appearance. Under certain circumstances, a single nonappearance or failure to be ready to proceed may warrant dismissal (*see Community Network Serv., Inc. v Verizon N.Y., Inc.*, 48 AD3d 249, 250 [2008]). However, to the extent that the Supreme Court's determination here rested upon the plaintiff's single nonappearance at the October 29, 2009, settlement conference, the court improvidently exercised its discretion in directing dismissal of the complaint with prejudice, especially since the plaintiff appears to have actively participated in subsequent litigation of this action over the two years following the October 29, 2009, settlement conference (*see generally Feders v Lamprecht*, 43 AD3d 276, 277 [2007]).

To the extent that the Supreme Court also determined that the borrower established, *prima facie*, that dismissal was warranted on the ground that the plaintiff acted in bad faith, that determination was also erroneous. Although CPLR 3408

provides that “[b]oth the plaintiff and defendant” in a foreclosure action “shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible,” and requires the plaintiff to appear at all conferences in person or by counsel with full authority to dispose of the case (CPLR 3408 [f]; *see* CPLR 3408 [c]), the CPLR does not specify a remedy for a party’s failure to comply with these requirements (*see Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 19 [2013], citing Hon. Mark C. Dillon, *The Newly-Enacted CPLR 3408 for Easing the Mortgage Foreclosure Crisis: Very Good Steps, But Not Legislatively Perfect*, 30 Pace L Rev 855, 875 [2010]; *see also US Bank N.A. v Sarmiento*, 121 AD3d 187 [2d Dept 2014]). In any event, other than his attorney’s affirmation, which has no evidentiary value (*see Winter v Black*, 95 AD3d 1208 [2012]; *Bahlkow v Greenberg*, 185 AD2d 829, 831 [1992]), the borrower only submitted the complaint in the action, a letter from a Supreme Court law clerk directing the plaintiff to provide the borrower’s counsel with certain documentation, and the plaintiff’s loan modification offer. These documents failed to demonstrate that the plaintiff did not evaluate the borrower’s loan modification application in good faith or work with him toward a mutually agreeable settlement, as required by CPLR 3408 (f). Accordingly, to the extent that the Supreme Court determined that dismissal was warranted on the basis that the borrower had demonstrated that the plaintiff acted in bad faith, such determination was error. Thus, the Supreme Court should have denied the borrower’s motion to dismiss the complaint insofar as asserted against him.

The Supreme Court also erred in, *sua sponte*, directing dismissal of the action in its entirety with prejudice (*see Bank of Am., N.A. v Bah*, 95 AD3d 1150, 1151-1152 [2012]; *Aurora Loan Servs., LLC v Shahmela Shah Sookoo*, 92 AD3d 705, 707 [2012]; *U.S. Bank, N.A. v Guichardo*, 90 AD3d 1032, 1033 [2011]; *U.S. Bank, N.A. v Emmanuel*, 83 AD3d 1047, 1048 [2011]; *HSBC Bank USA, N.A. v Valentin*, 72 AD3d 1027 [2010]; *see also IndyMac Bank, F.S.B. v Yano-Horoski*, 78 AD3d 895, 896 [2010]). “A court’s power to dismiss a complaint, *sua sponte*, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal” (*U.S. Bank, N.A. v Emmanuel*, 83 AD3d at 1048; *see HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 817 [2013]; *Aurora Loan Servs., LLC v Sobanke*, 101 AD3d 1065, 1066 [2012]; *Bank of Am., N.A. v Bah*, 95 AD3d at 1151-1152; *U.S. Bank, N.A. v Guichardo*, 90 AD3d at 1033). Furthermore, when a court exercises its power to impose a sanction *sua sponte*, it must afford the party to be sanctioned a reasonable opportunity to be heard (*see Matter of Griffin v Panzarin*, 305

AD2d 601, 603 [2003]; *see also Tirado v Miller*, 75 AD3d 153, 158-160 [2010]).

Here, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint. Moreover, the plaintiff was not “given fair warning that such a sanction was even under consideration,” as there is no indication that it was advised that the borrower’s motion was being revived or that the court was independently considering dismissal based, apparently, on the plaintiff’s conduct in the intervening two years (*IndyMac Bank, F.S.B. v Yano-Horoski*, 78 AD3d at 896; *see Matter of Griffin v Panzarin*, 305 AD2d at 603; *see also Tirado v Miller*, 75 AD3d at 158-160).

In addition, the Supreme Court’s “consideration of facts outside of the record, absent the parties’ consent, constituted error” (*Silberman v Antar*, 236 AD2d 385, 385 [1997]).

In light of the Supreme Court’s intemperate remarks, which exhibited bias against the plaintiff, and its improper reliance on its personal opinion of the federal bailout of mortgage lenders rather than on the evidence before it, we remit the matter to the Supreme Court, Orange County, for further proceedings before a different Justice (*see HSBC Bank USA, N.A. v Taher*, 104 AD3d at 817-818; *Aurora Loan Servs., LLC v Shahmela Shah Sookoo*, 92 AD3d at 707; *DeCrescenzo v Gonzalez*, 46 AD3d 607, 608 [2007]).

In light of the foregoing, we need not address the parties’ remaining contentions. Mastro, J.P., Leventhal, Lott and Roman, JJ., concur.

3 BANKDIRECT CAPITAL FINANCE, a Division of TEXAS CAPITAL BANK, N.A., as Assignee of Standard Funding Corp., Appellant, v INSURANCE COMPANY OF STATE OF PA, Respondent. [992 NYS2d 271]—

Judgments—Summary Judgment—Assignment of Interest in Insurance Premium—Triable Issues of Fact

Bankruptcy—Automatic Stay—Applicability to Nondebtor Defendant—Inapplicable in Absence of Immediate Adverse Economic Consequence for Debtor’s Estate

In an action to recover damages for breach of contract, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Brandveen, J.), entered March 15, 2013, as denied its motion for summary judgment on the complaint and granted that branch of the defendant’s cross motion which was pursuant to 11 USC § 362 (a) to stay the action.

Ordered that the order is modified, on the law, by deleting the

provision thereof granting that branch of the defendant's cross motion which was pursuant to 11 USC § 362 (a) to stay the action, and substituting therefor a provision denying that branch of the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

In 2009, Standard Funding Corp. (hereinafter Standard) contracted with a nonparty, Emivest Aerospace Corporation (hereinafter Emivest), to finance the sum of \$81,868.50 for insurance premiums for a workers compensation policy (hereinafter the policy) that the defendant, Insurance Company of State of Pa (hereinafter ISOP), issued to Emivest. Pursuant to the finance agreement, Emivest agreed to repay Standard the financed sum with interest, and purportedly assigned to Standard all of its interest in any unearned or return premium due upon cancellation of the policy. Nonparty Wortham Insurance & Risk Mgmt (hereinafter Wortham) was the broker for the finance agreement, which was governed by Texas law.

On an unspecified date, Standard purportedly notified ISOP of the assignment. On another unspecified date, the plaintiff, Bankdirect Capital Finance (hereinafter Bankdirect), purportedly acquired Standard, which purportedly assigned its interest in the return premium to Bankdirect. In June 2010, Emivest allegedly defaulted on its repayment obligation to Bankdirect. In September 2010, the policy allegedly was cancelled. In October 2010, Emivest filed for bankruptcy protection. In February 2011, ISOP paid the sum of \$47,022.09, representing the return premium, to Wortham.

In August 2011, Bankdirect commenced this action against ISOP to recover damages for breach of contract. After issue was joined, Bankdirect moved for summary judgment on the complaint. ISOP cross-moved to stay the action pursuant to 11 USC § 362 (a) or, alternatively, pursuant to CPLR 2201, in light of Emivest's bankruptcy. The Supreme Court, inter alia, denied Bankdirect's motion and granted that branch of ISOP's cross motion which was pursuant to 11 USC § 362 (a) to stay the action.

Contrary to Bankdirect's contention, the Supreme Court properly denied its motion for summary judgment on the complaint, as it failed to meet its initial burden of establishing its prima facie entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Bankdirect failed to tender sufficient evidence to eliminate all triable issues of fact as to whether, inter alia, Emivest assigned its entire interest or simply transferred a security interest in the return premium to Standard, whether Standard properly

notified ISOP of the purported assignment to it of such interest in the return premium, whether Standard assigned any interest in the return premium to Bankdirect, and whether Bankdirect properly notified ISOP of any such assignment.

However, the Supreme Court erred in granting that branch of ISOP's cross motion which was pursuant to 11 USC § 362 (a) to stay the action.

"[T]he bankruptcy court can stay actions against any party, even a non-debtor, whenever the objective of the action is to obtain possession or exercise control over the debtor's property. Unless a case involves unusual circumstances, however, the bankruptcy court cannot halt litigation by non-debtors, even if they are in a similar legal or factual nexus with the debtor.

"The unusual circumstances in which the bankruptcy court can stay cases against non-debtors are rare. They typically arise where there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. In other words, the automatic stay will apply to non-debtors only when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate" (*Ritchie Capital Mgt., L.L.C. v Jeffries*, 653 F3d 755, 762-763 [8th Cir 2011] [citations and internal quotation marks omitted]; see *McCartney v Integra Natl. Bank N.*, 106 F3d 506, 509-510 [3d Cir 1997]; *A.H. Robins Co., Inc. v Piccinin*, 788 F2d 994, 999 [4th Cir 1986]; *Lynch v Johns-Manville Sales Corp.*, 710 F2d 1194, 1196 [1983]).

ISOP failed to demonstrate that Bankdirect's claim against it would have an "immediate adverse economic consequence" for Emivest's estate (*Ritchie Capital Mgt., L.L.C. v Jeffries*, 653 F3d at 763). Thus, it was not entitled to the protection of the automatic stay pursuant to 11 USC § 362 (a).

The parties' remaining contentions are without merit. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

4 RICHARD BAUMANN, Respondent, v TOWN OF ISLIP, Appellant, and MAINLINE ELECTRIC CORP., Respondent, et al., Defendant. [992 NYS2d 276]—

Labor—Safe Place to Work—Trip and Fall on Electrical Wire
Labor—Safe Place to Work—Liability of Owner—Defective or Dangerous Condition on Premises

In an action to recover damages for personal injuries, the defendant Town of Islip appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Molia,

J.), dated August 22, 2012, as denied those branches of its motion which were for summary judgment dismissing the causes of action to recover damages for a violation of Labor Law § 200, common-law negligence, and a violation of Labor Law § 241 (6) insofar as predicated on 12 NYCRR 23-1.7 (e) (2), and all cross claims insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff allegedly sustained injuries when he tripped and fell at the Maple Street Marina (hereinafter the Marina) construction site owned by the defendant Town of Islip. At the time of his accident, the plaintiff was working as an equipment operator for Atlantic Coast Dock Building Corp. (hereinafter Atlantic). Atlantic was the general contractor for the construction at the Marina and subcontracted with the defendant Mainline Electric Corp. (hereinafter Mainline) to perform the electrical work. The plaintiff alleged that he tripped over a metal “fish” or “snake” line used by the electrical contractor to pull wire through electrical conduit as he was trying to clear a path to drive his excavator into position to complete his assigned task. The plaintiff commenced this action to recover damages for personal injuries against, among others, the Town. The Town moved for summary judgment dismissing, inter alia, the causes of action to recover damages for a violation of Labor Law § 200, common-law negligence, and a violation of Labor Law § 241 (6) insofar as predicated on 12 NYCRR 23-1.7 (e) (2), and all cross claims insofar as asserted against it. The Supreme Court denied those branches of the motion.

The Supreme Court properly denied that branch of the Town’s motion which was for summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as predicated on 12 NYCRR 23-1.7 (e) (2) insofar as asserted against it. The Town failed to establish, prima facie, that the area where the plaintiff was injured was not a “working area” within the meaning of 12 NYCRR 23-1.7 (e) (2) (*see Lane v Fratello Constr. Co.*, 52 AD3d 575, 576 [2008]; *see also Harkin v City of New York*, 69 AD3d 901, 902 [2010]; *Bopp v A.M. Rizzo Elec. Contrs., Inc.*, 19 AD3d 348 [2005]).

The Supreme Court also properly denied those branches of the Town’s motion which were for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action insofar as asserted against it. Before the Supreme Court and on appeal, in support of these branches of its motion, the Town focused exclusively upon its alleged lack of supervision of, or control over, the plaintiff’s work. That argument is only rele-

vant where the claimed injury arises from the manner in which the work is performed (*see Ortega v Puccia*, 57 AD3d 54, 60-63 [2008]). Where, as here, the injury arises from an allegedly defective or dangerous condition on the premises, the allegedly unsecured and improperly stored electrical wire, a property owner will be liable under a theory of common-law negligence, as codified by Labor Law § 200, when the owner created the alleged dangerous or defective condition, or failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*see Bridges v Wyandanch Community Dev. Corp.*, 66 AD3d 938, 940 [2009]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764 [2009]). Since the Town failed to address this issue, it did not meet its prima facie burden with respect to those branches of its motion which were for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action (*see Colon v Bet Torah, Inc.*, 66 AD3d 731, 732 [2009]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d at 764-765).

To the extent that the Town argues that the alleged dangerous or defective condition was “open and obvious,” that argument merely presents an issue of fact concerning the plaintiff’s comparative fault (*see Vigil v City of New York*, 110 AD3d 986, 987 [2013]).

Accordingly, the Supreme Court properly denied those branches of the Town’s motion which were for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of actions, and the Labor Law § 241 (6) cause of action insofar as predicated on 12 NYCRR 23-1.7 (e) (2), and all cross claims insofar as asserted against it. Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

5 SARAH BINIACHVILI, an Infant, by Her Father and Natural Guardian, DAVID BINIACHVILI, et al., Respondents, v YESHIVAT SHAARE TORAH, INC., Appellant. (Action No. 1.) LISA GINDI, an Infant, by Her Mother and Natural Guardian, JULIE GINDI, et al., Respondents, v YESHIVAT SHAARE TORAH, INC., Appellant, et al., Defendant. (Action No. 2.) RACHEL SASSON, an Infant, by Her Mother and Natural Guardian, RENEE SASSON, et al., Respondents, v YESHIVAT SHAARE TORAH, INC., Appellant, et al., Defendant. (Action No. 3.) [990 NYS2d 891]—

Disclosure—Penalty for Failure to Disclose—Spoliation of Evidence—Destruction of Crucial Physical Evidence—Answer Stricken

In related actions to recover damages for personal injuries, etc., the defendant Yeshivat Shaare Torah, Inc., appeals, as

limited by its brief, from so much of an order of the Supreme Court, Kings County (Kramer, J.), dated June 22, 2012, as granted that branch of the motion of the plaintiffs in action No. 1, and those branches of the separate motions of the respective plaintiffs in action Nos. 2 and 3, which were pursuant to CPLR 3126 to strike the answers based on its spoliation of evidence, and thereupon for summary judgment on the issue of liability insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs to the plaintiffs in action No. 2.

On May 22, 2009, the infant plaintiffs in the above-captioned actions, along with approximately 30 other students of the defendant Yeshivat Shaare Torah, Inc. (hereinafter the defendant), were directed by their teachers to stand on an exterior grate located on the school's premises for a class picture. The grate gave way, causing the students to plunge 11 feet down the shaft onto the concrete slab below. When the plaintiffs' experts arrived at the school on the agreed-upon date of July 23, 2009, to inspect the grate, the defendant informed them that the grate was not available. By letter dated November 3, 2009, in response to several inquiries made by the plaintiffs, the defendant advised that the grate had been removed from the school and disposed of on June 18, 2009.

Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, that party may be sanctioned under CPLR 3126 (*see Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713 [2013]; *Shay v Mozer, Inc.*, 80 AD3d 687, 688 [2011]; *Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627 [2009]). Since the Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence (*see Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *Lentz v Nic's Gym, Inc.*, 90 AD3d 618 [2011]), it may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the spoliator was on notice that the evidence might be needed for future litigation (*see Lentz v Nic's Gym, Inc.*, 90 AD3d 618 [2011]; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [1998]).

Here, the Supreme Court providently exercised its discretion in striking the defendant's answers and thereupon awarding the plaintiffs summary judgment on the issue of liability pursuant to CPLR 3126. The record demonstrates that the defendant disposed of the grate involved in the accident after having received a written demand from one of the infant plaintiff's at-

torneys that the grate be preserved for inspection by the plaintiffs and their experts. Moreover, the plaintiffs demonstrated that they were unduly prejudiced by the defendant's conduct in disposing of the grate.

The defendant's remaining contentions are without merit. Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

6 FERNANDO COSTA, Appellant, v BYRON LOPEZ, Respondent. [990 NYS2d 878]—

Trial—Verdict—Setting Verdict Aside—Jury Verdict Supported by Fair Interpretation of Evidence in Negligence Case

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Queens County (Ritholtz, J.), entered June 27, 2013, which, upon a jury verdict in favor of the defendant and against him on the issue of liability, and upon the denial of his motion pursuant to CPLR 4404 (a) to set aside the jury verdict as contrary to the weight of the evidence and for a new trial, is in favor of the defendant and against him.

Ordered that the judgment is affirmed, with costs.

On November 9, 2008, the plaintiff was riding his bicycle eastbound on Caldwell Avenue in Queens, a one-way street where traffic proceeds westbound. At the intersection of Caldwell Avenue and 69th Lane, a livery taxi operated by the defendant, which was traveling northbound on 69th Lane, allegedly struck the plaintiff, causing him to sustain injuries.

After a jury trial on the issue of liability, the jury determined that the defendant was not negligent. The Supreme Court denied the plaintiff's motion pursuant to CPLR 4404 (a) to set aside the jury verdict as contrary to the weight of the evidence and for a new trial.

A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict on any fair interpretation of the evidence (*see See v Baltic Estates, Inc.*, 90 AD3d 737, 738 [2011]; *Nicastro v Park*, 113 AD2d 129 [1985]). Here, the jury was presented with conflicting accounts of the manner in which the subject accident occurred. "Where [as here] the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Johnson v Yue Yu Chen*, 104 AD3d 915, 916 [2013]).

Since the jury verdict was supported by a fair interpretation of the evidence, there is no basis to disturb it (*see See v Baltic Estates, Inc.*, 90 AD3d at 738). Dillon, J.P., Chambers, Hall and Maltese, JJ., concur.

7 MARYSSEL DELGADO, Respondent, v MARIE BANG et al., Appellants, et al., Defendant. [991 NYS2d 649]—

Negligence—Comparative Negligence—Rear-End Collision—Summary Judgment

In an action to recover damages for personal injuries, the defendants Marie Bang and Patrick Sylvestre Nonos Bang appeal (1), as limited by their brief, from so much of an order of the Supreme Court, Kings County (F. Rivera, J.), dated May 17, 2013, as denied their motion for summary judgment dismissing the complaint insofar as asserted against them, and (2) from an order of the same court dated July 17, 2013, which granted the plaintiff's cross motion for summary judgment against them on the issue of liability.

Ordered that the order dated May 17, 2013, is affirmed insofar as appealed from, without costs or disbursements; and it is further,

Ordered that the order dated July 17, 2013, is reversed, on the law, without costs or disbursements, and the plaintiff's cross motion for summary judgment against the defendants Marie Bang and Patrick Sylvestre Nonos Bang on the issue of liability is denied.

On July 4, 2011, the plaintiff was a passenger on a motorcycle operated by the defendant Humberto Cordero. While traveling eastbound on the Brooklyn Bridge, Cordero struck the rear of a vehicle operated by the defendant Marie Bang (hereinafter Bang), and owned by the defendant Patrick Sylvestre Nonos Bang (hereinafter Nonos Bang and together the Bang defendants), while the Bang vehicle was stopped on the Brooklyn Bridge. According to Bang, she stopped her vehicle in the right lane of the bridge and activated her hazard lights a couple of minutes before the collision because she was experiencing engine difficulties. The impact of the collision caused both Cordero and the plaintiff to be thrown from the motorcycle.

The plaintiff commenced this action to recover damages for personal injuries against Cordero and the Bang defendants. Cordero failed to interpose an answer, and the Supreme Court granted the plaintiff leave to enter a default judgment against him on the issue of liability. After depositions had been conducted, the Bang defendants moved for summary judgment dismissing the complaint insofar as asserted against them, contending that Cordero had breached his statutory duty to maintain a safe distance between his motorcycle and their vehicle. The Bang defendants also argued that Bang was not comparatively negligent in stopping her vehicle on the Brooklyn

Bridge because she was faced with an emergency situation when the vehicle began experiencing mechanical difficulties and slowing down for no apparent reason. The plaintiff opposed the motion, and cross-moved for summary judgment on the issue of liability against the Bang defendants. The plaintiff maintained that the emergency doctrine was inapplicable to this case, and that Bang was negligent in stopping the vehicle on the bridge. The Supreme Court denied the Bang defendants' motion, and granted the plaintiff's cross motion.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Mallen v Su*, 67 AD3d 974 [2009]; *Zdenek v Safety Consultants, Inc.*, 63 AD3d 918 [2009]; *Purcell v Axelsen*, 286 AD2d 379, 380 [2001]; *see also* Vehicle and Traffic Law § 1129 [a]).

Contrary to the Bang defendants' contention, the Supreme Court properly denied their motion for summary judgment dismissing the complaint insofar as asserted against them. The Bang defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law, because although Cordero's motorcycle struck their vehicle in the rear, their own submissions raised issues of fact as to whether Bang was comparatively negligent in stopping her vehicle on the bridge (*see* Vehicle and Traffic Law § 1202 [a] [1] [g]; *see also* *Marsicano v Fabrizio*, 61 AD3d 941 [2009]; *Gregson v Terry*, 35 AD3d 358, 360-361 [2006]). While the emergency doctrine is inapplicable to the facts of this case (*see Lifson v City of Syracuse*, 17 NY3d 492, 497 [2011], citing *Caristo v Sanzone*, 96 NY2d 172 [2001]; *Ferrer v Harris*, 55 NY2d 285 [1982]; *Hendrickson v Philbor Motors, Inc.*, 101 AD3d 812 [2012]; *Williams v City of New York*, 88 AD3d 989 [2011]; *Jacobellis v New York State Thruway Auth.*, 51 AD3d 976 [2008]), Bang's deposition testimony nevertheless raises an issue of fact as to whether she could have safely continued to operate her vehicle while on the bridge, and whether it was reasonable for her to stop the vehicle under the circumstances (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Since issues of fact exist as to whether Bang was negligent, the Supreme Court also should have denied the plaintiff's cross motion for summary judgment on the issue of liability against the Bang defendants (*see id.* at 324). Eng, P.J., Austin, Hinds-Radix and LaSalle, JJ., concur.

8 DEUTSCHE BANK NATIONAL TRUST COMPANY, in its Capacity as Indenture Trustee for the NOTEHOLDERS OF AAMES MORTGAGE

INVESTMENT TRUST 2005-2, a Delaware Statutory Trust, Respondent, v GERARD J. QUINN, Also Known as GERARD QUINN, et al., Appellants, et al., Defendants. [990 NYS2d 885]—

Mortgages—Foreclosure—Required Notice—Service

In an action to foreclose a mortgage, the defendants Gerard J. Quinn and Eugenia M. Quinn appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Adams, J.), entered April 17, 2013, as denied that branch of their motion which was, inter alia, to dismiss the complaint insofar as asserted against them based upon the plaintiff's alleged failure to comply with the notice requirements of RPAPL 1304.

Ordered that the order is affirmed insofar as appealed from, with costs.

“[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action” (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2011]; see RPAPL 1304 [1], [2]). RPAPL 1304 provides, in relevant part, that “at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type” (RPAPL 1304 [1]; see *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909, 910 [2013]). “RPAPL 1304 sets forth the requirements for the content of such notice (see RPAPL 1304 [1]), and further provides that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (see RPAPL 1304 [2])” (*Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d at 910).

The defendants Gerard J. Quinn and Eugenia M. Quinn (hereinafter together the Quinn defendants) were properly served with the notice required by RPAPL 1304 (1) and (2) more than 90 days prior to the commencement of this action. Contrary to the Quinn defendants' contentions, the notice that was served upon them prior to the commencement of this foreclosure action was valid, as the notice and the 90-day period required by RPAPL 1304 (1) “need only be provided once in a twelve month period to the same borrower in connection with the same loan” (RPAPL 1304 [4]). Accordingly, the Supreme Court properly denied that branch of the Quinn defendants' motion which was to dismiss the complaint insofar as asserted against them based on the plaintiff's alleged failure to comply with the notice requirements of RPAPL 1304. Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

9 ANGEL DIAZ, Respondent, v PORT AUTHORITY OF NY & NJ, Respondent, and CRISTI CLEANING SERVICE CORP., Appellant, et al., Defendant. [990 NYS2d 882]—

Negligence—Duty—Snow Removal Contractor Owed No Duty to Injured Third Party

In an action to recover damages for personal injuries, the defendant Cristi Cleaning Service Corp. appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens County (Brathwaite Nelson, J.), entered October 10, 2012, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs, and the motion of the defendant Cristi Cleaning Service Corp. for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted.

The plaintiff, who was employed by nonparty Air-Serv Corporation, which provides shuttle bus service for airport employees at LaGuardia Airport, allegedly slipped and fell on black ice on the roadway in a parking lot during the course of his employment. Pursuant to a contract with the defendant Port Authority of NY & NJ (hereinafter the Port Authority), the appellant Cristi Cleaning Service Corp. (hereinafter Cristi) had performed snow removal services on the sidewalk areas at the airport. Cristi moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, contending that it had no duty to remove snow from the roadway where the plaintiff's accident occurred. The Supreme Court denied the motion, concluding that Cristi failed to demonstrate, *prima facie*, that the pile of snow left on the sidewalk did not compel the plaintiff to walk into the roadway where the accident occurred, thereby proximately causing the plaintiff's alleged injuries.

As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties (*see Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 810 [2013]; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1103 [2010]; *Wheaton v East End Commons Assoc., LLC*, 50 AD3d 675, 677 [2008]). However, in *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140 [2002]), the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the

continued performance of the contracting party's duties, or (3) where the contracting party has entirely displaced another party's duty to maintain the subject premises safely (*id.*).

Contrary to the Supreme Court's determination, Cristi made a prima facie showing of its entitlement to judgment as a matter of law by offering proof that the plaintiff was not a party to its snow removal contract with the Port Authority, and that it thus owed no duty of care to the plaintiff (*see Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d at 810-811; *Knox v Sodexo Am., LLC*, 93 AD3d 642 [2012]; *Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d 899, 901 [2011]; *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d at 1103; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2010]). Since the plaintiff did not allege facts in his complaint or bill of particulars which would establish the possible applicability of any of the *Espinal* exceptions, Cristi, in establishing its prima facie entitlement to judgment as a matter of law, was not required to affirmatively demonstrate that these exceptions did not apply (*see Knox v Sodexo Am., LLC*, 93 AD3d 642 [2012]).

In opposition to Cristi's prima facie showing, the Port Authority and the plaintiff offered no evidence to support their contentions that Cristi launched a force or instrument of harm by creating or exacerbating the icy condition that allegedly caused the plaintiff's fall (*see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 [2007]; *Knox v Sodexo Am., LLC*, 93 AD3d at 642-643; *Henriquez v Inserra Supermarkets, Inc.*, 89 AD3d at 902; *Quintanilla v John Mauro's Lawn Serv., Inc.*, 79 AD3d 838, 839 [2010]; *Foster v Herbert Slepoy Corp.*, 76 AD3d at 215; *Castro v Maple Run Condominium Assn.*, 41 AD3d 412, 413-414 [2007]). Similarly, they failed to raise a triable issue of fact as to whether the subject snow removal contract was a comprehensive and exclusive agreement that entirely displaced the Port Authority's duty to maintain the premises in a safe condition (*see Espinal v Melville Snow Contrs.*, 98 NY2d at 141; *Foster v Herbert Slepoy Corp.*, 76 AD3d at 215; *Linarello v Colin Serv. Sys., Inc.*, 31 AD3d 396, 397 [2006]). Likewise, they failed to raise a triable issue of fact as to whether the plaintiff relied upon Cristi's proper performance of its contractual duties (*see Dorestant v Snow, Inc.*, 274 AD2d 542 [2000]; *Bugiada v Iko*, 274 AD2d 368 [2000]). Accordingly, Cristi's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it should have been granted. Balkin, J.P., Austin, LaSalle and Barros, JJ., concur.

10 DiCARLO DISTRIBUTORS, INC., Appellant, v HAMPTON BAYS DINER CORP. et al., Respondents. [992 NYS2d 54]—

Sales—Goods Sold and Delivered—Calculation of Damages—Agreement to Interest Rate and Attorneys' Fees

In an action, inter alia, to recover damages for breach of contract and unjust enrichment, the plaintiff appeals from so much of a judgment of the Supreme Court, Suffolk County (Pitts, J.), entered September 5, 2012, as, upon a decision of the same court dated September 29, 2011, made after a nonjury trial, awarded it the principal sum of only \$34,000, failed to award it an attorney's fee, fixed prejudgment interest at a rate of only 9% per annum, and entered judgment only against the defendant Hampton Bays Diner Corp.

Ordered that the judgment is modified, on the law, (1) by deleting the provisions thereof fixing prejudgment interest at a rate of 9% per annum and entering judgment only against the defendant Hampton Bays Diner Corp., and substituting therefor, respectively, provisions fixing prejudgment interest at a rate of 18% per annum and entering judgment against all of the defendants, and (2) by adding thereto a provision directing that the plaintiff is entitled to an award of an attorney's fee; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Suffolk County, to determine the amount of interest and the attorney's fee, and thereafter for the entry of an appropriate amended judgment.

"In reviewing a determination made after a nonjury trial, the power of this Court is as broad as that of the trial court, and we may render a judgment we find warranted by the facts, bearing in mind that in a close case, the trial court had the advantage of seeing and hearing the witnesses" (*Hall v McDonald*, 115 AD3d 646, 647 [2014]; see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]).

Contrary to the plaintiff's contention, the Supreme Court's award of damages in the principal sum of \$34,000 is warranted by the facts (see *Elkin v Urarn Assoc.*, 72 AD3d 734, 736 [2010]). While the plaintiff's credit manager testified that the defendants owed the plaintiff the principal sum of \$51,292.97 for food products and other items, the manager was not aware of any credits for defective goods delivered to the defendants aside from credits that were reflected on the invoices, totaling only about \$100. The defendant Frank Vlahadamis testified that he rejected food products on numerous occasions by notifying the plaintiff's sales representative after the delivery driver had already left the premises. Both the plaintiff's credit manager and its sales representative testified that under those circumstances, the credit would not be reflected on the invoice. In light of the

foregoing, the Supreme Court properly awarded the plaintiff damages in the principal sum of \$34,000 based on Frank Vlahadamis's testimony concerning the amount owed by the defendants.

However, the Supreme Court erred in fixing prejudgment interest at a rate of only 9% per annum, entering judgment only against the corporate defendant, and failing to award the plaintiff an attorney's fee. The language of the regulations relied upon by the defendants at trial does not support a finding that the legislature intended to render an otherwise valid contract unenforceable as a result of a broker's failure to perform his or her duties after "the contract is effected" (7 CFR 46.28 [a]; see generally *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]). In light of the unequivocal provisions of the "credit contract and guaranty form" dated January 21, 2004, signed by the individual defendants in their individual capacities, the Supreme Court should have entered judgment against all of the defendants, fixed the prejudgment interest at a rate of 18% per annum, and awarded the plaintiff an attorney's fee (see *Yellow Book of N.Y., L.P. v Cataldo*, 81 AD3d 638, 640 [2011]; see generally *Stamina Prods., Inc. v Zintec USA, Inc.*, 90 AD3d 1021, 1022 [2011]).

The plaintiff's remaining contention is without merit. Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

11 JANET DIEMER et al., Appellants, v EBEN EZER MEDICAL ASSOCIATES et al., Defendants, and SELECT PHYSICIANS, P.C., et al., Respondents. [990 NYS2d 875]—

Dismissal and Nonsuit—Want of Prosecution—Failure to Serve 90-Day Demand for Service and Filing of Note of Issue—Action Restored to Calendar

In an action, inter alia, to recover damages for medical malpractice, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Parga, J.), dated October 25, 2012, which granted the motion of the defendants Select Physicians, P.C., and Daniel Reinharth pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against them for failure to prosecute.

Ordered that the order is reversed, on the law, with costs, and the motion of the defendants Select Physicians, P.C., and Daniel Reinharth pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against them is denied.

CPLR 3216 permits a court to dismiss an action for want of prosecution only after the court or the defendant has served the plaintiff with a written demand requiring the plaintiff to resume prosecution of the action and to serve and file a note of issue

within 90 days after receipt of the demand, and also stating that the failure to comply with the demand will serve as a basis for a motion to dismiss the action. As CPLR 3216 is a legislative creation and not part of a court's inherent power, a court may not dismiss an action for want of prosecution where the plaintiff was not served with the requisite 90-day demand pursuant to CPLR 3216 (b) (*see Chase v Scavuzzo*, 87 NY2d 228, 233 [1995]; *Airmont Homes v Town of Ramapo*, 69 NY2d 901, 902 [1987]; *Arroyo v Board of Educ. of City of N.Y.*, 110 AD3d 17, 20 [2013]).

Here, the defendants Select Physicians, P.C., and Daniel Reinharth (hereinafter together the defendants) failed to serve a 90-day demand pursuant to CPLR 3216 after the last note of issue was vacated on September 8, 2011, and the action reverted to its pre-note of issue status (*see Montalvo v Mumpus Restorations, Inc.*, 110 AD3d 1045, 1046 [2013]; *Dokaj v Ruxton Tower Ltd. Partnership*, 55 AD3d 661, 661-662 [2008]; *Andre v Bonetto Realty Corp.*, 32 AD3d 973, 974-975 [2006]; *Travis v Cuff*, 28 AD3d 749, 750 [2006]). Contrary to the defendants' contention, the certification orders issued by the Supreme Court, directing the plaintiffs to file a note of issue within 90 days, failed to satisfy CPLR 3216, as each of these orders predated vacatur of the note of issue on September 8, 2011. Further, the plaintiffs complied with each of these certification orders when they served and filed a note of issue within the respective 90-day periods (*see* CPLR 3216 [c]; *Darty v Hempstead Vil. Hous. Assoc.*, 95 AD3d 1161, 1162 [2012]). Accordingly, the defendants' motion pursuant to CPLR 3216 to dismiss the complaint insofar as asserted against them should have been denied (*see Montalvo v Mumpus Restorations, Inc.*, 110 AD3d at 1046; *Sellitto v Women's Health Care Specialists*, 58 AD3d 828, 829 [2009]; *Travis v Cuff*, 28 AD3d at 750). Mastro, J.P., Balkin, Cohen and Miller, JJ., concur.

12 EMIGRANT MORTGAGE COMPANY, INC., Respondent, v KENNETH W. HART et al., Defendants, and CATHERINE HART, Appellant. [990 NYS2d 857]—

Mortgages—Foreclosure—Vacatur of Judgment—Not Warranted Where Defendant Failed to Appear

In an action to foreclose a mortgage, the defendant Catherine Hart appeals, as limited by her brief, from so much of an order of the Supreme Court, Westchester County (Smith, J.), entered November 25, 2013, as denied that branch of her motion which was pursuant to CPLR 1203 to vacate a judgment of foreclosure and sale of the same court dated July 8, 2013, entered against the defendant Kenneth W. Hart upon his failure to appear in the action.

Ordered that the order is affirmed insofar as appealed from, with costs.

The Supreme Court correctly denied that branch of the appellant's motion which was pursuant to CPLR 1203 to vacate a judgment of foreclosure and sale entered against the defendant Kenneth W. Hart upon his failure to appear in the action. We note that, on this appeal, Catherine Hart appeared in her individual capacity only and no one appeared on behalf of the defendant Kenneth W. Hart. Rivera, J.P., Balkin, Chambers and Miller, JJ., concur.

13 LIUDMILA EREMINA et al., Appellants, v GERARD V. SCPARTA et al., Respondents. [991 NYS2d 438]—

Disclosure—Penalty for Failure to Disclose—Spoliation of Evidence—Sanctions Inappropriate Absent Proof Evidence was Lost or Destroyed
Disclosure—Supervision of Disclosure—Allow Party to Respond to Disclosure Requests before Imposing Sanctions

In an action to recover damages for personal injuries, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Schneier, JHO), dated May 10, 2013, as granted the motion of the defendants Gerard V. Scparta and Maureen E. Scparta, and that branch of the cross motion of the defendant Junko Funahashi, which were pursuant to CPLR 3126 to preclude the plaintiffs from introducing certain evidence at trial based on spoliation of evidence, and granted that branch of the cross motion of the defendant Junko Funahashi which was pursuant to CPLR 3124 to compel the plaintiffs to produce certain MRI films to the extent of directing them to, within 45 days, produce certain MRI films or be precluded from offering those MRI films and reports of those MRI films into evidence at trial.

Ordered that the order is modified, on the law and in the exercise of discretion, (1) by deleting the provision thereof granting the motion of the defendants Gerard V. Scparta and Maureen E. Scparta, and that branch of the cross motion of the defendant Junko Funahashi, which were pursuant to CPLR 3126 to preclude the plaintiffs from introducing certain evidence at trial based on spoliation of evidence, and substituting therefor a provision denying the motion and that branch of the cross motion, and (2) by deleting the provision thereof granting that branch of the cross motion of the defendant Junko Funahashi which was pursuant to CPLR 3124 to compel the plaintiffs to produce certain MRI films to the extent of directing the plaintiffs to, within 45 days, produce certain MRI films or be precluded from offering those MRI films and reports of those MRI films into evidence at trial, and substituting therefor a provision granting

that branch of the motion to the extent of directing the plaintiffs to, within 45 days, produce those MRI films or copies of those MRI films in their possession, in the possession of their counsel, treating physicians, experts, or anyone under their control or, in the alternative, provide an affidavit or affidavits that those MRI films and copies of those MRI films are not in their possession or control or the possession or control of their counsel, treating physicians, experts, or anyone under their control, and, upon their failure to comply therewith, be precluded from offering those MRI films and reports in evidence, or testimony relying upon or utilizing those MRI films at trial; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

On September 6, 2009, the plaintiffs, the operator and passengers in a vehicle, allegedly were injured when their vehicle was involved in a three-car collision with vehicles owned and operated by the defendants on Route I-87. The plaintiffs commenced this action against the defendants to recover damages for personal injuries. Counsel for the plaintiffs provided authorizations to counsel for the defendants to obtain the MRI films taken at Clearview of Brooklyn Medical, P.C. (hereinafter Clearview), with respect to the plaintiffs Liudmila Eremina and Konstantin Vayner. Counsel for the defendants Gerard V. Scparta and Maureen E. Scparta asked an outside vendor, Exam Works, to perform a radiological review of the films. By letter, an Exam Works radiological review supervisor informed the Scpartas' counsel that Clearview was no longer in business and that a letter sent to Clearview by certified mail at its last known address had been returned to them.

Thereafter, the Scpartas moved pursuant to CPLR 3126 to preclude the plaintiffs from introducing Clearview's MRI films taken of Eremina and Vayner, as well as any evidence as to the findings of those MRI tests. The defendant Junko Funahashi cross-moved pursuant to CPLR 3126 for the same relief and pursuant to CPLR 3124 to compel the plaintiffs to produce the MRI films within 45 days or be precluded from offering those MRI films and related reports into evidence at trial. The Supreme Court, inter alia, granted the motion and the cross motion and directed the plaintiffs to produce the subject films within 45 days or be precluded from offering the films and/or the reports relating to the films into evidence at the time of trial.

“Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence” (*Neve v City of New York*, 117 AD3d 1006, 1008

[2014]; see CPLR 3126; *Gotto v Eusebe-Carter*, 69 AD3d 566, 567 [2010]). “Where a party did not discard crucial evidence in an effort to frustrate discovery, and cannot be presumed to be responsible for the disappearance of such evidence, spoliation sanctions are inappropriate” (*Cordero v Mirecle Cab Corp.*, 51 AD3d 707, 709 [2008]; see *Shay v Mozer, Inc.*, 80 AD3d 687, 688 [2011]).

Here, the defendants failed to demonstrate that the plaintiffs lost or destroyed the MRI films, or even that the MRI films are lost or destroyed. Thus, the Supreme Court improvidently exercised its discretion in granting the Spartas’ motion, and that branch of Funahashi’s cross motion, which were pursuant to CPLR 3126 to preclude the plaintiffs from introducing the MRI films and related evidence at trial based on spoliation of evidence (see *Cordero v Mirecle Cab Corp.*, 51 AD3d at 709).

Further, CPLR 3101 (a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” In general, “the supervision of disclosure is left to the broad discretion of the trial court, which must balance the parties’ competing interests” (*Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1283 [2011]; see *Reilly Green Mtn. Platform Tennis v Cortese*, 59 AD3d 694, 695 [2009]).

Here, under the circumstances, the Supreme Court providently exercised its discretion in granting that branch of Funahashi’s cross motion which was pursuant to CPLR 3124 to compel the plaintiffs to make the MRI films available for duplication or, pursuant to CPLR 3126, be precluded from offering the films and/or the reports related to the films into evidence at the time of trial. However, the Supreme Court should have afforded the plaintiffs an opportunity to furnish an affidavit or affidavits, in the alternative, attesting to the fact that the MRI films or copies of the films were not in their possession or control or the possession and control of their counsel, treating physicians, experts, or anyone under their control. Mastro, J.P., Hall, Lott, Austin and Duffy, JJ., concur.

14 HENRY M. EVANS, Respondent, v ARGENT MORTGAGE COMPANY, LLC, et al., Defendants, and CITIFINANCIAL MORTGAGE COMPANY, INC., Appellant. (Action No. 1.) CITIFINANCIAL MORTGAGE COMPANY, INC., Appellant, v NIGEL WILLIAMS et al., Respondents, et al., Defendants. (Action No. 2.) [992 NYS2d 49]—

Mortgages—Foreclosure—Motion to Discharge Mortgage—Grant of Relief Not Requested

In related actions to foreclose a mortgage and, inter alia, for declaratory relief, Citifinancial Mortgage Company, Inc., a de-

defendant in action No. 1 and the plaintiff in action No. 2, appeals from (1) an order of the Supreme Court, Kings County (Schack, J.), dated July 8, 2011, which granted the motion of Henry M. Evans, the plaintiff in action No. 1 and a defendant in action No. 2, to discharge the mortgage and cancel the notice of pendency, and (2) a judgment of the same court dated July 8, 2013, which, upon an order of the same court dated July 6, 2011, and the order dated July 8, 2011, discharged the mortgage, cancelled the notice of pendency, and, in effect, declared, among other things, that any claims of the plaintiff in action No. 2 against the subject property are invalid.

Ordered that the appeal from the order dated July 8, 2011, is dismissed; and it is further,

Ordered that the judgment is reversed, on the law, the motion of the plaintiff in action No. 1 is denied, the order dated July 8, 2011, is modified accordingly, action No. 2 is reinstated, and the matter is remitted to the Supreme Court, Kings County, for further proceedings before a different Justice; and it is further,

Ordered that one bill of costs is awarded to the appellant.

The appeal from the intermediate order dated July 8, 2011, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the actions (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on appeal from the intermediate order are brought up for review and have been considered on appeal from the judgment (*see* CPLR 5501 [a] [1]).

The plaintiff in action No. 1, Henry M. Evans, is the owner of the subject property. He attained title by deed in 2002 from Nigel Williams and Eugena Nunes, defendants in action No. 2. Before the conveyance, Williams and Nunes had mortgaged the subject property and the last assignee of this mortgage was the plaintiff in action No. 2, Citifinancial Mortgage Company, Inc. (hereinafter Citifinancial). Evans contends that, in March 2006, he refinanced the subject property with Argent Mortgage Company, LLC (hereinafter Argent). However, according to Evans, Argent failed to subsequently pay off Citifinancial's prior mortgage on the subject property from the loan proceeds.

In January 2009, Citifinancial commenced an action to foreclose the mortgage against, among others, Evans, Williams, and Nunes (action No. 2). Subsequently, in July 2009, Evans commenced an action in the same court against, among others, Argent and Citifinancial, alleging that he refinanced the subject property with Argent, whose subsequent actions invalidated the resulting loan (action No. 1).

On February 5, 2010, the Supreme Court issued an order

wherein action No. 1 was discontinued, on the consent of Evans, as to Citifinancial and certain others, but not Argent. Action No. 1 and action No. 2 were thereafter joined for trial by order dated April 23, 2010.

In May 2011, Citifinancial made an application in action No. 2 to vacate a prior order of reference, therein informing the court that it planned to move to discontinue the action. By order dated July 6, 2011, the court granted Citifinancial's application to the extent that it vacated the prior order, but, on the grounds that it was conserving judicial resources, also, sua sponte, in effect, directed the dismissal of action No. 2 with prejudice.

In 2013, Evans moved to discharge the mortgage and to cancel a notice of pendency.

In the order appealed from, the court granted Evans's motion to discharge Citifinancial's mortgage and to cancel the notice of pendency. The court determined, sua sponte, that Citifinancial did not own the mortgage on the subject property on the grounds that an earlier assignment of the mortgage to a predecessor of Citifinancial was defective. In the judgment appealed from, the court discharged the mortgage, cancelled the notice of pendency, and, in effect, declared, inter alia, that Citifinancial's claims against the subject property are invalid. We reverse.

Civil Practice Law and Rules § 2214 (a) provides that "[a] notice of motion shall specify . . . the relief demanded and the grounds therefor." However, the court "may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" (*Frankel v Stavsky*, 40 AD3d 918, 918-919 [2007]; see *HCE Assoc. v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774 [1991]).

Here, the causes of action in Evans's complaint in action No. 1 arise out of his contention, inter alia, that he refinanced the subject property with Argent, which then failed to use the proceeds thereof to pay off the Citifinancial mortgage. Evans's motion sought discharge of the Citifinancial mortgage and cancellation of the notice of pendency on the grounds, inter alia, that his obligation to pay such mortgage was discharged when Argent received the proceeds for the purpose of paying off Citifinancial.

On grounds not raised or argued by the parties nor contained in the pleadings, the Supreme Court granted Evans's motion, determining that Citifinancial never actually owned the mortgage. The Supreme Court determined that a prior assign-

ment of the mortgage to Citifinancial's predecessor had been defective on the grounds that the power of attorney needed to execute such assignment was not recorded and, as a result, the mortgage could not thereafter properly be assigned to Citifinancial. The Supreme Court erred in discharging the mortgage and cancelling the notice of pendency on such grounds since Evans failed to dispute or contest the validity of Citifinancial's mortgage and actually affirmatively acknowledged the validity of the mortgage in his complaint and motion to the court (see *Emigrant Mtge. Co., Inc. v Fisher*, 90 AD3d 823, 824-825 [2011]).

The Supreme Court's determination that the mortgage was invalid prejudiced Citifinancial in that it was never afforded the opportunity to present evidence refuting the court's sua sponte determination that a prior power of attorney was not recorded, or that if such defect existed, it did not affect Citifinancial's rights (see *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 54 [2014]; *HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 818 [2013]; *Frankel v Stavsky*, 40 AD3d at 918-919). We note that the Supreme Court's determination, in effect, vitiated substantive rights of Citifinancial, which was no longer able to litigate its rights in the dismissed action No. 2, without giving it the opportunity to be heard on the issue decided (see *id.*; *NYC Med. & Neurodiagnostic, P.C. v Republic W. Ins. Co.*, 8 Misc 3d 33, 38 [App Term, 2d Dept, 2d & 11th Jud Dists 2004]).

In light of our determination, Citifinancial's remaining contentions need not be addressed.

Accordingly, under the circumstances of this case, we deem it appropriate to remit the matter to the Supreme Court, Kings County, for further proceedings before a different Justice (see *HSBC Bank USA, N.A. v Taher*, 104 AD3d at 818; *Aurora Loan Servs., LLC v Shahmela Shah Sookoo*, 92 AD3d 705, 707 [2012]). Skelos, J.P., Chambers, Lott and Duffy, JJ., concur.

15 FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent, v GIOVANNI CAPPELLI et al., Defendants, and NIVES CAPPELLI, Appellant. [990 NYS2d 856]—

Mortgages—Foreclosure—Standing—Unclear Whether Mortgagee was Lawful Holder of Note at Commencement

In an action to foreclose a mortgage, the defendant Nives Cappelli appeals from an order of the Supreme Court, Dutchess County (Sproat, J.), dated August 3, 2012, which denied her motion to dismiss the complaint insofar as asserted against her pursuant to CPLR 3211 (a) (3) for lack of standing, for the

plaintiff's failure to comply with the requirements of RPAPL 1304, and for the plaintiff's failure to make a good-faith attempt at settlement pursuant to CPLR 3408 (f).

Ordered that the order is affirmed, with costs.

In this action to foreclose a mortgage, the defendant Nives Cappelli (hereinafter the defendant) moved to dismiss the complaint insofar as asserted against her pursuant to CPLR 3211 (a) (3) for lack of standing, for the plaintiff's failure to comply with the requirements of RPAPL 1304, and for the plaintiff's failure to make a good-faith attempt at settlement pursuant to CPLR 3408 (f).

The Supreme Court properly denied that branch of the defendant's motion which was to dismiss the complaint insofar as asserted against her pursuant to CPLR 3211 (a) (3) for lack of standing. Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief (*see Bank of N.Y. Mellon v Gales*, 116 AD3d 723, 723 [2014]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]). In a mortgage foreclosure action, a plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced (*see Bank of N.Y. Mellon v Gales*, 116 AD3d at 723; *HSBC Bank USA v Hernandez*, 92 AD3d 843, 843 [2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753). Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation (*see HSBC Bank USA v Hernandez*, 92 AD3d at 844; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754). Here, the issue of standing cannot be determined as a matter of law on this record, because there is a question of fact as to whether the plaintiff was the lawful holder of the note when it commenced the action (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 683 [2012]; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061, 1062 [2012]; *HSBC Bank USA v Hernandez*, 92 AD3d at 844).

Contrary to the defendant's contention, the plaintiff complied with the requirements of RPAPL 1304 (*cf. Aurora Loan Servs., LLC v Weisblum*, 85 AD3d at 103). Moreover, the defendant's argument that the plaintiff failed to provide proof of service of a default notice is improperly raised for the first time on appeal (*cf. Pritchard v Curtis*, 101 AD3d 1502, 1504-1505 [2012]). Accordingly, the Supreme Court properly denied that branch of the defendant's motion which was to dismiss the complaint insofar as asserted against her on the ground that the plaintiff

failed to comply with RPAPL 1304. The Supreme Court also properly denied that branch of the defendant's motion which was to dismiss the complaint insofar as asserted against her for the plaintiff's failure to make a "good-faith" attempt at settlement (*see* CPLR 3408 [f]). The record before us is inadequate to determine whether, under the totality of the circumstances, the plaintiff's "conduct did not constitute a meaningful effort at reaching a resolution" (*US Bank N.A. v Sarmiento*, 121 AD3d 187 [2d Dept 2014]). Since such a factual determination cannot be made, the plaintiff's alleged bad faith does not provide a basis for dismissal of the action.

Based on the foregoing, the parties' remaining contentions need not be reached. Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

16 JENNIFER FIORE, Appellant, v DEBERBIERI ASSOCIATES, INC., et al., Respondents. [990 NYS2d 876]—In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Molia, J.), dated February 22, 2013, which granted the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The defendants made a prima facie showing of their entitlement to judgment as a matter of law through the deposition testimony of the plaintiff and the defendants' representative. The testimony established that the condition over which the plaintiff tripped was open and obvious and not inherently dangerous (*see Bouton v City of Newburgh*, 113 AD3d 715, 715 [2014]; *Capasso v Village of Goshen*, 84 AD3d 998, 999-1000 [2011]; *Ramos v Cooper Invs., Inc.*, 49 AD3d 623, 624 [2008]; *Colao v Community Programs Ctr. of Long Is., Inc.*, 29 AD3d 723, 724 [2006]; *Matone v DGM Partners Rye Ltd. Partnership*, 6 AD3d 585, 586 [2004]; *see also Nunez-Wilson v Carmo Realty*, 85 AD3d 888 [2011]). In opposition, the plaintiff failed to raise a triable issue of fact (*see Matone v DGM Partners Rye Ltd. Partnership*, 6 AD3d at 586). Accordingly, the Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint. Balkin, J.P., Austin, LaSalle and Barros, JJ., concur.

17 ANGELA GARCIA, Individually and as Administratrix of the Estate of DANIEL GARCIA, Deceased, Respondent, v EUROBUNGY USA, Appellant. (And a Third-Party Action.) [991 NYS2d 436]—

Appeal—Matters Appealable—No Appeal from Sua Sponte Dismissal of Complaint

Appeal—Parties Aggrieved—Defendant Not Aggrieved by Dismissal of Com-

plaint for Plaintiff's Lack of Capacity to Sue

In an action to recover damages for wrongful death, etc., the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated June 6, 2012, as, sua sponte, directed the dismissal of the complaint for lack of capacity to sue and denied, as academic, the defendant's cross motion pursuant to CPLR 3211 (a) to dismiss any claims regarding pecuniary damages and damages for loss of parental guidance and services purportedly made on behalf of the decedent's children.

Ordered that the appeal from so much of the order as, sua sponte, directed the dismissal of the complaint for lack of capacity to sue is dismissed; and it is further,

Ordered that the order is affirmed insofar as reviewed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The defendant argues that the Supreme Court erred in, sua sponte, directing the dismissal of the complaint for lack of capacity to sue. Although the plaintiff lacked the capacity to sue when the action was commenced, the defendant asserts that the defect was cured when letters of administration were issued to the plaintiff while the action was pending. The defendant, however, is not aggrieved by the direction that the complaint be dismissed (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144 [2010]). Moreover, no appeal lies as of right from that part of an order which does not decide a motion made on notice (*see* CPLR 5701 [a] [2]), and leave to appeal has not been granted from that portion of the order that directed the dismissal of the complaint (*see* CPLR 5701 [c]). Accordingly, the defendant's appeal from that portion of the order must be dismissed.

The defendant further contends that the Supreme Court improperly granted leave to the plaintiff to "replead" or commence a new action with additional allegations regarding the pecuniary interests of the decedent's children which were not alleged in the original complaint in this action. Contrary to the defendant's contention, however, the order appealed from does not contain this directive. The court simply directed the dismissal of the complaint for lack of capacity to sue, which the defendant is foreclosed from challenging on appeal due to lack of aggrievement.

In light of the Supreme Court directing dismissal of the complaint for lack of capacity to sue, the Supreme Court denied, as academic, the plaintiff's motion to amend the complaint to assert additional allegations regarding the pecuniary interests

of the decedent's children and denied, as academic, the defendant's cross motion pursuant to CPLR 3211 (a) to dismiss any claims regarding pecuniary damages and damages for loss of parental guidance and services purportedly made on behalf of the decedent's children in this action. The Supreme Court did not make any determination regarding the propriety of the plaintiff interposing additional claims on behalf of the pecuniary interests of the decedent's children, and thus, the defendant's contentions on this issue are not properly before this Court (see *Katz v Katz*, 68 AD2d 536 [1979]).

To the extent that the defendant is challenging the Supreme Court's denial of its cross motion as academic, the contention is without merit. In light of the direction to dismiss the complaint for lack of capacity to sue, which is not subject to review on the defendant's appeal, it was not improper for the Supreme Court to deny, as academic, the defendant's cross motion to dismiss any claims regarding pecuniary damages and damages for loss of parental guidance and services purportedly made on behalf of the decedent's children in the instant action. Chambers, J.P., Austin, Hinds-Radix and Duffy, JJ., concur.

18 GUIDEONE INSURANCE COMPANY, Appellant, v DARKEI NOAM RABBINICAL COLLEGE et al., Respondents, et al., Defendant. [992 NYS2d 66]—

Insurance—Disclaimer of Coverage—Late Notice of Occurrence—Nine-Month Delay—Failure to Demonstrate Reasonableness or Good Faith Belief in Nonliability

Insurance—Disclaimer of Coverage—Timeliness—Diligent Investigation

In an action for a judgment declaring that the plaintiff is not obligated to defend or indemnify the defendants Darkei Noam Rabbinical College, Darkei Noam, Inc., Keren Hachesed, and Keren Hachesed, Inc., in the underlying personal injury actions entitled *Sigler v Keren Hachesed, Inc.*, commenced in the Supreme Court, Kings County, under index No. 6573/06, and *Sigler v Yeshiva Darkei Noam*, commenced in the Supreme Court, Kings County, under index No. 35344/07, the plaintiff appeals from an order of the Supreme Court, Kings County (Solomon, J.), dated September 27, 2012, which denied its motion for summary judgment declaring that it is not so obligated and granted the cross motion of the defendants Darkei Noam Rabbinical College, Darkei Noam, Inc., Keren Hachesed, and Keren Hachesed, Inc., for summary judgment declaring that the plaintiff is so obligated.

Ordered that the order is reversed, on the law, with costs, the plaintiff's motion for summary judgment declaring that it is not obligated to defend or indemnify the defendants Darkei Noam

Rabbinical College, Darkei Noam, Inc., Keren Hachesed, and Keren Hachesed, Inc., in the underlying actions is granted, the cross motion of the defendants Darkei Noam Rabbinical College, Darkei Noam, Inc., Keren Hachesed, and Keren Hachesed, Inc., for summary judgment is denied, and the matter is remitted to the Supreme Court, Kings County, for the entry of a judgment declaring that the plaintiff is not so obligated.

On July 25, 2005, David Sigler allegedly was injured when he slipped and fell on property owned by the defendants Keren Hachesed and Keren Hachesed, Inc. (hereinafter together the Keren Hachesed defendants). The defendants Darkei Noam Rabbinical College and Darkei Noam, Inc. (hereinafter together the Darkei Noam defendants), leased that property to operate a synagogue and rabbinical college. By September or October 2005, the Darkei Noam defendants learned that someone had fallen in the synagogue, but did not investigate further. On June 6, 2006, a few days after the Darkei Noam defendants learned of Sigler's personal injury action against the Keren Hachesed defendants, the Darkei Noam defendants notified their liability insurance carrier, the plaintiff Guideone Insurance Company, of the underlying incident. After investigating the delay in notice, the plaintiff disclaimed coverage for the loss, citing the Darkei Noam defendants' late notice of the occurrence in violation of the insurance policy. The Darkei Noam defendants contested the disclaimer. Thereafter, the plaintiff commenced this action for a judgment declaring that it is not obligated to defend or indemnify the Darkei Noam defendants or the Keren Hachesed defendants. The Supreme Court denied the plaintiff's motion for summary judgment and granted the cross motion of the Darkei Noam defendants and the Keren Hachesed defendants for summary judgment declaring that the plaintiff is obligated to defend and indemnify them. The plaintiff appeals.

Where, as here, a policy of liability insurance requires the insured to provide notice of an occurrence "as soon as practicable," notice must be given "within a reasonable time under all the circumstances" (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 441 [1972] [internal quotation marks omitted]; see *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 19 [1979]; *Sputnik Rest. Corp. v United Natl. Ins. Co.*, 62 AD3d 689, 689 [2009]). Here, the subject policy was issued in 2004, and therefore, is not governed by the 2008 amendment to Insurance Law § 3420 (for policies issued after January 17, 2009), which provides that an insurer can only disclaim coverage based on untimely notice if it shows that it was prejudiced

by the failure to provide timely notice (see Insurance Law § 3420 [c] [2] [A]; see also *Zimmerman v Peerless Ins. Co.*, 85 AD3d 1021, 1023 [2011]). An insured's failure to satisfy the insurance policy's notice requirement constitutes "a failure to comply with a condition precedent which, as a matter of law, vitiates the contract" (*Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332, 339 [2005]; see *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]; *White v City of New York*, 81 NY2d 955, 957 [1993]; *McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.*, 79 AD3d 981, 983 [2010]).

Here, the plaintiff made a prima facie showing of entitlement to judgment as a matter of law with evidence that the Darkei Noam defendants learned of the underlying incident in September or October 2005, but waited until June 2006, approximately nine months later, to notify the plaintiff (see *Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742 [2005]; *Argentina v Otsego Mut. Fire Ins. Co.*, 86 NY2d 748, 750 [1995]; *Albano-Plotkin v Travelers Ins. Co.*, 101 AD3d 657 [2012]; *Columbia Univ. Press, Inc. v Travelers Indem. Co. of Am.*, 89 AD3d 667 [2011]). In opposition, the Darkei Noam defendants failed to raise a triable issue of fact as to whether their failure to investigate the underlying incident in September or October 2005 was reasonable, or to otherwise demonstrate a good faith belief in nonliability (see *Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436 [1972]; *Lancer Ins. Co. v Super Value, Inc.*, 96 AD3d 807 [2012]; *Fine Line Bldrs. & Remodelers, Inc. v Atlantic Cas. Ins. Co.*, 90 AD3d 702 [2011]).

Contrary to the contention of the Darkei Noam defendants and the Keren Hachesed defendants, the plaintiff's short delay in disclaiming coverage was reasonable under the circumstances. While Insurance Law § 3420 (d) (2) requires an insurer to give written notice of a disclaimer of coverage "as soon as is reasonably possible" (Insurance Law § 3420 [d] [2]; see *Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979]), an investigation into issues affecting the decision whether to disclaim coverage may excuse delay (see *Quincy Mut. Fire Ins. Co. v Enoe*, 107 AD3d 775, 776 [2013]). The insurer bears the burden of explaining the delay in notifying the insured of the disclaimer (see *id.* at 776). Here, the plaintiff made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it sent a disclaimer only 24 days after receiving notice of the underlying incident and, during those 24 days, it diligently investigated the possibility of a disclaimer based on the Darkei Noam defendants' untimely notice. In opposition, the insureds, the Darkei Noam defendants, failed to

raise a triable issue of fact as to the timeliness of the disclaimer (*see id.*). Therefore, the plaintiff's notice of disclaimer was timely as a matter of law.

Moreover, the plaintiff correctly contends that the Keren Hachesed defendants are not a named insured or additional insured under the Darkei Noam defendants' insurance policy (*see Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257 [2011]; *Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157 [2005]). Accordingly, the plaintiff is not obligated to defend or indemnify the Keren Hachesed defendants.

Because this is a declaratory judgment action, we remit the matter to the Supreme Court, Kings County, for the entry of a judgment declaring that the plaintiff is not obligated to defend or indemnify the Darkei Noam defendants or the Keren Hachesed defendants in the underlying actions (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Rivera, J.P., Balkin, Chambers and Miller, JJ., concur.

19 MIRIAM HERNANDEZ, Appellant, v CARLA A. SOLLO et al., Respondents. [990 NYS2d 888]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Plaintiff Unable to Continue Working Due to Neck and Hand Pain

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Jones, Jr., J.), dated December 21, 2012, which granted the motion of the defendant Hector Canelas and the separate motion of the defendants Carla A. Sollo and Anthony M. Marchese for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Ordered that the order is reversed, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, and the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them are denied.

The defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). In addressing the plaintiff's claims that she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d), the defendants argued that the plaintiff's deposition

testimony established that during the 180-day period following the accident, the plaintiff did not have injuries or impairments which, for more than 90 days, prevented her from performing substantially all of the material acts which constituted the plaintiff's usual and customary daily activities (see *Karpinos v Cora*, 89 AD3d 994 [2011]). However, the plaintiff's deposition testimony actually revealed the existence of a triable issue of fact as to whether the plaintiff had such injuries or impairments (cf. *Cruz v Advanced Concrete Leasing Corp.*, 101 AD3d 666 [2012]). The plaintiff testified that she worked as a babysitter five to six days a week for approximately eight hours a day prior to the accident. However, after the accident, she was unable to continue working due to neck and hand pain. Under these circumstances, the defendants failed to adequately address the plaintiff's 90/180-day claims (see *Cohn v Khan*, 89 AD3d 1052 [2011]).

Since the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact (see *Roman-Cabrera v THJ Transp. Corp.*, 107 AD3d 682 [2013]).

Accordingly, the Supreme Court should have denied the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them. Rivera, J.P., Dickerson, Chambers, Hinds-Radix and Maltese, JJ., concur. **[Prior Case History: 2012 NY Slip Op 33114(U).]**

20 JOEL FRIEDBERG TRUSTEE, Also Known as JOEL FRIEDBERG, Respondent, v METAGLO, INC., et al., Defendants, and VILLAGE OF MAMARONECK et al., Appellants. [991 NYS2d 449]—

Taxation—Tax Liens, Tax Sales and Tax Titles—Foreclosure of Tax Lien—Cancellation of Junior Liens Appropriate Where Lienors Failed to Commence Their Own Foreclosure Actions

In an action to foreclose a tax lien certificate dated March 8, 2006, the Village of Mamaroneck and the Town of Mamaroneck separately appeal from (1) an order of the Supreme Court, Westchester County (Smith, J.), dated May 1, 2012, which, in effect, granted the plaintiff's motion for leave to amend a judgment of foreclosure and sale of the same court dated February 7, 2012, to include a provision directing that all liens, taxes, and assessments prior in time to the subject tax lien certificate, for which the amount bid at the foreclosure auction was insufficient to cover, be extinguished upon transfer of the referee's deed, and (2) an amended judgment of foreclosure and sale of the same court, also dated May 1, 2012, which, upon the order, directed that all liens, taxes, and assessments prior in time to the subject

tax lien certificate, for which the amount bid at the foreclosure auction was insufficient to cover, be extinguished upon transfer of the referee's deed.

Ordered that the appeals from the order are dismissed; and it is further,

Ordered that the amended judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The appeals from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeals from the order are brought up for review and have been considered on the appeal from the amended judgment (*see* CPLR 5501 [a] [1]).

Title 3 of article 14 of the Real Property Tax Law, which had previously allowed villages to conduct tax lien sales and convey parcels of real property by tax deed, was repealed by the New York State Legislature pursuant to chapter 602 of the Laws of 1993. However, that same law authorized a village to adopt a local law allowing it to continue to enforce tax liens pursuant to the otherwise repealed sections of RPTL article 14, title 3. The law provided, in pertinent part, that "[a] village which conducted a tax sale in 1993 pursuant to [RPTL 1454] is hereby authorized to adopt a local law without referendum, no later than September 1, 1994, providing that the collection of taxes that shall become liens on or after January 1, 1995 and on or before December 31, 2015 shall be enforced pursuant to title 3 of article 14 of the [RPTL], as the same shall have been in effect on the last day preceding the effective date of this act" (L 1993, ch 602, § 6, as amended by L 1994, ch 532, § 9, as amended by L 2012, ch 154, § 1). The Village of Mamaroneck took advantage of Laws of 1993, chapter 602, § 6, as amended, and, in August 1994, adopted Local Law No. 7-1994, which provides that "[p]ursuant to Section 6 of Chapter 602 of the Laws of 1993, as amended by a chapter of the laws of 1994, as proposed in Legislative Bill No. S. 8560-A, the Village of Mamaroneck hereby acts by local law, not subject to referendum, to provide that the collection of property taxes shall continue to be enforced pursuant to Title 3 of Article 14 of the Real Property Tax Law, as is in effect on December 31, 1994" (Code of Village of Mamaroneck § 304-24).

Pursuant to Local Law No. 7-1994, the Village continued to conduct tax lien sales in accordance with the provisions of former RPTL 1454. In March 2006, at one such sale, the plaintiff purchased the tax lien certificate that is the subject of this ac-

tion, which is referable to premises situated within the Village. The certificate specifically provided that the purchaser, in the event that the premises were not timely redeemed, could either complete the purchase and take a conveyance of the premises, as provided by former RPTL 1464, or could commence an action to foreclose the lien, as provided by former RPTL 1458. When the premises were not timely redeemed, the plaintiff commenced the instant action to foreclose on the lien, naming, as defendants, among others, the Village and the Town of Mamaroneck, both of which held various tax liens against the premises, including some that date back to the mid-1990s.

On May 1, 2012, the Supreme Court entered an amended judgment of foreclosure, directing the premises to be sold at public auction. That amended judgment of foreclosure included a provision that directed the referee to pay, from the proceeds of the sale, and in order of their priority under RPTL 912, the taxes, assessments, unpaid tax liens, water rents, and sewer rents that lawfully had accrued. That same provision, however, also specified that “all liens, taxes, and assessments that are prior in time and thus inferior to the date of the sale of the tax lien foreclosed in this action and for which there are no remaining proceeds from the sale, shall be extinguished by this foreclosure action and not remain as liens upon the premises once the referee’s deed has been tendered and all surplus distributed.” In including this provision, the Supreme Court acknowledged that the subject property had accrued liens that exceeded the value of the property and that, as such, the proceeds from the sale would be insufficient to satisfy all of the open liens. The Village and the Town separately appeal.

Contrary to the contentions raised by the Village and the Town, the Supreme Court did not exceed its authority in including the provision directing that certain open liens be extinguished upon transfer of the referee’s deed. Former RPTL 1458 (8), which applies to the liens claimed by the Village here, authorizes the court to “direct the cancellation or satisfaction of record of any liens of any kind or nature whatever of any of the parties to the action” (former RPTL 1458 [8]). While some of the junior tax liens held by the Village or the Town might be extinguished as a result of the challenged provision, they could have avoided this result, as correctly noted by the Supreme Court, by commencing their own foreclosure actions or proceedings, which they failed to do. Moreover, under the circumstances presented here, the challenged provision helps ensure that the subject property is transferable, and that it will return to the active tax roll, as the provision makes clear to any potential

purchaser that the title acquired will be free of any prior claims or encumbrances (*see generally Melahn v Hearn*, 60 NY2d 944, 946 [1983]; *Mittelmark v County of Saratoga*, 85 AD3d 1359 [2011]; *First Natl. Bank of Downsville v Atkin*, 279 AD2d 779 [2001]; *Borisenok v Hug*, 212 AD2d 282 [1995]).

Accordingly, the Supreme Court properly granted the plaintiff's motion for leave to amend the judgment of foreclosure and sale to include the disputed provision. Mastro, J.P., Chambers, Austin and Miller, JJ., concur.

21 VICTOR JORDAN, Individually and as Administrator of the Estate of OSWALD JORDAN, Deceased, Appellant, v ANDREW JORDAN et al., Respondents. [990 NYS2d 874]—

Parties—Standing—Wrongful Death—Temporary Letters of Administration Revoked before Commencement

In an action to recover damages for, inter alia, wrongful death, the plaintiff appeals from an order of the Supreme Court, Kings County (Martin, J.), dated October 5, 2012, which granted the defendants' motion, in effect, pursuant to CPLR 3211 (a) (3) to dismiss the complaint for lack of standing.

Ordered that the order is affirmed, with costs.

The Supreme Court properly granted the defendants' motion, in effect, pursuant to CPLR 3211 (a) (3) to dismiss the complaint for lack of standing. A personal representative who has received letters of administration of the estate of a decedent is the only party who is authorized to bring a survival action for personal injuries sustained by the decedent and a wrongful death action to recover the damages sustained by the decedent's distributees on account of his or her death (*see* EPTL 1-2.13, 5-4.1 [1]; 11-3.2 [b]; *Mingone v State of New York*, 100 AD2d 897, 899 [1984]). Prior to the commencement of this action by the plaintiff, the Surrogate's Court revoked temporary letters of administration previously issued to the plaintiff and issued permanent letters of administration to the decedent's surviving spouse (*see Matter of Jordan*, 89 AD3d 1085 [2011]). As a result, the plaintiff lacked standing to commence this action.

The plaintiff's remaining contentions lack merit or need not be reached in light of our determination. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

22 DAVID KATZ, Appellant, v TOWN OF CLARKSTOWN, NEW YORK, et al., Respondents. [990 NYS2d 880]—

Municipal Corporations—Tort Liability—Ministerial Governmental Function—Garbage Collection—Special Relationship

In an action, inter alia, to recover damages for injury to prop-

erty and negligent infliction of emotional distress, the plaintiff appeals from an order of the Supreme Court, Rockland County (Berliner, J.), dated April 9, 2013, which granted that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action.

Ordered that the order is affirmed, with costs.

In August 2011, Tropical Storm Irene struck the Town of Clarkstown. The plaintiff obeyed governmental advisories to evacuate. On August 28, 2011, he returned home to assess the damage, and placed certain items of personal property, including family memorabilia and his awards and employment records as a police officer, in his driveway to air them out. The plaintiff was informed by Ralph Lauria, Deputy Director of the Town's Department of Environmental Control (hereinafter the DEC), that bulk pick-up of garbage would commence on September 5, 2011.

On August 31, 2011, the plaintiff was contacted by his neighbor and told that, at 7 a.m. on that date, the DEC commenced bulk garbage removal. When the plaintiff returned home, he ascertained that all items that he had placed on his driveway had been removed from the driveway, with the exception of a generator.

The plaintiff served a timely notice of claim and commenced the instant action against the Town and several of its agencies and officials to recover damages for injury to property and negligent infliction of emotional distress. The defendants moved, inter alia, to dismiss the complaint pursuant to CPLR 3211 (a) (7). The defendants alleged, among other things, that the complaint failed to allege extreme or outrageous conduct and, therefore, failed to state a cause of action to recover damages for negligent infliction of emotional distress. The defendants further alleged that they owed no duty to the plaintiff because they were acting in their governmental capacities when the plaintiff's belongings were removed from his driveway, that no special relationship was created between the plaintiff and them and, therefore, the complaint failed to state a cause of action to recover damages for injury to property. In the order appealed from, the Supreme Court granted the defendants' motion to dismiss the complaint.

The plaintiff failed to state a cause of action sounding in negligent infliction of emotional distress (*see McGovern v Nassau County Dept. of Social Servs.*, 60 AD3d 1016, 1017 [2009]).

Garbage collection is considered a governmental function (*see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 427 [2013]; *Nehrbas*

v Incorporated Vil. of Lloyd Harbor, 2 NY2d 190, 195 [1957]). A municipality cannot be held liable for negligence in the performance of discretionary acts, but can be held liable for negligence in the performance of ministerial acts, if there is a special relationship between the plaintiff and the defendant (see *McLean v City of New York*, 12 NY3d 194, 202 [2009]). The difference between ministerial or discretionary acts is described thusly: “ ‘discretionary or quasi-judicial acts involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result’ ” (*Haddock v City of New York*, 75 NY2d 478, 484 [1990], quoting *Tango v Tulevech*, 61 NY2d 34, 41 [1983]). Garbage collection falls within the definition of a ministerial function.

A special relationship based upon a duty voluntarily assumed by the municipality requires proof of the following elements: “ ‘(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking’ ” (*McLean v City of New York*, 12 NY3d at 201, quoting *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; see *Valdez v City of New York*, 18 NY3d 69, 80 [2011]). No facts were alleged indicating that the defendants undertook an affirmative duty to act on behalf of the plaintiff. Therefore, no basis was alleged to impose liability upon the defendants, based on the negligent destruction of property. Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur.

23 JOSEPH J. KELLMAN, an Infant, by His Father and Natural Guardian, JOHN KELLMAN, Respondent, v HAUPPAUGE UNION FREE SCHOOL DISTRICT et al., Appellants. [991 NYS2d 128]—

Schools—Notice of Claim—Late Notice—Actual Knowledge of Essential Facts—Accident Report Signed by School Nurse and Principal

In an action to recover damages for personal injuries, the defendants appeal from an order of the Supreme Court, Suffolk County (Rebolini, J.), dated July 15, 2013, which granted the plaintiff’s cross motion for leave to serve a late notice of claim upon the defendants pursuant to General Municipal Law § 50-e (5) and denied the defendants’ motion to dismiss the complaint on the ground that the plaintiff failed to timely serve a notice of claim.

Ordered that the order is affirmed, with costs.

In order to commence a tort action against a municipality, General Municipal Law § 50-e (1) (a) requires a claimant to serve a notice of claim upon that municipality within 90 days after the date that the claim arose (see *Jordan v City of New York*, 41 AD3d 658, 659 [2007]). General Municipal Law § 50-e (5) permits a court, in its discretion, to extend the time to serve a notice of claim (see *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006]; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138 [2008]; *Matter of Lodati v City of New York*, 303 AD2d 406, 406-407 [2003]). Whether the public corporation acquired timely actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter is seen as a factor which should be accorded great weight in determining whether or not to grant leave to serve a late notice of claim (see *Matter of Dell'Italia v Long Is. R.R. Corp.*, 31 AD3d 758, 759 [2006]; *Matter of Battle v City of New York*, 261 AD2d 614, 615 [1999]; *Matter of Morris v County of Suffolk*, 88 AD2d 956, 956 [1982], *aff'd* 58 NY2d 767 [1982]). "In order to have actual knowledge of the essential facts constituting the claim, the public corporation must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim; the public corporation need not have specific notice of the theory or theories themselves" (*Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d at 148).

Other factors a court must consider in determining whether to grant leave to serve a late notice of claim are: (1) whether the claimant was an infant or mentally or physically incapacitated; (2) whether the claimant had a reasonable excuse for the failure to serve a timely notice of claim; and (3) whether the delay would substantially prejudice the public corporation in maintaining its defense (see General Municipal Law § 50-e [5]; *Matter of Melissa G. v North Babylon Union Free School Dist.*, 50 AD3d 901 [2008]; *Jordan v City of New York*, 41 AD3d at 659; *Matter of Lodati v City of New York*, 303 AD2d at 407). The presence or absence of any one of these factors is not necessarily determinative (see *Matter of Dell'Italia v Long Is. R.R. Corp.*, 31 AD3d at 759; *Salvaggio v Western Regional Off-Track Betting Corp.*, 203 AD2d 938, 939 [1994]).

Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in granting the infant plaintiff's cross motion pursuant to General Municipal Law § 50-e (5) for leave to serve a late notice of claim. Two weeks before the injury at issue, the infant plaintiff sustained an ankle injury at school. The injury was tended to by the school nurse

and documented in the school records. In connection with that first injury, the infant plaintiff wore a visible air cast on his leg, the school made accommodations for his injury, and the infant plaintiff did not participate in gym or sports activities. Moreover, the defendants had in their possession a note from the infant plaintiff's doctor, dated the same day as the first injury, advising that the infant plaintiff should not participate in sports until a reevaluation on April 20, 2012. For almost two weeks, the baseball coach, an employee of the defendants, refused to allow the infant plaintiff to participate in practice. However, before the scheduled reevaluation had occurred, the baseball coach directed the infant plaintiff to act as goalie in a "handball" game during baseball practice, and the coach was present when the infant plaintiff fell and injured his shoulder during that game. That day, the coach filled out an accident report which was subsequently signed by the school nurse and the principal and retained in the school records. The following day, the school nurse sent out email communications to other staff members, including the baseball coach, about the infant plaintiff's injury and the doctor's note. The coach also admitted to the infant plaintiff's father that he had allowed the infant plaintiff "to play goalie during the game and [he] shouldn't have" and told the infant plaintiff that "he will definitely get fired for what happened." Accordingly, the defendants had actual knowledge of the essential facts underlying the legal theories on which liability is predicated well within the 90-day statutory period (*see Matter of Leeds v Port Washington Union Free School Dist.*, 55 AD3d 734, 735 [2008]; *Gibbs v City of New York*, 22 AD3d 717, 719 [2005]; *Matter of Schiffman v City of New York*, 19 AD3d 206, 207 [2005]; *Ayala v City of New York*, 189 AD2d 632, 633 [1993]; *see also Matter of Vasquez v City of Newburgh*, 35 AD3d 621, 623 [2006]), and any failure by the defendants to further inquire is not attributable to the late notice of claim (*see Matter of Apgar v Waverly Cent. School Dist.*, 36 AD3d 1113, 1114 [2007]).

Furthermore, by demonstrating that the defendants acquired timely knowledge of the essential facts of the claim, the infant plaintiff met his initial burden of establishing a lack of substantial prejudice to the defendants (*see Jordan v City of New York*, 41 AD3d at 660; *Gibbs v City of New York*, 22 AD3d at 719; *Matter of Schiffman v City of New York*, 19 AD3d at 207; *see also Williams v Nassau County Med. Ctr.*, 6 NY3d at 539). The defendants' conclusory assertion that they will be unable to investigate the infant plaintiff's claims due to the passage of time was insufficient to overcome the plaintiff's showing of a lack of substantial prejudice (*see Jordan v City of New York*, 41

AD3d at 660; *Gibbs v City of New York*, 22 AD3d at 720). The defendants failed to establish how they will be unable to investigate the infant plaintiff's claims due to the passage of time and presented no evidence that any of the defendants' employees or other witnesses are unavailable to be interviewed and questioned in connection with the accident (see *Matter of Vitale v Elwood Union Free School Dist.*, 19 AD3d 610, 611 [2005]).

The absence of a reasonable excuse for the infant plaintiff's delay does not bar the court from granting leave to serve a late notice of claim, since here, there is actual notice and an absence of prejudice (see *Matter of Rivera-Guallpa v County of Nassau*, 40 AD3d 1001, 1002 [2007]; *Gibbs v City of New York*, 22 AD3d at 720; *Montero v New York City Health & Hosps. Corp.*, 17 AD3d 550, 550-551 [2005]; *Matter of Hendershot v Westchester Med. Ctr.*, 8 AD3d 381, 382 [2004]).

Accordingly, the Supreme Court did not improvidently exercise its discretion in granting the cross motion pursuant to General Municipal Law § 50-e (5), for leave to serve a late notice of claim, and denying the defendants' motion to dismiss the complaint. Hall, J.P., Roman, Duffy and LaSalle, JJ., concur.

24 PATRICK MAGEE et al., Respondents, v JOHN MAGEE, Appellant, et al., Defendants. [990 NYS2d 894]—

Receivers—Appointment—Wind Up of Partnership Affairs

In an action, inter alia, in effect, for a judgment declaring that a partnership between the plaintiff Patrick Magee and the defendant John Magee has been dissolved, the defendant John Magee appeals from an order of the Supreme Court, Rockland County (Berliner, J.), dated March 21, 2013, which granted the plaintiffs' motion for summary judgment, in effect, declaring that the partnership has been dissolved and pursuant to CPLR 6401 for the appointment of a temporary receiver to wind up the partnership's affairs and liquidate and distribute its assets.

Ordered that the order is modified, on the facts and in the exercise of discretion, by deleting the provision thereof granting that branch of the plaintiffs' motion which was pursuant to CPLR 6401 for the appointment of a temporary receiver to wind up the partnership's affairs and liquidate and distribute its assets, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, with costs to the appellant, and the matter is remitted to the Supreme Court, Rockland County, for the entry of a judgment, inter alia, declaring that the partnership between the plaintiff Patrick Magee and the defendant John Magee has been dissolved.

The Supreme Court improvidently exercised its discretion in granting that branch of the plaintiffs' motion which was pursuant to CPLR 6401 for the appointment of a temporary receiver to wind up the affairs of a partnership between the plaintiff Patrick Magee and the defendant John Magee known as Bradley Industrial Park (hereinafter Bradley) and to liquidate and distribute its assets. "A party moving for the appointment of a temporary receiver must submit 'clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests' " (*Board of Mgrs. of Nob Hill Condominium Section II v Board of Mgrs. of Nob Hill Condominium Section I*, 100 AD3d 673 [2012], quoting *Natoli v Milazzo*, 65 AD3d 1309, 1310 [2009]; see CPLR 6401 [a]; *Vardaris Tech, Inc. v Paleros Inc.*, 49 AD3d 631 [2008]; *Lee v 183 Port Richmond Ave. Realty*, 303 AD2d 379, 380 [2003]). Here, the plaintiffs failed to make a "clear evidentiary showing that property of the [partnership] was in danger of being 'removed from the state, or lost, materially injured or destroyed' " (*Lee v 183 Port Richmond Ave. Realty*, 303 AD2d at 380, quoting CPLR 6401 [a]). Accordingly, that branch of the plaintiffs' motion which was for the appointment of a temporary receiver should have been denied.

The appellant's additional contention that the dissolution of Bradley would be inappropriate is academic since the partnership was previously dissolved by operation of law (see Partnership Law §§ 60, 62 [1] [b]; *Mashihi v 166-25 Hillside Partners*, 51 AD3d 738 [2008]).

Since this is, in part, an action for a declaratory judgment, we remit the matter to the Supreme Court, Rockland County, for the entry of a judgment, inter alia, declaring that Bradley has been dissolved (see *Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

25 ANDREA MANNINO et al., Appellants, v WELLS FARGO HOME MORTGAGE, INC., et al., Respondents. (And a Third-Party Action.) [990 NYS2d 854]—

Appeal—Academic and Moot Questions—Vacatur of Underlying Order

In an action to cancel a mortgage on certain real property, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Martin, J.), dated July 5, 2012, as denied their motion for summary judgment on the complaint and which searched the record and awarded the defendants summary judgment dismissing the complaint. Motion by the defendant Wells Fargo Home Mortgage, Inc., inter alia, to dismiss the appeal as academic. By decision and order

on motion of this Court dated August 19, 2013, that branch of the motion which was to dismiss the appeal as academic was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is

Ordered that the branch of the motion which is to dismiss the appeal as academic is granted; and it is further,

Ordered that the appeal is dismissed as academic, without costs or disbursements, and so much of the order of the Supreme Court, Kings County, dated July 5, 2012, as awarded the defendants summary judgment dismissing the complaint is vacated.

The subject premises has been sold and the subject mortgage has been satisfied. Therefore, the remedy sought is no longer available. Accordingly, the appeal has been rendered academic (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 [2003]; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713-715 [1980]; *Asher v Gigante*, 21 AD3d 916 [2005]).

While it is the general policy of New York courts to simply dismiss an appeal which has been rendered academic, vacatur of an order or judgment on appeal may be an appropriate exercise of discretion where necessary “in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent” (*Matter of Hearst Corp. v Clyne*, 50 NY2d at 718; *see Matter of Adirondack Moose Riv. Comm. v Board of Black Riv. Regulating Dist.*, 301 NY 219 [1950]; *E-Z Eating 41 Corp. v H.E. Newport L.L.C.*, 84 AD3d 401 [2011]; *Funderburke v New York State Dept. of Civ. Serv.*, 49 AD3d 809 [2008]). Here, the plaintiffs sold the premises and satisfied the subject mortgage under threat of foreclosure. They “‘ought not in fairness be forced to acquiesce in’” the unreviewable order, which could spawn adverse legal consequences due to its res judicata effect (*Matter of Ruskin v Safir*, 257 AD2d 268, 273 [1999], quoting *US Bancorp Mortgage Co. v Bonner Mall Partnership*, 513 US 18, 25 [1994]). Accordingly, we vacate so much of the order dated July 5, 2012, as awarded the defendants summary judgment dismissing the complaint. Mastro, J.P., Lott, Sgroi and Cohen, JJ., concur.

26 LAURA MICCIO et al., Respondents, v ELLIOT GERDIS, D.D.S., et al., Appellants. [990 NYS2d 863]—

Limitation of Actions—Continuous Treatment Doctrine—Failure to Diagnose Tumor while Continuously Treating Patient for Symptoms

In an action, inter alia, to recover damages for dental malpractice, etc., the defendants appeal from an order of the Supreme Court, Suffolk County (LaSalle, J.), dated March 6, 2013, which denied their motion, inter alia, for summary judgment dismissing the complaint as to any claims arising on or before April 1, 2008.

Ordered that the order is affirmed, with costs.

The plaintiffs alleged, among other things, that the defendants were negligent in failing to diagnose and treat the plaintiff Laura Miccio's condition of loosening teeth due to inadequate bone support and receding gums, and failing to diagnose a tumor which was causing her gums and jaw bone to deteriorate.

The defendants established their prima facie entitlement to judgment as a matter of law dismissing the claims arising on or before April 1, 2008, by demonstrating that the action was not commenced by filing until October 1, 2010 (*see Cox v Kingsboro Med. Group*, 88 NY2d 904, 906 [1996]; *Peykarian v Yin Chu Chien*, 109 AD3d 806, 807 [2013]; *Fraumeni v Oakwood Dental Arts, LLC*, 108 AD3d 495, 496 [2013]; *Salerno v Huntington Hosp. Dolan Family Health Ctr., Inc.*, 98 AD3d 730 [2012]; *Gomez v Katz*, 61 AD3d 108, 113 [2009]). However, in opposition, the plaintiffs raised triable issues of fact as to whether Laura Miccio received continuous treatment for her loose teeth and receding gums, which allegedly were symptomatic of the tumor the defendants failed to diagnose. The failure to make the correct diagnosis as to the underlying condition while continuing to treat the symptoms does not mean, for purposes of continuity, that there has not been treatment (*see Hein v Cornwall Hosp.*, 302 AD2d 170, 174 [2003]; *Dellert v Kramer*, 280 AD2d 438 [2001]). Thus, a physician or hospital cannot defeat the application of the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, where it treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition (*see Chestnut v Bobb-McKoy*, 94 AD3d 659, 661 [2012]; *Chkhartishvili v Volovoy*, 44 AD3d 893, 893-894 [2007]; *Couch v County of Suffolk*, 296 AD2d 194, 197 [2002]).

The defendants' remaining contentions are without merit.

Thus, the Supreme Court properly denied the defendants' motion, inter alia, for summary judgment dismissing the complaint as to any claims arising on or before April 1, 2008. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur. **[Prior Case History: 2013 NY Slip Op 30506(U).]**

27 DAVID PALKA et al., Respondents-Appellants, v VILLAGE OF OSSINING, Appellant-Respondent, et al., Respondents. [992 NYS2d 273]—

**Municipal Corporations—Snow and Ice—Absence of Prior Written Notice
Negligence—Snow and Ice—Abutting Landowner Not Liable for Failure to
Remove Snow and Ice from Sidewalk**

In an action to recover damages for personal injuries, etc., the defendant Village of Ossining appeals from so much of an order of the Supreme Court, Westchester County (Smith, J.), dated February 21, 2013, as denied its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the plaintiffs cross-appeal, as limited by their brief, from so much of the same order as granted that branch of motion of the defendants Chi His Tan and Atlantic Bar & Restaurant Corp. which was for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, and the cross motion of the defendant Village of Ossining for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted; and it is further,

Ordered that the order is affirmed insofar as cross-appealed from; and it is further,

Ordered that one bill of costs is awarded to the defendant Village of Ossining, payable by the plaintiffs, and one bill of costs is awarded to the defendants Chi His Tan and Atlantic Bar & Restaurant Corp., payable by the plaintiffs.

On February 7, 2009, at approximately 10:45 p.m., the plaintiff David Palka (hereinafter the injured plaintiff) allegedly slipped and fell on an icy condition located on the sidewalk, near the curbline, adjacent to 84 Croton Avenue, in the Village of Ossining. The injured plaintiff, and his wife suing derivatively, commenced this action against the Village, and Chi His Tan and Atlantic Bar & Restaurant Corp. (hereinafter together the Atlantic defendants), the alleged owners of the premises abutting the sidewalk, averring, inter alia, that they were negligent in their snow removal efforts.

Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies (*see Poirier v City of Schenectady*, 85 NY2d 310 [1995]; *Cuebas v City of Yonkers*, 97 AD3d 779,

780 [2012]; *Hanover Ins. Co. v Town of Pawling*, 94 AD3d 1055, 1056 [2012]; *Braver v Village of Cedarhurst*, 94 AD3d 933, 934 [2012]). “Recognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it” (*Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2012]).

On its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, the Village made a prima facie showing of entitlement to judgment as a matter of law by providing evidence that it lacked prior written notice of the allegedly dangerous icy condition, as required by Village Law § 6-628 (see *Moncrieffe v City of White Plains*, 115 AD3d 915 [2014]; *Keating v Town of Oyster Bay*, 111 AD3d 604, 605 [2013]). In opposition, the plaintiffs failed to raise a triable issue of fact (see *Moncrieffe v City of White Plains*, 115 AD3d at 917; *Keating v Town of Oyster Bay*, 111 AD3d at 605). Accordingly, the Supreme Court should have granted the Village’s cross motion for summary judgment.

Contrary to the plaintiffs’ contention, the Supreme Court properly granted that branch of the Atlantic defendants’ motion which was for summary judgment dismissing the complaint insofar as asserted against them. “Unless a statute or ordinance clearly imposes liability upon an abutting landowner, only a municipality may be held liable for the negligent failure to remove snow and ice from a public sidewalk” (*Hilpert v Village of Tarrytown*, 81 AD3d 781, 781 [2011]; see *Smalley v Bemben*, 12 NY3d 751 [2009]; *Schwint v Bank St. Commons, LLC*, 74 AD3d 1312 [2010]; *Ferguson v Shu Ham Lam*, 74 AD3d 870 [2010]; *Braun v Weissman*, 68 AD3d 797 [2009]). Although section 229-6 of the Code of the Village of Ossining (hereinafter the Village Code) requires a landowner to remove snow and ice from abutting public sidewalks, it does not specifically impose tort liability for a breach of that duty (see *Hilpert v Village of Tarrytown*, 81 AD3d at 781). “In the absence of a statute or ordinance imposing liability, the owner of property abutting a public sidewalk will be held liable only where it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally occurring conditions more hazardous” (*id.* at 782; see *Schwint v Bank St. Commons, LLC*, 74 AD3d at 1313; *Ferguson v Shu Ham Lam*, 74 AD3d at 871; *Braun v Weissman*, 68 AD3d at 798). In their pleadings, the plaintiffs did not allege that the Atlantic defendants created the icy condition. Rather, the pleadings alleged that the Atlantic defendants were negligent in, inter alia, failing to remove snow and ice from the

sidewalk. Since the Atlantic defendants established that section 229-6 of the Village Code did not impose tort liability upon them for a failure to remove snow and ice from the sidewalk, they demonstrated their prima facie entitlement to judgment as a matter of law (*see Marx v Great Neck Park Dist.*, 92 AD3d 925 [2012]).

In opposition, the plaintiffs failed to raise a triable issue of fact. In their opposition papers, for the first time, the plaintiffs alleged that the Atlantic defendants were negligent because they created the condition alleged. A plaintiff cannot, for the first time in opposition to a motion for summary judgment, raise a new or materially different theory of recovery against a party from those pleaded in the complaint and the bill of particulars (*see Mezger v Wyndham Homes, Inc.*, 81 AD3d 795 [2011]; *Pinn v Baker's Variety*, 32 AD3d 463 [2006]; *Yaeger v UCC Constructors*, 281 AD2d 990, 991 [2001]; *Otonoga v City of New York*, 234 AD2d 592, 593 [1996]; *cf. Rosse-Glickman v Beth Israel Med. Ctr.-Kings Hwy. Div.*, 309 AD2d 846 [2003]; *Orros v Yick Ming Yip Realty*, 258 AD2d 387, 388 [1999]). Therefore, the Supreme Court properly granted that branch of the Atlantic defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them. Mastro, J.P., Roman, Hinds-Radix and LaSalle, JJ., concur.

28 CHRISTOPHER PAOLICELLI, Respondent, v FIELDBRIDGE ASSOCIATES, LLC, Appellant. [992 NYS2d 60]—

Municipal Corporations—Tort Liability—Firefighters—Statutory and Regulatory Predicates for General Municipal Law § 205-a Liability

Local Laws—Preemption by State—Local Law Requiring Sufficient Heat in Apartments Not Preempted by State Law

Municipal Corporations—Tort Liability—Firefighters—General Municipal Law § 205-a Liability—Causal Connection between Injury and Landlord's Failure to Provide Sufficient Heat in Apartment

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Partnow, J.), dated September 5, 2012, which denied its motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint and its application pursuant to CPLR 3211 (c) to convert the motion into one for summary judgment dismissing the complaint.

Ordered that on the Court's own motion, the appeal from so much of the order as denied the defendant's application pursuant to CPLR 3211 (c) to convert its motion from a motion pursuant to CPLR 3211 (a) (7) to a motion for summary judgment dismissing the complaint is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701); and it is further,

Ordered that the order is modified, on the law, by deleting the provisions thereof denying those branches of the defendant's motion which were pursuant to CPLR 3211 (a) (7) to dismiss the cause of action to recover damages for common-law negligence and the cause of action pursuant to General Municipal Law § 205-a to the extent predicated on a violation of Multiple Residence Law § 173, and substituting therefor provisions granting those branches of the motion; as so modified, the order is affirmed, without costs or disbursements.

The plaintiff, a lieutenant in the New York City Fire Department, was injured on January 3, 2008, while fighting a fire in a high-rise apartment building in Brooklyn that is part of the Eb-bets Field apartment complex, and is owned by the defendant, Fieldbridge Associates, LLC. The fire started in an apartment on the 14th floor of the building, after a child allegedly lit paper material on the kitchen stove. The child's mother had earlier lit two burners on the stove to heat the apartment.

The plaintiff commenced this action to recover damages for his injuries. In addition to a cause of action to recover damages for common-law negligence, he asserted a cause of action to recover damages pursuant to General Municipal Law § 205-a, predicated on violations of Multiple Dwelling Law § 79, Multiple Residence Law § 173, and Administrative Code of the City of New York § 27-2029, all of which require, as relevant here, that, between October 1 and May 31, a landlord provide heat sufficient to maintain a temperature of 68 degrees Fahrenheit between the hours of 6 a.m. and 10 p.m. The defendant moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint on the ground, inter alia, that the statutes and Administrative Code provision cited were not proper predicates for the General Municipal Law § 205-a cause of action.

In considering a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010] [internal quotation marks omitted]; see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

General Municipal Law § 205-a affords firefighters and their survivors a statutory cause of action for line-of-duty injuries resulting from negligent noncompliance with the requirements of any governmental statutes, ordinances, rules, orders, and requirements (see *Giuffrida v Citibank Corp.*, 100 NY2d 72, 77 [2003]; *Galapo v City of New York*, 95 NY2d 568, 573 [2000]).

“To establish a defendant’s liability under General Municipal Law § 205-a, a plaintiff firefighter must ‘identify the statute or ordinance with which the defendant failed to comply, describe the manner in which the firefighter was injured, and set forth those facts from which it may be inferred that the defendant’s negligence directly or indirectly caused the harm to the firefighter’ ” (*Clarke v Drayton*, 83 AD3d 762, 762 [2011], quoting *Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 441 [1995]). The statute or ordinance identified must be part of a “well-developed body of law and regulation” that imposes “clear legal duties” or mandates the “performance or nonperformance of specific acts” (*Vosilla v City of New York*, 77 AD3d 649, 650 [2010] [internal quotation marks omitted]; see *Galapo v City of New York*, 95 NY2d at 574; *Mulham v City of New York*, 110 AD3d 856, 857 [2013]; *Fahey v A.O. Smith Corp.*, 77 AD3d 612, 617 [2010]).

As the plaintiff correctly concedes, Multiple Residence Law § 173 is inapplicable, since he was injured in New York City, and the statute applies only in cities with populations less than 325,000 (see Multiple Residence Law § 3 [1]). Accordingly, the Supreme Court erred in denying that branch of the motion which was to dismiss the cause of action pursuant to General Municipal Law § 205-a to the extent it is predicated on a violation of Multiple Residence Law § 173. However, the plaintiff made the requisite showing that Multiple Dwelling Law § 79 and Administrative Code of City of NY § 27-2029 are part of well-developed bodies of law and regulation that impose clear legal duties, or mandate the performance or nonperformance of specific acts (*cf. Vosilla v City of New York*, 77 AD3d at 650). Both provisions mandate the performance of specific acts. Moreover, failure to comply with the provisions can result in criminal sanctions (see Multiple Dwelling Law § 304; Administrative Code of City of NY § 27-2118 [a]). “Where criminal liability may be imposed, we would be hard put to find a more well-developed body of law and regulation that imposes clear duties” (*Mulham v City of New York*, 110 AD3d at 858 [internal quotation marks omitted]). Thus, Multiple Dwelling Law § 79 and Administrative Code § 27-2029 can properly serve as predicates for liability under General Municipal Law § 205-a.

The defendant’s contention that Administrative Code § 27-2029 cannot serve as a predicate for liability pursuant to General Municipal Law § 205-a because it is preempted by Multiple Dwelling Law § 79 is raised for the first time on appeal, but that contention may be reached since it involves a pure question of law that appears on the face of the record

which could not have been avoided if brought to the court's attention at the appropriate juncture (*see Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 751 [2014]). The contention is, however, without merit. Field preemption occurs when, as relevant here, "the Legislature's enactment of a comprehensive and detailed regulatory scheme in an area in controversy is deemed to demonstrate an intent to preempt local laws" (*Matter of Chwick v Mulvey*, 81 AD3d 161, 169-170 [2010]; *see Sunrise Check Cashing & Payroll Servs., Inc. v Town of Hempstead*, 91 AD3d 126, 135 [2011], *affd* 20 NY3d 481 [2013]). Contrary to the defendant's contention, Multiple Dwelling Law § 79 does not reflect the Legislature's intent to preempt local laws in the same area of regulation.

Furthermore, the plaintiff's allegations, as amplified by the evidentiary material he submitted in opposition to the defendant's motion, were sufficient to make out a claim that the defendant violated the predicate statutes and that the statutory violations directly or indirectly caused his injuries. For purposes of a General Municipal Law § 205-a cause of action, the plaintiff "is not required to show the same degree of proximate cause as is required in a common-law negligence action" (*Clarke v Drayton*, 83 AD3d at 762, quoting *Giuffrida v Citibank Corp.*, 100 NY2d at 81). The plaintiff need only establish a "practical or reasonable connection between the statutory or regulatory violation and the claimed injury" (*id.* at 81 [internal quotation marks omitted]; *see Clarke v Drayton*, 83 AD3d at 762; *Alcalde v Riley*, 73 AD3d 1101, 1103 [2010]). An "indirect cause" is "simply a factor that—though not a primary cause—plays a part in producing the result" (*Giuffrida v Citibank Corp.*, 100 NY2d at 80 [internal quotation marks omitted]). The plaintiff set forth facts sufficient to support a cause of action based on the defendant's alleged failure to provide sufficient heat, and set forth facts sufficient to allege that this failure was a factor that played a part in the tenant's decision to utilize the stove top burners to heat the apartment. Contrary to the defendant's contention, the act of the tenant's child in lighting paper material on a burner while the tenant was occupied elsewhere in the apartment, resulting in the fire which led to the plaintiff's injuries, was not, under the circumstances presented here, an intervening act that defeats, at the pleading stage, the causes of action alleging liability (*see Derdarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Accordingly, the Supreme Court properly denied those branches of the defendant's motion which were to dismiss the cause of action pursuant to General Municipal Law § 205-a to the extent that it was predicated on violations of Multiple Dwelling Law § 79 and Administrative Code § 27-2029.

The Supreme Court erred, however, in denying that branch of the motion which was to dismiss the cause of action to recover damages for common-law negligence, as the plaintiff did not oppose that branch of the motion (*see Matter of Agoglia v Benepe*, 84 AD3d 1072, 1075 [2011]).

The Supreme Court did not improvidently exercise its discretion in denying the defendant's application pursuant to CPLR 3211 (c) to convert the motion to one for summary judgment (*see Sokol v Leader*, 74 AD3d at 1183; *cf. Pistolese v William Floyd Union Free Dist.*, 69 AD3d 825, 826 [2010]). Rivera, J.P., Balkin, Dickerson and Cohen, JJ., concur.

29 CATRESE PRESTON et al., Appellants, v CHERIF ZIANE et al., Respondents. [990 NYS2d 889]—

Insurance—No-Fault Automobile Insurance—Serious Injury

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (Dufficy, J.), dated January 9, 2013, which granted the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff Catrese Preston did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is denied.

The defendants met their prima facie burden of showing that the plaintiff Catrese Preston (hereinafter the injured plaintiff) did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). However, in opposition to the motion, the plaintiffs raised a triable issue of fact through the affirmation of Dr. Gregory Lieberman as to whether the injured plaintiff sustained a medically determined injury or impairment of a nonpermanent nature as a result of the subject accident which rendered her unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days thereafter (*see Hughes v Turner*, 237 AD2d 331 [1997]).

Accordingly, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint. Balkin, J.P., Roman, Sgroi and Miller, JJ., concur.

30 JAMES PRITSIOLOS et al., Appellants, v APPLE BANKCORP, INC., Doing Business as APPLE BANK FOR SAVINGS, Respondent. [992 NYS2d 71]—

Adverse Possession—What Constitutes—Applicability of 2008 Statutory Amendments—Law in Effect at Time Property Interest Allegedly Vested Governs

Adverse Possession—Cultivation or Improvement of Property—Keeping Property in Presentable Condition Insufficient

Adverse Possession—What Constitutes—Claim of Right

In an action pursuant to RPAPL article 15 to determine claims to real property, the plaintiffs appeal, as limited by their brief, from so much of (1) an order of the Supreme Court, Nassau County (Galasso, J.), entered April 9, 2013, as granted the defendant's cross motion for summary judgment, inter alia, dismissing the complaint, and (2) a judgment of the same court entered May 22, 2013, as, upon the order, inter alia, is in favor of the defendant and against them dismissing the complaint. By decision and order on motion of this Court dated January 15, 2014, as amended by a decision and order on motion dated January 29, 2014, the notice of appeal from the order was deemed also to be a notice of appeal from the judgment (*see* CPLR 5501 [c]).

Ordered that the appeal from the order is dismissed, without costs or disbursements; and it is further,

Ordered that the judgment is modified, on the law, by (1) deleting the first and fifth decretal paragraphs thereof, (2) adding to the second decretal paragraph thereof, following the words "plaintiffs' complaint is hereby dismissed," the words "to the extent that the complaint seeks a determination that the plaintiffs are the owners of that portion of the disputed area of the subject real property which was unfenced as of the date of commencement of the action," and (3) adding to the third decretal paragraph thereof, following the words "Lots 21 and 22," the words "except for that portion of the disputed area of the subject real property which was fenced as of the date of the commencement of the action"; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, that branch of the defendant's motion which was for summary judgment dismissing the complaint is granted only to the extent that the complaint sought a determination that the plaintiffs are the owners of that portion of the disputed area of the subject real property which was unfenced as of the date of the commencement of the action, the order is modified accordingly, and the claim with respect to the unfenced portion of the disputed area is severed.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order

are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

The plaintiffs and the defendant own parcels of real property that are adjacent to one another. The plaintiffs acquired title to their parcel by deed dated January 29, 2001. On September 28, 2012, the plaintiffs commenced this action, seeking a judgment determining that they are the owners of a strip of property, measuring approximately 5 feet in width and 95 feet in length (hereinafter the disputed area), that runs along the southern boundary of their parcel and encroaches on the northern portion of the defendant's parcel. It is undisputed that a portion of the disputed area has been fenced in since 1992 as part of the rear yard of the residence currently occupied by the plaintiffs. The plaintiffs alleged in their complaint that they acquired title to the entire disputed area in 2002 by adverse possession, arising out of the combined use of the area by themselves and their immediate predecessor in title. The Supreme Court awarded summary judgment in favor of the defendant, *inter alia*, dismissing the complaint, and determined that the erection of the fence and the actions taken by the plaintiffs and their predecessor with respect to the disputed area were permissive, and not adverse within the meaning of RPAPL 543.

The Supreme Court erred in applying RPAPL 543 to this action. Although that statute is generally applicable to actions involving claims of adverse possession that are commenced after its effective date of July 7, 2008, it does not apply where, as in this case, the property interest is alleged to have vested by adverse possession prior to the enactment of the statute (*see Shilkoff v Longhitano*, 94 AD3d 974, 976 [2012]), since the statute "cannot be retroactively applied to deprive a claimant of a property right which vested prior to [its] enactment" (*Hogan v Kelly*, 86 AD3d 590, 592 [2011]; *see Franza v Olin*, 73 AD3d 44 [2010]). Therefore, the law in effect at the time the plaintiffs claim to have acquired title must be applied.

In order to demonstrate adverse possession, the plaintiffs were required to satisfy the common-law elements that the possession was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period of 10 years (*see Ram v Dann*, 84 AD3d 1204, 1205 [2011]; *Corigliano v Sunick*, 56 AD3d 1121 [2008]). Additionally, under the former version of RPAPL 522 that was in effect at the relevant time, the plaintiffs were obligated to establish that the disputed area was either "usually cultivated or improved" or "protected by a substantial inclosure" (*Skyview Motel, LLC v Wald*, 82 AD3d 1081, 1082 [2011] [internal quota-

tion marks omitted]; see *BTJ Realty, Inc. v Caradonna*, 65 AD3d 657, 658 [2009]). Contrary to the determination of the Supreme Court, under the circumstances presented here, the plaintiffs are entitled to tack any period of adverse possession enjoyed by their predecessor in title onto their own period of adverse possession (see *Brand v Prince*, 35 NY2d 634, 637 [1974]; *Stroem v Plackis*, 96 AD3d 1040, 1042 [2012]).

The defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the plaintiffs' claim of adverse possession of that portion of the disputed area which was unfenced by submitting evidence that the plaintiffs did not engage in any cultivation or improvement of that portion of the property. In response, the plaintiffs merely alleged in vague and conclusory terms that they "planted, watered, landscaped and maintained the entire area," although they simultaneously admitted that "there is absolutely nothing to maintain" in that portion of the area. At best, the plaintiffs assert that they merely attempted to keep the unfenced portion in presentable condition, which is inadequate to satisfy the requirement that the real property in dispute was usually cultivated or improved (see e.g. *Walsh v Ellis*, 64 AD3d 702, 704 [2009]; *Giannone v Trotwood Corp.*, 266 AD2d 430, 431 [1999]; *Simpson v Chien Yuan Kao*, 222 AD2d 666, 667 [1995]; *Yamin v Daly*, 205 AD2d 870, 871 [1994]). Since the plaintiffs failed to raise a triable issue of fact in opposition to that branch of the defendant's motion which was for summary judgment pertaining to the unfenced portion of the disputed area, the Supreme Court correctly granted that branch of the motion.

With regard to the fenced portion, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by submitting the affidavits of its senior vice president and of a professional landscaper who had maintained the defendant's property for some 16 years. These affidavits indicated that the defendant had permitted the encroachment of the fence onto its property as a neighborly accommodation, and that the defendant's landscaper routinely entered the fenced area, with the knowledge and at least the implicit approval of the plaintiffs and their predecessor, in order to maintain the defendant's property beyond the fence. These affidavits, in conjunction with various documents submitted by the defendants, indicated that the requirement that the possession of the fenced portion by the plaintiffs and their predecessor occurred under a claim of right was not satisfied (see generally *Koudellou v Sakalis*, 29 AD3d 640, 641 [2006]; *Beyer v Patierno*, 29 AD3d 613, 614-615 [2006]; *Bockowski v Malak*, 280 AD2d 572 [2001]; *Soukup v*

Nardone, 212 AD2d 772, 774-775 [1995]). However, the plaintiffs raised a triable issue of fact in opposition to this branch of the motion by submitting the affidavits of the plaintiff James Pritsiolas and of the plaintiffs' predecessor in title, both of whom denied that the defendant's landscaper had ever entered onto the fenced portion of the disputed area, and who further averred that they at all times considered the fenced portion to be part of the parcel that was conveyed to them. Accordingly, a triable issue of fact exists with regard to whether their possession of the fenced portion was under a claim of right (*see generally Corigliano v Sunick*, 56 AD3d 1121, 1122 [2008]) and, therefore, the Supreme Court should have denied that branch of the motion. Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

31 HENRY PRZYBOROWSKI, Appellant, v A&M COOK, LLC, Defendant/Third-Party Plaintiff-Respondent. PSG CONSTRUCTION COMPANY, Inc., Third-Party Defendant-Respondent. [992 NYS2d 56]—

Labor—Safe Place to Work—Fall from Unsecured A-Frame Ladder—Plaintiff's Actions Not Sole Proximate Cause

Labor—Safe Place to Work—Labor Law § 241 (6) Claim—Failure to Identify Industrial Code Provision in Complaint or Bill of Particulars Not Fatal

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Gavrin, J.), dated July 31, 2012, which, inter alia, denied his motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), granted those branches of the cross motion of the defendant/third-party plaintiff and the separate cross motion of the third-party defendant which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 200, 240 (1) and 241 (6), and granted those branches of the third-party defendant's cross motion which were for summary judgment dismissing the common-law indemnification and contribution causes of action that were alleged in the third-party complaint.

Ordered that the appeal from so much of the order as granted those branches of the third-party defendant's cross motion which were for summary judgment dismissing the common-law indemnification and contribution causes of action that were alleged in the third-party complaint is dismissed, as the plaintiff is not aggrieved by that portion of the order (*see* CPLR 5511); and it is further,

Ordered that the order is modified, on the law, (1) by deleting the provision thereof denying the plaintiff's motion for sum-

mary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), and substituting therefor a provision granting the plaintiff's motion, and (2) by deleting the provisions thereof granting those branches of the cross motion of the defendant/third-party plaintiff and the separate cross motion of the third-party defendant which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6), and substituting therefor provisions denying those branches of the respective cross motions; as so modified, the order is affirmed insofar as reviewed, with one bill of costs to the plaintiff.

The plaintiff allegedly sustained injuries when he fell while descending an unsecured A-frame ladder at his work site. It is undisputed that the ladder, which provided access for the plaintiff and other workers to move between an upper level and a lower level of the work site, was unsecured and leaning against the wall in a closed position. The upper level of the work site was approximately six feet above the lower level. In addition to the subject ladder, access between the two levels was available by means of a concrete staircase located approximately three to four meters away from the ladder. Notably, the record does not establish that the plaintiff was instructed to use one method of access rather than the other.

The plaintiff commenced this action against the owner of the work site, the defendant A&M Cook, LLC (hereinafter Cook), alleging violations of Labor Law §§ 200, 240 (1) and 241 (6). Cook commenced a third-party action against the third-party defendant, PSG Construction Company, Inc. (hereinafter PSG), the plaintiff's employer. After depositions had been conducted, the plaintiff moved for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1). Cook cross-moved for summary judgment dismissing the complaint. PSG separately cross-moved, *inter alia*, for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6).

Cook established, *prima facie*, that the plaintiff's injuries arose as a result of the methods and means of his work (*see Cody v State of New York*, 82 AD3d 925 [2011]; *McFadden v Lee*, 62 AD3d 966 [2009]), that it had no authority to supervise or control the plaintiff's work, and that it did not provide the subject ladder. Therefore, Labor Law § 200 imposed no liability upon Cook (*see Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 605 [2013]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701, 702 [2008]; *Ortega v Puccia*, 57 AD3d 54, 60-63 [2008]). In opposition, the plaintiff failed to raise a triable issue of fact. Ac-

cordingly, the Supreme Court properly granted that branch of Cook's cross motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 200.

However, contrary to the Supreme Court's determination, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), and neither Cook nor PSG raised a triable issue of fact in opposition to the plaintiff's motion.

To recover on a cause of action pursuant to Labor Law § 240 (1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 553-555 [2006]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]). Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that he was injured when the unsecured, closed A-frame ladder fell backwards as he descended it (*see Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [2013]; *Ordonez v C.G. Plumbing Supply Corp.*, 83 AD3d 1021, 1022 [2011]; *Preneta v North Castle, Inc.*, 65 AD3d 1027 [2009]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2007]).

Contrary to Cook's contention, it failed to raise a triable issue of fact as to whether the plaintiff's decision to use the ladder, rather than the staircase, was the sole proximate cause of his injuries. "Liability under section 240 (1) does not attach when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, *and* plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident. In such cases, plaintiff's own negligence is the sole proximate cause of his [or her] injur[ies]" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010], citing *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40 [2004] [emphasis added]; *see Robinson v East Med. Ctr., LP*, 6 NY3d at 553-555; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d at 287). Here, there is no evidence that anyone instructed the plaintiff that he was "expected to" use the staircase rather than the ladder (*Gallagher v New York Post*, 14 NY3d at 89; *see Cioffi v Target Corp.*, 114 AD3d 897, 898-899 [2014]). Indeed, the record reveals that, on at least some occasions, other workers used the ladder rather than the staircase. Under these circumstances, the plaintiff's exercise of his discretion in connection with whether to use the ladder or the staircase cannot be said to be

the sole proximate cause of his injuries (see *Gallagher v New York Post*, 14 NY3d at 88-89; *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d at 403; *Kin v State of New York*, 101 AD3d 1606, 1607-1608 [2012]; *Dwyer v Central Park Studios, Inc.*, 98 AD3d 882, 883-884 [2012]; cf. *Cioffi v Target Corp.*, 114 AD3d at 899). Accordingly, the Supreme Court should have granted the plaintiff's motion for summary judgment on the cause of action alleging a violation of Labor Law § 240 (1), and denied that branch of Cook's cross motion and that branch of PSG's separate cross motion which were for summary judgment dismissing that cause of action.

Furthermore, the Supreme Court improperly granted that branch of Cook's cross motion and that branch of PSG's separate cross motion which were for summary judgment dismissing the cause of action alleging violations of Labor Law § 241 (6), which was predicated upon alleged violations of 12 NYCRR 23-1.21 (b) (1), (3) (i), (iv); (4) (ii) and (e) (2). Although a plaintiff asserting a Labor Law § 241 (6) cause of action must allege a violation of a specific and concrete provision of the Industrial Code (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 [1993]; *Kowalik v Lipschutz*, 81 AD3d 782, 783 [2011]), the failure to identify the code provision in the complaint or bill of particulars is not fatal to such a claim (see *Kowalik v Lipschutz*, 81 AD3d at 783; *Galarraga v City of New York*, 54 AD3d 308 [2008]; *Kelleir v Supreme Indus. Park*, 293 AD2d 513, 513-514 [2002]). Here, the plaintiff's belated allegations that Cook violated 12 NYCRR 23-1.21 (b) (1), (3) (i), (iv); (4) (ii) and (e) (2) involved no new factual allegations, raised no new theories of liability, and caused no prejudice to Cook or PSG (see *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605 [2013]; *D'Elia v City of New York*, 81 AD3d 682, 684 [2011]; *Kelleir v Supreme Indus. Park*, 293 AD2d at 513-514). Moreover, these code provisions set forth specific, rather than general, safety standards, and are sufficient to support a Labor Law § 241 (6) cause of action (see *Vega v Renaissance 632 Broadway, LLC*, 103 AD3d 883, 885 [2013]; *Melchor v Singh*, 90 AD3d 866, 870 [2011]; *Riccio v NHT Owners, LLC*, 51 AD3d 897, 899 [2008]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 802 [2005]; but cf. *Crousett v Chen*, 102 AD3d 448 [2013]; *Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 871 [1998]). Since Cook and PSG did not establish, prima facie, either that those Industrial Code provisions were inapplicable to the facts of this case, or that the alleged violation of those provisions was not a proximate cause of the plaintiff's injuries, the subject branches of their respective cross motions which were for summary judgment dismissing the Labor Law § 241 (6) cause of action should have been denied

(see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-505; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605 [2013]; cf. *Melchor v Singh*, 90 AD3d 866 [2011]), regardless of the sufficiency of the plaintiff's opposition papers. Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur. [**Prior Case History: 2012 NY Slip Op 32259(U).**]

32 JOSEPH T. REPETTI et al., Respondents, v CITY OF NEW YORK DEPARTMENT OF ENVIRONMENTAL PROTECTION et al., Respondents, and Public Administrator of the Estate of CHARLES GOLDEN, Deceased, et al., Appellants. [990 NYS2d 860]—

Negligence—Sidewalks—Liability of Abutting Landowner

In an action to recover damages for personal injuries, etc., the defendants Public Administrator of the Estate of Charles Golden, deceased, and Catherine Golden appeal from an order of the Supreme Court, Kings County (Landicino, J.), dated December 5, 2012, which denied their motion for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is reversed, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, and the motion of the defendants Public Administrator of the Estate of Charles Golden, deceased, and Catherine Golden for summary judgment dismissing the complaint insofar as asserted against them is granted.

The plaintiff Joseph T. Repetti tripped and fell on a sidewalk abutting property owned by the defendant Catherine Golden and her now deceased husband, Charles Golden, who is represented by the defendant Public Administrator of the Estate of Charles Golden (hereinafter together the appellants). An abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk (see *Crawford v City of New York*, 98 AD3d 935, 936 [2012]; *Long v Town of Southold*, 96 AD3d 808 [2012]; *Romano v Leger*, 72 AD3d 1059 [2010]; *Smirnova v City of New York*, 64 AD3d 641 [2009]).

Here, the appellants made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating that they did not create the alleged defective condition, cause the condition through the special use of the sidewalk as a driveway, or breach a specific ordinance or statute obligating them to maintain the sidewalk (see *Rodriguez v City of Yonkers*, 106 AD3d 802 [2013]; *Romero v City of New York*, 5 AD3d 657 [2004]; *Jeanty v Benin*, 1 AD3d 566 [2003]; *Levy v City of New*

York, 1 AD3d 409 [2003]). In opposition, the plaintiffs and the remaining defendants failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted the appellants' motion for summary judgment dismissing the complaint insofar as asserted against them. Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

33 ANNE REYNOLDS, Appellant, et al., Plaintiff, v WALTER HAIDUK, Respondent et al., Defendant. [990 NYS2d 873]—

Appeal—Matters Appealable—No Appeal from Order Entered on Default

In an action, inter alia, to recover damages for personal injuries, the plaintiff Anne Reynolds appeals, as limited by her brief, from so much of an order of the Supreme Court, Westchester County (Colabella, J.), entered September 27, 2012, as granted that branch of the motion of the defendant Walter Haiduk which was for summary judgment dismissing the second cause of action insofar as asserted by the plaintiff Anne Reynolds against him, upon her failure to oppose the motion.

Motion by the respondent Walter Haiduk, inter alia, to dismiss the appeal on the grounds that the appellant is not aggrieved or that the appeal has been rendered academic. By decision and order on motion of this Court dated June 20, 2013, that branch of the motion which was to dismiss the appeal was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the submission of the appeal, it is

Ordered that the branch of the motion which was to dismiss the appeal from the order is granted; and it is further,

Ordered that the appeal from the order is dismissed, with costs.

The appellant failed to submit papers to the Supreme Court in opposition to the motion of the defendant Walter Haiduk for, inter alia, summary judgment dismissing the second cause of action insofar as asserted by the appellant against him, and the motion was granted on default. No appeal lies from an order or judgment granted upon the default of the appealing party (*see* CPLR 5511; *J.F.J. Fuel, Inc. v Tran Camp Contr. Corp.*, 105 AD3d 908, 908 [2013]; *Washington Mut. Bank v Valencia*, 92 AD3d 774, 774 [2012]; *HSBC Mtge. Corp. [USA] v MacPherson*, 89 AD3d 1061, 1062 [2011]). Since the order appealed from was entered upon the appellant's failure to oppose the motion, the appeal must be dismissed (*see Lumbermen's Mut. Cas. Co. v Fireman's Fund Am. Ins. Co.*, 117 AD2d 588 [1986]).

We decline the request of the defendant Walter Haiduk for the imposition of sanctions against the appellant and her counsel based upon allegedly frivolous conduct in prosecuting this action and appeal against him (*see* 22 NYCRR 130-1.1). Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

34 ARNOLD SIMON et al., Appellants, v HAMLET WINDWATCH DEVELOPMENT, LLC, et al., Respondents. [990 NYS2d 870]—

Negligence—Assumption of Risk—Trip and Fall on Cart Path while Playing Golf

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from so much an order of the Supreme Court, Suffolk County (Spinner, J.), entered February 19, 2013, as granted the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed insofar as appealed from, with costs.

On August 14, 2008, the plaintiff Arnold Simon (hereinafter the injured plaintiff) allegedly tripped and fell while playing golf on a golf course owned and operated by the defendants Hamlet Windwatch Development, LLC, and Hamlet Windwatch, LLC (hereinafter together the defendants), located in Hauppauge. The injured plaintiff exited his golf cart on the cart path near the top of a staircase leading down to the green at the second hole. While walking to the rear of the golf cart to retrieve his putter, he stepped into an area of the cart path containing a depressed drainage grate. As a result, he fell forward and partially onto the wooden step leading down to the green at the second hole. The defendants moved for summary judgment dismissing the complaint on the ground that the injured plaintiff's claims were barred by the doctrine of primary assumption of risk. The Supreme Court granted the motion and the plaintiffs appeal.

Under the doctrine of primary assumption of the risk, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Those risks include risks associated with the construction of the playing surface and any open and obvious condition on it (*see Mangan v Engineer's Country Club, Inc.*, 79 AD3d 706 [2010]; *Galski v State of New York*, 289 AD2d 195 [2001]). Here, contrary to the plaintiffs' contention, the defendants established their prima facie entitlement to judgment as a matter of law on the ground that the doctrine of primary

assumption of risk applied (see *Mangan v Engineer's Country Club, Inc.*, 79 AD3d at 706; *Bockelmann v New Paltz Golf Course*, 284 AD2d 783 [2001]; *Galski v State of New York*, 289 AD2d at 195; *Egeth v County of Westchester*, 206 AD2d 502 [1994]). In opposition, the plaintiffs failed to raise a triable issue of fact. Accordingly, the defendants were entitled to summary judgment dismissing the complaint. Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

35 LISA A. SMITH, Appellant, v ALBERTO BERRIOS et al., Respondents. [990 NYS2d 880]—

Insurance—No-Fault Automobile Insurance—Serious Injury

In an action to recover damages for personal injuries, the plaintiff appeals from so much of an order of the Supreme Court, Nassau County (McCormack, J.), entered January 16, 2013, as granted the separate motions of the defendants Alberto Berrios and Angela Guevara, and the defendants W.T. Breidenbach and Joseph W. Breidenbach for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs, and the motions are denied.

The defendants, moving separately but relying on the same evidence and arguments, failed to meet their prima facie burdens of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The papers submitted by the defendants failed to adequately address the plaintiff's claim, set forth in the bills of particulars, that she sustained a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (see *Che Hong Kim v Kossoff*, 90 AD3d 969 [2011]).

Since the defendants did not sustain their prima facie burdens, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (see *id.*; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Therefore, the Supreme Court should have denied the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them. Skelos, J.P., Leventhal, Cohen, LaSalle and Barros, JJ., concur.

36 JOANNE TRICARICO et al., Appellants, v COUNTY OF NASSAU et al., Respondents. [990 NYS2d 864]—

Taxation—Assessment—Proper Method for Challenging Real Property Tax Assessment

In an action, inter alia, to recover damages related to the classification of certain real property as “Class two” residential real property pursuant to RPTL 1802 (1), the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Cozzens, Jr., J.), dated February 1, 2012, as, upon reargument, vacated the determination in an order of the same court dated October 7, 2010, denying the defendants’ motion pursuant to CPLR 3211 (a) to dismiss the complaint, and thereupon granted the defendants’ motion to dismiss the complaint.

Ordered that the order dated February 1, 2012, is affirmed insofar as appealed from, with costs.

The plaintiffs own a four-family residential property in the Town of Oyster Bay. For tax year 2007/2008, the Nassau County Board of Assessors (hereinafter the Board) classified the property as “Class two” real property pursuant to Real Property Tax Law § 1802 (1). The plaintiffs commenced this action asserting, inter alia, that the property had been previously classified as “Class one” (see RPTL 1802 [1] [a]), that the use of the property had not changed, and that the reclassification had resulted in a dramatic increase in the real property tax assessment.

The defendants moved pursuant to CPLR 3211 (a) to dismiss the complaint arguing, among other things, that any challenge to the classification had to be made in a proceeding pursuant to RPTL article 7, that no such proceeding had been commenced in a timely manner, and that, as such, the Supreme Court did not have subject matter jurisdiction to consider the plaintiffs’ collateral attack. By order dated October 7, 2010, the Supreme Court denied the defendants’ motion to dismiss the complaint. In the order appealed from, the Supreme Court granted the defendants’ motion for leave to reargue their prior motion to dismiss the complaint, and upon reargument, granted their motion to dismiss the complaint.

In general, the proper method for challenging excessive or unlawful real property tax assessments is by the commencement of a tax certiorari proceeding pursuant to RPTL article 7 (see *Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991]; *Matter of St. Francis Hosp. v Taber*, 76 AD3d 635, 638 [2010]; *Matter of Level 3 Communications, LLC v DeBellis*, 72 AD3d 164, 173 [2010]). Such a proceeding, which must be commenced within 30 days after the filing of the final assessment roll, can challenge an assessment as being excessive, unequal, or unlawful, or as result-

ing from the property being misclassified (*see* RPTL 702 [2]; 706 [1]).

The procedures of RPTL article 7 need not be followed, and a plenary action may be commenced collaterally attacking the assessment where the challenge is that the taxing authority has exceeded its power, such as by effectively withdrawing a previously recognized exemption (*see Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d at 204-205; *Matter of St. Francis Hosp. v Taber*, 76 AD3d at 638). A collateral attack may also be mounted where the challenge is based upon “the method employed in the assessment involving several properties rather than the overvaluation or undervaluation of specific properties” (*Matter of Krugman v Board of Assessors of Vil. of Atl. Beach*, 141 AD2d 175, 180 [1988]; *see Matter of Board of Mgrs. of Greens of N. Hills Condominium v Board of Assessors of County of Nassau*, 202 AD2d 417, 419 [1994]).

Here, all of the allegations regarding the assessment stem from the Board’s determination that the subject property should be classified as “Class two” property on the 2007/2008 tax roll (*see generally* Nassau County Administrative Code § 6-2.1 [a]). As the Supreme Court properly pointed out, a challenge to this alleged misclassification had to be asserted in a proceeding pursuant to RPTL article 7 (*see* RPTL 706 [1]; *Matter of 200 Cent. Ave., LLC v Board of Assessors*, 56 AD3d 679 [2008]). Contrary to the plaintiffs’ contention, this is not a case where a previously afforded statutory exemption was improperly withdrawn (*see Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d at 204-205; *Matter of Watchtower Bible & Tract Socy. of N.Y. v Lewisohn*, 35 NY2d 92 [1974]). Moreover, despite the plaintiffs’ attempt to style the challenge as one regarding the method of assessment, it is, in actuality, a claim that the subject property was overassessed (*see Matter of Woodland Estates, LLC v Soules*, 79 AD3d 942, 943 [2010]). As such, the plaintiffs were required to pursue any remedies they might have had in a proceeding timely and properly prosecuted pursuant to RPTL article 7.

The plaintiffs’ remaining contentions are without merit. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

37 JOHN VAN BLERKOM, Appellant, v AMERICA PAINTING, LLC, Respondent. [992 NYS2d 52]—

Labor—Safe Place to Work—Statutory Agent—Liability of Subcontractor as Owner of Allegedly Defective Scaffold

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an or-

der of the Supreme Court, Queens County (Rosengarten, J.), entered November 12, 2013, as denied his motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), and granted those branches of the defendant's cross motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6).

Ordered that the order is reversed insofar as appealed from, on the law, with costs, the plaintiff's motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) is granted, and those branches of the defendant's cross motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) are denied.

The plaintiff allegedly sustained injuries when he fell from a scaffold while performing electrical installation work on an apartment renovation project. The scaffold was supplied by the defendant painting subcontractor, pursuant to its own agreement with the general contractor. The plaintiff commenced this action against the defendant, alleging that it was a statutory agent of the general contractor and that he was caused to fall due to the allegedly defective condition of the defendant's scaffold. The Supreme Court denied the plaintiff's motion for summary judgment on the cause of action alleging a violation of Labor Law § 240 (1), and granted those branches of the defendant's cross motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) on the sole ground proffered by the defendant—that the defendant was not a statutory agent of the general contractor under the Labor Law. The defendant did not deny that it supplied the scaffold in the defective condition, as alleged by the plaintiff, and that its alleged violation of Labor Law § 240 (1) was a proximate cause of the plaintiff's injuries.

To hold a defendant liable as an agent of the general contractor for violations of Labor Law §§ 240 (1) and 241 (6), there must be a showing that it had the authority to supervise and control the work (*see Temperino v DRA, Inc.*, 75 AD3d 543, 544-545 [2010]; *Torres v LPE Land Dev. & Constr., Inc.*, 54 AD3d 668, 669 [2008]; *Kehoe v Segal*, 272 AD2d 583, 584 [2000]). “The determinative factor is whether the party had the right to exercise control over the work, not whether it actually exercised that right” (*Bakhtadze v Riddle*, 56 AD3d 589, 590 [2008] [internal quotation marks and citations omitted]). Where the owner or general contractor does in fact delegate the duty to conform to the requirements of the Labor Law to a third-party

subcontractor, the subcontractor becomes the statutory agent of the owner or general contractor (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]).

In the instant case, the defendant's owner testified at his deposition that, pursuant to his agreement with the general contractor, he supplied the subject scaffold to be used by the defendant as well as the plaintiff. He also testified that, prior to the accident, he asked the general contractor for the authority to supervise and control the plaintiff's use of the subject scaffold, to which the general contractor responded in the affirmative. Thus, the plaintiff established as a matter of law that the defendant had the authority to supervise and control the work and was the statutory agent of the general contractor (*see Inga v EBS N. Hills, LLC*, 69 AD3d 568 [2010]; *Bakhtadze v Riddle*, 56 AD3d at 590).

In opposition to the plaintiff's prima facie showing, the defendant failed to raise a triable issue of fact regarding, inter alia, its supervision and control of the work giving rise to the plaintiff's injuries (*see Inga v EBS N. Hills, LLC*, 69 AD3d 568 [2010]; *Bakhtadze v Riddle*, 56 AD3d at 591; *Miller v Yeshiva Zichron Mayir Gedola*, 44 AD3d 1017, 1018 [2007]). Accordingly, the plaintiff's motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) should have been granted, and those branches of the defendant's cross motion which were for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) denied. Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur.

38 DENNIS WARREN, Appellant, v TATYANA STEPANOVA, Respondent, et al., Defendant. [990 NYS2d 859]—

Labor—Safe Place to Work—Fall from Ladder—Failure to Allege Specific Provision of Industrial Code

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Whelan, J.), dated February 5, 2013, as granted that branch of the motion of the defendant Tatyana Stepanova which was, in effect, for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6) insofar as asserted against her.

Ordered that the order is affirmed insofar as appealed from, with costs.

On September 1, 2005, the plaintiff, a carpenter, allegedly was injured while working at a house in Suffolk County owned by the defendant Tatyana Stepanova (hereinafter the defendant).

The plaintiff had been hired to construct low decking at the house and did not require a ladder to perform the work. The plaintiff alleges that as he exited from the back of the house in order to get down to the deck framing, he stepped onto a rung of a ladder that was leaning against the house. The ladder collapsed, and the plaintiff allegedly was injured. Neither the plaintiff nor the defendant owned the ladder.

In August 2007, the plaintiff commenced this action alleging common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). After the completion of discovery, the plaintiff moved for summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action. The defendant cross-moved for summary judgment dismissing the complaint insofar as asserted against her. The Supreme Court denied the plaintiff's motion and granted the defendant's cross motion.

On appeal, the plaintiff contends that the Supreme Court improperly, in effect, *sua sponte*, reached an issue which the defendant did not raise in her cross motion when it directed the dismissal of the Labor Law § 241 (6) cause of action. However, the defendant cross-moved for summary judgment dismissing the complaint in its entirety, submitting papers that included arguments for the dismissal of the Labor Law § 241 (6) cause of action. In opposition, the plaintiff contended that the complaint expressly alleged liability under Labor Law § 241 (6) based upon the defendants' violation of Industrial Code rule 23. Thus, contrary to the plaintiff's contention, the issue was properly before the Supreme Court.

Moreover, the Supreme Court properly granted that branch of the defendant's cross motion which was for summary judgment dismissing the Labor Law § 241 (6) cause of action. Although the complaint contained a general allegation of a violation of Industrial Code rule 23 (12 NYCRR part 23), it failed to identify a specific and applicable provision of rule 23 that the defendant allegedly violated (*see Canosa v Holy Name of Mary R.C. Church*, 83 AD3d 635, 637 [2011]; *Kowalik v Lipschutz*, 81 AD3d 782, 783 [2011]; *Galarraaga v City of New York*, 54 AD3d 308, 310 [2008]). Furthermore, the plaintiff, in opposition to the defendant's cross motion, failed to allege a specific and applicable provision of the Industrial Code (*see Kowalik v Lipschutz*, 81 AD3d at 783-784).

The plaintiff's remaining contentions are without merit. Dillon, J.P., Hall, Sgroi and Barros, JJ., concur.

39 RONALD B. WEATHERS, Respondent, et al., Plaintiff, v ALEX RIOS, Appellant. [990 NYS2d 853]—

Damages—Inadequate and Excessive Damages—Past and Future Pain and Suffering—Material Deviation from Reasonable Compensation**Damages—Future Damages—Future Physical Therapy and Medical Expenses—Unsupported by Record and Based upon Speculation**

In an action, inter alia, to recover damages for personal injuries, the defendant appeals (1) from a judgment of the Supreme Court, Kings County (Solomon, J.), dated September 6, 2012, which, upon a jury verdict on the issue of damages finding that the plaintiff Ronald B. Weathers sustained damages in the principal sums of \$450,000 for past pain and suffering, \$1,000,000 for future pain and suffering, \$72,000 for future physical therapy, and \$125,000 for future medical expenses, is in favor of that plaintiff and against him in the principal sum of \$1,647,000, and (2) as limited by his brief, from so much of an order of the same court dated September 27, 2012, as denied that branch of his motion pursuant to CPLR 4404 (a) which was to set aside the jury verdict on the issue of damages as excessive.

Ordered that the judgment is reversed, on the facts and in the exercise of discretion, with costs, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of damages, unless within 30 days after service upon the plaintiff Ronald B. Weathers of a copy of this decision and order, that plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Kings County, a written stipulation consenting to reduce the verdict as to damages for past pain and suffering from the principal sum of \$450,000 to the principal sum of \$350,000, future pain and suffering from the principal sum of \$1,000,000 to the principal sum of \$450,000, future physical therapy from the principal sum of \$72,000 to \$0, and future medical expenses from the principal sum of \$125,000 to \$0, and to the entry of an appropriate amended judgment; in the event that the plaintiff Ronald B. Weathers so stipulates, then the judgment, as so reduced and amended, is affirmed, without costs or disbursements; and it is further,

Ordered that the appeal from the order is dismissed as academic, without costs or disbursements, in light of our determination on the appeal from the judgment.

Under the circumstances of this case, the jury's awards of damages for past pain and suffering and future pain and suffering deviate materially from what would be reasonable compensation to the extent indicated herein (*see* CPLR 5501 [c]; *Graves v New York City Tr. Auth.*, 81 AD3d 589 [2011]; *Conlon v Foley*, 73 AD3d 836, 838 [2010]; *DeSimone v Royal GM, Inc.*, 49 AD3d 490 [2008]; *Sanz v MTA-Long Is. Bus.*, 46 AD3d 867 [2007]; *Van*

Nostrand v Froehlich, 18 AD3d 539 [2005]; *Cromas v Kosher Plaza Supermarket*, 300 AD2d 273, 274 [2002]).

Furthermore, the award of damages for future physical therapy and future medical expenses is not supported by the record and was based upon speculation (see *Mohamed v New York City Tr. Auth.*, 80 AD3d 677, 679 [2011]; *Petrilli v Federated Dept. Stores, Inc.*, 40 AD3d 1339, 1344 [2007]; *O'Donnell v Blanaru*, 33 AD3d 776, 776-777 [2006]; *Jansen v Raimondo & Son Constr. Corp.*, 293 AD2d 574, 575 [2002]). Dillon, J.P., Leventhal, Sgroi and Maltese, JJ., concur.

40 WAYNE WILSON, Respondent, v INCORPORATED VILLAGE OF HEMPSTEAD, Appellant, et al., Defendant. [991 NYS2d 651]—

Municipal Corporations—Notice of Street Defect—Prior Written Notice Law—Voicemail Messages Insufficient Even if Reduced to Writing by Municipal Employee

Highways—Maintenance—Negligent Repair of Pothole Did Not Make Condition More Dangerous

In an action to recover damages for personal injuries, the defendant Incorporated Village of Hempstead appeals from an order of the Supreme Court, Nassau County (Brown, J.), entered June 10, 2013, which denied its motion for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is reversed, on the law, with costs, and the appellant's motion for summary judgment dismissing the complaint insofar as asserted against it is granted.

The plaintiff seeks to recover damages for personal injuries he allegedly sustained on April 30, 2010, when his motorcycle allegedly drove over a pothole in a public street in the defendant Incorporated Village of Hempstead. In support of its motion for summary judgment, the Village submitted the affidavit of the Village Clerk, who stated that pursuant to the Code of the Village of Hempstead § 39-1 (B), written notice to the Village of a defect in a roadway prior to an accident is a condition precedent for the commencement of an action against the Village, and a search of Village records for the five-year period up to and including April 30, 2010, indicated that no prior written notice of the subject alleged defect was given. The Village also submitted the affidavit of its Director of the Department of Public Works, who stated that in March 2010, his department would have only made "cold patch repairs" of potholes, which are intended to be temporary, and the potholes may progressively return to their prior state, depending on weather conditions. In March, his department only did cold patch repairs because of the season. He explained that permanent repairs were done during warm weather.

In opposition, the plaintiff submitted the sworn statement of two witnesses who lived on the street where the accident occurred. The first witness stated that the pothole condition was so severe that in January 2010, he telephoned the Village and left a voicemail with information with respect to the condition. He further claimed that “the Village did come and repair the pothole, yet it was repaired incorrectly because the patches quickly fell apart.” The second witness also claimed that he reported the pothole condition to the Village by telephone and the Village repaired the pothole about two weeks later, but the pothole reappeared only one week later, after a rainstorm, and “was in the same condition.”

In the order appealed from, the Supreme Court denied the Village’s motion on the ground that “[q]uestions of fact for the jury exist as to whether the Village created the condition in question by its repair and the manner in which it maintained the street in question and its potholes and defects.”

The plaintiff contends that there is a triable issue of fact as to whether the Village received prior written notice of the defect, because the oral notice provided by residents of the street, including voicemail, could have been reduced to writing by an employee of the Village. However, Hempstead Village Code § 39-1 requires that “written notice of said defect causing the injuries or damages was actually given to the Village Clerk.” There are no provisions permitting other types of notice, such as a written acknowledgment of oral notice (*see Dalton v City of Saratoga Springs*, 12 AD3d 899, 901 n 2 [2004]; *cf. Bruni v City of New York*, 2 NY3d 319 [2004]). Therefore, a verbal or telephonic communication which was reduced to writing by the Village would not satisfy the prior written notice requirement (*see Gorman v Town of Huntington*, 12 NY3d 275, 280 [2009]).

In *Yarborough v City of New York* (10 NY3d 726, 728 [2008]), the Court of Appeals noted that once the municipality establishes lack of written notice, “the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality.” A negligent repair of the defective condition is insufficient to establish that the municipality affirmatively created the defect (*see id.*; *Torres v City of New York*, 39 AD3d 438 [2007]). To fall within the exception, the repair must immediately result in a dangerous condition (*see Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Laracuente v City of New York*, 104 AD3d 822 [2013]), which made the defective condition more dangerous than it was before

any efforts were made to repair it (see *Kushner v City of Albany*, 7 NY3d 726 [2006]; *Perrington v City of Mount Vernon*, 37 AD3d 571, 572 [2007]; *Padula v City of Long Beach*, 20 AD3d 555 [2005]).

The Village established its entitlement to judgment as matter of law based upon proof that it did not receive prior written notice of the subject defect, and did not affirmatively create the defect. In opposition, the plaintiff failed to raise a triable issue of fact. Indeed, the sworn statements of the plaintiff's own witnesses indicated that the defect was not immediately apparent after repairs were made, and that when the defect thereafter reappeared, the defect was "in the same condition."

The plaintiff's remaining contentions are without merit (see *Robinson v Bond St. Levy, LLC*, 115 AD3d 928 [2014]; *Zito v County of Suffolk*, 106 AD3d 814 [2013]).

Accordingly, the Village is entitled to summary judgment dismissing the complaint insofar as asserted against it. Mastro, J.P., Roman, Hinds-Radix and LaSalle, JJ., concur.

41 SHAMEKA WORLEY et al., Appellants, v SAFEMOVE RENTAL et al., Respondents. [990 NYS2d 890]—

Judgments—Summary Judgment—Motion Filed Prior to Deposition of Eyewitnesses Denied as Premature

In an action to recover damages for personal injuries, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Bayne, J.), dated September 27, 2013, as denied, as premature, their motion for summary judgment on the issue of liability, with leave to renew after the completion of discovery, and denied the cross motion of the defendant John Williams for summary judgment dismissing the complaint and all cross claims insofar as asserted against him.

Ordered that the appeal from so much of the order as denied the cross motion of the defendant John Williams for summary judgment dismissing the complaint and all cross claims insofar as asserted against him is dismissed, as the plaintiffs are not aggrieved by that portion of the order (see CPLR 5511); and it is further,

Ordered that the order is affirmed insofar as reviewed, with costs.

Contrary to the plaintiffs' contention, the Supreme Court properly denied, as premature, their motion for summary judgment on the issue of liability, with leave to renew after the completion of discovery. The plaintiffs moved for summary judg-

ment on the issue of liability prior to the parties' depositions, including depositions of eyewitnesses identified in the police accident report. Moreover, the defendant Safemove Rental submitted, inter alia, an affidavit which suggested that discovery might lead to relevant evidence pertaining to the circumstances of the subject accident, or "that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party" (*Suero-Sosa v Cardona*, 112 AD3d 706, 708 [2013]). Under these circumstances, the opposing parties did not have a reasonable opportunity to conduct discovery (see CPLR 3212 [f]; *Bond v DeMasco*, 84 AD3d 1292, 1293 [2011]; *Gardner v Cason, Inc.*, 82 AD3d 930, 931-932 [2011]; cf. *Jones v American Commerce Ins. Co.*, 92 AD3d 844, 845 [2012]; cf. also *Suero-Sosa v Cardona*, 112 AD3d at 708; *Anzel v Pistorino*, 105 AD3d 784 [2013]). Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

42 In the Matter of THOMAS J. ABINANTI, Appellant, v MIKE DUFFY, Respondent, et al., Respondents. [991 NYS2d 319]—

Elections—Designating Petitions—Validity—Use of Shortened Name

In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a petition designating Mike Duffy as a candidate in a primary election to be held on September 9, 2014, for the nomination of the Conservative Party as its candidate for the public office of Member of the New York State Assembly for the 92nd Assembly District, the petitioner appeals, as limited by his brief, from so much of a final order of the Supreme Court, Westchester County (Connolly, J.), dated August 1, 2014, as, after a hearing, denied the petition, inter alia, to invalidate and dismissed the proceeding.

Ordered that the final order is affirmed insofar as appealed from, without costs or disbursements.

The petitioner asserts that the designating petition is invalid on the ground that it does not include the full name of the candidate, Michael K. Duffy. However, under the circumstances of this case, the petitioner did not meet his burden of showing that the use of the name "Mike Duffy" was intended to mislead or confuse potential signatories, or did, in fact, mislead or tend to lead to misidentification or confusion on the part of potential signatories as to the candidate's identity (see *Matter of Ferris v Sadowski*, 45 NY2d 815 [1978]). Therefore, the Supreme Court properly denied the petition, inter alia, to invalidate the designating petition and dismissed the proceeding (see *Matter of Mannarino v Goodbee*, 109 AD3d 683, 685 [2013]; *Matter of Eisenberg v Strasser*, 307 AD2d 1053, 1054 [2003], *affd* 100

NY2d 590 [2003]; *Matter of Petersen v Board of Elections of City of N.Y.*, 218 AD2d 776 [1995]).

In light of our determination, we need not reach the petitioner's remaining contention, which was raised as an alternative ground for affirmance (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983]; *Matter of MacKay v Johnson*, 54 AD3d 428, 430 [2008]). Skelos, J.P., Balkin, Austin, Sgroi and LaSalle, JJ., concur.

43 In the Matter of THOMAS J. ABINANTI, Appellant, v MIKE DUFFY, Respondent, et al., Respondents. [991 NYS2d 320]—

Elections—Designating Petitions—Validity—Use of Shortened Name

In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a petition designating Mike Duffy as a candidate in a primary election to be held on September 9, 2014, for the nomination of the Republican Party as its candidate for the public office of Member of the New York State Assembly for the 92nd Assembly District, the petitioner appeals from a final order of the Supreme Court, Westchester County (Connolly, J.), dated August 1, 2014, which, after a hearing, denied the petition, inter alia, to invalidate and dismissed the proceeding.

Ordered that the final order is affirmed, without costs or disbursements.

The petitioner asserts that the designating petition is invalid on the ground that it does not include the full name of the candidate, Michael K. Duffy. However, under the circumstances of this case, the petitioner did not meet his burden of showing that the use of the name “Mike Duffy” was intended to mislead or confuse potential signatories, or did, in fact, mislead or tend to lead to misidentification or confusion on the part of potential signatories as to the candidate's identity (*see Matter of Ferris v Sadowski*, 45 NY2d 815 [1978]). Therefore, the Supreme Court properly denied the petition, inter alia, to invalidate the designating petition and dismissed the proceeding (*see Matter of Mannarino v Goodbee*, 109 AD3d 683, 685 [2013]; *Matter of Eisenberg v Strasser*, 307 AD2d 1053, 1054 [2003], *affd* 100 NY2d 590 [2003]; *Matter of Petersen v Board of Elections of City of N.Y.*, 218 AD2d 776 [1995]). Skelos, J.P., Balkin, Austin, Sgroi and LaSalle, JJ., concur.

44 In the Matter of AFP HOLDING, INC., Petitioner, v CITY OF NEW YORK et al., Respondents. [990 NYS2d 877]—

Administrative Law—Judicial Review—Construction and/or Repair Work without Permit—Determination Supported by Substantial Evidence

Proceeding pursuant to CPLR article 78 to review a determi-

nation of the Environmental Control Board of the City of New York, dated March 29, 2012, which confirmed a determination of an administrative law judge dated October 5, 2011, which, after a hearing, found that the petitioner violated Administrative Code of the City of New York § 28-105.1 by performing construction and/or repair work without a permit, and imposed a penalty in the sum of \$1,600.

Adjudged that the determination dated March 29, 2012, is confirmed, the petition is denied, and the proceeding is dismissed on the merits, with costs.

The determination of the Environmental Control Board of the City of New York confirming the administrative law judge's determination that the petitioner violated Administrative Code of the City of New York § 28-105.1 by performing construction and/or repair work without a permit was supported by substantial evidence and, as such, will not be disturbed (*see* Administrative Code of City of NY §§ 28-105.1, 28-105.4, 28-105.4.2, 28-105.4.2.1 [8]; 48 RCNY 3-54 [a], [b]; *see also* *Matter of E2CD, LLC v Appeals Unit of NYC Env'tl. Control Bd.*, 116 AD3d 773 [2014]; *Matter of Konstas v Environmental Control Bd. of City of N.Y.*, 104 AD3d 689, 690 [2013]; *Matter of Aparicio v Environmental Control Bd. of City of N.Y.*, 83 AD3d 1054, 1055 [2011]; *see generally* *Matter of Wagner v Fiala*, 113 AD3d 694, 695 [2014]; *Matter of R.I., Inc. v New York State Dept. of Labor*, 72 AD3d 1098, 1098-1099 [2010]).

The petitioner's remaining contentions are without merit. Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

45 In the Matter of AMERICAN COMMERCE INSURANCE CO., Respondent, v HENRY NOWICKI et al., Appellants. [990 NYS2d 870]—

Arbitration—Stay of Arbitration—Timeliness

In a proceeding pursuant to CPLR article 75 to temporarily stay arbitration of an underinsured motorist claim pending completion of discovery, Henry Nowicki and Grace Nowicki appeal from a judgment of the Supreme Court, Nassau County (Brandveen, J.), dated September 18, 2013, which granted the petition.

Ordered that the judgment is reversed, on the law, with costs, the petition is denied, and the proceeding is dismissed as time-barred.

CPLR 7503 (c) requires that an application to stay arbitration be made within 20 days after service of a notice of intention to arbitrate (*see* *Matter of Auto One Ins. Co. v Lopez*, 88 AD3d 701

[2011]). The timeliness of a proceeding for a stay of arbitration is measured from the date of receipt of the demand for arbitration to the date of the filing of the notice of petition and petition (*see id.*; *MacLeod v County of Nassau*, 75 AD3d 57, 60 [2010]; *Matter of Eagle Ins. Co. v Brown*, 309 AD2d 749, 750 [2003]; *Matter of Eagle Ins. Co. v Pierre-Louis*, 306 AD2d 344, 345 [2003]).

Here, it is undisputed that the petitioner received the appellants' demand for arbitration of their claims on June 3, 2013, but that the petitioner did not file its notice of petition and petition until July 1, 2013, which was beyond the 20-day statute of limitations. Consequently, the proceeding is time-barred (*see Matter of Allstate Ins. Co. v Calderon*, 14 AD3d 698, 698-699 [2005]).

The petitioner's remaining contention is not properly before this Court, as it is raised for the first time on appeal and based on matter dehors the record (*see Williams v Yang Qi Nail Salon, Inc.*, 113 AD3d 843, 845 [2014]).

Accordingly, the Supreme Court should have denied the petition and dismissed the proceeding as time-barred. Dillon, J.P., Chambers, Hall and Maltese, JJ., concur.

46 In the Matter of ROBERT AXELROD, Appellant, v VINCENT D. REDA et al., Respondents, et al., Respondents. [991 NYS2d 316]—

Elections—Designating Petitions—Standing

In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate petitions designating certain of the respondents as candidates in a primary election to be held on September 9, 2014, for the party position of Members of the Rockland County Republican Committee, the petitioner appeals from a final order of the Supreme Court, Rockland County (Berliner, J.), dated August 1, 2014, which granted that branch of the motion of the respondent candidates which was to dismiss the petition, inter alia, to invalidate the designating petitions on the ground that the petitioner lacked standing to commence the proceeding, and dismissed the proceeding.

Ordered that the final order is affirmed, without costs or disbursements.

The Supreme Court properly granted that branch of the respondent candidates' motion which was to dismiss the petition on the ground that the petitioner lacked standing to commence this proceeding to invalidate the petitions designating them as candidates for party positions. As the Chairperson of the Town

of Clarkstown Republican Committee, the petitioner did not have standing to commence the proceeding pursuant to Election Law § 16-102 (1) (*see Matter of Eaton v Rosenberg*, 109 AD3d 770, 771 [2013]; *Matter of Levine v Turco*, 43 AD3d 618, 619-620 [2007]; *Matter of Maltese v Anderson*, 264 AD2d 457 [1999]; *Matter of Crawley v Board of Elections of County of Rensselaer*, 218 AD2d 914, 915 [1995]; *Matter of D'Alvia v DiGiacomo*, 175 AD2d 891, 891-892 [1991]; *Matter of Davis v Dutchess County Bd. of Elections*, 153 AD2d 716, 717 [1989]). Rivera, J.P., Leventhal, Hall, Roman and Hinds-Radix, JJ., concur.

47 In the Matter of DESTINY B. SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent; DANIEL B., Appellant, et al., Respondent. [990 NYS2d 867]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect

In a child protective proceeding pursuant to Family Court Act article 10 and Social Services Law § 384-b, the father appeals from (1) an order of the Family Court, Suffolk County (Freundlich, J.), dated July 26, 2012, which, after a hearing, denied the motion of the Suffolk County Department of Social Services, as joined in by the father, in effect, pursuant to Family Court Act § 1061 to modify an order of fact-finding and disposition dated October 31, 2011, as modified on January 12, 2012, to change the placement of the subject child from nonrelative foster care to placement with her maternal great-grandparents, and (2) an order of fact-finding and disposition of the same court dated March 5, 2013, which, after fact-finding and dispositional hearings, found that he permanently neglected the subject child, terminated his parental rights, and transferred custody and guardianship of the subject child to the Suffolk County Department of Social Services for the purpose of adoption.

Ordered that the appeal from the order dated July 26, 2012, is dismissed as academic, without costs or disbursements, in light of the subsequent order of fact-finding and disposition dated March 5, 2013; and it is further,

Order that the order of fact-finding and disposition dated March 5, 2013, is affirmed, without costs or disbursements.

The Family Court properly found that the father permanently neglected the child (*see* Social Services Law § 384-b). Contrary to the father's contention, the Suffolk County Department of Social Services established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship (*see Matter of Corey S. [Angel S.]*, 112 AD3d 641, 642 [2013]; *Matter of Kenneth Frederick G. [Charles*

G.], 81 AD3d 645, 645 [2011]; *Matter of Imani M.*, 61 AD3d 870, 871 [2009]). Despite these efforts, the father failed to plan for the child's future (see *Matter of Tramel T.V. [Tracina M.V.]*, 108 AD3d 726, 726 [2013]; *Matter of Imani M.*, 61 AD3d at 871; *Matter of "Female" V.*, 21 AD3d 1118, 1119 [2005]).

The Family Court also properly determined that termination of the father's parental rights, rather than the entry of a suspended judgment, was in the child's best interests (see Family Ct Act § 631; see *Matter of Jessica C. [Johanna B.]*, 117 AD3d 1044 [2014]; *Matter of Amonte M. [Mary M.]*, 112 AD3d 937, 938-939 [2013]). Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

48 In the Matter of DESTINY B. SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent; DAPHNE T., Appellant. [990 NYS2d 866]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect

In a proceeding pursuant to Social Services Law § 384-b to terminate parental rights on the ground of permanent neglect, the mother appeals from two orders of fact-finding and disposition of the Family Court, Suffolk County (Freundlich, J.), both dated May 2, 2013, which, after fact-finding and dispositional hearings, found that she permanently neglected the subject child, terminated her parental rights, and transferred custody and guardianship of the subject child to the Suffolk County Department of Social Services for the purpose of adoption.

Ordered that the orders of fact-finding and disposition are affirmed, without costs and disbursements.

The Family Court properly found that the mother permanently neglected the subject child. The petitioner agency established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the parental relationship (see *Matter of Amonte M. [Mary M.]*, 112 AD3d 937, 938 [2013]; *Matter of Tarmara F.J. [Jaineen J.]*, 108 AD3d 543, 543 [2013]; *Matter of Darnnell G. [Robin Denise H.]*, 88 AD3d 789, 790 [2011]). Despite these efforts, the mother failed to plan for the child's future (see Social Services Law § 384-b [7] [a], [c]; *Matter of Darnnell G. [Robin Denise H.]*, 88 AD3d at 790; *Matter of Deajah Shabri T.*, 44 AD3d 1060, 1061 [2007]). Contrary to the mother's contention, testimony relating to matters occurring subsequent to the filing of a petition for permanent neglect is inadmissible during the fact-finding stage of the proceeding (see Family Ct Act § 624; *Matter of Christopher II.*, 222 AD2d 900, 902 [1995]; *Matter of Diana S.*, 68 AD2d 915 [1979]).

The mother's contention relating to an arrest in August 2012 is unpreserved for appellate review and, in any event, without merit.

Moreover, the Family Court properly determined that termination of the mother's parental rights, rather than the entry of a suspended judgment, was in the child's best interests (see Family Ct Act § 631; *Matter of Jessica C. [Johanna B.]*, 117 AD3d 1044 [2014]; *Matter of Amonte M. [Mary M.]*, 112 AD3d at 938-939; *Matter of Precious D.A. [Tasha A.]*, 110 AD3d 789, 790 [2013]). Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

49 In the Matter of RODNEYSE BICHOTTE, Appellant, v MICHELE N. ADOLPHE, Respondent, et al., Respondent. [991 NYS2d 317]—

Elections—Designating Petitions—Validity of Signatures—Residence Address of Subscribing Witness

Elections—Designating Petitions—Validity of Signatures—Inactive Voter Status of Subscribing Witness

In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a petition designating Michele N. Adolphe as a candidate in a primary election to be held on September 9, 2014, for the nomination of the Democratic Party as its candidate for the public office of Member of the Assembly, 42nd Assembly District, the petitioner appeals from a final order of the Supreme Court, Kings County (Schmidt, J.), dated August 12, 2014, which, after a hearing, denied the petition, inter alia, to invalidate the designating petition and, in effect, dismissed the proceeding.

Ordered that the final order is affirmed, without costs or disbursements.

The petitioner commenced this proceeding, inter alia, to invalidate a petition designating Michele N. Adolphe as a candidate in a primary election to be held on September 9, 2014, for the nomination of the Democratic Party as its candidate for the public office of Member of the Assembly, 42nd Assembly District. The designating petition was required to have 500 valid signatures (see Election Law § 6-136 [2] [i]). It is undisputed that, without the inclusion of the signatures witnessed by Carl Thompson and Markim Moore, Michele N. Adolphe would have fewer valid signatures than the number required, but she would have more valid signatures than the number required with the inclusion of those signatures.

The Supreme Court determined that the signatures witnessed by Thompson and Moore were not rendered invalid by the fact that the addresses listed for those subscribing witnesses on

their respective buff cards, as contained in the database of the Board of Elections in the City of New York (hereinafter the Board), did not match the residence addresses set forth in the Statement of Witness appended to the bottom of each sheet of the designating petition signed by those subscribing witnesses. Additionally, the Supreme Court determined that the signatures witnessed by Moore were not rendered invalid due to his status as an “inactive” voter in the Board’s records.

An individual’s status as a registered voter is unaffected by a change of address within the city or county in which he or she was registered (see Election Law §§ 5-208 [1]; 5-210 [5] [a]; *Matter of Robelotto v Burch*, 242 AD2d 397, 398 [1997]). Election Law § 6-132 (2) requires that a subscribing witness to a designating petition be a duly qualified voter of the State of New York and an enrolled voter of the same political party as the voters qualified to sign the petition (see Election Law § 6-132 [2]; *Matter of La Brake v Dukes*, 96 NY2d 913, 914 [2001]). Election Law § 6-132 (2) further requires that a subscribing witness set forth his or her current address in a signed Statement of Witness appended to the bottom of each sheet of a designating petition (see *Matter of La Brake v Dukes*, 96 NY2d at 914).

Contrary to the petitioner’s contention, the fact that the addresses listed for Thompson and Moore in the Board’s records did not match their residence addresses set forth in the signed Statements of Witness did not establish that either witness was not a “duly qualified voter” under Election Law § 6-132 (2). Election Law § 6-132 (2) does not require that the residence address of the subscribing witness match the address on file for that witness with the relevant board of elections (see Election Law § 6-132 [2]). Therefore, where the address of a subscribing witness, as set forth on the petition, does not match the address on file with the board of elections, that fact alone cannot provide a basis for invalidating the signatures at issue (see *Matter of Hudson v Board of Elections of City of N.Y.*, 207 AD2d 508, 509 [1994]; see also *Matter of Curley v Zacek*, 22 AD3d 954, 957 [2005]).

The signatures witnessed by Moore were not rendered invalid by the fact that the Board’s records reflected that he had an “inactive” voter status, inasmuch as he was still a registered voter at the time he witnessed the signatures (see *Matter of Bray v Marsolais*, 21 AD3d 1143, 1146 [2005]; see generally Election Law § 5-213 [governing “active” and “inactive” voter status]), and Election Law § 6-132 (2) does not mandate that subscribing witnesses have an “active” voter status.

The petitioner's contention that the Supreme Court lacked an evidentiary basis for its determination that Moore lived at the address set forth in his signed Statement of Witness during the time that he procured signatures, raised for the first time on appeal, is not properly before this Court (*see Matter of Venditto v Roth*, 110 AD3d 908 [2013]; *Matter of Lord v New York State Bd. of Elections*, 98 AD3d 622, 623 [2012]; *Matter of Muscarella v Nassau County Bd. of Elections*, 87 AD3d 645, 646 [2011]).

Accordingly, the Supreme Court properly denied the petition, inter alia, to invalidate the designating petition and, in effect, dismissed the proceeding. Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

50 *Matter of EVERLY BROWN, Appellant, v JAMES SANDERS, JR., et al., Respondents, et al., Respondent.* [991 NYS2d 319]—In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a petition designating James Sanders, Jr., and Gian A. Jones as candidates in a primary election to be held on September 9, 2014, for the nominations of the Democratic Party and the Working Families Party as their candidates for the public office of New York State Senator for the 10th Senatorial District, the petitioner appeals from a final order of the Supreme Court, Queens County (Elliot, J.), entered August 7, 2014, which dismissed the petition, inter alia, to invalidate on the ground of lack of personal jurisdiction.

Ordered that the final order is affirmed, without costs or disbursements.

The petitioner's failure to produce affidavits of service establishing that he served the respondents James Sanders, Jr., and Gian A. Jones with copies of the order to show cause and supporting papers warranted dismissal of the petition, inter alia, to invalidate the designating petition (*see* CPLR 306). Mastro, J.P., Chambers, Miller, Maltese and Barros, JJ., concur.

51 In the *Matter of KIRIN DOYLE, Appellant, v ROBIN DEBE, Respondent.* (Proceeding No. 1.) In the *Matter of ROBIN DEBE, Respondent, v KIRIN DOYLE, Appellant.* (Proceeding No. 2.) [991 NYS2d 135]—

Parent, Child and Family—Custody—Petition for Sole Physical Custody and Relocation to Another State—Best Interests of Child

In related child custody proceedings pursuant to Family Court Act article 6, the mother appeals, as limited by her brief, from so much of an order of the Family Court, Queens County (Salinitro, J.), dated December 21, 2012, as, after a hearing, denied her petitions for sole physical custody of the subject

child and for permission to relocate to Georgia with the child, and granted the father's petition for sole physical custody of the child.

Ordered that the order is reversed insofar as appealed from, on the facts and in the exercise of discretion, without costs or disbursements, the mother's petitions for sole physical custody of the subject child and for permission to relocate to Georgia with the child are granted, the father's petition for sole physical custody of the child is denied, and the matter is remitted to the Family Court, Queens County, for a hearing to establish an appropriate post-relocation visitation schedule for the father.

The parties met online while the mother was living in California and the father was living in New York. They married in 2002, and the mother relocated to New York. After the parties had a child in March 2006, their relationship deteriorated, and, in 2007, the mother returned to California with the child. The mother and the father eventually reconciled, and the mother and the child returned to New York. The parties separated again in May 2008.

After the second separation, the child initially lived with the mother, but, in August 2008, the child began living with the father. The mother has maintained that the father was supposed to have the child for a four-day visit but refused to return her. The father contends that the mother abandoned the child.

On or about September 12, 2008, the mother filed a petition for sole physical custody of the child. In her petition, the mother alleged that she had a letter from the father in which he stated that the mother could have sole custody of the child. Thereafter, on or about September 16, 2008, the father filed his own petition for sole physical custody of the child.

In April 2010, while the petitions were pending, the mother moved to Georgia and began living with her then-fiancé, whom she later married. In October 2010, the mother filed a petition for permission to relocate to Georgia with the child, alleging that she had moved due to the long history of domestic violence between the parties. She also alleged that, in Georgia, she would be able to provide housing and amenities for the child which were superior to those which she or the father could provide in New York.

In December 2012, the Family Court held a fact-finding hearing on the petitions. The mother testified that, when the parties separated in 2008, the father signed an "agreement," which was admitted into evidence. The document, entitled "Separation Agreement," provided that the mother would have sole physical custody of the child, that the father would pay child

support in a certain amount, and that the father acknowledged that the mother would be relocating with the child. The document, signed by the parties, stated that the father “D[id] Not Want Custody of [the child],” and that the mother agreed to forego maintenance from him.

The mother testified that the parties’ divorce was finalized on July 26, 2010. She explained that, on the day they were in court with respect to their matrimonial action, the father approached her to resolve the outstanding custody issues. The parties entered into a “Custody Agreement,” which was also admitted into evidence at the fact-finding hearing. That agreement, which was signed by the parties and notarized, provided, *inter alia*, that the child would “be in her mother’s care during Georgia school year. [The child] will have visits with her father . . . during summer [break] and spring [b]reak and every other Christmas.”

The mother testified that she filed her custody petition in September 2008 when the father refused to return the child after a visit, despite the parties’ prior informal custody arrangement set forth in the “Separation Agreement.” The mother explained that she attempted to have the police intervene, but that the father told them that the mother was trying to kidnap the child and the police instructed the mother to go to Family Court to find out if a custody proceeding had been commenced. She stated that the father had kept the child ever since that time.

The mother testified that, since moving to Georgia, she saw the child frequently, including during the summer and over the spring and Christmas breaks. She explained that she had been renting a three-bedroom house in Georgia with her husband, who had family in Georgia, for over two years, and that the child had her own room there. The mother had found a school and chosen a doctor in the area for the child.

The mother also testified that if she were awarded custody, she would allow the father to have visitation with the child every holiday, birthday, spring and Christmas break, and summer recess.

The father testified that, at one point, the mother and the child were living with his sister while he was living at the apartment of his mother (hereinafter the grandmother). He recalled that his sister advised him that the mother had left and the sister did not know where the mother had gone, so he took the child back to the grandmother’s apartment to live. Thereafter, the father commenced his custody proceeding.

The father testified that the child had friends from school,

daycare, and Sunday school. During the father's testimony, the child's report cards indicating that she was performing well at school were admitted into evidence.

The father denied that he signed the "Separation Agreement" but acknowledged executing the "Custody Agreement." He testified that, since the time he signed the "Custody Agreement," circumstances had changed because the mother had no family in Georgia and it was not a safe environment. He also stated that he was unaware that the mother's husband had family in Georgia until she testified to that effect, and that he had no proof of this fact. The father testified that if he were awarded custody, he would continue to allow the child to see the mother if the mother stopped smoking.

The father also presented the testimony of the grandmother and his brother. The grandmother acknowledged that she shares a bedroom with the child in the one-bedroom apartment where they reside and that her three adult sons, including the father, also live there.

The court-appointed forensic evaluator testified about her observations of the mother and father with the child, her interviews with both parties, and her opinions of their parenting skills. In the expert's opinion, the mother was the more appropriate custodial parent. The expert opined that it would be in the child's best interests to live with the mother, as she would provide a more stable environment for the child.

The Family Court denied the mother's custody and relocation petitions and granted the father's custody petition on the grounds that, although both parents were fit, the child should not be uprooted from the home she has known since 2008. The mother appeals from so much of the order as denied her petitions and granted the father's petition. We reverse the order insofar as appealed from.

In deciding custody issues, the most important factor to be considered by the court is the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Felty v Felty*, 108 AD3d 705, 706 [2013]). This requires the court to evaluate the totality of the circumstances (*see Eschbach v Eschbach*, 56 NY2d at 171; *Matter of Brown v Brown*, 97 AD3d 568, 570 [2012]). In making such a determination, the court is to consider various factors, including "the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award

of custody to one parent might have on the child's relationship with the other parent" (*Kaplan v Kaplan*, 21 AD3d 993, 994 [2005] [internal quotation marks omitted]; see *Eschbach v Eschbach*, 56 NY2d at 171-172).

Further, a parent seeking to relocate bears the burden of establishing by a preponderance of the evidence that the proposed move is in the child's best interests (see *Matter of Caruso v Cruz*, 114 AD3d 769, 771 [2014]). In considering such a request, the court is to look at "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements" (*Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]).

"In custody matters, the credibility determinations of the Family Court are entitled to deference, as the Family Court was in the best position to evaluate the credibility of witnesses" (*Matter of Cortez v Cortez*, 111 AD3d 717, 717 [2013]). However, this Court's authority is as broad as that of the hearing court and a custody determination which lacks a sound and substantial basis in the record will not be allowed to stand (see *Matter of Cortez v Cortez*, 111 AD3d 717 [2013]; *Matter of James A.-S. v Cassandra A.-S.*, 107 AD3d 703, 706 [2013]). Similarly, in relocation proceedings, this Court's authority is as broad as that of the hearing court and the hearing court's determination with respect to relocation also will not stand if it is not supported by a sound and substantial basis in the record (see *Matter of Caruso v Cruz*, 114 AD3d at 771-772).

Here, we find that the Family Court's determination as to custody and relocation were not supported by a sound and substantial basis in the record. The court did not give appropriate weight to the credible evidence before it, including the testimony of the parties and witnesses, one of whom was a forensic evaluator. In determining that the child should remain with the father, the court found that, while both parents were fit, the home atmosphere provided by the father was warm and congenial, with relatives residing within the home and nearby. While the father has relatives living in the area, the living conditions provided by the father raise a significant concern since the child shares a bedroom with the grandmother in a one-bedroom apartment and lives with her father and two adult uncles. This

situation is far from being in the child's best interests, especially as she grows older, in view of the fact that the child has her own bedroom in her mother's three-bedroom house which the child shares only with her mother and her mother's husband.

In addition, although this Court recognizes that the child has been residing with the father since 2008, the mother immediately filed a petition for sole physical custody in 2008. Thus, the fact that the child has been residing with the father and not the mother since that time is not a factor which weighs in favor of awarding custody to the father since the amount of time that elapsed between the filing of the mother's petition and the Family Court's determination on the petitions should not be weighed against the mother. The mother, who did not have custody during that time period, visited with the child in New York, and the child spent the summer of 2012 in Georgia with the mother. The mother also mailed the child packages of clothing, school supplies, and toys.

Furthermore, while the recommendation of a court-appointed evaluator is not determinative, it is a factor to be considered and is entitled to some weight (*see Matter of Shannon J. v Aaron P.*, 111 AD3d 829 [2013]). Thus, the Family Court should have given more than minimal weight to the report and testimony of the forensic evaluator who interviewed the parties and the child, and conducted psychological testing. The forensic evaluator found that the child was at ease with her mother despite their separation, and concluded that the mother was the more appropriate custodial parent because she was in a stable relationship, employed, had gone to great lengths to regain custody, and would provide a stable home for the child. Significantly, the psychologist expressed detailed concerns about the father's psychological state, and the impact of his psychological state upon his parenting abilities, and noted that he minimized past incidents of domestic violence between the parties. Further, in the forensic report, which was admitted in evidence, there were statements that, at the last minute, the father would cancel activities that the mother had planned in advance for the child. This evidence calls into question the father's ability to continue to foster the child's relationship with the mother (*see Matter of Griffin v Moore-James*, 104 AD3d 685, 686 [2013]; *Matter of Vasquez v Ortiz*, 77 AD3d 962, 962 [2010]).

Moreover, the parties entered into a "Custody Agreement" whereby they agreed, inter alia, that the child would live in Georgia during the school year. The father acknowledged that he executed this agreement. It does not appear that the Family

Court gave any consideration to this agreement. In addition, the father's testimony as to why he did not abide by the agreement further concerns this Court as to the father's ability to assure that there will continue to be meaningful contact between the mother and the child.

Finally, the mother established by a preponderance of the evidence that moving to Georgia was in the child's best interests. In addition to being able to provide superior living conditions, the mother has already chosen a school and a medical care provider for the child, and she testified that she would promote liberal visitation with the father over almost all of the school breaks.

Accordingly, in examining the totality of the circumstances, the Family Court should have granted the mother's petitions for sole physical custody of the child and for permission to relocate to Georgia with the child, and should have denied the father's petition for sole physical custody of the child. Dickerson, J.P., Chambers, Austin and Sgroi, JJ., concur.

52 In the Matter of SHARON FUCHS et al., Respondents, v JOSEPH ITZKOWITZ et al., Appellants, et al., Respondent. [991 NYS2d 324]—

Elections—Petition for Opportunity to Ballot—Signatures Invalid Where Witnessing Notaries Public Failed to Administer Oath

In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a petition for an opportunity to ballot by providing for a write-in candidate pursuant to Election Law § 6-164 in a primary election to be held on September 9, 2014, for the nomination of the Conservative Party as its candidate for the public office of Member of the New York State Assembly for the 48th Assembly District, the appeal is from a final order of the Supreme Court, Kings County (Rothenberg, J.), dated August 15, 2014, which, after a hearing, granted the petition, inter alia, to invalidate the petition for an opportunity to ballot.

Ordered that the final order is affirmed, without costs or disbursements.

The Supreme Court properly invalidated the signatures that were witnessed by notaries public Michael Koenig and Ronald Agrachov. The record demonstrates that Koenig and Agrachov had neither administered an oath to the signatories "in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his [or her] religious or ethical beliefs" (CPLR 2309 [b]; see *Matter of Bonner v Negron*, 87 AD3d 737, 738 [2011]; *Matter of Liebler v Friedman*, 54 AD3d 697, 698 [2008]; *Matter of Quintyne v Canary*, 104 AD2d 473,

475 [1984]), nor obtained “ ‘a statement from each of the signatories as to the truth of the matter to which they subscribed their names’ ” (*Matter of Bonner v Negron*, 87 AD3d at 738, quoting *Matter of Brown v Suffolk County Bd. of Elections*, 264 AD2d 489, 489 [1999]; see *Matter of Helfand v Meisser*, 22 NY2d 762 [1968], *affg* 30 AD2d 670 [1968]; *Matter of LeBron v Clyne*, 65 AD3d 801, 802 [2009]; *Matter of Imre v Johnson*, 54 AD3d 427, 428 [2008]; *Matter of Merrill v Adler*, 253 AD2d 505, 506 [1998]; *Matter of Andolfi v Rohl*, 83 AD2d 890 [1981]). As such, the signatures to which they attested failed to substantially comply with Election Law § 6-132 (3). Accordingly, there was an insufficient number of valid signatures on the petition for an opportunity to ballot.

To the extent that the appellants are challenging the constitutionality of Election Law § 6-132 (3), they were required to preserve that issue for appellate review by timely raising it before the Supreme Court (see generally *Matter of Burkins v Scully*, 108 AD2d 743, 744 [1985]). Here, however, we need not determine whether the appellants preserved that issue for appellate review, since nothing in the record indicates that they provided the requisite notice to the Attorney General that they intended to challenge the constitutionality of a State statute (see Executive Law § 71 [3]; CPLR 1012 [b] [3]; *Matter of McGee v Korman*, 70 NY2d 225, 231-232 [1987]; *Futia v Westchester County Bd. of Elections*, 109 AD3d 958, 959 [2013]). Accordingly, we do not reach the merits of that challenge.

In light of our determination, we need not reach the petitioners' remaining contention, which was raised as an alternative ground for affirmance (see *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983]; *Matter of MacKay v Johnson*, 54 AD3d 428, 430 [2008]). Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

53 In the Matter of ROSE G. ROSEMARY CARMOLA et al., Respondents; VINCENT G., Appellant. [990 NYS2d 897]—

**Appeal—Records and Briefs on Appeal—Failure to Include Transcript
Rendered Record Inadequate**

In a proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian for the personal needs and property management of Rose G., an alleged incapacitated person, in which Vincent G. cross-petitioned to be appointed as the guardian, Vincent G. appeals from an order of the Supreme Court, Kings County (King, J.), dated February 15, 2013, which, after a hearing, granted the motion of Roberto Lopez, the temporary guardian of the alleged incapacitated person, for permission to relocate the alleged incapacitated person.

Ordered that the appeal is dismissed, without costs or disbursements.

It is the obligation of the appellant to assemble a proper record on appeal (*see* CPLR 5525 [a]; *Hazell v State of New York*, 81 AD3d 893, 893 [2011]; *Matison v County of Nassau*, 290 AD2d 494, 495 [2002]). The failure to provide necessary transcripts inhibits this Court's ability to render an informed decision on the merits of an appeal (*see Matter of Leichter-Kessler v Kessler*, 117 AD3d 825, 826 [2014]).

Here, the appellant failed to include, in the record on appeal, a copy of the transcript of the hearing that was held before the Supreme Court in connection with the motion of the temporary guardian of the alleged incapacitated person for permission to relocate the alleged incapacitated person. Since the record is inadequate for this Court to render an informed decision on the issues raised by the appellant, the appeal must be dismissed (*see Smith v Imagery Media, LLC*, 95 AD3d 1204 [2012]; *Hazell v State of New York*, 81 AD3d at 893). Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

54 In the Matter of GOVERNMENT EMPLOYEES INSURANCE COMPANY, Respondent, v SALVADOR BELTRAN, Appellant. [992 NYS2d 69]—

Insurance—Automobile Insurance—Underinsured Motorist Endorsement—Permanent Stay of Arbitration

In a proceeding pursuant to CPLR article 75 to permanently stay arbitration of a claim for supplementary underinsured motorist benefits, Salvador Beltran appeals from an order of the Supreme Court, Richmond County (Corrigan, Ct. Atty. Ref.), dated September 9, 2013, which granted the petition and permanently stayed arbitration.

Ordered that the order is affirmed, with costs.

The appellant sustained injuries as a result of a collision involving his motorcycle and an automobile. At the time of the accident, the appellant's motorcycle was insured by Dairyland Insurance Company, with statutory minimum coverage of \$25,000 per person/\$50,000 per incident and no supplementary uninsured/underinsured motorist (hereinafter SUM) coverage. The automobile involved in the collision also had the statutory minimum coverage of \$25,000 per person/\$50,000 per incident. The appellant commenced an action against the owner of the automobile, which was later settled for \$25,000, the limit of the policy. At the time of the collision, the appellant also had an automobile insurance policy through the petitioner, Government Employees Insurance Company (hereinafter GEICO). The

GEICO policy had SUM limits of \$100,000 per person/\$300,000 per incident.

The appellant sought coverage under the SUM provisions of the GEICO policy. GEICO issued a disclaimer on the ground that the claim was subject to a policy exclusion that excluded SUM motorist coverage for bodily injury sustained by an insured while occupying a motor vehicle owned by the insured but not covered under the policy. Subsequently, the appellant made a demand for arbitration of his claim. GEICO commenced this proceeding to permanently stay arbitration of the claim. The Supreme Court granted the petition to permanently stay arbitration.

The policy language in question was not ambiguous and GEICO was entitled to have the provisions it relied on to disclaim coverage enforced (*see Matter of Government Empls. Ins. Co. v Avelar*, 108 AD3d 672, 673 [2013]; *Matter of USAA Cas. Ins. Co. v Cook*, 84 AD3d 825, 826 [2011]; *Matter of USAA Cas. Ins. Co. v Hughes*, 35 AD3d 486, 487-488 [2006]; *see generally Baughman v Merchants Mut. Ins. Co.*, 87 NY2d 589, 592 [1996]; *Government Empls. Ins. Co. v Kligler*, 42 NY2d 863, 864-865 [1977]). The SUM endorsement under the subject policy provided, in relevant part, that it did not apply “to bodily injury to an insured incurred while occupying a motor vehicle owned by that insured, if such motor vehicle is not insured for SUM coverage by the policy under which a claim is made, or is not a newly acquired or replacement vehicle covered under the terms of the policy.” This language must be construed according to its plain and ordinary meaning. This policy exclusion unambiguously excluded from SUM coverage compensation for bodily injuries sustained by an insured when injured in a motor vehicle accident while occupying a motor vehicle he or she owns, which vehicle was not covered under the policy (*see Matter of Government Empls. Ins. Co. v Avelar*, 108 AD3d at 673; *Matter of New York Cent. Mut. Fire Ins. Co. v Polyakov*, 74 AD3d 820, 822 [2010]; *Matter of USAA Cas. Ins. Co. v Hughes*, 35 AD3d at 488). There is no dispute that the appellant, at the time of the accident, was occupying a vehicle, the motorcycle, that he owned but that was not covered under the subject policy (*Matter of New York Cent. Mut. Fire Ins. Co. v Polyakov*, 74 AD3d at 822).

The appellant’s remaining contention is without merit. Accordingly, the Supreme Court properly granted the petition to permanently stay arbitration. Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

55 In the Matter of DENNIS T. KROPP et al., Appellants-Respondents, v STEVE HACKELING et al., Respondents, and

WALTER D. LONG, JR., et al., Respondents-Appellants. [991 NYS2d 317]—

Elections—Designating Petitions—Number of Signatures

In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a petition designating Walter D. Long, Jr., and Paul H. Senzer as candidates in a primary election to be held on September 9, 2014, for the nomination of the Independence Party as its candidates for the public office of District Court Judge, 3rd District, Town of Huntington, the petitioners appeal, as limited by their brief, from so much of a final order of the Supreme Court, Suffolk County (J.E. Murphy, J.), dated August 5, 2014, as, after a hearing, in effect, denied the petition, inter alia, to invalidate and dismissed the proceeding, and Walter D. Long, Jr., and Paul H. Senzer cross-appeal, as limited by their brief, from stated portions of the same final order.

Ordered that the cross appeal is dismissed, without costs or disbursements, as Walter D. Long, Jr., and Paul H. Senzer are not aggrieved by the final order (*see* CPLR 5511); and it is further,

Ordered that the final order is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court invalidated certain signatures on the designating petition of Walter D. Long, Jr., and Paul H. Senzer, but nevertheless concluded that the designating petition contained the requisite number of valid signatures. The petitioners failed to demonstrate that sufficient additional signatures were invalid so as to establish that the designating petition contained fewer valid signatures than required. Under these circumstances, we find no reason to disturb the Supreme Court's determination (*see Matter of Fall v Luthmann*, 109 AD3d 540, 541 [2013]; *see also Matter of Simmons v Wills*, 54 AD3d 431, 431-432 [2008]). Mastro, J.P., Chambers, Miller, Maltese and Barros, JJ., concur.

56 In the Matter of LILLY PAD, LLC, Appellant, v ZONING BOARD OF APPEALS OF VILLAGE OF EAST HAMPTON et al., Respondents. [990 NYS2d 868]—In a proceeding pursuant to CPLR article 78 to review a determination of the Zoning Board of Appeals of the Village of East Hampton dated May 2, 2011, which, after a hearing, granted the application of the respondents Sheri Kersch-Schultz, Residence Trust No. 1, and Howard D. Schultz, Residence Trust No. 1, to construct an addition to a residence on certain property, the petitioner appeals from a judgment of the Supreme Court, Suffolk County (Leis III, J.), dated May 21, 2012, which denied the petition and dismissed the proceeding.

Cross motion by the respondents Sheri Kersch-Schultz, Residence Trust No. 1, and Howard D. Schultz, Residence Trust No. 1, to dismiss the appeal on the grounds that it has been rendered academic or that it is barred by the doctrine of laches. By decision and order on motion of this Court dated June 17, 2013, the cross motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the cross motion, the papers filed in opposition thereto, and upon the argument of the appeal, it is,

Ordered that the branch of the cross motion which is to dismiss the appeal on the ground that it has been rendered academic is granted; and it is further,

Ordered that the branch of the cross motion which is to dismiss the appeal on the ground that it is barred by the doctrine of laches is denied as academic; and it is further,

Ordered that the appeal is dismissed as academic, with one bill of costs to the respondents appearing separately and filing separate briefs.

The petitioner commenced this CPLR article 78 proceeding to review a determination of the Zoning Board of Appeals of the Village of East Hampton (hereinafter the ZBA), which granted the application of Sheri Kersch-Schultz, Residence Trust No. 1, and Howard D. Schultz, Residence Trust No. 1 (hereinafter together the Schultz respondents), to construct an addition to their residence without requiring certain setback variances. It is undisputed that during the pendency of this appeal, the construction permit issued to the Schultz respondents pursuant to the ZBA's determination expired. Subsequently, the Schultz respondents submitted a new application to the ZBA, which resulted in another hearing and a new determination, in which the ZBA again granted the Schultz respondents' application, but this time invoked an additional ground for not requiring certain setback variances.

Generally, an appeal "will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; see *Matter of Richmond County Dist. Attorney v Staten Is. Univ. Hosp.*, 109 AD3d 620, 620 [2013]). Since the determination challenged in this proceeding was superseded by a subsequent determination by the ZBA, pursuant to which a new construction permit was issued, any determination by this Court will not affect the rights of the par-

ties, and the matter does not otherwise warrant invoking an exception to the mootness doctrine (see *Matter of Hearst Corp. v Clyne*, 50 NY2d at 714; see also *Yuelys v Grigonis*, 112 AD2d 157 [1985]).

Accordingly, we grant that branch of the Schultz respondents' cross motion which was to dismiss the appeal on the ground that the appeal has been rendered academic, and do not address the merits of the petitioner's claims. Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

57 In the Matter of ARMANDO LOPEZ, as Proposed Guardian Ad Litem for ANTONIO LOPEZ, Respondent, v COUNTY OF NASSAU, Appellant. [990 NYS2d 886]—

Municipal Corporations—Notice of Claim—Late Notice—Extremely Serious and Incapacitating Injuries Reasonably Excused Minimal Delay

In a proceeding, inter alia, pursuant to General Municipal Law § 50-e for leave to serve a late notice of claim or to deem a late notice of claim timely served nunc pro tunc, the County of Nassau appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Woodward, J.), entered October 5, 2012, as granted that branch of the petition which was for leave to serve a late notice of claim or to deem a late notice of claim to have been timely served on behalf of the claimant Antonio Lopez.

Ordered that the order is affirmed insofar as appealed from, with costs.

The determination of an application for leave to serve a late notice of claim is left to the sound discretion of the court (see *Matter of McLean v Valley Stream Union Free School Dist.* 30, 48 AD3d 571, 571-572 [2008]; *Matter of Vasquez v City of Newburgh*, 35 AD3d 621, 623 [2006]). Among the factors to be considered on an application for leave to serve a late notice of claim are whether the claimant is “physically incapacitated,” whether the movant has demonstrated a reasonable excuse for failing to timely serve a notice of claim, whether the municipality “acquired actual knowledge of the essential facts constituting the claim” within 90 days after the claim “arose or a reasonable time thereafter,” and whether the delay would substantially prejudice the municipality in maintaining its defense on the merits (General Municipal Law § 50-e [5]; see *Claud v West Babylon Union Free Sch. Dist.*, 110 AD3d 663 [2013]; *Matter of Ceselka v City of New York*, 101 AD3d 994, 995 [2012]; *Williams v Nassau County Med. Ctr.*, 13 AD3d 363, 364 [2004], *affd* 6 NY3d 531 [2006]). Neither the presence nor the absence of any one factor is determinative (see *Matter of*

Dell'Italia v Long Is. R.R. Corp., 31 AD3d 758, 759 [2006]; *Gibbs v City of New York*, 22 AD3d 717, 719 [2005]).

In this case, the extremely serious and incapacitating injuries that the claimant suffered in the underlying car accident reasonably excused the minimal delay in seeking leave to serve a late notice of claim against the County of Nassau (see General Municipal Law § 50-e [5]; *Matter of Savelli v City of New York*, 104 AD2d 943, 944 [1984]). The record further demonstrates that the County acquired actual knowledge of the facts underlying the claim within the 90-day statutory period or within a reasonable time thereafter (see *Morano v County of Dutchess*, 160 AD2d 690, 692 [1990]; *Fahey v County of Nassau*, 111 AD2d 214, 217 [1985]). Finally, under the circumstances of this case, the County was not prejudiced by the delay in serving the notice of claim (see *Matter of Mounsey v City of New York*, 68 AD3d 998, 999-1000 [2009]; *Matter of Cox v City of Peekskill*, 297 AD2d 735, 736 [2002]; *Rosenblatt v City of New York*, 160 AD2d 927, 928 [1990]; see also *McBee v County of Onondaga*, 34 AD3d 1360 [2006]).

The County's remaining contention is without merit.

Accordingly, the Supreme Court did not improvidently exercise its discretion in granting that branch of the petitioner's motion which was for leave to serve a late notice of claim or to deem a late notice of claim to have been timely served. Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

58 In the Matter of JOANNE M. LONG MERRILL, Respondent, v JOSEPH L. FRITZ, Appellant, et al., Respondents. (Proceeding No. 1.) In the Matter of JOSEPH L. FRITZ, Appellant, v JOANNE M. LONG MERRILL, Respondent, et al., Respondents. (Proceeding No. 2.) [991 NYS2d 323]—

Elections—Designating Petitions—Uninitialed Alterations to Dates on Signature Lines Invalidated Petition

In a proceeding pursuant to Election Law § 16-102, inter alia, to invalidate a petition designating Joseph L. Fritz as a candidate in a primary election to be held on September 9, 2014, for the nomination of the Democratic Party as its candidate for the public office of State Senator for the 3rd Senatorial District, and a related proceeding, inter alia, to validate that designating petition, Joseph L. Fritz appeals from a final order of the Supreme Court, Suffolk County (Leo, J.), dated August 15, 2014, which, after a hearing, in effect, granted the petition, inter alia, to invalidate the designating petition, denied the petition, inter alia, to validate the designating petition, dismissed that proceeding, and directed the Suffolk County Board of Elections to refrain from placing the name of Joseph L. Fritz on the ballot.

Ordered that the final order is affirmed, without costs or disbursements.

The Supreme Court properly invalidated the appellant's designating petition. "An alteration or correction of information appearing on a signature line, *other than the signature itself and the date*, shall not invalidate such signature" (Election Law § 6-134 [6] [emphasis added]). While the provisions of the Election Law are to be "liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud" (Election Law § 6-134 [10]), here, the Supreme Court properly found that the numerous instances of unexplained and uninitialed alterations to the dates on numerous signature lines, many of which were contained on petition sheets for which the appellant himself was the subscribing witness, required the invalidation of the designating petition (*see Matter of McGuire v Gamache*, 5 NY3d 444, 448 [2005]; *Matter of Jonas v Velez*, 65 NY2d 954, 955 [1985]). While the appellant testified at the hearing, he did not provide an adequate explanation for the uninitialed changes, and we decline to disturb the Supreme Court's finding that his testimony was "unreliable, not tenable, and not worthy of belief" (*see Matter of Kraham v Rabbitt*, 11 AD3d 808 [2004]; *cf. Matter of Henry v Trotto*, 54 AD3d 424 [2008]).

The appellant's remaining contentions are without merit. Rivera, J.P., Leventhal, Hall, Roman and Hinds-Radix, JJ., concur.

59 In the Matter of JAMES W. MISKOWSKI (Admitted as JAMES WILLIAM MISKOWSKI), an Attorney, Respondent. GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT, Petitioner. [991 NYS2d 315]—

Attorney and Client—Disciplinary Proceedings—Reciprocal Discipline—Censure

Motion by the respondent, inter alia, to amend an opinion and order of this Court dated October 23, 2013, which granted an application by the Grievance Committee for the Ninth Judicial District to impose reciprocal discipline upon him.

Upon the papers filed in support of the motion and the papers filed in relation thereto, it is

Ordered that the motion is granted to the extent that the opinion and order of this Court dated October 23, 2013 (112 AD3d 88 [2013]), is recalled and vacated, and the following opinion and order is substituted therefor, and the motion is otherwise denied: Application by the Grievance Committee for the Ninth Judicial District pursuant to 22 NYCRR 691.3 to

impose discipline on the respondent based upon disciplinary action taken by the Supreme Court of New Jersey. The respondent was admitted to the bar in the State of New York at a term of the Appellate Division of the Supreme Court in the First Judicial Department on March 17, 1975, under the name James William Miskowski.

By corrected order of the Supreme Court of New Jersey dated March 8, 2011, the respondent was reprimanded in New Jersey based on his violation of rule 1.15 (a) of the New Jersey Rules of Professional Conduct (hereinafter the RPC) for failing to safeguard client funds, as well as rule 1.15 (d) of the RPC and rule 1:21-6 of the New Jersey Court Rules for record-keeping violations. The New Jersey proceedings arose from an unintentional overdraft in the respondent's attorney trust account, which occurred in February 2008.

A notice pursuant to 22 NYCRR 691.3 was served upon the respondent, by mail, on January 17, 2013, affording him an opportunity to file a verified statement setting forth any of the defenses enumerated under 22 NYCRR 691.3 (c) and a written demand for a hearing, and advising him that if he did not file a verified statement and request a hearing, this Court would impose such discipline or take such disciplinary action as it deemed appropriate (*see* 22 NYCRR 691.3 [b]).

Inasmuch as the respondent has not filed a request for a hearing, there is no impediment to the imposition of reciprocal discipline.

Under the totality of the circumstances, the respondent is publicly censured in New York. Eng, P.J., Mastro, Rivera, Skelos and Roman, JJ., concur.

60 In the Matter of JESSICA MOJICA, Appellant, v KASEEM DENSON, Respondent. [991 NYS2d 443]—

Parent, Child and Family—Custody—Uniform Child Custody Jurisdiction and Enforcement Act—Modification Petition—Child's Significant Connection to New York

Parent, Child and Family—Custody—Uniform Child Custody Jurisdiction and Enforcement Act—Inconvenient Forum—Consideration of Statutory Factors

In a child custody proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Queens County (Matthews, Ct. Atty. Ref.), dated July 25, 2013, which granted the father's motion to dismiss, for lack of subject matter jurisdiction, her petition to modify an order of custody of the same court dated May 8, 2012, so as to award her sole custody of the parties' child.

Ordered that the order dated July 25, 2013, is reversed, on

the law, without costs or disbursements, the father's motion to dismiss the mother's petition for lack of subject matter jurisdiction is denied, and the matter is remitted to the Family Court, Queens County, for a hearing and a determination thereafter on the mother's petition.

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified in article 5-A of the Domestic Relations Law (hereinafter UCCJEA), a court in this State that has made an initial custody determination has exclusive continuing jurisdiction over that determination until it finds, as is relevant here, that the child does not have a "significant connection" with New York, and "substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76-a [1] [a]; see *Matter of Wnorowska v Wnorowski*, 76 AD3d 714 [2010]). Here, while the subject child moved to Connecticut to live with her father approximately eight months before the mother petitioned to modify a prior order of custody so as to award her sole custody of the child, the record reveals that the child retained a significant connection to New York, including attending school and having frequent visitation with her mother in New York, and that substantial evidence was available in this state concerning her present and future welfare (see *Matter of Seminara v Seminara*, 111 AD3d 949 [2013]; *Matter of Blerim M. v Racquel M.*, 41 AD3d 306, 311 [2007]; *Bjornson v Bjornson*, 20 AD3d 497 [2005]). The child's significant connection to Connecticut does not diminish her significant connection to New York as well (see *Vernon v Vernon*, 100 NY2d 960, 972 [2003]). Accordingly, the Family Court erred in determining that it lacked exclusive, continuing jurisdiction over the matter, and in granting the father's motion to dismiss the petition for lack of subject matter jurisdiction (see Domestic Relations Law § 76-a).

After the Family Court improperly determined that it lacked exclusive, continuing jurisdiction over the matter, it, in effect, determined that, even if it had such jurisdiction, it would decline to exercise it. A court of this State that has jurisdiction under the UCCJEA may decline to exercise it if it finds that New York is an inconvenient forum and that a court of another state is a more appropriate forum (see Domestic Relations Law § 76-f [1]; *Matter of Hassan v Silva*, 100 AD3d 753 [2012]). However, the court is required to consider the factors set forth in Domestic Relations Law § 76-f (2) (a)-(h) before determining that New York is an inconvenient forum (see *Matter of Ferris v Quinones*, 44 AD3d 854 [2007]; *Matter of Rey v Spinetta*, 8 AD3d 393 [2004]; *Matter of Dawber v Kelly*, 287 AD2d 625 [2001]). The

Family Court failed to do so here. However, we need not remit the matter to the Family Court, Queens County, for consideration of the statutory factors because the record is sufficient for this Court to consider and evaluate those factors (*see Matter of Balde v Barry*, 108 AD3d 622 [2013]; *Matter of Sutton v Sutton*, 74 AD3d 1838 [2010]; *cf. Matter of Ferris v Quinones*, 44 AD3d 854 [2007]). Consideration of the relevant statutory factors, including the nature and location of relevant evidence, and the Family Court's greater familiarity than the courts of Connecticut with the facts and issues underlying the mother's modification petition, supports a conclusion that New York is not an inconvenient forum (*see Matter of Wnorowska v Wnorowski*, 76 AD3d 714 [2010]).

Contrary to the father's remaining contention, asserted as an alternative basis for affirmance (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545 [1983]), the mother made an evidentiary showing sufficient to warrant a hearing on the petition to modify the prior order of custody (*see Matter of Ross v Ross*, 68 AD3d 878 [2009]; *Matter of Gurewich v Gurewich*, 58 AD3d 628 [2009]). Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

61 In the Matter of JONI LYNN REILLY, Respondent, v MADALYN FARLEY, Commissioner of the Nassau County Office of Consumer Affairs, et al., Appellants. [990 NYS2d 861]—

Limitation of Actions—Four-Month Statute of Limitations—Application for Restitution from Home Improvement Restitution Fund

In a proceeding pursuant to CPLR article 78, inter alia, to review a determination of the Commissioner of the Office of Consumer Affairs of the County of Nassau dated September 17, 2010, denying an application for restitution from the Home Improvement Restitution Fund, Madeline F. Farley (named herein as Madalyn Farley), as Acting Commissioner of the Office of Consumer Affairs of the County of Nassau, the Office of Consumer Affairs of the County of Nassau, and the County of Nassau appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Nassau County (Brown, J.), entered November 15, 2012, as, upon an order of the same court entered March 8, 2012, denying their motion pursuant to CPLR 217 and 7804 (f) to dismiss the petition as time-barred, granted the petition to the extent of vacating the determination denying the application for restitution, granted the application, and directed them to pay restitution in the sum of \$60,000 to the petitioner.

Ordered that the judgment is reversed, on the law, without costs or disbursements, the motion pursuant to CPLR 217 and

7804 (f) is granted, the petition is dismissed as time-barred, and the order entered March 8, 2012, is modified accordingly.

Pursuant to CPLR 217 (1), a proceeding pursuant to CPLR article 78 “must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” There are “two requirements for fixing the time when agency action is ‘final and binding upon the petitioner.’ First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party” (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; see *Matter of Silvestri v Hubert*, 106 AD3d 924, 925 [2013]). Moreover, a determination generally becomes binding when the aggrieved party is notified (see *Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 72 [1989]; *Matter of Silvestri v Hubert*, 106 AD3d at 925).

Here, the determination of the Commissioner of the Office of Consumer Affairs of the County of Nassau denying the petitioner’s application for restitution from the Home Improvement Restitution Fund became final and binding upon the petitioner more than a year before she commenced this proceeding pursuant to CPLR article 78 (see *Matter of Silvestri v Hubert*, 106 AD3d at 925-926). The petitioner’s requests for discretionary reconsideration neither extended the statute of limitations nor rendered the otherwise final determination nonfinal (see *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Lubin v Board of Educ. of City of N.Y.*, 60 NY2d 974, 976 [1983]; *Matter of Silvestri v Hubert*, 106 AD3d at 925; *Matter of Drake v Reuter*, 27 AD3d 736, 737 [2006]; *Matter of Hunt Bros. Contrs. v Glennon*, 214 AD2d 817, 819-820 [1995]).

Accordingly, the proceeding is time-barred, and the Supreme Court should have dismissed it on that basis (see *Matter of Williams v Department of Sanitation*, 116 AD3d 873 [2014]).

In light of the foregoing, we need not reach the petitioner’s remaining contention. Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

62 In the Matter of STATE OF NEW YORK, Respondent, v DENNIS K., Appellant. [991 NYS2d 125]—

Crimes—Sex Offenders—Civil Commitment or Supervision—Mental Abnormality—Confinement Required

Trial—Instructions—Charge to Jury Properly Set Forth Relevant Principles Disclosure—Penalty for Failure to Disclose—Preclusion of Expert Testimony—No Wilfulness or Significant Prejudice Demonstrated

In a proceeding pursuant to Mental Hygiene Law article 10 for the civil management of Dennis K., an alleged sex offender requiring civil management, Dennis K. appeals from (1) a decision of the Supreme Court, Kings County (Garnett, J.), dated October 11, 2012, made after a hearing, and (2) an order of the same court dated October 11, 2012, which, upon a finding, made after a jury trial, that he suffers from a mental abnormality as defined in Mental Hygiene Law § 10.03 (i), and upon a determination, made after a dispositional hearing, that he is currently a dangerous sex offender requiring civil confinement, in effect, granted the petition and directed that he be committed to a secure treatment facility for care and treatment, subject to his right to petition the court for discharge pursuant to Mental Hygiene Law § 10.09 and all other rights provided for by Mental Hygiene Law article 10.

Ordered that the appeal from the decision is dismissed, without costs or disbursements, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509 [1984]); and it is further,

Ordered that the order is affirmed, without costs or disbursements.

Contrary to the appellant's contention, the expert testimony that he suffered from "Paraphilia NOS" and Antisocial Personality Disorder was legally sufficient to show that he suffered from a "mental abnormality" as defined by Mental Hygiene Law § 10.03 (i), under the circumstances herein (*see Matter of State of New York v Shannon S.*, 20 NY3d 99, 104-105, 107 [2012]; *Matter of State of New York v Kenneth T.*, 106 AD3d 829 [2013], *lv granted* 21 NY3d 863 [2013]; *see also Matter of State of New York v Terry P.*, 109 AD3d 934 [2013]; *Matter of State of New York v Alfredo M.*, 96 AD3d 1068, 1069 [2012]; *Matter of State of New York v Spencer D.*, 96 AD3d 768, 770-771 [2012]). The jury's verdict, finding that he suffered from a "mental abnormality," was also not contrary to the weight of the evidence (*see Matter of State of New York v Edison G.*, 107 AD3d 723, 724 [2013]; *Matter of State of New York v Andre L.*, 84 AD3d 1248, 1250 [2011]; *Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1142 [2010]; *Matter of State of New York v Shawn X.*, 69 AD3d 165, 169 [2009]; *Matter of State of New York v Derrick B.*, 68 AD3d 1124, 1126 [2009]).

In light of the Supreme Court's jury charge, the summation remarks by the Assistant Attorney General did not deprive the appellant of a fair trial (*see Richardson v City of New York*, 109 AD3d 808, 809 [2013]; *Fekry v New York City Tr. Auth.*, 75 AD3d 616, 617 [2010]). The Supreme Court did not improvidently

exercise its discretion in declining to give the specific jury charge requested by the appellant, in light of its overall charge, which properly set forth the relevant principles (*see* Mental Hygiene Law § 10.03 [i]).

The Supreme Court did not err in denying the appellant's application to preclude certain expert testimony at the dispositional hearing, based on the State's failure to comply with CPLR 3101 (d), as no wilfulness or significant prejudice was demonstrated (*see Ocampo v Pagan*, 68 AD3d 1077, 1078 [2009]; *Shopsin v Siben & Siben*, 289 AD2d 220, 221 [2001]). The Supreme Court also did not err in denying that branch of the appellant's post-hearing motion which was to strike portions of the testimony of a State witness, Dr. Kunkle, based on an alleged violation of the Health Insurance Portability and Accountability Act of 1996 (Pub L 104-191). Notably, Dr. Kunkle testified only that a post-petition search of Department of Corrections records revealed the existence of no pertinent medical records. Under these particular circumstances, the Supreme Court did not err in declining to strike the testimony at issue (*see generally* 45 CFR 164.508; *cf. Matter of Miguel M. [Barron]*, 17 NY3d 37, 45 [2011]).

The Supreme Court properly found, by clear and convincing evidence, after the dispositional hearing, that the appellant's level of dangerousness is such that he required confinement, rather than strict and intensive supervision (*see* Mental Hygiene Law § 10.07 [f]; *Matter of State of New York v Larry B.*, 113 AD3d 865, 867 [2014]; *Matter of State of New York v Lonard ZZ.*, 100 AD3d 1279, 1281 [2012]; *Matter of State of New York v Clarence D.*, 82 AD3d 776, 777-778 [2011]; *Matter of State of New York v Derrick B.*, 68 AD3d 1124, 1127 [2009]). Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

63 In the Matter of ELLA STEVENS et al., Respondents, v NATILE J. COLLINS et al., Appellants, et al., Respondents. [991 NYS2d 321]—

Elections—Petition for Opportunity to Ballot—Signatures Invalid Where Jurat Predated Signatures

In a proceeding pursuant to Election Law § 16-102, *inter alia*, to invalidate a petition for an opportunity to ballot by providing for write-in candidates pursuant to Election Law § 6-164 in a primary election to be held on September 9, 2014, for the nomination as the Green Party candidate for the public office of State Senator for the 8th Senatorial District, in which Natile J. Collins, Kevin F. Hagan, and Gerald W. Bethea cross-petitioned, among other things, to validate the petition for an opportunity

to ballot, Natile J. Collins, Kevin F. Hagan, and Gerald W. Bethea appeal from a final order of the Supreme Court, Nassau County (Driscoll, J.), entered August 8, 2014, which, after a hearing, granted the petition, inter alia, to invalidate the petition for an opportunity to ballot and denied their cross petition, among other things, to validate the petition for an opportunity to ballot.

Ordered that the final order is affirmed, without costs or disbursements.

Natalie J. Collins, sued herein as Natile J. Collins, together with Kevin F. Hagan and Gerald W. Bethea (hereinafter collectively the appellants), filed, with the New York State Board of Elections (hereinafter the Board of Elections), a petition for an opportunity to ballot by providing for write-in candidates pursuant to Election Law § 6-164 in a primary election to be held on September 9, 2014, for the nomination as the Green Party candidate for the public office of State Senator for the 8th Senatorial District. Michael Venditto, as an aggrieved candidate, and Ella Stevens and Patricia Woodstock, as citizen-objectors, commenced this proceeding, inter alia, to invalidate the petition for an opportunity to ballot, and the appellants cross-petitioned, among other things, to validate the petition for an opportunity to ballot. The Supreme Court invalidated the petition for an opportunity to ballot on the ground that there was an insufficient number of valid signatures.

Contrary to the appellants' contention, the Supreme Court properly invalidated all of the signatures appearing on sheet 2 of the opportunity-to-ballot petition. The date of the jurat purporting to authenticate the signatures on sheet 2 of that petition was "6-16-14," whereas the signatures were all dated in July. That discrepancy was fatal to the signatures appearing on that page (*see Matter of Alamo v Black*, 51 NY2d 716, 717 [1980]; *Matter of MacKay v Cochran*, 264 AD2d 699, 700 [1999]; *Matter of Burgess v D'Apice*, 112 AD2d 1058, 1059 [1985]). The hearing testimony of the notary that he in fact authenticated the signatures on sheet 2 in July, and that the date marked was an inadvertent mistake, did not serve to correct the defect, inasmuch as the time to file petitions with the Board of Elections, as well as the time to amend or correct such petitions, had expired by the time the hearing was held (*see Daverso v Romeo*, 89 AD2d 1054 [1982]; *Matter of Esse v Chiavaroli*, 71 AD2d 1046 [1979]; *Matter of Sortino v Chiavaroli*, 59 AD2d 644 [1977], *affd* 42 NY2d 982 [1977]; *Matter of Lyden v Sullivan*, 269 App Div 942 [1945]; *Matter of Sinon v Westchester County Bd. of Elections*, 29 Misc 3d 496, 504 [Sup Ct, Westchester

County 2010]; *cf. Matter of Etkin v Thalmann*, 287 AD2d 775, 776 [2001]).

Contrary to the appellants' further contention, the Supreme Court did not improvidently exercise its discretion in denying their request for an opportunity to ballot on equitable grounds. The opportunity to ballot may be afforded as an "exceptional equitable remedy" where a designating petition manifests an ostensibly viable candidacy but is nullified on the ground of a technical defect, leaving the political party without a designated candidate for a given office (*Matter of Harden v Board of Elections in City of N.Y.*, 74 NY2d 796, 797-798 [1989]; *see Matter of Hunting v Power*, 20 NY2d 680, 681 [1967]; *Matter of Gray v Hochberg*, 175 AD2d 892 [1991]). Here, since the requirement that the notarial statement accurately reflect the date of the authentication is one of substance, not form (*see Matter of Alamo v Black*, 51 NY2d at 717; *Matter of MacKay v Cochran*, 264 AD2d at 700; *Matter of Burgess v D'Apice*, 112 AD2d at 1059), the error in the jurat on sheet 2 cannot be considered merely technical (*see Matter of Bowen v Ulster County Bd. of Elections*, 21 AD3d 693, 695 [2005]). Moreover, the opportunity-to-ballot remedy is "intended to permit voters to write in the name of the candidate whose *designating petition* failed to comply with the technical dictates of the Election Law" (*Matter of Hochberg v D'Apice*, 112 AD2d 1067, 1068 [1985], *affd* 65 NY2d 960, 961 [1985] [emphasis added]). Where, as here, the defective petition itself was for an opportunity to ballot pursuant to Election Law § 6-164, and the signers of the petition had not previously indicated their support for a specific candidate, the remedy is unavailable (*see Matter of Hochberg v D'Apice*, 112 AD2d at 1068). Indeed, awarding the appellants the opportunity to ballot by write-in as an equitable remedy would permit them to obtain relief identical to that which they sought under the statute despite their failure to comply with the substantive statutory requirements. "The 'opportunity to ballot' remedy . . . was not intended to be a generally available substitute for the petition process set forth in article 6 of the Election Law" (*Matter of Harden v Board of Elections in City of N.Y.*, 74 NY2d at 797). Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

64 In the Matter of UNITRIN DIRECT/WARNER INSURANCE COMPANY, Respondent, v JOSEPH BRAND, Appellant. [993 NYS2d 37]—

Conflict of Laws—Law Governing Contract Actions—No-Fault Automobile Insurance—Grouping of Contacts Inquiry
Insurance—Automobile Insurance—Underinsured Motorist Endorsement—SUM Coverage Not Triggered Where Liability Limits Identical to Those Cover-

ing Offending Vehicle

In a proceeding pursuant to CPLR 7503 to permanently stay arbitration of a claim for supplementary uninsured/underinsured motorist benefits, Joseph Brand appeals from an order of the Supreme Court, Nassau County (Diamond, J.), dated November 15, 2012, which granted the petition.

Ordered that the order is affirmed, with costs.

On October 17, 2011, Joseph Brand was operating a bicycle on Rockley Boulevard in Sarasota, Florida, when he was struck by a motor vehicle owned and operated by Thomas Collins. Brand sustained multiple serious injuries. Collins is a resident of Florida and his motor vehicle is registered in Florida. Brand is a resident of New York.

At the time of the accident, Collins maintained automobile liability insurance in Florida with Allstate Insurance Company with liability limits for bodily injury in the amount of \$100,000 per person/\$300,000 per occurrence and supplementary uninsured/underinsured motorist (hereinafter SUM) coverage for bodily injury in the amount of \$100,000 per person/\$300,000 per occurrence. Allstate tendered the bodily injury policy limit in the amount of \$100,000 in settlement of Brand's claim.

At the time of the accident, Brand maintained automobile insurance coverage with the petitioner Unitrin Direct/Warner Insurance Company (hereinafter Unitrin) with policy limits for bodily injury also of \$100,000 per person/\$300,000 per occurrence and SUM coverage for bodily injury also of \$100,000 per person/\$300,000 per occurrence. Brand claimed that his injuries exceeded the limits of Collins' policy, and demanded from the American Arbitration Association in New York arbitration of a claim for SUM benefits under his Unitrin policy. In response to Brand's demand for arbitration, Unitrin moved for a permanent stay of arbitration on the ground that the SUM coverage was not triggered under New York law because the offending vehicle was not underinsured since Collins' bodily injury liability coverage under the Allstate policy equaled Brand's bodily injury liability coverage under the Unitrin policy. Unitrin argues that the "center of gravity"/"grouping of contacts" analysis demonstrates that New York is the forum that has the most significant contact to the dispute such that New York law should govern this matter. Brand contends, however, that under the "center of gravity"/"grouping of contacts" analysis, Florida law should control.

It is undisputed that this conflict of law question, although arising in the context of a motor vehicle accident, must be resolved by the conflict of law rules relevant to contracts, not

torts (see *Matter of Eagle Ins. Co. v Singletary*, 279 AD2d 56 [2000]). Generally, “the courts apply the more flexible ‘center of gravity’ or ‘grouping of contacts’ inquiry, which permits consideration of the ‘spectrum of significant contacts’ in order to determine which State has the most significant contacts to the particular contract dispute” (*id.* at 58-59, quoting *Matter of Allstate Ins. Co. [Stolarz—New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 226 [1993]). “In general, significant contacts in a case involving contracts, in addition to the place of contracting, are the place of negotiation and performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties” (*id.* at 59). As to insurance contracts specifically, significance has been attached to the “‘local law of the state which the parties understood was to be the principal location of the insured risk . . . unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 [of the Restatement] to the transaction and the parties’ ” (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 318 [1994], quoting Restatement [Second] of Conflict of Laws § 193). In the case of a noncommercial vehicle, which is by its nature mobile, the principal location of the insured risk is the place where the vehicle is to be principally garaged (*Matter of Eagle Ins. Co. v Singletary*, 279 AD2d at 59).

Here, as the Supreme Court correctly noted, the insurance contract at issue was written to conform to the laws, rules and regulations of New York State, and was obtained in New York by Brand, a New York resident, from an insurance company doing business in New York. Furthermore, Brand served the demand for SUM arbitration upon the American Arbitration Association in New York. Applying the grouping of contacts inquiry to these facts, New York has the most significant contacts with the parties and the contract. Indeed, such a conclusion would be in conformity with the reasonable expectations of the contracting parties.

Brand’s reliance on Florida as the situs of the accident confuses the contacts that might be significant in a tort case with those that are material in a contract dispute (see *Matter of Allstate Ins. Co. [Stolarz—New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219 [1993]). New York law applies herein.

Under New York law, SUM coverage is only triggered where the bodily injury liability insurance limits of the policy covering the tortfeasor’s vehicle are less than the liability limits of the policy under which a party is seeking SUM benefits (see Insurance Law § 3420 [f] [2] [A]; *Matter of Allstate Ins. Co. v Rivera*,

12 NY3d 602, 607-608 [2009]; *Matter of AIU Ins. Co. v Hibbert*, 85 AD3d 779 [2011]). Here, Collins' Allstate policy limits for bodily injury were identical to Brand's Unitrin policy limits for bodily injury. Hence, Collins does not qualify as an underinsured driver.

Accordingly, the Supreme Court properly granted the petitioner's application to permanently stay arbitration of a claim for SUM benefits.

Brand's contention that Unitrin's payment of first party benefits constituted an agreement that Florida law controls is without merit, as Unitrin's payment of first party benefits in the first instance was required pursuant to 11 NYCRR 65-3.12 (a) (3) and (b). To the extent there was a dispute between Unitrin and Allstate as to the priority of first party benefits, that is a matter to be resolved between the insurers (*see* Insurance Law § 5105; 11 NYCRR 65-3.12 [b]; 65-4.11).

Brand's remaining contentions are without merit. Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

65 In the Matter of HARRIS WEISS et al., Appellants, v ZEPHYR R. TEACHOUT, Respondent, et al., Respondent. [991 NYS2d 654]—

Elections—Residence Requirement—Challenger Bears Burden to Prove Candidate Does Not Meet Residency Requirement by Clear and Convincing Evidence

In a proceeding pursuant to Election Law § 16-102, *inter alia*, to invalidate a petition designating Zephyr R. Teachout as a candidate in a primary election to be held on September 9, 2014, for the nomination of the Democratic Party as its candidate for the public office of governor of the State of New York, the petitioners appeal, as limited by their brief, from so much of a final order of the Supreme Court, Kings County (Walker, J.), dated August 11, 2014, as, after a hearing, denied the petition, *inter alia*, to invalidate and dismissed the proceeding.

Ordered that the final order is affirmed insofar as appealed from, without costs or disbursements.

The New York Constitution requires that a candidate for the office of governor reside within the state for the five-year period immediately preceding the election (*see* NY Const, art IV, § 2). The Election Law defines the term "residence" as "that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return" (Election Law § 1-104 [22]; *see Matter of Stewart v Chautauqua County Bd. of Elections*, 14 NY3d 139, 146 [2010]; *People v O'Hara*, 96 NY2d 378, 384 [2001]; *Matter of Willis v Suffolk County Bd. of Elections*, 54 AD3d 436, 437

[2008]; *Matter of Stavisky v Koo*, 54 AD3d 432, 434 [2008]; *Matter of Fernandez v Monegro*, 10 AD3d 429, 430 [2004]; *Matter of Camardi v Sinawski*, 297 AD2d 357 [2002]; *Matter of Thompson v Karben*, 295 AD2d 438, 439 [2002]). Thus, “[a]s used in the Election Law, the term ‘residence’ is synonymous with ‘domicile’ ” (*Matter of Stavisky v Koo*, 54 AD3d at 434 [internal quotation marks omitted]; see *Matter of Chaimowitz v Calcaterra*, 76 AD3d 685, 686 [2010]; *Matter of Fernandez v Monegro*, 10 AD3d at 430; *Matter of Markowitz v Gumbs*, 122 AD2d 906, 907 [1986]). Although “[t]he crucial determination whether a particular residence complies with the requirements of the Election Law is that the individual must manifest an intent [to reside there], coupled with physical presence ‘without any aura of sham’ ” (*People v O’Hara*, 96 NY2d at 385, quoting *Matter of Gallagher v Dinkins*, 41 AD2d 946, 947 [1973], *affd* 32 NY2d 839 [1973]; see *Matter of Palla v Suffolk County Bd. of Elections*, 31 NY2d 36, 47 [1972]), the party challenging residence has the burden of proof by clear and convincing evidence (see *Matter of Chaimowitz v Calcaterra*, 76 AD3d at 686; *Matter of Willis v Suffolk County Bd. of Elections*, 54 AD3d at 437; *Matter of Fernandez v Monegro*, 10 AD3d at 429; *Matter of Camardi v Sinawski*, 297 AD2d at 358; *Matter of Rosenthal v Kelly*, 275 AD2d 429 [2000]).

“The question of residence is a factual one, based on a variety of factors and circumstances” (*Matter of Chaimowitz v Calcaterra*, 76 AD3d at 686 [internal quotation marks omitted]; see *Matter of Diamondstone v Connor*, 32 AD3d 482, 483 [2006]). Although Zephyr R. Teachout has resided in several different residences within the City of New York since 2009, while maintaining close connections to her childhood domicile of Vermont, that is nothing more than an ambiguity in the residency calculus. However, the burden in this proceeding is not on Teachout to establish residency, but rather, upon the petitioners to establish by clear and convincing evidence that she does not meet the residency requirements established by article IV, § 2 of the New York Constitution. The Supreme Court’s determination that the petitioners failed to meet their burden of demonstrating that Teachout did not meet the constitutional residency requirements for the office of governor is warranted by the facts (see NY Const, art IV, § 2; Election Law § 1-104 [22]; *People v O’Hara*, 96 NY2d at 385; *Matter of Newcomb*, 192 NY 238, 250 [1908]; *Matter of Chaimowitz v Calcaterra*, 76 AD3d at 686; *Matter of Willis v Suffolk County Bd. of Elections*, 54 AD3d at 437; *Matter of Stavisky v Koo*, 54 AD3d at 434; *Matter of Rosenthal v Kelly*, 275 AD2d at 429). Accordingly, the Supreme Court properly denied the petition, inter

alia, to invalidate the petition designating Teachout as a candidate for the public office of governor and dismissed the proceeding. Skelos, J.P., Balkin, Lott and LaSalle, JJ., concur.

66 In the Matter of WESTERN RAMAPO SEWER EXTENSION PROJECT. SPLIT ROCK PARTNERSHIP, Respondent; ROCKLAND COUNTY SEWER DISTRICT NO. 1, Appellant. [990 NYS2d 895]—

Eminent Domain—Valuation—Condemnation of Vacant Land to Extend Sewer Service—Highest and Best Use of Property—Unconsummated Contract Evidence of Value

Disclosure—Penalty for Failure to Disclose—Failure to Disclose Expert Witnesses and Spoliation of Evidence—Preclusion of Witnesses and Adverse Inference Warranted

In a claim pursuant to EDPL article 5 for compensation arising from the condemnation of real property, the condemnor, Rockland County Sewer District No. 1, appeals, as limited by its brief, from stated portions of (1) a decision of the Supreme Court, Rockland County (LaCava, J.), dated November 13, 2012, made after a nonjury trial, (2) an order of the same court dated December 10, 2012, which, inter alia, sua sponte, amended the decision, and (3) a judgment of the same court (Tolbert, J.), entered February 4, 2013, which, upon the decision, as amended, and the order, among other things, is in favor of the claimant and against it in the principal sum of \$7,855,200 as and for just compensation for the taking of the claimant's real property.

Ordered that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509 [1984]); and it is further,

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the claimant.

The appeal from the order must be dismissed because no appeal lies as of right from an order that does not decide a motion made on notice, and we decline to grant leave to appeal in view of the fact that a judgment has been entered in the action (*see Szewczuk v Szewczuk*, 107 AD3d 692, 692 [2013]; *see generally Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

The claimant, Split Rock Partnership (hereinafter Split Rock), owned approximately 64 acres of vacant land (hereinafter the subject property) in the Village of Hillburn, located in the Town

of Ramapo in Rockland County. In November 2004, Split Rock executed a contract of sale (hereinafter the Wilder Contract) to sell the subject property to a developer, the Wilder Companies. In February 2005, Rockland County Sewer District No. 1 (hereinafter the Sewer District) acquired the subject property by condemnation to facilitate the extension of sewer service. Split Rock thereafter commenced this proceeding to determine the appropriate amount of compensation due to it for the taking of the subject property.

“The measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time” (*Chester Indus. Park Assoc., LLP v State of New York*, 65 AD3d 513, 514 [2009], quoting *Chemical Corp. v Town of E. Hampton*, 298 AD2d 419, 420 [2002]). The determination of highest and best use must be based upon evidence of a use which reasonably could or would be made of the property in the near future (see *Matter of City of New York [Broadway Cary Corp.]*, 34 NY2d 535 [1974]; *Matter of City of New York [Rudnick]*, 25 NY2d 146, 148-149 [1969]). Here, contrary to the Sewer District’s contentions, Split Rock satisfied its burden of demonstrating that the highest and best use of the subject property was for the commercial development of an office center.

A property’s market value is defined as “‘the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell’” (936 *Second Ave. L.P. v Second Corporate Dev. Co., Inc.*, 10 NY3d 628, 632 [2008], quoting *Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d 273, 277 [1975]). “[T]he purchase price set in the course of an arm’s length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the ‘highest rank’ to determine the true value of the property at that time” (*Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d at 277; see *Matter of Adler v Nassau County*, 52 AD3d 506, 507 [2008]; *Matter of Village of Port Chester*, 42 AD3d 465, 467 [2007]).

The Supreme Court properly considered the unconsummated Wilder Contract as admissible evidence of the subject property’s value since the Sewer District failed to demonstrate that the transaction was “abnormal” or was not an “arm’s length transaction” (*Plaza Hotel Assoc. v Wellington Assoc.*, 37 NY2d at 277; see *Matter of Metropolitan Transp. Auth. [Washed Aggregate Resources, Inc.]*, 102 AD3d 787, 792 [2013]; *Novack v State of New York*, 61 AD2d 288, 292 [1978]). Furthermore, contrary to the Sewer District’s contention, under the circumstances of this

case, the fact that Split Rock knew of the potential condemnation prior to executing the Wilder Contract does not demonstrate that Split Rock entered into the Wilder Contract in bad faith for the purpose of inflating the value of the subject property (see *Matter of Metropolitan Transp. Auth.*, 86 AD3d 314, 325 [2011]; *Matter of Town of E. Hampton [Windmill II Affordable Hous. Project (9 Parcels)]*, 44 AD3d 963, 964 [2007]).

The Supreme Court providently exercised its discretion in precluding two of the Sewer District's witnesses from testifying at trial as experts, based upon its noncompliance with CPLR 3101 (d) (1) (i) (see *Rivers v Birnbaum*, 102 AD3d 26 [2012]; *Sushchenko v Dyker Emergency Physicians Serv., P.C.*, 86 AD3d 638, 639 [2011]; *Mohamed v New York City Tr. Auth.*, 80 AD3d 677, 678 [2011]; *Parlante v Cavallero*, 73 AD3d 1001, 1003 [2010]). In this regard, the Sewer District did not disclose or identify either witness until after the trial had begun, and provided no explanation for that failure.

Contrary to the Sewer District's contention, the Supreme Court providently exercised its broad discretion in granting Split Rock's application for an adverse inference against the Sewer District with respect to the destruction of the draft appraisal reports prepared by its appraiser and draft feasibility studies prepared by its civil engineering firm (see *Matter of Village of Port Chester [Bologna]*, 95 AD3d 895, 897 [2012]; see generally *Shayovich v 800 Ocean Parkway Apt. Corp.*, 77 AD3d 814, 815 [2010]; *Gotto v Eusebe-Carter*, 69 AD3d 566, 567-568 [2010]).

The Sewer District's remaining contentions are without merit. Dickerson, J.P., Leventhal, Hall and Miller, JJ., concur.

67 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RICARDO BENITEZ, Appellant. [991 NYS2d 133]—

Crimes—Right of Confrontation—Unnamed Witness Who Provided Tip—Prosecutor's Improper Comments About Tip Necessitated New Trial

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Latella, J.), rendered December 14, 2010, convicting him of robbery in the first degree and robbery in third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is reversed, on the law and as a matter of discretion in the interest of justice, and a new trial is ordered.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear

the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

The defendant's contention that he was deprived of his right to effective assistance of counsel at the independent source hearing and at trial is without merit (*see People v Baldi*, 54 NY2d 137, 146-147 [1981]).

Nonetheless, we conclude that a new trial is necessary. The defendant was charged with crimes related to a robbery of a Radio Shack store. A detective testified during the People's case that he had received information through the "Crime Tips Office" and that, after further investigation, he began looking for a "White male Hispanic, with the possible name of Rick." The detective went to an apartment on the sixth floor of a building located at 82-01 Rockaway Beach Boulevard in Queens, but did not find a person fitting that description. Later that day, however, the detective was provided with information that the person for whom he was looking was in front of that building. Upon arriving there, the detective arrested the defendant, Ricardo Benitez. The detective also testified that the defendant, in providing pedigree information, gave his address as 82-01 Rockaway Beach Boulevard, Apartment 6B.

During summation, the prosecutor strongly implied that whoever had provided the tip had implicated the defendant: "Someone calls 577-TIPS . . . [The detective] gets this information and where does he go? 82-01 Rockaway Beach Boulevard, make a left out of the elevator. I'm looking for a guy named Rick who lives on the sixth floor. Ricardo Benitez." After defense counsel's objection to this remark was overruled, the prosecutor continued: "Gave Detective Lopez the following address. 82-01 Rockaway Beach Boulevard, 6B. Rick. Ladies and gentlemen, I introduce you to Rick." Defense counsel again objected, but the Supreme Court again overruled the objection.

The only purpose of the prosecutor's improper comments was to suggest to the jury, in this one-witness identification case, that the complainant was not the only person who had implicated the defendant in the commission of the robbery (*see People v Mendez*, 22 AD3d 688, 689 [2005]). Moreover, in overruling defense counsel's objections, the Supreme Court "legitimized" the prosecutor's improper remarks (*People v Lloyd*, 115 AD3d 766, 769 [2014]). The defendant, of course, was given no opportunity to cross-examine the unnamed witness who had allegedly provided the tip (*see People v McEaddy*, 41 AD3d 877, 879-

880 [2007]; *cf. Crawford v Washington*, 541 US 36 [2004]). The evidence against the defendant was not overwhelming, so there is no basis for the application of harmless error analysis (*see People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Brown*, 26 AD3d 392, 393 [2006]). To the extent that the defendant failed to preserve the claim by specific objection, we reach the issue in the exercise of our interest of justice jurisdiction, and reverse the judgment (*see* CPL 470.15 [6] [a]).

In light of our determination, we need not address the defendant's remaining contentions. Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

68 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v THEODORE BEST, Appellant. [991 NYS2d 441]—

Crimes—Identification of Defendant—Lineup—Instruction on Cross-Racial Identification Not Warranted

Crimes—Fair Trial—Jury Notes—No Mode of Proceedings Error

**Crimes—Lesser Included Offense—Burglary and Robbery in Third Degree
Lesser Included Offenses of Burglary and Robbery in Second Degree**

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Lebowitz, J.), rendered June 10, 2011, convicting him of burglary in the second degree (three counts), burglary in the third degree (two counts), robbery in the second degree, and robbery in the third degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, without a hearing, of the defendant's pretrial motion to renew that branch of his omnibus motion which was to suppress evidence of a lineup identification.

Ordered that the judgment is modified, on the law, by vacating the convictions of burglary in the third degree (counts four and seven) and robbery in the third degree (count five), vacating the sentences imposed thereon, and dismissing those counts of the indictment; as so modified, the judgment is affirmed.

In October 2007 and November 2007, respectively, women were robbed in two separate incidents in Queens County. In each case, the victim lived in a multifamily residence served by an outside front door used by all residents to gain access to the building, leading to a vestibule from which a resident could then gain access to individual apartments. In each case, the perpetrator knocked on the outside front door of the victim's building, just after she had entered the vestibule. When each woman opened the outside front door to her building, the perpetrator propped open the door with his foot, grabbed the victim's purse through the opening, thereafter entered the vestibule, struggled with the victim, and ran away with the purse. The first victim reported that, after the perpetrator took

her purse, he entered a black car and drove away. She also provided a license plate number for the car she saw, and a police investigation eventually led to the defendant. Each victim separately viewed a lineup conducted in December 2007. Both victims identified the defendant as the perpetrator during the lineup, and at trial.

Prior to the trial, the defendant moved to suppress evidence of the lineup identifications as unduly suggestive. The motion was denied and, almost two years later, the defendant moved to renew his suppression motion, contending that the lineup was conducted in violation of his right to counsel. This motion also was denied. Subsequently, after a jury trial, the defendant was found guilty, in connection with the first incident, of burglary in the second degree (counts one and two), robbery in the second degree (count three), burglary in the third degree (count four), and robbery in the third degree (count five). He was also found guilty in connection with the second incident of burglary in the second degree (count six), burglary in the third degree (count seven), and robbery in the third degree (count eight). The defendant appeals.

First, contrary to the defendant's assertions, the Supreme Court did not err in denying his motion to renew. Clearly, the defendant knew of the circumstances of the lineup and whether or not he asked for the assistance of counsel prior to the lineup. The defendant's conclusory allegations, unsupported by any evidence or affidavit, were insufficient to satisfy his burden of showing reasonable diligence in bringing the allegedly new facts to the court's attention (*see People v Winkfield*, 44 AD3d 499, 500 [2007]; *People v Musgrove*, 261 AD2d 640, 641 [1999]).

At trial, the defendant requested a jury charge that he contended was relevant to the issue of "cross-racial identification" (*State v Cromedy*, 158 NJ 112, 115, 727 A2d 457, 458 [1999]). However, on the record presented, the Supreme Court properly denied the defendant's requested jury charge (*People v German*, 45 AD3d 861, 861 [2007]; *People v Ellison*, 8 AD3d 400, 401 [2004]).

The defendant's contention that the trial court violated the procedure for the consideration of jury notes, as set forth in *People v O'Rama* (78 NY2d 270 [1991]), is unpreserved for appellate review, as, under the circumstances of this case, the error was not a mode of proceedings error, as defense counsel had notice of each of the jury's notes and failed to object when the error could have been cured (*see People v Williams*, 21 NY3d 932, 935 [2013]; *People v DeRosario*, 81 NY2d 801, 803 [1993]; *People v Lykes*, 81 NY2d 767 [1992]; *People v Kahley*, 105 AD3d

1322, 1324 [2013]; *People v Jackson*, 52 AD3d 1052, 1053-1054 [2008]).

The defendant's claim of ineffective assistance of counsel, asserted in his pro se supplemental brief, is without merit. He was not deprived of his right to the effective assistance of counsel, who provided meaningful representation (*see People v Henry*, 95 NY2d 563, 565-566 [2000]; *People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Walston*, 101 AD3d 1156, 1156-1157 [2012], *mod on other grounds* 23 NY3d 986 [2014]).

However, as the People correctly concede, burglary in the third degree is a lesser-included offense of burglary in the second degree, and robbery in the third degree is a lesser-included offense of robbery in the second degree (*see* Penal Law §§ 140.25 [1] [b]; [2]; 140.20; *see also* Penal Law §§ 160.10 [2] [a]; 160.05). Thus, we vacate the defendant's convictions of burglary in the third degree (counts four and seven) and robbery in the third degree (count five), vacate the sentences imposed thereon, and dismiss those counts of the indictment (*see* CPL 300.40 [3] [b]; *People v Lee*, 39 NY2d 388, 390 [1976]; *People v Ortiz*, 95 AD3d 1140, 1141 [2012]). Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

69 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v LEONARD BLANC, Appellant. [990 NYS2d 872]—Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Suffolk County (R. Doyle, J.), imposed on August 23, 2011, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

As the prosecution concedes, the defendant's purported waiver of his right to appeal was invalid (*see People v Bradshaw*, 18 NY3d 257, 265 [2011]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]) and, thus, does not preclude review of his excessive sentence claim. However, the sentence imposed was not excessive (*see People v Suito*, 90 AD2d 80 [1982]). Eng, P.J., Mastro, Hall, Miller and LaSalle, JJ., concur.

70 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRUCE BLOCKER, Appellant. [990 NYS2d 888]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Modica, J.), imposed November 4, 2011, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's valid waiver of his right to appeal precludes review of his contention that the sentence imposed was exces-

sive (see *People v Bradshaw*, 18 NY3d 257, 264-267 [2011]; *People v Lopez*, 6 NY3d 248, 255-256 [2006]). Eng, P.J., Mastro, Hall and Roman, JJ., concur.

71 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TIMOTHY BROWN, Appellant. [990 NYS2d 872]—Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kohm, J.), rendered May 26, 2011, convicting him of robbery in the second degree and criminal possession of stolen property in the fourth degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contentions that the testimony of a police detective impermissibly bolstered (see *People v Trowbridge*, 305 NY 471 [1953]) the pretrial identification testimony are unpreserved for appellate review (see CPL 470.05 [2]; *People v Tavaréz*, 55 AD3d 932 [2008]) and, in any event, without merit (see *People v Totesau*, 112 AD3d 977, 978 [2013]; *People v Lassiter*, 74 AD3d 1094 [2010]; *People v Moore*, 159 AD2d 521 [1990]).

The defendant failed to preserve for appellate review his contention that the Supreme Court improperly permitted a police detective to testify that, in his opinion, an individual depicted in a surveillance video tape was the defendant (see CPL 470.05 [2]; *People v Dubois*, 116 AD3d 878 [2014]; *People v Alleyne*, 114 AD3d 804, 804 [2014]). In any event, the contention is without merit (see *People v Alleyne*, 114 AD3d at 804; *People v Ruiz*, 7 AD3d 737 [2004]; *People v Magin*, 1 AD3d 1024, 1025 [2003]).

Moreover, the defendant's contention that trial counsel's failure to preserve certain claims for appellate review constituted ineffective assistance of counsel is without merit (see *People v Stultz*, 2 NY3d 277, 287 [2004]; *People v Bedford*, 95 AD3d 1226, 1227 [2012]; *People v Archer*, 82 AD3d 781 [2011]; *People v Greenlee*, 70 AD3d 966 [2010]; *People v Taberas*, 60 AD3d 791 [2009]; *People v Hyatt*, 2 AD3d 749 [2003]).

The defendant's remaining contention is unpreserved for appellate review and, in any event, without merit. Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

72 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JASON D. COOPER, Appellant. [990 NYS2d 862]—

Crimes—Search Warrant—Probable Cause

Appeal by the defendant from a judgment of the Supreme Court, Suffolk County (R. Doyle, J.), rendered November 29, 2011, convicting him of criminal possession of a controlled

substance in the third degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the judgment is affirmed.

There is no merit to the defendant's contention that certain physical evidence recovered after law enforcement officials executed a search warrant at his premises should have been suppressed. There is a strong judicial preference for search warrants (*see People v Hanlon*, 36 NY2d 549, 558 [1975]; *People v Williams*, 249 AD2d 343, 344 [1998]). A warrant application must provide the court with sufficient information to support a reasonable belief that evidence of illegal activity will be present at the specific time and place of the search (*see People v Bigelow*, 66 NY2d 417, 423 [1985]; *People v Fricchione*, 20 AD3d 433 [2005]). Contrary to the defendant's contention, there was probable cause to issue the subject search warrant (*see CPL 690.10; People v Bigelow*, 66 NY2d at 423; *People v Traymore*, 241 AD2d 226, 229-230 [1998]; *People v Ianniello*, 156 AD2d 469 [1989]).

The defendant's contention regarding the alleged unreliability of the confidential informant who provided information leading to the issuance of the warrant is unpreserved for appellate review (*see CPL 470.05 [2]; People v Maxis*, 50 AD3d 922 [2008]; *People v Toellner*, 299 AD2d 567 [2002]; *see also People v Valverde*, 13 AD3d 658 [2004]). In any event, the defendant's contention is without merit (*see People v Corr*, 28 AD3d 574 [2006]).

The sentence imposed was not excessive (*see People v Felix*, 58 NY2d 156, 161 [1983]; *People v Suitte*, 90 AD2d 80 [1982]). Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

73 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RONALD HAYES, Appellant. [990 NYS2d 876]—

Crimes—Vacatur of Judgment of Conviction—Sufficiency of Plea Allocution—Review of Proceedings Underlying Judgment
 Crimes—Right to Counsel—Effective Representation—Inadequate Explanation of Deficiencies in Representation

Appeal by the defendant, by permission, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Ayres, J.), entered September 22, 2011, as denied, without a hearing, that branch of his motion which was pursuant to CPL 440.10 to vacate a judgment of the same court

rendered September 6, 1991, convicting him, upon his plea of guilty, of robbery in the second degree, and imposing sentence.

Ordered that the order is affirmed insofar as appealed from.

Contrary to the defendant's contention, sufficient facts appear on the record of the proceedings underlying the judgment of conviction to have permitted, upon appeal from such judgment, adequate review of the defendant's contention that his plea of guilty was not knowingly or intelligently entered (*see generally People v Pettress*, 109 AD3d 555, 555-556 [2013]; *People v Ortega*, 61 AD3d 705, 706 [2009]; *People v Kegel*, 55 AD3d 625, 625 [2008]; *People v Henderson*, 44 AD3d 873, 874 [2007]; *People v Cisco*, 208 AD2d 643, 643 [1994]). Accordingly, under the circumstances presented here, the defendant is barred from raising that contention on a motion to vacate the judgment (*see* CPL 440.10 [2] [c]; *see also People v Cooks*, 67 NY2d 100, 104 [1986]; *People v Chiu Mei Lan Kwok*, 51 AD3d 814, 815 [2008]).

The defendant failed to submit sworn allegations substantiating or tending to substantiate all essential facts necessary to support his claim that he did not receive the effective assistance of counsel during the sentencing proceeding (*see Strickland v Washington*, 466 US 668 [1984]; *People v Hernandez*, 22 NY3d 972 [2013]). Under these circumstances, the Supreme Court providently exercised its discretion in denying, without a hearing, that branch of his motion which was to set aside the sentence (*see* CPL 440.30 [4] [b]; *People v Ford*, 46 NY2d 1021, 1023 [1979]; *People v Williams*, 24 AD3d 575, 575 [2005]; *People v Wells*, 265 AD2d 589 [1999]; *People v Lake*, 213 AD2d 494, 495-496 [1995]).

The defendant's request for leave to prosecute a direct appeal from the judgment is not properly before this Court, as the proper procedure for making such a request is an application for a writ of error coram nobis, not an appeal from an order denying a motion made pursuant to CPL 440.10 (*see People v Syville*, 15 NY3d 391, 400 [2010]; *accord People v Dawkins*, 27 AD3d 576, 576 [2006]). Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

74 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KANAV KHOSLA, Appellant. [990 NYS2d 871]—Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Suffolk County (Kahn, J.), imposed May 4, 2009, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*,

90 AD2d 80 [1982]; *see also People v Haimson*, 164 AD2d 867 [1990]). Eng, P.J., Dillon, Austin, Sgroi and Maltese, JJ., concur.

75 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v GERALD LINSTER, Appellant. [990 NYS2d 858]—Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Grella, J.), rendered March 21, 2013, convicting him of robbery in the third degree and grand larceny in the fourth degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 348 [2007]), we accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

Contrary to the defendant's contention, he was not deprived of the effective assistance of counsel, as defense counsel provided meaningful representation (*see People v Benevento*, 91 NY2d 708 [1998]; *People v West*, 105 AD3d 781 [2013]; *People v Prescott*, 63 AD3d 1090 [2009]; *People v Velez*, 197 AD2d 651, 652 [1993]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80, 85-86 [1982]). Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

76 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ROBERT MICHAEL, Appellant. [990 NYS2d 879]—

Crimes—Appeal—Waiver of Right to Appeal Unenforceable Despite Execution of Written Waiver Form

Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Suffolk County (Braslow, J.), imposed February 26, 2013, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's purported waiver of his right to appeal was invalid (*see People v Lopez*, 6 NY3d 248, 256 [2006]). The record does not demonstrate that the defendant "grasped the concept of the appeal waiver and the nature of the right he was forgoing" (*People v Bradshaw*, 18 NY3d 257, 267 [2011]; *see People v Johnson*, 113 AD3d 635, 635 [2014]). Therefore, notwithstanding the defendant's execution of the written waiver form, it can-

not be said that he knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Pressley*, 116 AD3d 794 [2014]). Accordingly, review of the defendant's excessive sentence claim is not precluded.

Nevertheless, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Dillon, Lott, Sgroi and Maltese, JJ., concur.

77 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RAUL NUNEZ, Appellant. [991 NYS2d 121]—

Crimes—Lesser Included Offense—Reckless and Intentional Assault—No Evidence Defendant Acted Recklessly

Crimes—Instructions—Justification Defense—Assault on Police Officer

Crimes—Murder—Extreme Emotional Disturbance—Applicability to Attempted Murder

Crimes—Sentence—Concurrent and Consecutive Terms—Separate and Discrete Events

Crimes—Right to Remain Silent—Valid Waiver Notwithstanding Injuries

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kron, J.), rendered April 7, 2011, convicting him of attempted manslaughter in the first degree (two counts), aggravated assault upon a police officer, criminal possession of a weapon in the second degree, attempted assault in the first degree (two counts), assault on a police officer, theft of services, and resisting arrest, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Gross, J.), of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

Ordered that the judgment is modified, on the law, by vacating the conviction of assault on a police officer, as charged in count ten of the indictment, vacating the sentence imposed thereon, and remitting the matter to the Supreme Court, Queens County, for a new trial as to that count of the indictment; as so modified, the judgment is affirmed.

The charges against the defendant arose from an incident in which he shot and seriously wounded two police officers in a subway station, and allegedly attempted to shoot a third officer.

Contrary to the defendant's contention, the Supreme Court did not err in denying his request to charge assault in the second degree under Penal Law § 120.05 (4) as a lesser-included offense of the counts of attempted assault in the first degree and aggravated assault upon a police officer, with respect to the shooting of Police Officer Farina. When viewed in the light most favorable to the defendant, there was no reasonable view of the evidence that the defendant acted recklessly, rather than

intentionally, in firing a gun at Officer Farina, particularly as the record showed that the defendant grabbed a gun belonging to a police officer during a physical struggle with Officer Farina and then fired the gun in close proximity to Officer Farina, striking him (*see People v Gutt*, 101 AD3d 423, 424 [2012]; *People v Funchess*, 284 AD2d 478 [2001]; *People v Ellis*, 230 AD2d 751 [1996]).

However, the Supreme Court should have submitted a justification charge to the jury with respect to the crime of assault on a police officer under Penal Law § 120.08, as charged in count ten of the indictment. As relevant here, “justification is comprised of both subjective and objective elements. The subjective element is concerned with whether the defendant believed that the use of deadly force was necessary; while under the objective prong, the jury must consider whether a reasonable person in the defendant’s circumstances would have believed that deadly force was required” (*People v Umali*, 10 NY3d 417, 425 [2008]). When a defense of justification is raised, “the People must demonstrate beyond a reasonable doubt that the defendant did not believe deadly force was necessary or that a reasonable person in the same situation would not have perceived that deadly force was necessary” (*id.*). A trial “court is obliged to give a justification charge whenever the evidence, reasonably viewed in the light most favorable to the defendant, supports the charge” (*People v Lauderdale*, 295 AD2d 539, 540 [2002]; *see People v Padgett*, 60 NY2d 142, 144 [1983]; *People v Torres*, 288 AD2d 406 [2001]).

Contrary to the determination of the Supreme Court, the defense of justification is potentially applicable to the crime of assault on a police officer under Penal Law § 120.08 (*see People v Cain*, 236 AD2d 788 [1997]; *People v Dare*, 175 AD2d 586, 586-587 [1991]; *see also People v Magliato*, 68 NY2d 24, 29 [1986]). Further, a reasonable view of the evidence in this case supported a justification charge with respect to count ten of the indictment charging the defendant with assault on a police officer under Penal Law § 120.08 (*see People v Fermin*, 36 AD3d 934, 935-936 [2007]; *see also People v Molina*, 101 AD3d 577 [2012]; *People v Curry*, 85 AD3d 1209, 1211-1212 [2011]). Consequently, the defendant is entitled to a new trial as to count ten of the indictment. However, contrary to the defendant’s assertion, there was no “spillover” effect emanating from this error with respect to the remaining charges as, *inter alia*, the trial court delivered a justification charge with respect to the remaining counts to which it was applicable.

The Supreme Court did not improvidently exercise its discre-

tion in denying the jury's request for a readback of the defense summation remarks (see *People v Smith*, 4 AD3d 378 [2004]; *People v Dixon*, 277 AD2d 65 [2000]).

The sentences imposed with respect to the convictions of attempted manslaughter in the first degree (two counts), aggravated assault upon a police officer, criminal possession of a weapon in the second degree, attempted assault in the first degree (two counts), theft of services, and resisting arrest were not excessive (see *People v Suito*, 90 AD2d 80 [1982]).

With respect to the first contention raised by the defendant in his pro se supplemental brief, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt with respect to the crimes of attempted manslaughter in the first degree (two counts) and aggravated assault upon a police officer was not against the weight of the evidence (see *People v Romero*, 7 NY3d 633 [2006]). Further, under the circumstances of this case, the defendant was properly convicted of attempted manslaughter in the first degree. Where, as here, a defendant raises the affirmative defense of extreme emotional disturbance to mitigate a charge of attempted murder, he or she may be convicted of attempted manslaughter in the first degree if the jury accepts that defense (see Penal Law §§ 110.00, 125.20 [2]; *People v Rabideau*, 82 AD3d 1283, 1285-1286 [2011]; *People v Ledesma*, 300 AD2d 72 [2002]; *People v Motter*, 235 AD2d 582, 584 [1997]; *People v White*, 125 AD2d 932, 933 [1986]; see also *People v Robinson*, 143 AD2d 376, 377 [1988]; *People v Harris*, 138 AD2d 626, 627 [1988]; *People v Tabarez*, 113 AD2d 461, 462 [1985], *aff'd* 69 NY2d 663 [1986]).

The defendant failed to preserve for appellate review his contentions regarding the jury charge as to extreme emotional disturbance, and regarding the form of the verdict sheet (see CPL 470.05 [2]). In any event, these contentions are without merit (see Penal Law § 125.20 [2]; see also Penal Law § 125.25 [1] [a]).

Contrary to the defendant's contention, the Supreme Court did not err in imposing consecutive sentences with respect to counts two and five of the indictment, as the record showed that those counts were based on separate and discrete events (see *People v McKnight*, 16 NY3d 43, 49-50 [2010]; *People v*

Crawford, 112 AD3d 734 [2013]; *see also People v Holmes*, 92 AD3d 957 [2012]).

The defendant failed to preserve for appellate review his contention regarding the trial court's response to certain jury notes. Further, the alleged error did not affect the mode of trial proceedings; thus, preservation was required (*see People v Williams*, 21 NY3d 932, 934-935 [2013]). In any event, this contention is without merit (*see People v Almodovar*, 62 NY2d 126, 131-132 [1984]).

The hearing court did not err in denying that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials. The hearing record showed that notwithstanding his injuries, the defendant made a knowing, voluntary, and intelligent waiver of his *Miranda* rights (*see Miranda v Arizona*, 384 US 436 [1966]; *People v Legere*, 81 AD3d 746, 748 [2011]; *People v Braithwaite*, 286 AD2d 507 [2001]; *People v Pearce*, 283 AD2d 1007 [2001]).

The record, in totality, shows that the defendant was afforded the effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]). Mastro, J.P., Lott, Sgroi and LaSalle, JJ., concur.

78 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ENOS RAGGUETE, Appellant. [991 NYS2d 131]—

Crimes—Assault—Serious Physical Injury—Sufficiency of Evidence
 Crimes—Attempt—Assault—Victim Stabbed and Slashed Repeatedly with Knife Until She Lost Consciousness
 Crimes—Right to Counsel—Effective Representation—Mixed Claim of Ineffectiveness—Appellate Review

Appeal by the defendant from a judgment of the Supreme Court, Kings County (D'Emic, J.), rendered February 18, 2010, convicting him of assault in the first degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is modified, as a matter of discretion in the interest of justice, by reducing the defendant's conviction of assault in the first degree to attempted assault in the first degree, and by vacating the sentence imposed thereon; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for sentencing on the conviction of attempted assault in the first degree.

The defendant's contention that the evidence was legally insufficient to support his conviction of assault in the first degree is unpreserved for appellate review (*see CPL 470.05* [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Gray*, 86 NY2d 10, 19 [1995]). However, upon reviewing this contention

in the interest of justice (see CPL 470.10 [2]; *People v Wingate*, 70 AD3d 734 [2010]; *People v Gilford*, 65 AD3d 840, 841 [2009], *affd* 16 NY3d 864 [2011]), we find that the evidence, viewed in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620 [1983]), was legally insufficient to establish the defendant's guilt of assault in the first degree because the complainant did not suffer a "serious physical injury" as a result of the attack by the defendant (Penal Law §§ 120.10 [1]; 10.00 [10]; see *People v Ham*, 67 AD3d 1038, 1039-1040 [2009]; *People v Gilford*, 65 AD3d at 841; *People v Clark*, 42 AD3d 957, 958 [2007]; *People v Gray*, 30 AD3d 771, 772-773 [2006]). The prosecution failed to demonstrate beyond a reasonable doubt either that the complainant suffered serious and protracted disfigurement (see *People v Stewart*, 18 NY3d 831 [2011]; *People v McKinnon*, 15 NY3d 311 [2010]), or that a pulmonary embolism which she experienced subsequent to the incident was caused by the defendant's actions. Nevertheless, the evidence presented at trial established beyond a reasonable doubt that the defendant, who threatened to kill the complainant and who stabbed and slashed her repeatedly with a knife until she lost consciousness, acted with the intent to inflict serious physical injury and came "dangerously near" to committing the completed crime (*People v Kassebaum*, 95 NY2d 611, 618 [2001]; see *People v Mazariego*, 117 AD3d 1082 [2014]). Accordingly, we modify the judgment by reducing the defendant's conviction of assault in the first degree to attempted assault in the first degree, and we remit the matter to the Supreme Court for sentencing on the conviction of attempted assault in the first degree (see *People v Madera*, 103 AD3d 1197, 1198-1199 [2013]; *People v Brown*, 100 AD3d 1035, 1036 [2012]; *People v Serrano*, 74 AD3d 1104, 1106 [2010]).

The defendant's contention that he was deprived of the effective assistance of counsel is based, in part, on matter appearing on the record and, in part, on matter outside the record and, thus, constitutes a "'mixed claim[]'" of ineffective assistance (*People v Maxwell*, 89 AD3d 1108, 1109 [2011], quoting *People v Evans*, 16 NY3d 571, 575 n 2 [2011]). In this case, it is not evident from the matter appearing on the record that the defendant was deprived of the effective assistance of counsel (cf. *People v Crump*, 53 NY2d 824, 825 [1981]; *People v Brown*, 45 NY2d 852, 853-854 [1978]). Since the defendant's claim of ineffective assistance of counsel cannot be resolved without reference to matter outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety (see *People v Freeman*, 93 AD3d 805, 806 [2012]; *People v Maxwell*, 89 AD3d at 1109). Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

79 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v LENOX RAMSAY, Appellant. [990 NYS2d 891]—Appeals by the defendant, as limited by his motion, from two sentences of the Supreme Court, Kings County (D’Emic, J.), both imposed July 19, 2010, on the ground that the sentences were excessive.

Ordered that the sentences are affirmed.

The defendant’s purported waiver of his right to appeal was invalid (*see People v Bradshaw*, 18 NY3d 257, 265 [2011]; *People v DeSimone*, 80 NY2d 273, 283 [1992]) and, thus, does not preclude review of his excessive sentence claim. However, contrary to the defendant’s contention, the sentences imposed were not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Skelos, Leventhal, Roman and Duffy, JJ., concur.

80 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAMES M. RICHARDSON, Appellant. [990 NYS2d 884]—Appeal by the defendant from a judgment of the County Court, Orange County (De Rosa, J.), rendered November 17, 2010, convicting him of criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which he moves for leave to withdraw as counsel for the appellant.

Ordered that the judgment is affirmed.

We are satisfied with the sufficiency of the brief filed by the defendant’s assigned counsel pursuant to *Anders v California* (386 US 738 [1967]). Counsel has informed this Court that the defendant has not authorized counsel to raise any issues related to whether the defendant should have been allowed to withdraw his plea. Upon an independent review of the record, we conclude that there are no remaining nonfrivolous issues which could be raised on appeal. Counsel’s application for leave to withdraw as counsel is, therefore, granted (*see Anders v California*, 386 US 738 [1967]; *People v Cardwell*, 98 AD3d 986 [2012]; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252 [2011]; *People v Paige*, 54 AD2d 631 [1976]; *cf. People v Gonzalez*, 47 NY2d 606 [1979]). Rivera, J.P., Dickerson, Chambers, Hinds-Radix and Maltese, JJ., concur.

81 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DEREK SIMMONS, Appellant. [990 NYS2d 858]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated May 17, 2011, (*People v Simmons*, 84 AD3d 1120 [2011]), affirming a judgment of the Supreme Court, Queens County, rendered November 19, 2008.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Mastro, J.P., Leventhal, Sgroi and Hinds-Radix, JJ., concur.

82 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSEPH SMITH, Appellant. [990 NYS2d 884]—Appeal by the defendant from an order of the Supreme Court, Kings County (Chun, J.), entered April 19, 2012, which denied his motion to be resentenced pursuant to CPL 440.46 on his conviction of criminal sale of a controlled substance in the third degree, which sentence was originally imposed, upon his plea of guilty, on October 24, 2002.

Motion by the respondent to dismiss the appeal on the ground that the appeal has been rendered academic.

Ordered that the motion is granted; and it is further,

Ordered that the appeal is dismissed as academic.

Inasmuch as the maximum term of the defendant's sentence expired during the pendency of this appeal, the appeal has been rendered academic (*see People v Paulin*, 17 NY3d 238, 242 [2011]; *People v Verdejo*, 112 AD3d 761, 761 [2013]; *People v Hernandez*, 108 AD3d 640, 641 [2013]). Balkin, J.P., Austin, LaSalle and Barros, JJ., concur.

83 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CAMEY TOBIN, Appellant. [990 NYS2d 866]—Appeal by the defendant from a judgment of the County Court, Nassau County (Gulotta, Jr., J.), rendered March 1, 2013, convicting her of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, upon her plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which he moves for leave to withdraw as counsel for the appellant.

Ordered that the judgment is affirmed.

We are satisfied with the sufficiency of the brief filed by the defendant's assigned counsel pursuant to *Anders v California* (386 US 738 [1967]), and, upon an independent review of the record, we conclude that there are no nonfrivolous issues which could be raised on appeal. Counsel's application for leave to withdraw as counsel is, therefore, granted (*see Anders v California*, 386 US 738 [1967]; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252 [2011]; *People v Paige*, 54 AD2d 631 [1976]; *cf. People v Gonzalez*, 47 NY2d 606 [1979]). Mastro, J.P., Lott, Austin and Duffy, JJ., concur.

84 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRIAN TORRES, Appellant. [990 NYS2d 887]—Appeal by the defendant from a sentence of the Supreme Court, Queens County (Latella, J.), imposed November 3, 2011, on the ground that the sentence is excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Balkin, Dickerson, Chambers and Hinds-Radix, JJ., concur.

85 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHARON Y. WILLIAMS, Appellant. [991 NYS2d 427]—

Crimes—Appeal—Invalid Waiver of Right to Appeal—Defendant Not Made Aware of Meaning of Right to Appeal

Crimes—Sentence—Second Felony Offender—Predicate Offense Committed within 10-Year Look-Back Period

Crimes—Right to Counsel—Effective Representation—Mixed Claim of Ineffectiveness—Appellate Review

Appeals by the defendant from two judgments of the County Court, Suffolk County (Braslow, J.), both rendered March 21, 2012, convicting her of grand larceny in the second degree under indictment No. 735-11, and forgery in the second degree (two counts) under superior court information No. 2965-11, upon her pleas of guilty, and imposing sentences.

Ordered that the judgment under indictment No. 735-11 is affirmed; and it is further,

Ordered that the judgment under superior court information No. 2965-11 is modified, as a matter of discretion in the interest of justice, by vacating the provisions of the sentence directing the defendant to make restitution in a certain sum; as so modified, that judgment is affirmed.

In August 2011, the defendant was convicted of grand larceny in the second degree (Penal Law § 155.40) under indictment No. 735-11, upon her plea of guilty. The plea agreement called for a sentence not to exceed an indeterminate term of imprisonment of four to eight years, and the defendant's payment of restitution not to exceed a certain amount. The defendant was also adjudicated a second felony offender. While awaiting sentencing on that conviction, the defendant committed further crimes. In December 2011, she waived her right to be prosecuted by indictment and was arraigned on superior court information No. 2965-11. The defendant pleaded guilty under that superior court information to two counts of forgery in the second degree (Penal Law § 170.10), and she was promised a specific total aggregate sentence. In March 2012, at the outset of the sentencing

proceeding on both accusatory instruments, the defendant was notified that the County Court intended to impose an enhanced prison term and an enhanced amount of restitution on the conviction under indictment No. 735-11. The enhancements were specified. Upon being given an opportunity to address the court, neither the defendant nor defense counsel objected to the enhancements. The court then sentenced the defendant on the convictions under both accusatory instruments as a second felony offender. Under superior court information No. 2965-11, the defendant was sentenced to prison terms consistent with the plea agreement, but she was also ordered to pay restitution, notwithstanding that restitution was not part of the plea agreement under that accusatory instrument.

On appeal, the defendant raises numerous contentions with respect to the judgments. Initially, as the defendant correctly contends, she did not validly waive her right to appeal, inasmuch as the record fails to demonstrate that the defendant was made aware of the meaning of the right to appeal (*see People v Bradshaw*, 18 NY3d 257, 265 [2011]).

Turning to the merits, in connection with the conviction under indictment No. 735-11, the defendant was required to timely object to the court's imposition of restitution in order to preserve for appellate review her challenge thereto, since restitution was expressly made a part of the plea agreement (*see People v Jerome*, 110 AD3d 739, 740 [2013]). The defendant was also required to timely object to the court's imposition of an enhanced term of imprisonment to the extent that the enhancement was based on her violation of certain conditions of the plea agreement (*see People v Browning*, 44 AD3d 1067 [2007]). The defendant's contentions with respect to these two issues are unpreserved for appellate review (*see People v McAlpin*, 17 NY3d 936, 938 [2011]; *People v Joy*, 114 AD3d 809, 809 [2014]; *People v Totesau*, 112 AD3d 977, 978-979 [2013]; *People v Woods*, 110 AD3d 748, 748 [2013]; *People v Jerome*, 110 AD3d at 740), and we decline to reach them in the exercise of our interest of justice jurisdiction.

The preservation requirement does not apply to the defendant's contention that she was improperly sentenced as a second felony offender on her conviction of grand larceny in the second degree under indictment No. 735-11, since the defendant is essentially challenging the lawfulness of her sentence, and the facts underlying this contention appear on the face of the record (*see People v Samms*, 95 NY2d 52, 56-57 [2000]). Nonetheless, the defendant's contention in this regard is without merit, as the record demonstrates that the predicate offense was commit-

ted within the 10-year “look back” period of Penal Law § 70.06 (1) (b) (iv) and (v).

The preservation requirement does apply to the defendant’s contention that she was improperly sentenced as a second felony offender on her convictions under superior court information No. 2965-11, since the facts underlying her contention in this regard do not appear on the face of the record (*see People v Nieves*, 2 NY3d 310, 315 [2004]; *cf. People v Samms*, 95 NY2d at 58; *People v Stanley*, 12 AD3d 467, 467 [2004]). Here, the defendant failed to preserve for appellate review her contention that she was improperly sentenced as a second felony offender on her convictions under superior court information No. 2965-11, inasmuch as she did not object to the court’s adjudication of her as a second felony offender in connection with that accusatory instrument, and we decline to reach that contention in the exercise of our interest of justice jurisdiction.

The defendant likewise did not preserve for appellate review her contention that the County Court erred in ordering her to make restitution on the conviction under superior court information No. 2965-11 (*see People v Murray*, 15 NY3d 725, 726 [2010]; *cf. People v McAlpin*, 17 NY3d 936, 938 [2011]), but we reach that contention in the exercise of our interest of justice jurisdiction. A court may not impose restitution when restitution is not part of the plea agreement unless it first gives the defendant an opportunity to withdraw the plea of guilty (*see People v Pettress*, 109 AD3d 555, 555-556 [2013]; *People v Esquivel*, 100 AD3d 652, 652 [2012]; *People v Gibson*, 88 AD3d 1012, 1012 [2011]; *People v Kegel*, 55 AD3d 625, 625 [2008]). Unlike the plea agreement made in connection with the criminal action prosecuted under indictment No. 735-11, the defendant was never informed that restitution would be part of the plea agreement under superior court information No. 2965-11. Accordingly, the court improperly imposed restitution in that case without first giving the defendant an opportunity to withdraw her plea of guilty. The parties agree that the judgment entered under superior court information No. 2965-11 should be modified by deleting the provision regarding restitution, and we deem it appropriate to do so in the interest of justice (*see People v Thompson*, 105 AD3d 1067, 1067 [2013]).

The defendant’s claim of ineffective assistance of counsel is based in part on matter on the record and in part on matter dehors the record and, thus, constitutes a “‘mixed claim[]’” of ineffective assistance (*People v Maxwell*, 89 AD3d 1108, 1109 [2011], quoting *People v Evans*, 16 NY3d 571, 575 n 2 [2011]). In this case, it is not evident from the matter appearing on the

record that the defendant was deprived of the effective assistance of counsel (*see People v Addison*, 107 AD3d 730, 732 [2013]; *cf. People v Crump*, 53 NY2d 824 [1981]). Since the defendant's claim of ineffective assistance of counsel cannot be resolved without reference to matter outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety (*see People v Addison*, 107 AD3d at 732; *People v Freeman*, 93 AD3d 805, 806 [2012]; *People v Maxwell*, 89 AD3d at 1109).

The defendant failed to preserve for appellate review her contention that her sentences constituted cruel and unusual punishment (*see People v Gil*, 109 AD3d 484, 485 [2013]), and the record does not permit a full evaluation of the grounds on which the defendant bases this contention. We decline to reach the contention in the exercise of our interest of justice jurisdiction. Contrary to the People's contention, a contention that a sentence was excessive is not subject to preservation requirements. A claim that a sentence is excessive is, by definition (*see* CPL 470.15 [6] [b]), addressed to this Court's interest of justice jurisdiction, and does not need to be preserved as a question of law (*cf. CPL 470.05* [2]; CPL 470.15 [4]). Nonetheless, the sentences imposed were not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Rivera, J.P., Balkin, Dickerson and Cohen, JJ., concur.

86 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SIDNEY WISDOM, Appellant. [991 NYS2d 141]—

Crimes—Proof of Other Crimes—Proof of Uncharged Crimes to Establish Motive of Perpetrator

Crimes—Evidence—Hearsay Evidence—Failure to Give Limiting Instruction to Jury Sua Sponte was Harmless

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Dowling, J.), rendered October 30, 1997, convicting him of attempted murder in the second degree (two counts), burglary in the first degree, and endangering the welfare of a child, upon a jury verdict, and imposing sentence. By opinion and order dated July 11, 2012, this Court reversed the judgment, on the law, granted the defendant's motion to dismiss the indictment pursuant to CPL 210.20 (1) (c) and 210.35 (5), and granted the People leave to resubmit the charges to another grand jury (*see People v Wisdom*, 98 AD3d 241 [2012]). On June 5, 2014, the Court of Appeals reversed the opinion and order of this Court, reinstated the judgment of conviction, and remitted the matter to this Court for consideration of the facts and issues raised but not determined on the appeal to this Court (*see People v Wisdom*, 23 NY3d 970 [2014]).

Justice Lott has been substituted for former Justice Florio (*see* 22 NYCRR 670.1 [c]).

Ordered that, upon remittitur from the Court of Appeals, the judgment is affirmed.

On January 31, 1996, the complainant and her four-year-old granddaughter were attacked in the complainant's apartment. Subsequently, the defendant was arrested in connection with the incident. During trial, the court admitted into evidence testimony from a daughter of the complainant regarding the course of her relationship with the defendant. The witness testified that she had helped the defendant when he was "down on his luck," but that he became increasingly abusive to her, displaying a jealousy about a perceived relationship that did not exist between them. The witness's testimony recounted, among other things, the defendant's stalking behavior and two attacks the defendant committed on her before the attack against her mother and niece. The court admitted the evidence as relevant to the defendant's motive, intent, and "factual background" of the case. On appeal, the defendant contends that the witness's testimony regarding his uncharged acts against her should not have been admitted. He argues that the testimony was not relevant for a proper purpose, but only on the improper issue of his propensity to be violent. Further, he contends that even if the evidence was relevant to a proper purpose, the prejudicial effect far outweighed any probative value. We disagree.

Evidence of uncharged crimes is, under the *Molineux* rule (*see People v Molineux*, 168 NY 264 [1901]), inadmissible if its only purpose is to prove the defendant's propensity to commit crimes (*see People v Harris*, 117 AD3d 847, 854 [2014]). Nonetheless, evidence of uncharged crimes may be admissible under the *Molineux* rule if the evidence is admissible for a proper purpose (*see People v Gamble*, 18 NY3d 386, 397-398 [2012]). When a court is asked to admit evidence of a defendant's uncharged crimes, the court must first determine whether, as a matter of law, the evidence is probative on a relevant and material issue. If it is, the court must balance the probative value and need for the evidence against the likelihood for prejudice (*see People v Leeson*, 12 NY3d 823, 826-827 [2009]; *People v Alvino*, 71 NY2d 233, 242 [1987]; *People v Wilkinson*, 71 AD3d 249, 254-255 [2010]).

In this case, the evidence of the defendant's uncharged crimes against the complainant's daughter was relevant and probative as to the defendant's motive to commit the charged crimes against the complainant and her granddaughter, and to give the jury an appropriate context in which to evaluate the case. Ac-

cordingly, it was not inadmissible as a matter of law. Further, the court did not improvidently exercise its discretion in admitting the evidence regarding the complainant's daughter, because the probative value and need for it outweighed the potential for unfair prejudice. The complainant had told the defendant at one point that he was not welcome in her home. This perceived slight could not have explained the depth of the anger evinced by the brutality of the defendant's attacks on the complainant and her four-year-old granddaughter. The evidence of uncharged crimes against the complainant's daughter made clear to the jury that the defendant's rage began against the complainant's daughter and arose from his relationship with her, rather than from anything the complainant had said to the defendant (*see People v Gamble*, 18 NY3d at 392; *People v Dorm*, 12 NY3d 16, 18-19 [2009]; *People v Wilkinson*, 71 AD3d at 255). Without that evidence, the jury would have been deprived of necessary context with respect to the crimes and the defendant's reason for committing them.

The defendant next contends that it was improper for the court to permit the complainant's daughter to testify on redirect examination that she was told shortly after the attacks that the defendant had tried to kill her mother and niece. The defendant's contention is, in part, unpreserved for appellate review (*see* CPL 470.05 [2]). To the extent that the issue is preserved, it is meritless. During cross-examination, defense counsel questioned the witness about why she was able to remember the day before the attack. This opened the door to the challenged testimony, which was elicited on redirect examination to explain why the witness was able to remember seeing the defendant in front of her home the day before her mother and niece were attacked (*see People v Barcero*, 116 AD3d 1060, 1061 [2014]). It was not elicited for the purpose of identifying the defendant as the assailant. Accordingly, the testimony was not inadmissible hearsay (*see People v Kass*, 59 AD3d 77, 85-86 [2008]). Moreover, the defendant failed to request that the court instruct the jury as to the proper use of that testimony. Any error in the court's failure to sua sponte issue a limiting instruction was harmless. The evidence of the defendant's guilt was overwhelming and there was no significant probability that the defendant would have been acquitted had the court given a limiting instruction with respect to this evidence. Moreover, the absence of a limiting instruction did not deprive the defendant of a fair trial (*see People v Crimmins*, 36 NY2d 230 [1975]). Mastro, J.P., Balkin, Chambers and Lott, JJ., concur.

(August 27, 2014)

1 KERRY BACON et al., Plaintiffs, v 4042 AUSTIN BLVD., LLC, Defendant/Third-Party Plaintiff-Appellant. SOUTH ISLAND MEDICAL, LLP, INC., Third-Party Defendant-Respondent. [991 NYS2d 365]—

Indemnity—Contractual Indemnification—Commercial Lease

In an action to recover damages for personal injuries, etc., the defendant/third-party plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Cozzens, Jr., J.), entered April 1, 2013, as denied that branch of its motion which was for summary judgment on its third-party cause of action for contractual indemnification and granted that branch of the cross motion of the third-party defendant which was for summary judgment dismissing the third-party cause of action for contractual indemnification.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, that branch of the motion of the defendant/third-party plaintiff which was for summary judgment on its third-party cause of action for contractual indemnification is granted, and that branch of the cross motion of the third-party defendant which was for summary judgment dismissing the third-party cause of action for contractual indemnification is denied.

On February 7, 2011, the plaintiff Kerry Bacon (hereinafter the injured plaintiff) allegedly was injured when she slipped and fell on ice outside the entrance to a building owned by the defendant, 4042 Austin Blvd., LLC (hereinafter 4042 Austin), and leased to the third-party defendant, South Island Medical, LLP, Inc. (hereinafter South Island). The injured plaintiff, and her husband suing derivatively, commenced this action to recover damages for personal injuries against 4042 Austin. 4042 Austin commenced a third-party action against South Island, inter alia, for contractual indemnification. Thereafter, 4042 Austin moved, among other things, for summary judgment on its third-party cause of action for contractual indemnification, and South Island cross-moved, inter alia, for summary judgment dismissing the third-party cause of action for contractual indemnification. In an order entered April 1, 2013, the Supreme Court, among other things, denied that branch of 4042 Austin's motion which was for summary judgment on its third-party cause of action for contractual indemnification, and granted that branch of South Island's cross motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification. 4042 Austin appeals from those portions of the order.

“[W]here, as here, the liability is to a third party, General Obligations Law § 5-321 does not preclude enforcement of an indemnification provision in a commercial lease negotiated at arm’s length between two sophisticated parties when coupled with an insurance procurement requirement” (*DiBuono v Abbey, LLC*, 95 AD3d 1062, 1064 [2012] [internal quotation marks omitted]; see *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 418-419 [2006]; *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153 [1977]). Here, 4042 Austin established, prima facie, that the purpose of the indemnification provision in the subject lease was not to exempt it from liability to the victim for its own negligence, but rather to allocate the risk of liability to third parties between the lessor and the lessee (see *DiBuono v Abbey, LLC*, 95 AD3d at 1064; *Castano v Zee-Jay Realty Co.*, 55 AD3d 770, 772 [2008]). In opposition to 4042 Austin’s prima facie showing, South Island failed to raise a triable issue of fact.

South Island’s remaining contentions are either improperly raised for the first time on appeal or without merit.

Accordingly, the Supreme Court should have granted that branch of 4042 Austin’s motion which was for summary judgment on its third-party cause of action for contractual indemnification, and denied that branch of South Island’s cross motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification. Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

2 BENJAMIN BARRAGAN, JR., Respondent, v CITY SCHOOL DISTRICT OF NEW ROCHELLE, Appellant. [991 NYS2d 367]—

Schools—Students—Injury to Student

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Westchester County (Smith, J.), entered September 3, 2013, which denied its motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff, then a senior at New Rochelle High School, a school within the defendant City School District of New Rochelle, cut his finger while working on a project in architecture class. He was sent to the school nurses’ office to receive care. One of the nurses instructed him to wash his finger at the sink unattended. After walking back from the sink, the plaintiff remained standing while the nurse dabbed alcohol on the cut and applied a bandage to it. As the nurse was attending to the plaintiff’s finger, the plaintiff fell and struck his head on the tile floor, allegedly causing cerebral hemorrhaging for which he required hospitalization.

The plaintiff commenced this action against the defendant, alleging that it proximately caused his injuries when it failed to properly supervise him in loco parentis following his injury. Further, he alleged that the defendant departed from good and accepted standards of school nursing care in its failure to perform a proper school nursing assessment of him and to provide appropriate medical treatment. In particular, the plaintiff claimed that the defendant's school nursing staff was negligent in failing to review his medical chart either before or while rendering care to him and permitting him to be left standing unattended, when the staff knew or should have known that doing so was hazardous and dangerous.

The defendant moved for summary judgment dismissing the complaint. In support of its motion, the defendant submitted, inter alia, the plaintiff's school medical records, the transcript of the plaintiff's General Municipal Law § 50-h hearing testimony, and the transcript of the plaintiff's deposition testimony. This evidence failed to eliminate triable issues of fact as to whether the school was on notice that the plaintiff had a prior history of fainting and as to whether the plaintiff informed the nurse on the day of the incident that he was feeling lightheaded. Under these circumstances, the defendant failed to make a prima facie showing that it did not breach its duty to supervise the plaintiff in loco parentis (*see Mirand v City of New York*, 84 NY2d 44 [1994]) and/or breach its separate duty to provide the plaintiff with adequate nursing care, which proximately caused the plaintiff's injuries (*see Cham v St. Mary's Hosp. of Brooklyn*, 72 AD3d 1003, 1005-1006 [2010]; *cf. Begley v City of New York*, 111 AD3d 5 [2013]).

Since the defendant failed to establish its prima facie entitlement to judgment as a matter of law, we need not review the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

3 MARY ALICE BENNETT, Respondent, v SPYROS PANOS et al., Defendants, and MID HUDSON MEDICAL GROUP, P.C., et al., Appellants. [991 NYS2d 372]—

Limitation of Actions—Medical Malpractice

In an action, inter alia, to recover damages for medical malpractice, the defendant Robert Morgantini appeals, as limited by his brief, from so much of an order of the Supreme Court, Dutchess County (Lubell, J.), dated November 29, 2012, as

denied his motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred, and the defendant Mid Hudson Medical Group, P.C., separately appeals, as limited by its brief, from so much of the same order as denied that branch of its motion which was pursuant to CPLR 3211 (a) (7) to dismiss the claims in the complaint to recover damages for negligent hiring and supervision insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from by the defendant Robert Morgantini, on the law, and his motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred is granted; and it is further,

Ordered that the order is affirmed insofar as appealed from by the defendant Mid Hudson Medical Group, P.C.; and it is further,

Ordered that one bill of costs is awarded to the defendant Robert Morgantini, payable by the plaintiff, and one bill of costs is awarded to the plaintiff, payable by the defendant Mid Hudson Medical Group, P.C.

According to the plaintiff, in or about December 2008, she sought treatment for her right hip from the defendant Spyros Panos, a physician employed by the defendant Mid Hudson Medical Group, P.C. (hereinafter Mid Hudson). On June 23, 2009, Panos performed surgery on the plaintiff's right hip. During the surgery, Panos was assisted by the defendant Robert Morgantini, a registered nurse. On February 24, 2012, the plaintiff commenced this action against Morgantini and Mid Hudson, among others, inter alia, to recover damages for medical malpractice.

The Supreme Court should have granted Morgantini's motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against him as time-barred. In support of his motion, Morgantini established, prima facie, that the action was commenced after the expiration of the applicable 2¹/₂-year limitations period. Contrary to the plaintiff's contention, she failed to raise a question of fact as to whether the doctrine of equitable estoppel barred Morgantini from asserting the affirmative defense of the statute of limitations. In opposition to Morgantini's motion, the plaintiff failed to present evidence in support of her allegation that Morgantini made a misrepresentation after the subject surgery for the purpose of concealing the alleged health-care malpractice (see *Bennie v Hudson Val. Ctr. at St. Francis, LLC*, 115 AD3d 899, 900 [2014]; see also *Plain v Vassar Bros. Hosp.*, 115 AD3d 922, 923 [2014]; *Nelson v Hudson Val.*

Ctr. at St. Francis, LLC, 115 AD3d 917, 918 [2014]; *Butcher v Panos*, 115 AD3d 900, 901 [2014]). Further, the plaintiff failed to establish that facts essential to justify opposition to Morgantini's motion may exist, but, absent discovery, could not be stated (see CPLR 3211 [d]; see also *Bennie v Hudson Val. Ctr. at St. Francis, LLC*, 115 AD3d at 900).

However, the Supreme Court properly denied that branch of Mid Hudson's motion which was pursuant to CPLR 3211 (a) (7) to dismiss the claims in the complaint to recover damages for negligent hiring and supervision insofar as asserted against it (see *Saretto v Panos*, 120 AD3d 786 [2014] [decided herewith]). Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

4 ROBREA BLACK, Appellant-Respondent, v NEW YORK CITY HOUSING AUTHORITY, Appellant, and WOMAN WORK CONSTRUCT. CORP., Respondent, et al., Defendants. [991 NYS2d 337]—

Negligence—Maintenance of Premises—Criminal Acts by Third Parties

In an action to recover damages for personal injuries, the plaintiff appeals from so much of an order of the Supreme Court, Kings County (Velasquez, J.), dated May 9, 2012, as granted the motion of the defendant Woman Work Construct. Corp. pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it, and the defendant New York City Housing Authority cross-appeals from so much of the same order as denied its motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from; and it is further,

Ordered that the order is reversed insofar as cross-appealed from, and the motion of the defendant New York City Housing Authority pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it is granted; and it is further,

Ordered that one bill of costs is awarded to the defendant New York City Housing Authority and the defendant Woman Work Construct. Corp., payable by the plaintiff.

In June 2011, the plaintiff commenced this action against, among others, Woman Work Construct. Corp. (hereinafter WWCC) and the New York City Housing Authority (hereinafter NYCHA) to recover damages for personal injuries she allegedly sustained on July 30, 2010, when she was assaulted on an exterior walkway in a NYCHA housing development where she resided. At the time of the assault, the area around the site of the assault was either undergoing construction or repairs.

NYCHA had hired WWCC to perform work on the project, and WWCC allegedly erected construction fencing, in the form of wooden boards, around the area where the assault occurred, as required by applicable safety codes. The plaintiff alleged that NYCHA and WWCC were negligent in that the construction and repair work being undertaken made the area of the walkway unsafe, dangerous, and hazardous, as the construction fencing created a physical barrier to public visibility. NYCHA and WWCC separately moved pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against each of them on the ground that the plaintiff failed to state a cause of action against either of them. The Supreme Court granted WWCC's motion and denied NYCHA's motion.

"In considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court should 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Simos v Vic-Armen Realty, LLC*, 92 AD3d 760, 761 [2012], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see *Sinensky v Rokowsky*, 22 AD3d 563, 564 [2005]).

Here, NYCHA and WWCC each established their entitlement to dismissal. Even accepting the allegations in the complaint as true, the erection of construction fencing around an exterior walkway that resulted in a physical barrier to public visibility of the walkway did not constitute either the breach of a duty of care to the plaintiff, or the proximate cause of injuries inflicted upon the plaintiff by third parties (see generally *James v Jamie Towers Hous. Co.*, 99 NY2d 639, 641 [2003]; *Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]; *Miller v State of New York*, 62 NY2d 506, 509, 513 [1984]; *M.D. v Pasadena Realty Co.*, 300 AD2d 235, 237 [2002]; cf. *Brewster v Prince Apts.*, 264 AD2d 611, 612-613 [1999]). Accordingly, the Supreme Court properly granted WWCC's motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it, and should have granted NYCHA's motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it.

The plaintiff's remaining contentions are without merit. Mastro, J.P., Lott, Sgroi and LaSalle, JJ., concur.

5 STACEY M. CAFARO, Respondent, v BARI F. CEKA et al., Appellants, et al., Defendants. [991 NYS2d 350]—

Physicians and Surgeons—Malpractice—Summary Judgment

In an action, inter alia, to recover damages for medical mal-

practice, the defendants Bari F. Ceka, Tottenville Medical Pavilion, PLLC, Ralph J. Ciccone, and Staten Island Pulmonary Associates, P.C., appeal, as limited by their brief, from so much of an order of the Supreme Court, Richmond County (McMahon, J.), dated December 17, 2012, as denied their motion for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the motion of the defendants Bari F. Ceka, Tottenville Medical Pavillion, PLLC, Ralph J. Ciccone, and Staten Island Pulmonary Associates, P.C., for summary judgment dismissing the complaint insofar as asserted against them is granted.

The plaintiff is the administrator of the estate of the decedent, Janice Cafaro. The plaintiff commenced this action alleging, inter alia, that the appellants failed to diagnose and treat an obstruction of the decedent's common bile duct, and that this failure, along with hemorrhagic pancreatitis, ultimately caused the decedent's death. The appellants moved for summary judgment dismissing the complaint insofar as asserted against them. The Supreme Court, among other things, denied their motion, concluding that the plaintiff had raised a triable issue of fact in opposition to their prima facie establishment of their entitlement to judgment as a matter of law.

On their motion for summary judgment dismissing the complaint in this medical malpractice action, the appellants were required to make a prima facie showing that there was no departure from good and accepted medical practice, or that any claimed departure was not the proximate cause of the decedent's injuries (*see Stukas v Streiter*, 83 AD3d 18, 24 [2011]). To defeat the motion after the appellants made the necessary prima facie showing, the plaintiff was obligated to submit evidence sufficient to raise a triable issue of fact (*see id.* at 31).

Here, as the Supreme Court properly determined, the appellants satisfied their prima facie burden by establishing, through deposition testimony, medical records, and the detailed and specific affirmation of their expert, that they did not depart from good and accepted medical practice in their treatment of the decedent (*see id.* at 30-31). Contrary to the court's conclusion, however, the plaintiff failed to raise a triable issue of fact in opposition. The affirmation of the plaintiff's expert was conclusory and speculative (*see Lahara v Auteri*, 97 AD3d 799, 799-800 [2012]). In this respect, the plaintiff's expert failed to explain why the appellants should have suspected a blockage of the decedent's common bile duct while the decedent was in

their care (*see David v Hutchinson*, 114 AD3d 412, 413 [2014]). Moreover, to the extent that the opinion of the plaintiff's expert rested on an area of "haziness" depicted in a CT scan, the expert's opinion is without basis in the record (*see Lahara v Auteri*, 97 AD3d at 799-800), because the "haziness" related to a part of the decedent's abdomen different from that in which the common bile duct is situated. Since the plaintiff failed to raise a triable issue of fact, the Supreme Court should have granted the appellants' motion for summary judgment dismissing the complaint insofar as asserted against them (*see DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2012]). Balkin, J.P., Austin, LaSalle and Barros, JJ., concur.

6 LEE CARLIN, Respondent, v REBECCA CARLIN, Appellant.
[991 NYS2d 335]—

Husband and Wife and Other Domestic Relationships—Counsel Fees—Interim Counsel Fees

Husband and Wife and Other Domestic Relationships—Counsel Fees—Expert Witness Fees

In an action for a divorce and ancillary relief, the defendant appeals, by permission, from an order of the Supreme Court, Suffolk County (Santorelli, J.), dated December 11, 2012, which referred to the trial court her motion for an award of interim counsel fees in the sum of \$307,350 and for an award of expert fees in the sum of \$88,246.19. By decision and order on motion dated January 9, 2013, this Court granted that branch of the defendant's motion which was to stay the trial in this action pending hearing and determination of the appeal.

Ordered that the order is reversed, on the law, on the facts, and in the exercise of discretion, with costs, and the defendant's motion is granted to the extent of awarding the defendant interim counsel fees in the sum of \$307,350 and expert fees in the sum of \$67,111.19, and the motion is otherwise denied.

"Domestic Relations Law § 237 provides that in any action for a divorce, the court may direct either spouse to pay counsel fees directly to the attorney of the other spouse to enable the other party to carry on or defend the action as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties" (*Falcone v Falcone*, 109 AD3d 787, 788 [2013]; *see* Domestic Relations Law § 237). "The statute provides that there shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse" (*Falcone v Falcone*, 109 AD3d at 788). "Such an award is intended to ensure that the nonmonied spouse 'will be able to litigate the action, and do so on equal footing with the monied spouse' " (*id.*, quoting *Prichep v Prichep*, 52 AD3d 61, 65 [2008];

see *Coven v Coven*, 82 AD3d 1144, 1145 [2011]). “The issue of interim counsel fees is controlled by the equities of the case and the financial circumstances of the parties” (*Falcone v Falcone*, 109 AD3d at 788; see *Tadesse v Amanu*, 116 AD3d 1034, 1035 [2014]; *Silver v Silver*, 46 AD3d 667, 669 [2007]; *Wald v Wald*, 44 AD3d 848, 850 [2007]). “An award of interim counsel fees to the nonmonied spouse will generally be warranted where there is a significant disparity in the financial circumstances of the parties” (*Falcone v Falcone*, 109 AD3d at 788; see *Kaminash v Levi*, 102 AD3d 837, 838 [2013]; *Palmeri v Palmeri*, 87 AD3d 572, 572 [2011]; *Penavic v Penavic*, 60 AD3d 1026, 1028 [2009]; *Prichep v Prichep*, 52 AD3d 61 [2008]). “Accordingly, courts should not defer requests for interim counsel fees to the trial court, and should normally exercise their discretion to grant such a request made by the nonmonied spouse, in the absence of good cause—for example, where the requested fees are unsubstantiated or clearly disproportionate to the amount of legal work required in the case—articulated by the court in a written decision” (*Prichep v Prichep*, 52 AD3d at 65-66; see *Penavic v Penavic*, 60 AD3d at 1028).

Here, the Supreme Court improvidently exercised its discretion in referring the defendant’s motion for interim counsel fees to the trial court for determination. The evidence before the Supreme Court revealed a gross disparity in the parties’ income, that the defendant is the nonmonied spouse, and that the plaintiff’s income in 2010, when he filed a separate tax return, exceeded \$27,000,000 (see *Penavic v Penavic*, 60 AD3d at 1028; *Prichep v Prichep*, 52 AD3d at 66; *Assini v Assini*, 11 AD3d 417, 419 [2004]; see also *Goncalves v Goncalves*, 105 AD3d 901, 903 [2013]; *Palmeri v Palmeri*, 87 AD3d at 572; *Witter v Daire*, 81 AD3d 719, 720 [2011]; *Stubbs v Stubbs*, 41 AD3d 832, 833 [2007]; cf. *Vistocco v Jardine*, 116 AD3d 842 [2014]). This evidence demonstrated that the defendant lacks the resources to litigate this action. In light of the significant economic disparity between the parties, and based on the documentation submitted by the defendant in support of her motion, the Supreme Court should have awarded her interim counsel fees in the sum of \$307,350. On this record, based on the amount of legal fees that the defendant has incurred or will imminently incur (see *Witter v Daire*, 81 AD3d at 720; *Penavic v Penavic*, 60 AD3d at 1028-1029), this award is sufficient to ensure that the defendant may litigate this action on equal footing with the plaintiff (see *Isaacs v Isaacs*, 71 AD3d 951, 951 [2010]; see generally *Prichep v Prichep*, 52 AD3d at 65).

“The award of expert witness fees in a matrimonial action is

left to the sound discretion of the trial court, but such awards should not be made routinely” (*Avello v Avello*, 72 AD3d 850, 852 [2010]; see *Vistocco v Jardine*, 116 AD3d at 844; *O’Donnell v O’Donnell*, 2 AD3d 604, 605 [2003]). “They should be made upon a detailed showing of the services to be rendered and the estimated time involved” (*Avello v Avello*, 72 AD3d at 852; see *Vistocco v Jardine*, 116 AD3d at 844; *O’Donnell v O’Donnell*, 2 AD3d at 605; *Ahern v Ahern*, 94 AD2d 53, 58 [1983]). The defendant’s documentary submissions warrant an award in the sum of \$67,111.19 to pay for the services of Dr. Marvin Aronson, Ronald Klein, CPA, and Dr. Rami Kaminski (see Domestic Relations Law § 237; 22 NYCRR 202.16 [k]). Contrary to the defendant’s contentions, however, her evidentiary submissions are insufficient to support an award of expert fees for the services of a certain appraiser and private investigator (see Domestic Relations Law § 237; 22 NYCRR 202.16 [k]).

The defendant’s remaining contention is without merit. Dickerson, J.P., Lott, Roman and Cohen, JJ., concur.

7 MOHAMAD H. CHEHAB, Respondent, v VLADIMIR ROITMAN, Appellant. [992 NYS2d 74]—

Trial—Place of Trial—Demand for Change of Venue

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Graham, J.), entered November 29, 2012, which denied his motion to change the venue of the action from Kings County to Queens County.

Ordered that the order is affirmed, with costs.

In July 2012, the plaintiff commenced this action in the Supreme Court, Kings County, to recover damages for personal injuries against the defendant, stemming from an accident involving the defendant’s motor vehicle and the plaintiff’s bicycle that had occurred in Manhattan approximately two months earlier. According to the summons, the plaintiff chose Kings County as the place of trial for this action based upon his residence. When the defendant answered the complaint, he served a demand to change venue from Kings County to Queens County on the ground that Kings County was improper since neither party resided there. Thereafter, the defendant moved to change venue to Queens County. In support of his motion, the defendant submitted the police accident report, which indicated that the plaintiff’s driver license, as presented at the time of the accident, identified an address in El Paso, Texas. The defendant also submitted the pleadings, his own New York State driver license showing that he was a resident of Queens County, and

his vehicle's registration demonstrating that his vehicle was registered at an address in Queens County. The Supreme Court denied the motion.

CPLR 503 (a) provides, in relevant part, that "the place of trial shall be in the county in which one of the parties resided when it was commenced." "For venue purposes, a residence is where a party stays for some time with a bona fide intent to retain the place as a residence for some length of time and with some degree of permanency" (*Ellis v Wirshba*, 18 AD3d 805, 805 [2005]; see *Forbes v Rubinovich*, 94 AD3d 809, 810 [2012]; *Furth v ELRAC, Inc.*, 11 AD3d 509, 510 [2004]). "Residence means living in a particular place; domicile means 'living in that locality with intent to make it a fixed and permanent home' " (*King v Car Rentals, Inc.*, 29 AD3d 205, 210 [2006], quoting *Matter of Newcomb*, 192 NY 238, 250 [1908]). In the context of determining the proper venue of an action, a party can have more than one residence (see *King v Car Rentals, Inc.*, 29 AD3d at 210; see also CPLR 503 [a]).

"To effect a change of venue pursuant to CPLR 510 (1), a defendant must show that the plaintiff's choice of venue is improper and that [his or her] choice of venue is proper" (*Gonzalez v Sun Moon Enters. Corp.*, 53 AD3d 526, 526 [2008]; see CPLR 511 [b]; see also *Lopez v K Angle K, Inc.*, 24 AD3d 422, 423 [2005]). To succeed on his motion here, the defendant was obligated to demonstrate that, on the date that this action was commenced, neither of the parties resided in the county that was designated by the plaintiff (see *Ramos v Cooper Tire & Rubber Co.*, 62 AD3d 773 [2009]; *Baez v Marcus*, 58 AD3d 585, 586 [2009]; *Corea v Browne*, 45 AD3d 623, 624 [2007]; see also *Fiallos v New York Univ. Hosp.*, 85 AD3d 678, 678 [2011]; *Clarke v Ahern Prod. Servs.*, 181 AD2d 514, 515 [1992]; *Bradley v Plaisted*, 277 App Div 620, 621 [1951]). Only if the defendant made such a showing was the plaintiff required to establish, in opposition, via documentary evidence, that the venue he selected was proper (see *Buziashvili v Ryan*, 264 AD2d 797 [1999]).

Here, the sole piece of evidence that the defendant submitted with respect to the issue of the plaintiff's residence was the police accident report referable to the subject accident. This evidence merely showed that, at the time the accident occurred, the plaintiff had a residence in Texas. This evidence did not demonstrate that the plaintiff did not maintain a residence in Kings County at the time when the action was commenced, two months after the accident (see *Ramos v Cooper Tire & Rubber Co.*, 62 AD3d at 773; *Baez v Marcus*, 58 AD3d at 586; *Corea v Browne*, 45 AD3d at 624; see also *Fiallos v New York Univ.*

Hosp., 85 AD3d at 678; *Clarke v Ahern Prod. Servs.*, 181 AD2d at 515; *Bradley v Plaisted*, 277 App Div at 621). Consequently, the defendant failed to meet his initial burden.

Although a plaintiff may choose venue based solely on a defendant's address, as set forth in a police accident report (see *Gonzalez v Weiss*, 38 AD3d 492, 493 [2007]; *Furth v ELRAC, Inc.*, 11 AD3d at 510), a police accident report, standing alone, is not sufficient evidence to demonstrate that, on the date that an action is commenced, a plaintiff does not reside in the county where he or she elects to place the venue of trial. To the extent that this Court's decisions in *Samuel v Green* (276 AD2d 687 [2000]) and *Senzon v Uveges* (265 AD2d 476 [1999]) may be read to indicate to the contrary, they should not be followed.

Accordingly, the Supreme Court properly denied the defendant's motion to change the venue of the action from Kings County to Queens County. Balkin, J.P., Chambers, Austin and Roman, JJ., concur.

8 JANIS CIPRIANO, Appellant, v CITY OF NEW YORK et al., Respondents. [991 NYS2d 363]—

Negligence—Proximate Cause—Slip and Fall

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Richmond County (Aliotta, J.), entered July 16, 2013, which granted the motion of the defendants Courthouse Municipal Garage-Parking Systems and Parking Systems Plus, Inc., and the cross motion of the defendants City of New York, New York City Department of Transportation, and New York City Department of Sanitation, for summary judgment dismissing the complaint insofar as asserted against each of them.

Ordered that the order is reversed, on the law, with one bill of costs, and the motion and cross motion are denied.

The plaintiff allegedly was injured when she slipped and fell when leaving a parking garage on Staten Island. Before the completion of discovery, the defendants Courthouse Municipal Garage-Parking Systems and Parking Systems Plus, Inc. (hereinafter together the parking defendants), moved, and the defendants City of New York, New York City Department of Transportation, and New York City Department of Sanitation (hereinafter collectively the city defendants) cross-moved, for summary judgment dismissing the complaint insofar as asserted against each of them. The Supreme Court granted the motion and cross motion. The plaintiff appeals.

In a slip and fall case, a defendant may establish its prima

facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall (see *Altinel v John's Farms*, 113 AD3d 709 [2014]; *Antelope v Saint Aidan's Church, Inc.*, 110 AD3d 1020 [2013]; *Izaguirre v New York City Tr. Auth.*, 106 AD3d 878 [2013]). If a plaintiff is unable to identify the cause of a fall, any finding of negligence would be based upon speculation (see *Patrick v Costco Wholesale Corp.*, 77 AD3d 810 [2010]; *Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477, 478 [2001]). “That does not mean that a plaintiff must have personal knowledge of the cause of his or her fall. Rather, it means only that a plaintiff’s inability to establish the cause of his or [her] fall—whether by personal knowledge or by other admissible proof—is fatal to a cause of action based on negligence” (*Izaguirre v New York City Tr. Auth.*, 106 AD3d at 878; see *Morgan v Windham Realty, LLC*, 68 AD3d 828, 829 [2009]; cf. *Stock v Otis El. Co.*, 52 AD3d 816, 817 [2008]; *Stanojevic v Scotto Bros. Rest. Enters., Inc.*, 16 AD3d 575, 576 [2005]).

Here, the defendants failed to establish, *prima facie*, that the plaintiff could not identify the cause of her fall. In support of the motion and cross motion, the defendants primarily relied upon the transcript of the plaintiff’s hearing testimony pursuant to General Municipal Law § 50-h. This transcript failed to eliminate triable issues of fact as to whether the plaintiff could establish the cause of her fall, as she testified that there was ice at the location of her fall (see *Altinel v John's Farms*, 113 AD3d at 710; *Bernardo v 444 Rte. 111, LLC*, 83 AD3d 753, 754 [2011]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2005]). Since the defendants failed to meet their initial burden, we need not consider the sufficiency of the plaintiff’s opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Accordingly, the Supreme Court should have denied the motion of the parking defendants and the cross motion of the city defendants for summary judgment dismissing the complaint insofar as asserted against each of them. Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

9 CONFIDENTIAL LENDING, LLC, Appellant, v VIOLA NURSE, Respondent, et al., Defendants. [992 NYS2d 77]—

Bills, Notes and Checks—Promissory Note

Consumer Protection—Deceptive Acts and Practices

Brokers—Real Estate Brokers

Pleading—Amendment—Answer

Judgments—Default Judgment—Notice Requirements

In an action to foreclose a mortgage, the plaintiff appeals

from so much of an order of the Supreme Court, Kings County (Edwards, J.), dated September 19, 2012, as granted the cross motion of the defendant Viola Nurse for leave to amend her answer to assert the defense of lack of standing and additional allegations in support of her defense and counterclaims sounding in fraud and alleging violations of General Business Law § 349 and Real Property Law § 440-a, and, upon renewal, denied those branches of its motion which were for summary judgment on the complaint and dismissing the affirmative defenses and counterclaims asserted by the defendant Viola Nurse or, alternatively, to sever her counterclaims, for leave to enter a default judgment against the defendants Caryn Nurse, the New York City Environmental Control Board, Charles Laing, and Iris Laing, and to appoint a referee to compute the amount due the plaintiff.

Ordered that the order is modified, on the law, on the facts, and in the exercise of discretion, (1) by deleting the provisions thereof, upon renewal, denying those branches of the plaintiff's motion which were for summary judgment dismissing the defense and counterclaims asserted by the defendant Viola Nurse sounding in fraud and alleging violations of General Business Law § 349 and Real Property Law § 440-a, and for leave to enter a default judgment against the defendant the New York City Environmental Control Board, and substituting therefor a provision granting those branches of the plaintiff's motion, and (2) by deleting the provision thereof granting that branch of the cross motion of the defendant Viola Nurse which was for leave to amend her answer to assert additional allegations in support of her defense and counterclaims sounding in fraud and alleging violations of General Business Law § 349 and Real Property Law § 440-a, and substituting therefor a provision denying that branch of the cross motion; as so modified, the order is affirmed insofar as appealed from, with costs payable to the plaintiff by the defendant Viola Nurse.

Contrary to the plaintiff's contention, it failed to establish, *prima facie*, that it had standing to commence this foreclosure action. Accordingly, the Supreme Court, upon renewal, correctly denied that branch of its motion which was for summary judgment on the complaint insofar as asserted against the defendant Viola Nurse (hereafter Nurse) (*see HSBC Bank USA v Hernandez*, 92 AD3d 843, 844 [2012]; *see generally* RPAPL 1302 [1]; *Deutsche Bank Natl. Trust Co. v Spanos*, 102 AD3d 909 [2013]).

However, we agree with the plaintiff's contention that, upon renewal, the Supreme Court erred in denying that branch of its

motion which was for summary judgment dismissing Nurse's defense and counterclaim sounding in fraud. Upon renewal, the plaintiff demonstrated, *prima facie*, that Nurse ratified the subject note, mortgage, and collateral mortgage by making payments thereon to the plaintiff without protest, while she remained aware of the circumstances forming the basis of her defense and counterclaim sounding in fraud. In so doing, Nurse waived all such defenses and counterclaims (*see Moweta v Citywide Home Improvements of Queens*, 267 AD2d 438 [1999]; *see also Wujin Nanxiashu Secant Factory v Ti-Well Intl. Corp.*, 14 AD3d 352 [2005]; *Davis & Davis v Morson*, 286 AD2d 584, 585 [2001]). In opposition, Nurse failed to raise a triable issue of fact.

We also agree with the plaintiff's contention that, upon renewal, the Supreme Court erred in denying that branch of its motion which was for summary judgment dismissing Nurse's counterclaim alleging a violation of General Business Law § 349. In opposition to the plaintiff's *prima facie* showing that the underlying transaction was private in nature, and that the allegedly deceptive acts were not aimed at the public at large (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]), Nurse failed to raise a triable issue of fact.

Further, upon renewal, the Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment dismissing Nurse's counterclaim alleging a violation of Real Property Law § 440-a, since the allegation that certain nonparties unlawfully held themselves out as real estate brokers without the requisite license is irrelevant to the circumstances surrounding Nurses's execution of the underlying mortgage, note, guaranty, and collateral mortgage. In any event, Nurse's conclusory allegations that certain persons allegedly violated Real Property Law § 440-a by virtue of their failure to secure the requisite real estate brokers' license were insufficient, upon renewal, to defeat that branch of the plaintiff's motion which was for summary judgment dismissing Nurse's counterclaim alleging a violation of Real Property Law § 440-a.

The Supreme Court improvidently exercised its discretion in granting Nurse leave to amend her answer to the extent that she sought to assert additional allegations in support of her defense and counterclaims sounding in fraud and alleging violations of General Business Law § 349 and Real Property Law § 440-a. Leave to amend a pleading should be freely given absent prejudice or surprise, and a court should not examine the merits or legal sufficiency of the proposed amendment unless it is palpably insufficient or patently devoid of merit on its face (*see*

Greco v Christoffersen, 70 AD3d 769, 770 [2010]; *Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 514 [2009]). The determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed (*see Greco v Christoffersen*, 70 AD3d at 770). Here, the proposed allegations supporting the defense and counterclaims sounding in fraud and alleging violations of General Business Law § 349 and Real Property Law § 440-a were palpably insufficient and patently devoid of merit (*see Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 656 [2013]; *Bloom v Lugli*, 102 AD3d 715, 718 [2013]).

Upon renewal, the Supreme Court properly denied that branch of the plaintiff's motion which was for leave to enter a default judgment against the defendants Caryn Nurse, Charles Laing, and Iris Laing. Although service upon the defaulting defendants of the notice of motion to renew was not required since the plaintiff moved for leave to enter a default judgment within one year of the defendants' default (*see Stoltz v Playquest Theater Co.*, 257 AD2d 758, 759 [1999]; *Milman & Shwergold v Chase Manhattan Bank*, 105 AD2d 652, 653 [1984]; *Q.P.I. Rests. v Slevin*, 93 AD2d 767, 768 [1983]), the Supreme Court properly determined that the plaintiff failed to comply with the additional notice requirement of CPLR 3215 (g) (3) (i) (*see Tsiporin v Ziegel*, 203 AD2d 451 [1994]; *see also Bunch v Dollar Budget, Inc.*, 12 AD3d 391 [2004]; *Schilling v Maren Enters.*, 302 AD2d 375, 376 [2003]; *Rafa Enters. v Pigand Mgt. Corp.*, 184 AD2d 329 [1992]). However, in seeking a default judgment against the defendant the New York City Environmental Control Board (hereinafter the ECB), the plaintiff was not required to comply with the additional notice requirement of CPLR 3215 (g) because the ECB is neither a "natural person" (CPLR 3215 [g] [3] [i]), nor "a domestic or authorized foreign corporation" that had been served with process pursuant to Business Corporation Law § 306 (b) (CPLR 3215 [g] [4] [i]). Accordingly, the Supreme Court erred in denying that branch of the plaintiff's motion which was for leave to enter a default judgment against the ECB. The plaintiff's remaining contentions either are without merit or need not be addressed in light of our determination. Skelos, J.P., Lott, Roman and Cohen, JJ., concur.

10 PHILIP COOPER et al., Appellants, v SLEEPY'S, LLC, Respondent. [992 NYS2d 95]—

Actions—Class Actions—Certification of Class

In an action, inter alia, pursuant to Labor Law § 193 to recover wages wrongly withheld, the plaintiffs appeal, as limited

by their brief, from so much of an order of the Supreme Court, Nassau County (Adams, J.), entered August 15, 2012, as denied their motion for class certification pursuant to CPLR article 9.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiffs commenced this action, inter alia, to recover money which, they alleged, had been unlawfully deducted from commissions they earned while working as commissioned sales staff for the defendant. The plaintiffs then sought certification of the matter as a class action on behalf of all nonexempt persons employed by the defendant in New York State as salespersons during the six years prior to the filing of the complaint in this action. The Supreme Court denied class certification on the basis that common questions of law and fact did not predominate over questions affecting only individual members (*see* CPLR 901 [a] [3]). We affirm, but on a different ground, namely, that the plaintiffs failed to demonstrate that the plaintiffs would fairly and adequately protect the interests of the class (*see* CPLR 901 [a] [4]).

A class action may be maintained in New York only after the five prerequisites of CPLR 901 (a) have been satisfied (*see* CPLR 902; *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 135 [2008]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1998]). Once those prerequisites are satisfied, the court “shall consider” the factors set forth in CPLR 902 (CPLR 902; *see Ackerman v Price Waterhouse*, 252 AD2d at 191). The class representative “bears the burden of establishing compliance with the requirements of both CPLR 901 and 902, and the determination is ultimately vested in the sound discretion of the trial court” (*Ackerman v Price Waterhouse*, 252 AD2d at 191; *see Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d at 135; *Kings Choice Neckwear, Inc. v DHL Airways, Inc.*, 41 AD3d 117, 117 [2007]).

One of the prerequisites to class certification requires the class representative to demonstrate that “the representative . . . will fairly and adequately protect the interests of the class” (CPLR 901 [a] [4]). “A class representative acts as principal to the other class members and owes them a fiduciary duty to vigorously protect their interests” (*City of Rochester v Chiarella*, 65 NY2d 92, 100 [1985]). “That responsibility clearly encompasses the duty to act affirmatively to secure the class members’ rights as well as to oppose the adverse interests asserted by others” (*id.* at 100). “The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members,

personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel” (*Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d at 144).

Here, the plaintiffs failed to sustain their burden of demonstrating that they would fairly and adequately protect the interests of the class (*see* CPLR 901 [a] [4]; *see also* *Yonkers Contr. Co. v Romano Enters. of N.Y.*, 304 AD2d 657, 658-659 [2003]). To the contrary, the record discloses that one of the proposed representatives maintains that he was entitled to a certain commission that was wrongfully paid by the defendant to a different member of the proposed class. Given the evidence in the record indicating that such disputes between and among salespersons were not unusual, we conclude that there exist potential conflicts of interest between the representatives and the class members such that the plaintiffs cannot fairly and adequately represent the interest of each member of the class (*see* *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 54-55 [1999]; *Zedeck v Derfner Mgt. Inc.*, 98 AD3d 925, 925 [2012]; *Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1046-1047 [2008]; *Yonkers Contr. Co. v Romano Enters. of N.Y.*, 304 AD2d at 658-659; *accord* Rules of Professional Conduct [22 NYCRR 1200.00] rule 1.7 [a] [1]). Under such circumstances, class certification is inappropriate (*see* CPLR 901, 902).

In light of the foregoing, we need not reach the parties’ remaining contentions. Rivera, J.P., Lott, Miller and Hinds-Radix, JJ., concur.

11 RICARDO ENRIQUE CRUZ, Appellant-Respondent, v CABLEVISION SYSTEMS CORPORATION et al., Respondents-Appellants. [992 NYS2d 281]—

Labor—Safe Place to Work—Fall from Roof

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Molia, J.), dated June 29, 2012, as denied his motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), and the defendants cross-appeal from so much of the same order as denied their cross motion for summary judgment dismissing the causes of action alleging common-law negligence and violations of Labor Law §§ 200 and 241 (6).

Ordered that the order is modified, on the law, (1) by deleting the provision thereof denying the plaintiff’s motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1), and substituting

therefor a provision granting that motion, (2) by deleting the provision thereof denying that branch of the defendants' cross motion which was for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against the defendant JQ II Associates, LLC, and substituting therefor a provision granting that branch of the cross motion, and (3) by deleting the provision thereof denying that branch of the defendants' cross motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6), and substituting therefor a provision granting that branch of the cross motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The plaintiff worked for Douglas S. Plotke Jr., Inc., doing business as Roof Services (hereinafter Roof Services). The defendant JQ II Associates, LLC (hereinafter JQ), owned a building in Jericho (hereinafter the building) that JQ leased to the defendant Cablevision Systems Corporation (hereinafter Cablevision) and/or the defendant CSC Holdings, Inc. (hereinafter CSC). CSC hired Roof Services to remove the roof of the building and install a new one.

There was evidence that a "perimeter warning system" was in place on the roof during the course of the project, which consisted of mobile stanchions, approximately 42 inches tall, placed around the perimeter of the roof at certain intervals approximately six feet from the edge of the roof. Rope was strung between the stanchions, and flags were tied to the rope, so that an individual walking into the rope would be alerted that he or she was within six feet of the edge of the roof. An individual serving as a "safety monitor" was charged with watching workers and verbally warning them as they neared the roof's edge. There were no safety lines or guardrails along the perimeter of the roof, and no harnesses or safety lines were provided.

On or about November 19, 2008, the plaintiff was engaged in installing insulation, which required him to work about 1½ feet from the edge of the roof, on the outside of the six-foot perimeter. During the course of the installation, the plaintiff fell from the roof, a fall of approximately 40 feet, and was injured. The plaintiff commenced this action against Cablevision, JQ, and CSC to recover damages for personal injuries, alleging common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6).

The plaintiff moved for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1). The defendants cross-moved for summary judgment

dismissing the causes of action alleging common-law negligence and violations of Labor Law §§ 200 and 241 (6). In an order dated June 29, 2012, the Supreme Court denied both the motion and the cross motion. The plaintiff appeals, and the defendants cross-appeal.

The Supreme Court should have granted the plaintiff's motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) against all three defendants. Labor Law § 240 (1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices to protect workers from elevation-related risks (see *Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 977 [2003]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]; *Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 770 [2012]; *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1194 [2011]; *Barr v 157 5 Ave., LLC*, 60 AD3d 796, 797 [2009]). To recover under Labor Law § 240 (1), the plaintiff must demonstrate a violation of the statute and that such violation proximately caused his or her injuries (see *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

Here, the plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on his Labor Law § 240 (1) cause of action by demonstrating that he was not provided with safety devices to properly protect himself from the elevation-related risk, and that this failure proximately caused his accident (see *Poracki v St. Mary's R.C. Church*, 82 AD3d at 1194; *Bin Gu v Palm Beach Tan, Inc.*, 81 AD3d 867, 868 [2011]; *Ortiz v 164 Atl. Ave., LLC*, 77 AD3d 807, 809 [2010]).

In opposition to the plaintiff's prima facie showing, the defendants failed to raise a triable issue of fact. Contrary to the defendants' contention, the perimeter warning system allegedly in place at the time of the plaintiff's fall did not constitute a safety device within the meaning of Labor Law § 240 (1) (see *Miranda v Norstar Bldg. Corp.*, 79 AD3d 42, 48 [2010]). The affidavit of the defendants' expert in construction safety, in which he opined that the perimeter warning system complied with the Occupational Safety and Health Act (29 USC § 651 *et seq.*), and other recognized industry practices, was insufficient to raise a triable issue of fact as to whether the defendants violated Labor Law § 240 (1). Labor Law § 240 (1) is "a self-executing statute which, contain[s] its own specific safety measures," the violation of which provides an independent legal basis for liability,

regardless of whether there was compliance with federal regulations or general industry standards (*Long v Forest-Fehlhaber*, 55 NY2d 154, 160 [1982]; see *Miranda v Norstar Bldg. Corp.*, 79 AD3d at 47; *Dalaba v City of Schenectady*, 61 AD3d 1151, 1153 [2009]). Since the defendants failed to raise a triable issue of fact as to the existence of a Labor Law § 240 (1) violation or whether the plaintiff's alleged actions were the sole proximate cause of his accident, the Supreme Court should have granted the plaintiff's motion for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) (see *Ortiz v 164 Atl. Ave., LLC*, 77 AD3d at 809).

There is no evidence in the record of when the order with notice of entry was served and, thus, we reject the plaintiff's contention that the cross appeal should be dismissed as untimely taken (see *Zapata v County of Suffolk*, 23 AD3d 553, 554 [2005]).

The Supreme Court should have granted that branch of the defendants' cross motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 241 (6). The defendants established, prima facie, that the Industrial Code provisions upon which the plaintiff relied either do not apply in this case (see *Wein v Amato Props., LLC*, 30 AD3d 506, 507 [2006]), or relate to general safety standards and, thus, cannot serve as a predicate for liability under Labor Law § 241 (6) (see *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 1224 [2011]; *Greenwood v Shearson, Lehman & Hutton*, 238 AD2d 311, 312 [1997]). In opposition to that showing, the plaintiff failed to raise a triable issue of fact.

The Supreme Court should have granted that branch of the defendants' cross motion which was for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against JQ. The defendants established JQ's prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against JQ (see *Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 814 [2013]), and the plaintiff failed to raise a triable issue of fact in opposition.

However, the Supreme Court properly denied that branch of the defendants' cross motion which was for summary judgment dismissing the causes of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against the defendants Cablevision and CSC. The defendants failed to establish, prima facie, that Cablevision and CSC lacked the authority to supervise or control the means and methods of the plaintiff's work (see *Gomez v State of New York*, 106 AD3d 870,

871 [2013]). The failure to make such prima facie showing requires the denial of that branch of the defendants' cross motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

12 RAYMOND DAWSON, Respondent, v YMCA OF LONG ISLAND, INC., et al., Appellants. [991 NYS2d 360]—

Negligence—Proximate Cause
Damages—Punitive Damages

In an action, inter alia, to recover damages for wrongful death and personal injuries, etc., the defendants appeal from an order of the Supreme Court, Suffolk County (Molia, J.), entered March 18, 2013, which denied their motion for summary judgment dismissing the complaint.

Ordered that the order is modified, on the law, by deleting the provisions thereof denying those branches of the defendants' motion which were for summary judgment dismissing so much of the complaint as sought to recover punitive damages and damages for loss of consortium insofar as asserted in connection with the plaintiffs' wrongful death cause of action, and substituting therefor provisions granting those branches of the motion; as so modified, the order is affirmed, without costs or disbursements.

In February 2008, 17-year-old Marc William Dawson drowned in a swimming pool owned and operated by the defendant YMCA of Long Island, Inc. (hereinafter the YMCA). Marc's father, Raymond Dawson, commenced this action individually, and as the administrator of Marc's estate, to recover damages for wrongful death and personal injuries against the YMCA and four of its employees, alleging that they were negligent in causing Marc's injuries and death.

The defendants moved for summary judgment dismissing the complaint. The Supreme Court denied the motion. The defendants appeal.

On their motion for summary judgment dismissing the complaint, the defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that Marc's actions in taking several deep breaths and then deliberately attempting to remain underwater in the pool as long as possible were the sole proximate cause of his death (*see Carriero v Nazario*, 116 AD3d 818, 819 [2014]; *cf. Williams v City of New York*, 71 AD3d 1135, 1136-1137 [2010]). Given that Marc was a certified lifeguard, and based on "plain common sense," he should have known that these actions posed

a significant danger (*see Nolasco v Splish Splash at Adventureland, Inc.*, 74 AD3d 1303, 1304 [2010]). Additionally, the defendants submitted evidence demonstrating that “shallow water blackout” was not an unusual consequence of such actions. In opposition to the defendants’ prima facie showing, however, the plaintiff raised triable issues of fact as to whether the defendants acted negligently, specifically in their alleged failure to diligently attempt to have Marc surface earlier and in their alleged failure to physically remove him from the pool more quickly (*see Taveras v City of New York*, 108 AD3d 614, 616 [2013]; *cf. Williams v City of New York*, 71 AD3d at 1136-1137). Accordingly, that branch of the defendant’s motion which was for summary judgment dismissing the complaint was properly denied (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

However, the Supreme Court erred in denying that branch of the defendants’ motion which was for summary judgment dismissing so much of the complaint as sought to recover punitive damages. Such an award “is warranted where a plaintiff establishes that the defendant’s conduct evinced a high degree of moral turpitude and demonstrated behavior that equated to criminal indifference to civil obligations” (*Stormes v United Water N.Y., Inc.*, 84 AD3d 1351, 1351 [2011]; *Huang v Sy*, 62 AD3d 660, 662 [2009]). The conduct “must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness . . . or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights” (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007] [internal quotation marks omitted]).

Here, the defendants made a prima facie showing of entitlement to judgment as a matter of law that, to the extent that triable issues of fact remain as to whether they were negligent, their conduct did not rise to the level of moral culpability required to impose punitive damages (*see generally Shovak v Long Is. Commercial Bank*, 50 AD3d 1118, 1120-1121 [2008]). In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendants’ alleged conduct rose to such level (*see Outside Connection, Inc. v DiGennaro*, 18 AD3d 634, 634 [2005]).

The Supreme Court also erred in denying that branch of the defendants’ motion which was for summary judgment dismissing so much of the complaint as sought to recover damages for loss of consortium insofar as this claim is asserted in connection with the plaintiffs’ wrongful death cause of action (*see Liff v*

Schildkrout, 49 NY2d 622 [1980]; *Dobin v Town of Islip*, 11 AD3d 577, 579 [2004]; *Erbstein v Savasatit*, 274 AD2d 445, 446 [2000]).

The defendants' remaining contentions are without merit. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

13 NED DEAS, Respondent, v CHAUDHARY M. AHMED, Appellant. [991 NYS2d 661]—

Trial—Place of Trial—Demand for Change of Venue

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Ruchelsman, J.), dated January 4, 2013, which denied his motion to change venue of the action from Kings County to Nassau County.

Ordered that the order is affirmed, with costs.

The plaintiff commenced this action in Kings County. Thereafter, the defendant served a timely demand for a change of venue, and subsequently moved in timely fashion to change venue from Kings County to Nassau County, where the defendant maintained a residence. The defendant alleged that Kings County was not a proper venue because neither party resided there at the time of the commencement of the action. The Supreme Court denied the defendant's motion to change venue. The defendant appeals.

CPLR 503 (a) provides, in relevant part, that “the place of trial shall be in the county in which one of the parties resided when it was commenced.” “For venue purposes, a residence is where a party stays for some time with a bona fide intent to retain the place as a residence for some length of time and with some degree of permanency” (*Ellis v Wirshba*, 18 AD3d 805, 805 [2005]; see *Forbes v Rubinovich*, 94 AD3d 809, 810 [2012]; *Furth v ELRAC, Inc.*, 11 AD3d 509, 510 [2004]). Residence means living in a particular place, while domicile means “living in that locality with intent to make it a fixed and permanent home” (*Matter of Newcomb*, 192 NY 238, 250 [1908]; see *King v Car Rentals, Inc.*, 29 AD3d 205, 210 [2006]; cf. *Antone v General Motors Corp., Buick Motor Div.*, 64 NY2d 20, 29-30 [1984]). In the context of determining the proper venue of an action, a party may have more than one residence (see CPLR 503 [a]; *King v Car Rentals, Inc.*, 29 AD3d at 210).

In order to prevail on a motion pursuant to CPLR 510 (1) to change venue, a defendant must show that the plaintiff's choice of venue is improper, and also that the defendant's choice of venue is proper (see CPLR 511 [b]; *Gonzalez v Sun Moon Enters.*

Corp., 53 AD3d 526, 526 [2008]; *see also Lopez v K Angle K, Inc.*, 24 AD3d 422, 423 [2005]). To succeed on his motion here, the defendant was obligated to demonstrate that, on the date that this action was commenced, neither of the parties resided in Kings County (*see Chehab v Roitman*, 120 AD3d 736 [2014] [decided herewith]; *Ramos v Cooper Tire & Rubber Co.*, 62 AD3d 773 [2009]; *Baez v Marcus*, 58 AD3d 585, 586 [2009]; *Corea v Browne*, 45 AD3d 623, 624 [2007]; *see also Clarke v Ahern Prod. Servs.*, 181 AD2d 514, 515 [1992]). Only if the defendant made such a showing would the plaintiff have been required to establish, in opposition, that the venue that he selected was proper (*see Chehab v Roitman*, 120 AD3d 736 [2014] [decided herewith]; *Buziashvili v Ryan*, 264 AD2d 797 [1999]).

Here, the sole piece of evidence that the defendant submitted with respect to the plaintiff's residence was the police accident report referable to the subject accident. This evidence merely showed that, when the accident occurred, the plaintiff maintained a residence in New York County. However, this evidence failed to demonstrate that the plaintiff did not maintain a residence in Kings County at the time the action was commenced, more than two years after the accident (*see Chehab v Roitman*, 120 AD3d 736 [2014] [decided herewith]; *Ramos v Cooper Tire & Rubber Co.*, 62 AD3d at 773; *Baez v Marcus*, 58 AD3d at 586; *Corea v Browne*, 45 AD3d at 624; *see also Fiallos v New York Univ. Hosp.*, 85 AD3d 678, 678 [2011]; *Clarke v Ahern Prod. Servs.*, 181 AD2d at 515). Consequently, the defendant failed to meet his initial burden.

Although a plaintiff may choose venue based solely on a defendant's address, as set forth in a police accident report (*see Gonzalez v Weiss*, 38 AD3d 492, 493 [2007]; *Furth v ELRAC, Inc.*, 11 AD3d at 510), a police accident report referable to the subject accident, standing alone, is not sufficient evidence to demonstrate that, on the date that an action is commenced, a plaintiff does not reside in the county where he or she elects to place the venue of trial (*see Chehab v Roitman*, 120 AD3d 736 [2014] [decided herewith]). To the extent that this Court's decisions in *Samuel v Green* (276 AD2d 687 [2000]) and *Senzon v Uveges* (265 AD2d 476 [1999]) may be read to indicate the contrary, they should not be followed.

Accordingly, the Supreme Court properly denied the defendant's motion to change venue of the action from Kings County to Nassau County. Skelos, J.P., Lott, Roman and Miller, JJ., concur.

14 ANTHONY DIXON et al., Respondents, v CITY OF NEW YORK et al., Appellants. [991 NYS2d 463]—

Municipal Corporations—Tort Liability—Governmental Function Immunity Defense

In an action to recover damages for personal injuries, etc., the defendants appeal from an order of the Supreme Court, Kings County (Bunyan, J.), dated December 19, 2012, which denied their motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is granted.

The adult son of the plaintiff Carolyn Mason called the 911 emergency telephone number to obtain assistance for Mason, who was approximately 38 weeks pregnant, after Mason began to experience heavy vaginal bleeding. A few minutes later, a "Basic Life Support" (hereinafter BLS) ambulance arrived at Mason's residence. The emergency medical technicians (hereinafter EMTs) requested an "Advanced Life Support" (hereinafter ALS) ambulance staffed with paramedics based upon Mason's heavy blood loss and shortness of breath. The ALS ambulance arrived a few minutes later. Mason was then carried by a stair chair down the stairs to the BLS ambulance and transferred onto a stretcher. An intravenous (hereinafter IV) line was started by a paramedic before Mason was transported to the hospital, where she arrived 34 minutes after the 911 call was placed. An emergency cesarean section was performed, and the infant plaintiff Anthony Dixon was delivered. It was determined that Mason had suffered a placental abruption, which caused a depletion in oxygen from the mother to the fetus, resulting in the infant plaintiff sustaining, among other things, permanent brain damage.

The plaintiffs commenced this action against the City of New York and the New York City Fire Department (hereinafter together the city defendants), alleging that the infant plaintiff's injuries were caused, inter alia, by the negligence of the ambulance dispatcher in sending the wrong type of ambulance, and the negligence of the ambulance personnel in delaying the transport of Mason to the hospital. The Supreme Court denied the city defendants' motion for summary judgment dismissing the complaint, and the city defendants appeal.

Under the doctrine of governmental function immunity, "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*Valdez v City of New York*, 18 NY3d 69, 89-90 [2011], quoting *McLean v City of New York*, 12 NY3d 194, 203 [2009]; see *Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [2013]).

Here, the city defendants met their burden of establishing their prima facie entitlement to judgment as a matter of law by demonstrating that their actions were discretionary. The city defendants' dispatcher exercised discretion in deciding which type of ambulance to send to Mason's home, based upon the information provided in the 911 call. The EMTs exercised their discretion in calling for an ALS ambulance based upon the amount of blood loss and Mason's difficulty breathing, in declining the assistance of the police officers who responded to the scene, and in requiring Mason to wait for the ALS paramedics in her apartment. Similarly, the city defendants' paramedics exercised their discretion in reassessing Mason's condition upon their arrival at the scene and in administering an IV prior to transporting her to the hospital. The aforementioned allegedly negligent actions of the ambulance dispatcher, the EMTs, and the paramedics were discretionary and, therefore, may not be a basis for liability (see *DiMeo v Rotterdam Emergency Med. Servs., Inc.*, 110 AD3d 1423 [2013]; *Sherpa v New York City Health & Hosps. Corp.*, 90 AD3d 738, 740 [2011]).

In opposition, the plaintiffs failed to raise a triable issue of fact.

The city defendants' remaining contentions either are without merit or need not be reached in light of the foregoing.

Accordingly, the Supreme Court should have granted the city defendants' motion for summary judgment dismissing the complaint. Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

15 ALVIN L. GARRISON, as Administrator of the Estate of JESSICA OUTEN, Deceased, Respondent, v J. GERALD QUIRK et al., Defendants, and ADAM BUCKLEY et al., Appellants. [991 NYS2d 334]—

Physicians and Surgeons—Malpractice—Summary Judgment

In an action to recover damages for medical malpractice, the defendants Adam Buckley, University Associates in Obstetrics & Gynecology, P.C., also known as University Physicians at Stony Brook, Joy Schabel, and Stony Brook Anesthesiology, P.C., also known as University Physicians at Stony Brook, appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Farneti, J.), dated June 19, 2012, as denied their motion for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs.

“A physician moving for summary judgment dismissing a

complaint alleging medical malpractice must establish, prima facie, either that there was no departure or that any alleged departure was not a proximate cause of the plaintiff's injuries" (*Garrett v University Assoc. in Obstetrics & Gynecology, P.C.*, 95 AD3d 823, 825 [2012]). "The burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact only upon the defendant physician's meeting the initial burden, and only as to the elements on which the defendant met the prima facie burden" (*id.* at 825 [citation omitted]). Here, as the Supreme Court correctly determined, the moving defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law. In forming their opinions, the moving defendants' medical experts did not examine the plaintiff's decedent but relied upon, inter alia, medical reports and medical records that were not annexed to the motion (*see LaVecchia v Bilello*, 76 AD3d 548 [2010]; *Farmer v City of New York*, 25 AD3d 649, 650 [2006]; *see also Jian-Yu Zhang v Qiang Wang*, 24 AD3d 611, 612 [2005]). Although the moving defendants contend that they provided the Supreme Court with a CD-R containing the medical records relied upon by their experts, there is no evidence that the CD-R provided to the court properly contained the certified medical records, or was even readable by the court (*see* CPLR 2214 [c]; *Loeb v Tanenbaum*, 124 AD2d 941, 942 [1986]; *see generally* 22 NYCRR 202.5 [b]). Moreover, even if a readable CD-R was previously submitted to the court in connection with an earlier motion in this case, the Supreme Court should "not be compelled, absent a rule providing otherwise, to locate previously submitted documents in the electronic record in considering subsequent motions" (*Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 179 [2012]). The moving defendants' remaining contentions are without merit. Therefore, the Supreme Court correctly denied the motion. Skelos, J.P., Lott, Roman and LaSalle, JJ., concur. **[Prior Case History: 2012 NY Slip Op 31726(U).]**

16 AMELIA GUERRA, Appellant, v CRESCENT STREET CORP., Respondent. QPII-38-05 CRESCENT STREET, LLC, et al., Non-party Respondents. [991 NYS2d 343]—

Judgments—Relief from Judgment—Renewal Judgment

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Queens County (Schulman, J.), dated July 6, 2012, as denied that branch of her motion which was pursuant to CPLR 5014 to renew a judgment lien against real property located at 38-05 Crescent Street in Queens County.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs.

In 1993, the plaintiff commenced this action against the defendant, Crescent Street Corp., to recover damages for injuries she allegedly sustained when she fell on the defendant's property located at 38-05 Crescent Street in Queens County (hereinafter the property). The defendant failed to appear in the action and, on September 28, 1998, the Supreme Court entered a judgment in favor of the plaintiff in the total sum of \$27,452.51. The judgment was docketed in the Queens County Clerk's Office on October 7, 1998, thus creating a 10-year lien on the property (*see* CPLR 5203 [a]). On January 31, 2008, the defendant sold the property to QPII-38-05 Crescent Street, LLC (hereinafter QPII). On August 1, 2008, the City Marshal attempted to execute the judgment against the property on behalf of the plaintiff but was unsuccessful. By notice of motion dated December 29, 2011, after the lien had expired, the plaintiff moved in the instant, original action, *inter alia*, to set aside the conveyance of the property to QPII as fraudulent and to extend the judgment lien on the property for another 10 years. By order dated July 6, 2012, the Supreme Court denied the motion, finding, among other things, that the plaintiff failed to timely commence an action for a renewal judgment pursuant to CPLR 5014.

"Since a money judgment is viable for 20 years, but a lien on real property is only effective for 10 years (*see* CPLR 211 [b]; 5203 [a]), the Legislature enacted CPLR 5014 to allow a judgment creditor to apply for a renewal of the lien by commencing an action for a renewal judgment" (*Schiff Food Prods., Co., Inc. v M&M Import Export*, 84 AD3d 1346, 1347-1348 [2011]; *see Gletzer v Harris*, 12 NY3d 468, 473 [2009]; *Rose v Gulizia*, 104 AD3d 757, 757-758 [2013]; *Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677, 678 [2011]). "Pursuant to CPLR 5014 (1), an action upon a money judgment may be maintained between the original parties where ten years have elapsed since the judgment was originally docketed" (*Pangburn v Klug*, 244 AD2d 394, 395 [1997]; *see Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d at 678). Thus, an action for a renewal judgment is not time-barred even when it is commenced more than 10 years after the original judgment was docketed (*see Schiff Food Prods., Co., Inc. v M&M Import Export*, 84 AD3d at 1348).

Here, instead of commencing a new action, as required by CPLR 5014, the plaintiff moved in the instant, original action to renew the judgment lien. In view of the plaintiff's failure to commence a new action and thereby satisfy the procedural

requirement of CPLR 5014, the Supreme Court properly denied that branch of her motion which was to renew the judgment lien on the subject property. Balkin, J.P., Austin, LaSalle and Barros, JJ., concur.

17 ROSEMARIE HARRIS, Appellant, v COUNTY OF NASSAU et al., Respondents, et al., Defendants. [991 NYS2d 356]—In an action, inter alia, to recover damages for malicious prosecution, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Phelan, J.), dated April 25, 2012, as granted those branches of the motion of the defendants County of Nassau, Police Officer Brendan Gibbs, Police Officer Thomas McDonough, and Sergeant Charles Dunn which were for summary judgment dismissing the causes of action alleging false arrest, false imprisonment, malicious prosecution, and civil rights violations pursuant to 42 USC § 1983 insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs.

The Supreme Court properly granted those branches of the respondents' motion which were for summary judgment dismissing the causes of action alleging false arrest, false imprisonment, malicious prosecution, and civil rights violations pursuant to 42 USC § 1983. Under the circumstances presented here, the respondents established, prima facie, that there was probable cause to arrest the plaintiff (*see Rodgers v City of New York*, 106 AD3d 1068 [2013]; *Rivera v County of Nassau*, 83 AD3d 1032 [2011]; *Redmond v City of White Plains*, 77 AD3d 902 [2010]). In opposition, the plaintiff failed to raise a triable issue of fact. Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

18 HSBC BANK USA, NATIONAL ASSOCIATION, Respondent, v ARLENE GILBERT et al., Appellants, et al., Defendants. [991 NYS2d 358]—

Mortgages—Foreclosure—Standing

In an action to foreclose a mortgage, the defendants Arlene Gilbert and James Coffey appeal, as limited by their brief, from so much of an order of the Supreme Court, Dutchess County (Brands, J.), dated November 30, 2012, as granted that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against the appellants is denied.

On or about May 14, 2005, the defendant Arlene Gilbert executed a note to borrow the sum of \$227,500 from Homebridge Mortgage Bankers Corp. The note was secured by a mortgage executed by Gilbert and the defendant James Coffey (hereinafter together the appellants). The mortgage was subsequently assigned to the plaintiff and, when the appellants defaulted, the plaintiff commenced this action to foreclose the mortgage, alleging, inter alia, that it was the owner and holder of the note and the mortgage. The appellants asserted the plaintiff's lack of standing as an affirmative defense. The plaintiff moved, inter alia, for summary judgment on the complaint insofar as asserted against the appellants, and the Supreme Court granted that branch of the motion.

In a mortgage foreclosure action, where the plaintiff's standing to commence the action is placed in issue by the defendant, the plaintiff must prove standing to be entitled to relief (see *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2009]). The plaintiff has standing where, at the time the action is commenced, it is the holder or assignee of both the subject mortgage and the underlying note (see *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680 [2012]; *Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]). Written assignment of the underlying note or physical delivery of the note prior to the commencement of the action is sufficient to transfer the obligation (see *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]; *Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680 [2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2009]). Once a promissory note is tendered to and accepted by an assignee, the mortgage passes as an incident to the note (see *Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2007]). However, the assignment of a mortgage without assignment of the underlying debt is a nullity, and no interest is acquired by it (see *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]; *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2012]; *Bank of N.Y. v Silverberg*, 86 AD3d 274 [2011]).

Here, the plaintiff failed to demonstrate its prima facie entitlement to judgment as a matter of law, because it did not eliminate triable issues of fact regarding whether it had standing as the lawful holder or assignee of the subject note on the date it commenced the action (see *Bank of N.Y. Mellon v Gales*, 116 AD3d 723 [2014]; *HSBC Bank USA v Hernandez*, 92 AD3d 843 [2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2009]).

Accordingly, the Supreme Court erred in granting that branch

of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against the appellants. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

19 BARRETT HUGHES et al., Appellants, v BROOKLYN SKATING, LLC, et al., Defendants/Third-Party Plaintiffs-Respondents. TRICORP AMUSEMENTS, INC., Third-Party Defendant-Respondent. [991 NYS2d 326]—

Disclosure—Penalty for Failure to Disclose—Enforcement of Conditional Order of Preclusion

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Kings County (Ruchelsman, J.), dated June 4, 2012, which denied their motion to restore the action to the active calendar and granted the cross motion of the defendants Brooklyn Skating, LLC, and Empire Roller Rink Center, joined in by the third-party defendant, Tricorp Amusements, Inc., to dismiss the complaint, and (2) so much of an order of the same court dated January 17, 2013, as, in effect, denied that branch of the plaintiffs' motion which was to vacate a conditional order of preclusion of the same court dated April 24, 2009.

Ordered that the order dated June 4, 2012, is affirmed; and it is further,

Ordered that the order dated January 17, 2013, is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

In this action seeking damages for personal injuries, the Supreme Court issued multiple orders directing the parties to comply with certain discovery demands. On April 24, 2009, a conditional preclusion order directed that discovery be provided within 30 days, or the plaintiffs would be "automatically precluded." The plaintiffs failed to timely comply with this order. On or about December 9, 2009, the action was marked "Other Final Disp. Pre Note." More than two years later, the plaintiffs moved to restore the action to the court's calendar. The court denied the plaintiffs' motion and granted the cross motion of the defendants Brooklyn Skating, LLC, and Empire Roller Rink Center, joined in by the third-party defendant, Tricorp Amusements, Inc. (hereinafter collectively the respondents), to dismiss the complaint. The plaintiffs then moved, inter alia, to vacate the conditional preclusion order, and the Supreme Court denied that branch of the motion.

A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions speci-

fied in the order (see *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74 [2010]; *Wei Hong Hu v Sadiqi*, 83 AD3d 820, 821 [2011]). As a result of the plaintiffs' failure to timely comply with the conditional order of preclusion, that conditional order became absolute (see *Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 801 [2012]; *Keenan v Fiorentino*, 84 AD3d 740 [2011]; *Wei Hong Hu v Sadiqi*, 83 AD3d at 821; *Panagiotou v Samaritan Vil., Inc.*, 66 AD3d 979, 980 [2009]; *Rodriguez v Zeichner*, 50 AD3d 999, 1000 [2008]). To be relieved of the adverse impact of the conditional order of preclusion, the plaintiffs were required to demonstrate a reasonable excuse for their failure to comply with the order and the existence of a potentially meritorious cause of action (see *Keenan v Fiorentino*, 84 AD3d 740 [2011]; *Wei Hong Hu v Sadiqi*, 83 AD3d at 821). The plaintiffs failed to demonstrate either (see *G.D. Van Wagenen Fin. Servs., Inc. v Sichel*, 43 AD3d 1104, 1105 [2007]; *Kumar v Yonkers Contr. Co., Inc.*, 14 AD3d 493, 494 [2005]; *Baturov v Marchewka*, 10 AD3d 345 [2004]). Accordingly, the Supreme Court properly denied that branch of the plaintiffs' motion which was to vacate the conditional preclusion order and properly granted the respondents' cross motion to dismiss the complaint on the ground that the plaintiffs failed to comply with the conditional order of preclusion.

In light of our determination, we need not address the plaintiffs' remaining contention. Mastro, J.P., Lott, Sgroi and LaSalle, JJ., concur.

20 HUNTER SPORTS SHOOTING GROUNDS, INC., Appellant-Respondent, v BRIAN X. FOLEY et al., Respondents-Appellants, and COUNTY OF SUFFOLK, Appellant-Respondent. [992 NYS2d 285]—

Judgments—Summary Judgment

In an action, inter alia, for a judgment declaring that the actions of the Town Board of the Town of Brookhaven in enforcing a Town of Brookhaven noise ordinance against the plaintiff are unconstitutional, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Farneti, J.), dated June 21, 2012, as denied its cross motion for summary judgment on the first, second, third, and sixth causes of action, the defendant County of Suffolk separately appeals, as limited by its brief, from so much of the same order as denied its cross motion for summary judgment in favor of the plaintiff on the first, fifth, and sixth causes of action, and the defendants Brian X. Foley, Steve Fiore-Rosenfeld, Kevin T. McCarrick, Kathleen Walsh, Connie Kepert, Carol Bissonette, and Timothy P. Mazzei, constituting the Town Board

of the Town Brookhaven, cross-appeal, as limited by their brief, from so much of the same order as denied their motion for summary judgment dismissing so much of the complaint as alleged that the noise ordinance was unlawfully and improperly applied to the plaintiff.

Ordered that the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

According to the complaint, since 1963, various licensees have operated a trap and skeet shooting range on certain real property located within the Town of Brookhaven and owned by the County of Suffolk. In 1987, the Town enacted a noise ordinance which, inter alia, authorized the imposition of fines upon entities that emit sound in excess of 65 decibels. In 2006, the plaintiff began operating the trap and skeet shooting range. In November and December 2006, the Town commenced a series of proceedings in the Sixth District Court, Suffolk County, alleging that the plaintiff was in violation of the Town's noise ordinance.

The plaintiff commenced this action in the Supreme Court, Suffolk County, against the members of the Town Board of the Town of Brookhaven (hereinafter the Town), inter alia, for a judgment declaring that the Town's actions in enforcing the noise ordinance against it were unconstitutional, and that the noise ordinance was unlawfully and improperly applied to the plaintiff. In a prior order, the Supreme Court directed that the County be joined as a necessary party. The plaintiff subsequently filed an amended complaint that named the County as an additional defendant, but did not assert any causes of action against the County.

The Supreme Court properly denied the Town's motion for summary judgment dismissing so much of the complaint as alleged that the noise ordinance was unlawfully and improperly applied to the plaintiff. In a prior order dated October 6, 2011, the Supreme Court denied that branch of the Town's prior motion which was for summary judgment dismissing so much of the complaint as alleged that the noise ordinance was unlawfully and improperly applied to the plaintiff "without prejudice to timely renewal, upon submission of proper papers." In the prior order, the Supreme Court explained that the Town failed to present evidence in admissible form establishing the level of sound emitted by the plaintiff's operation, as the affidavit of its expert, Eric Zwerling, which was made and notarized in the State of New Jersey, lacked the required certificate of conformity (see CPLR 2309 [c]; *PRA III, LLC v Gonzalez*, 54 AD3d 917, 918 [2008]), and a report of the Noise Consultancy, LLC, was without probative value because it was unsworn and uncertified

(see *Duke v Saurelis*, 41 AD3d 770, 771 [2007]). Instead of correcting the defects in its supporting papers and moving to renew its prior motion, the Town made a second motion for summary judgment, and submitted the same documents it had submitted in support of its original motion, without rectifying the defects identified by the Supreme Court. Nor did the Town submit any other evidence establishing the level of sound emitted by the plaintiff's operation. Although the Town's failure to submit the relevant certificate of conformity was not a fatal defect that would warrant the outright denial of its motion for summary judgment, here, the Supreme Court properly afforded the Town an opportunity to correct the defect, and yet the Town failed to do so (cf. *Midfirst Bank v Agho*, 121 AD3d 343 [2014]; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45 [2014]). Accordingly, the Supreme Court properly denied the Town's second motion on the ground that it was an improper successive motion for summary judgment (see *Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570 [2014]).

The Supreme Court also properly denied the plaintiff's cross motion for summary judgment on its first, second, third, and sixth causes of action. The plaintiff failed to meet its prima facie burden of establishing that its operation of the trap and skeet shooting range should be exempt from the enforcement of the Town's noise ordinance based upon the property's use as a trap and skeet shooting range for the past 50 years, as alleged in the first cause of action (see *Matter of Taylor Tree v Planning Bd. of Town of Montgomery*, 272 AD2d 336, 336-337 [2000]; *Town Bd. of Town of Southampton v 1320 Entertainment*, 236 AD2d 387, 388 [1997]), or upon grounds of preemption or a violation of the Municipal Home Rule Law, as alleged in the sixth cause of action (see Municipal Home Rule Law § 10 [1] [ii] [a] [6]; *People v New York Trap Rock Corp.*, 57 NY2d 371, 377 [1982]). In addition, the plaintiff failed to meet its prima facie burden of establishing that the enforcement of the Town's noise ordinance against it results in an unlawful confiscation, as alleged in the second cause of action (see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 501 [1983]; *Fred F. French Inv. Co. v City of New York*, 39 NY2d 587, 596 [1976]), or an unlawful taking, as alleged in the third cause of action (see *Eastern Enterprises v Apfel*, 524 US 498, 523-524 [1998]; *Penn Central Transp. Co. v New York City*, 438 US 104, 124 [1978]).

Finally, the Supreme Court also properly denied the County's cross motion for summary judgment in favor of the plaintiff on

the first, fifth, and sixth causes of action. For the same reasons discussed above, the County failed to satisfy its prima facie burden with respect to the first and sixth causes of action, which alleged a prior, existing nonconforming use, preemption, and violation of the Municipal Home Rule Law. The County further failed to establish its prima facie entitlement to judgment as a matter of law on the fifth cause of action, as it failed to demonstrate that a balancing of public interests weighs in favor of exempting the County from enforcement of the Town's noise ordinance (see *Matter of County of Monroe [City of Rochester]*, 72 NY2d 338, 343 [1988]). Mastro, J.P., Chambers, Lott and Roman, JJ., concur. [**Prior Case History: 2012 NY Slip Op 31721(U).**]

21 INFRA-METALS COMPANY, Respondent, v DK INDUSTRIAL SERVICES CORPORATION, Defendant, and LAQUILA GROUP, INC., et al., Appellants. (And a Third-Party Action.) [991 NYS2d 353]—

Liens—Mechanic's Lien—Summary Judgment

In an action, inter alia, to recover on a bond filed to discharge a mechanic's lien, the defendants Laquila Group, Inc., and Yonkers 300, LLC, appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Westchester County (O. Bellantoni, J.), entered August 15, 2012, as granted that branch of the plaintiff's motion which was for summary judgment on the second cause of action, which sought to recover on the bond filed to discharge the mechanic's lien, insofar as asserted against them, and denied that branch of their cross motion, made jointly with the defendant Liberty Mutual Insurance Company, which was for summary judgment dismissing that cause of action insofar as asserted against the defendants Laquila Group, Inc., and Yonkers 300, LLC, and (2) so much of a judgment of the same court dated October 22, 2012, as, upon those portions of the order, is in favor of the plaintiff and against them in the sum of \$503,559.38, and the defendant Liberty Mutual Insurance Company separately appeals from so much of the judgment as, upon so much of the order as granted that branch of the plaintiff's motion which was for summary judgment on the second cause of action insofar as asserted against it and denied that branch of the cross motion which was for summary judgment dismissing that cause of action insofar as asserted against it, is in favor of the plaintiff and against it in the sum of \$503,559.38.

Ordered that the appeal by the defendants Laquila Group, Inc., and Yonkers 300, LLC, from the order entered August 15, 2012, is dismissed; and it is further,

Ordered that the judgment is reversed insofar as appealed from, on the law, that branch of the plaintiff's motion which was for summary judgment on the second cause of action insofar as asserted against the defendants Laquila Group, Inc., Yonkers 300, LLC, and Liberty Mutual Insurance Company is denied, and the order entered August 15, 2012, is modified accordingly; and it is further,

Ordered that one bill of costs is awarded to the appellants appearing separately and filing separate briefs.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeals from the judgment (*see* CPLR 5501 [a] [1]).

Under Lien Law § 3, in order to be entitled to recover on a mechanic's lien, the materialman must furnish material to an owner, contractor, or subcontractor. "A person or entity who furnishes material to a materialman is not a materialman" (8-92 Warren's Weed, New York Real Property § 92.05 [3] [2014]; *see A & J Buyers v Johnson, Drake & Piper*, 25 NY2d 265, 271 [1969]). As the moving party, the plaintiff bore the burden of presenting "evidentiary facts showing the existence of a valid lien and that there were funds due and owing . . . to which the lien could attach" (*Bryan's Quality Plus, LLC v Dorime*, 112 AD3d 870, 870 [2013]; *see Tomaselli v Oneida County Indus. Dev. Agency*, 77 AD3d 1315, 1316 [2010]).

Here, the plaintiff failed to make a prima facie showing of its entitlement to judgment as a matter of law on the second cause of action, which sought to recover on a bond filed to discharge a mechanic's lien, insofar as asserted against the appellants. The plaintiff failed to establish, inter alia, that it was a materialman which provided materials to an owner, contractor, or subcontractor, and that the materials it allegedly supplied were used for the improvement of the real property at issue (*see Commercial Union Ins. Co. v Eastern Refractories Co.*, 240 AD2d 613, 614 [1997]; *Plattsburgh Quarries v Falcon Indus.*, 111 AD2d 1069, 1070 [1985]). Accordingly, the Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment on the second cause of action insofar as asserted against the appellants.

However, the Supreme Court properly denied the appellants' cross motion for summary judgment dismissing the second cause of action insofar as asserted against them, as they failed to make a prima facie showing of their entitlement to judgment as

a matter of law (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The appellants' contention that they are entitled to summary judgment dismissing the second cause of action insofar as asserted against them on the ground that the plaintiff is not a materialman entitled to recover under Lien Law § 3 is raised for the first time on appeal and is not properly before this Court (*see Gross v Aetna Cas. & Sur. Co.*, 240 AD2d 468, 469 [1997]). The contention of Laquila Group, Inc., and Yonkers 300, LLC, that the plaintiff is not entitled to bring an action in New York because it is an unauthorized foreign corporation doing business in New York is also improperly raised for the first time on appeal (*see Business Corporation Law* § 1312 [a]; *Household Bank [SB], N.A. v Mitchell*, 12 AD3d 568 [2004]). Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

22 J.P. MORGAN CHASE BANK, N.A., Respondent, v LANAR SYSTEMS, INC., et al., Defendants, and JONI GAMBARDELLA, Appellant. [991 NYS2d 371]—

Bills, Notes and Checks—Promissory Note

In an action to recover on revolving line of credit agreements and guaranties, the defendant Joni Gambardella appeals, as limited by her brief, from so much of an order of the Supreme Court, Westchester County (Giacomo, J.), entered February 28, 2013, as granted that branch of the plaintiff's motion which was for summary judgment on so much of the complaint as sought, in effect, to recover the outstanding principal balance of \$56,866.36 against her.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff made a prima facie showing of its entitlement to judgment as a matter of law against the defendant Joni Gambardella by submitting proof of the existence of the underlying credit agreements, Gambardella's personal guaranties of the obligations under those agreements, and the other defendants' failure to make payment in accordance with the terms of the credit agreements (*see JPMorgan Chase Bank, N.A. v Bauer*, 92 AD3d 641, 641-642 [2012]; *JPMorgan Chase Bank v Gamut-Mitchell, Inc.*, 27 AD3d 622, 622-623 [2006]). In opposition, Gambardella failed to raise a triable issue of fact. Accordingly, the Supreme Court properly granted that branch of the plaintiff's motion which was for summary judgment on so much of the complaint as sought, in effect, to recover the outstanding principal balance of \$56,866.36 against Gambardella. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

23 DENIS JOHNSON, Respondent, v EMIL BRAUN et al., Respondents-Appellants, and TOWN OF EAST HAMPTON, Appellant-Respondent. [991 NYS2d 351]—

Municipal Corporations—Notice of Street Defect

Motor Vehicles—Injuries to Passengers—Innocent Passenger

In an action to recover damages for personal injuries, the defendant Town of East Hampton appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Rebolini, J.), dated February 19, 2013, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the defendants Emil Braun and Harley M. Braun cross-appeal, as limited by their brief, from so much of the same order as granted the plaintiff's cross motion for summary judgment against them on the issue of liability.

Ordered that the order is reversed insofar as appealed from, on the law, and the motion of the defendant Town of East Hampton for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted; and it is further,

Ordered that the order is affirmed insofar as cross-appealed from; and it is further,

Ordered that one bill of costs is awarded to the defendant Town of East Hampton, payable by the defendants Emil Braun and Harley M. Braun and the plaintiff Denis Johnson, appearing separately and filing separate briefs, and one bill of costs is awarded to the plaintiff Denis Johnson, payable by the defendants Emil Braun and Harley M. Braun.

On the evening of February 18, 2010, the plaintiff was a rear-seat passenger in a vehicle owned by the defendant Emil Braun and driven by his daughter, Harley M. Braun (hereinafter the driver, and hereinafter together the Braun defendants), along a roadway located in the defendant Town of East Hampton, when the driver lost control, causing the vehicle to strike a tree. The plaintiff commenced this action against the Braun defendants and the Town to recover damages for injuries he allegedly sustained. The Supreme Court denied the Town's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it and granted the plaintiff's cross motion for summary judgment on the issue of liability against the Braun defendants.

The Town established its prima facie entitlement to judgment as a matter of law by demonstrating the enactment of the Town of East Hampton Code § 217-4, a prior written notice law, and

submitting affidavits by the Deputy Town Clerk and its Deputy Superintendent of Highways, who stated that their search of the Town's records revealed no prior written notice of a defective condition in the roadway where the accident occurred (see Town Law § 65-a [1]; *Politis v Town of Islip*, 82 AD3d 1191, 1192 [2011]; *Weinfeld v Roth Assoc.*, 177 AD2d 977, 978 [1991]).

Contrary to the Supreme Court's determination, the plaintiff failed to raise a triable issue of fact as to whether an exception to the prior written notice requirement—an affirmative act of negligence by the Town in creating or exacerbating a dangerous condition—applied here (see *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Politis v Town of Islip*, 82 AD3d at 1192). The plaintiff's opposition to the motion was premised on his theory that the driver lost control of the vehicle upon traveling over an improperly applied asphalt patch, which created a dangerous condition, rather than as a result of a black ice condition coupled with the driver's own negligence. The plaintiff's theory was speculative and insufficient to raise a triable issue of fact as to this exception to the prior written notice requirement (see *Mal-lory v City of New Rochelle*, 41 AD3d 556 [2007]). The plaintiff's deposition testimony, which contradicted his earlier testimony at the General Municipal Law § 50-h hearing, and attempted to raise a feigned factual issue, was insufficient to defeat the motion (see *id.* at 557). Additionally, the affidavit of the plaintiff's expert did not support plaintiff's theory, since it was based on speculation rather than record facts (see *Urbano v Rockefeller Ctr. N., Inc.*, 91 AD3d 549 [2012]).

Accordingly, the Supreme Court should have granted the Town's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

However, the Supreme Court correctly granted the plaintiff's cross motion for summary judgment in his favor and against the Braun defendants on the issue of liability. The plaintiff made a prima facie showing of his entitlement to judgment as a matter of law by submitting evidence that this was a one-car accident that occurred when the driver lost control of the vehicle she was driving (see *Mughal v Rajput*, 106 AD3d 886, 888 [2013]). "An innocent passenger . . . who, in support of [his or] her motion for summary judgment, submits evidence that the accident resulted from the driver losing control of the vehicle, shifts the burden to the driver to come forward with an exculpatory explanation" (*Siegel v Terrusa*, 222 AD2d 428, 428-429 [1995]). In opposition, the Braun defendants failed to raise a triable issue of fact sufficient to defeat the plaintiff's cross motion. The driver testified at her deposition that she skidded on

black ice while driving too fast and weaving in and out of her lane of traffic when she lost control of her vehicle and, thus, failed to raise a triable issue of fact as to whether the skid was unavoidable (*see Mughal v Rajput*, 106 AD3d at 888). Contrary to the Braun defendants' contention, the plaintiff's alleged comparative fault in, inter alia, removing his seat belt just prior to the accident, does not defeat the plaintiff's cross motion, because it concerns damages, not liability (*see O'Connor v S & R Medallion Corp.*, 2 AD3d 176, 177 [2003]). Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

24 ANTOINE M. JOHNSON et al., Respondents, v RANDY P. RICHARDSON, Defendant, and U-HAUL COMPANY OF ARIZONA, Appellant. [991 NYS2d 357]—

**Motor Vehicles—Collision—Summary Judgment on Issue of Liability
Premature**

In an action to recover damages for personal injuries, the defendant U-Haul Company of Arizona appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Martin, J.), dated December 21, 2012, as, upon reargument, vacated the determination in an order of the same court dated February 28, 2012, denying the plaintiffs' motion for summary judgment on the issue of liability, and thereupon granted the plaintiffs' motion.

Ordered that the order dated December 21, 2012, is reversed insofar as appealed from, on the law, with costs, and, upon reargument, the determination in the prior order dated February 28, 2012, denying the plaintiffs' motion for summary judgment on the issue of liability is adhered to.

This action arises from an automobile accident that occurred near the intersection of Bedford Avenue and Brevoort Place in Brooklyn. A vehicle owned by the defendant U-Haul Company of Arizona (hereinafter U-Haul) and operated by the defendant Randy P. Richardson collided with a vehicle owned and operated by the plaintiff Antoine M. Johnson, in which the other plaintiffs were passengers. The plaintiffs commenced this action to recover damages for personal injuries. Prior to pretrial discovery, the plaintiffs moved for summary judgment on the issue of liability. In an order dated February 28, 2012, the Supreme Court, inter alia, denied the plaintiffs' motion, with leave to renew upon the completion of discovery.

Prior to the completion of discovery, the plaintiffs moved for leave to reargue their motion for summary judgment on the issue of liability. In the order appealed from, the Supreme Court granted leave to reargue, and, upon reargument, inter alia, granted the plaintiffs' motion for summary judgment on the issue of liability. U-Haul appeals.

“A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party’s position may exist but cannot then be stated” (*James v Aircraft Serv. Intl. Group*, 84 AD3d 1026, 1027 [2011] [internal quotation marks omitted]; see CPLR 3212 [f]; *Wesolowski v St. Francis Hosp.*, 108 AD3d 525, 526 [2013]; *Jones v American Commerce Ins. Co.*, 92 AD3d 844, 845 [2012]; *Juseinoski v New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637 [2006]). “This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion” (*Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 793 [1988]; see *Wesolowski v St. Francis Hosp.*, 108 AD3d at 526; *James v Aircraft Serv. Intl. Group*, 84 AD3d at 1027).

Here, the plaintiffs’ motion for leave to reargue was made prior to the parties conducting depositions. U-Haul asserts that the accident was “staged” by the plaintiffs and Richardson, and, thus, U-Haul was not liable for negligence. Since U-Haul had no personal knowledge of the relevant facts, it should be afforded the opportunity to conduct discovery, including depositions of the plaintiffs and the defendant Richardson. Accordingly, it was premature to award summary judgment at this stage of the action (see *Wesolowski v St. Francis Hosp.*, 108 AD3d at 526; *Jones v American Commerce Ins. Co.*, 92 AD3d at 845; *Gardner v Cason, Inc.*, 82 AD3d 930, 931-932 [2011]; *Adler v City of New York*, 52 AD3d 549, 549-550 [2008]). Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

25 LESLIE KATZ et al., Appellants, v JEFFERSON MILLER et al., Defendants, and JOHN TOPPIN, Also Known as JOHN W. TOPPIN, et al., Respondents. [991 NYS2d 346]—

Mortgages—Foreclosure—Summary Judgment

In an action to foreclose a mortgage, the plaintiffs appeal from so much of an order of the Supreme Court, Queens County (Greco, Jr., J.), entered July 30, 2013, as denied those branches of their motion which were for summary judgment on the complaint insofar as asserted against the defendants John Toppin, also known as John W. Toppin, and Pearline Toppin, striking their affirmative defenses, and dismissing their counterclaims.

Ordered that the order is modified, on the law, by deleting the provisions thereof denying those branches of the plaintiffs’ motion which were for summary judgment striking the first through twelfth affirmative defenses and dismissing the second and third counterclaims, and substituting therefor a provision

granting those branches of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

In an action to foreclose a mortgage, a plaintiff meets its initial burden by producing the mortgage and the unpaid note, and evidence of default (*see W & H Equities LLC v Odums*, 113 AD3d 840 [2014]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856 [2009]). Here, the plaintiffs made a prima facie showing of entitlement to judgment as a matter of law against the defendants John Toppin, also known as John W. Toppin, and Pearline Toppin (hereinafter together the Toppin defendants) by submitting the note executed by Jefferson Miller, the guaranty of that note executed by the Toppin defendants and the mortgage securing that guaranty, as well as evidence of default (*see Baron Assoc., LLC v Garcia Group Enters., Inc.*, 96 AD3d 793 [2012]; *cf. W & H Equities LLC v Odums*, 113 AD3d 840 [2014]). However, in opposition, the Toppin defendants raised triable issues of fact as to whether the guaranty, mortgage, and related documents that they executed were unenforceable since they were procured by duress or were unconscionable (*see Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]; *Adams v Irving Natl. Bank of N.Y.*, 116 NY 606, 611-612 [1889]; *Call v Ellenville Natl. Bank*, 5 AD3d 521, 525 [2004]; *Triad Distribs. v Conde*, 56 AD2d 648 [1977]). While the documents executed by the Toppin defendants included an estoppel certificate containing a waiver of any defenses, offsets, or counterclaims, the triable issues of fact concerning duress and unconscionability extend to the enforceability of that waiver (*see Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 593-594 [1981]; *JRK Franklin, LLC v 164 E. 87th St. LLC*, 27 AD3d 392, 393 [2006]). Moreover, the plaintiffs did not establish, prima facie, that the Toppin defendants ratified the guaranty and mortgage (*see Malek v Malek*, 107 AD3d 425 [2013]; *Arrow v Arrow*, 133 AD2d 960 [1987]). Accordingly, the Supreme Court properly denied those branches of the plaintiffs' motion which were for summary judgment on the complaint against the Toppin defendants and striking their thirteenth affirmative defense, misdesignated as the fourteenth affirmative defense, which alleged that the mortgage was unenforceable against them since it was secured by duress.

However, the Supreme Court should have granted those branches of the plaintiffs' motion which were for summary judgment striking the first through twelfth affirmative defenses. The second and eleventh affirmative defenses were not substantiated with factual allegations, and were conclusory in nature (*see CPLR 3013, 3018 [b]; Becher v Feller*, 64 AD3d 672, 677

[2009]; *Cohen Fashion Opt., Inc. v V & M Opt., Inc.*, 51 AD3d 619 [2008]). The plaintiffs established their prima facie entitlement to judgment as a matter of law striking the first, third through tenth, and twelfth affirmative defenses, and the Toppin defendants failed to raise a triable issue of fact in opposition (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The Supreme Court should also have granted those branches of the plaintiffs' motion which were for summary judgment dismissing the second and third counterclaims, which were in the nature of defenses to the complaint and did not assert facts upon which affirmative relief may be granted (see CPLR 3019 [a]; *P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d 195, 199-200 [2009]). The Supreme Court properly denied that branch of the plaintiffs' motion which was for summary judgment dismissing the first counterclaim (see Real Property Law § 282).

We decline the Toppin defendants' request to impose sanctions upon the plaintiffs or their attorney (see generally 22 NYCRR 130-1.1). Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

26 HAMID KHAN, Appellant, v KAIETEUR CONSTRUCTION, INC., et al., Respondents. [991 NYS2d 349]—

Contracts—Breach or Performance of Contract

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from a judgment of the Supreme Court, Queens County (Yablon, Ct. Atty. Ref.), entered September 4, 2012, which, upon a decision of the same court dated July 13, 2012, made after a nonjury trial, is in favor of the defendants and against him dismissing the complaint, awarding the defendants the principal sum of \$47,000 on their counterclaim to recover damages for breach of contract, and declaring that the defendants' lien on the subject real property in the sum of \$47,000 is valid.

Ordered that the judgment is affirmed, with costs.

In reviewing a determination rendered after a nonjury trial, the power of this Court is as broad as that of the trial court, and this Court may render the judgment it finds warranted by the facts, taking into account that in a close case the trial court had the advantage of seeing the witnesses and hearing the testimony (see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *Novair Mech. Corp. v Universal Mgt. & Contr. Corp.*, 81 AD3d 909, 909-910 [2011]; *Yonkers Contr. Co., Inc. v Romano Enters. of N.Y., Inc.*, 40 AD3d 629 [2007]).

Here, the Supreme Court's determination that the plaintiff failed to meet his burden of establishing his causes of action alleging breach of contract and fraud is warranted by the facts, and we find no reason to disturb it (*see Tornheim v Kohn*, 31 AD3d 748 [2006]; *Zanani v Savad*, 217 AD2d 696, 697 [1995]).

Moreover, the Supreme Court properly determined that the defendants were entitled to recover damages from the plaintiff on their counterclaim alleging breach of contract. The defendants showed, by a preponderance of the credible evidence, that the plaintiff breached his contract with the defendants in failing to pay the balance due thereon (*see Metropolitan Switch Bd. Mfg. Co., Inc. v B & G Elec. Contrs., Div. of B & G Indus., Inc.*, 96 AD3d 725, 726 [2012]; *cf. Cohn v Titan Drilling Corp.*, 79 AD3d 925, 926 [2010]). In addition, the Supreme Court's determination that the defendants had a valid lien on the plaintiff's interest in certain real property is warranted by the facts, and we find no reason to disturb it.

The plaintiff's remaining contentions are either unpreserved for appellate review or without merit. Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur.

27 WALFREDO LEON, Appellant, v STATE UNIVERSITY OF NEW YORK et al., Respondents. [991 NYS2d 359]—

Civil Rights—Discrimination Based on Disability

In an action, inter alia, to recover damages for employment discrimination on the basis of disability in violation of Executive Law § 296, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated April 5, 2013, as granted that branch of the defendants' motion which was for summary judgment dismissing the second cause of action, which alleged employment discrimination based on disability.

Ordered that the order is affirmed insofar as appealed from, with costs.

The New York Human Rights Law provides, "It shall be an unlawful discriminatory practice for an employer . . . to refuse to provide reasonable accommodations to the known disabilities of an employee" (Executive Law § 296 [3] [a]). Here, the Supreme Court correctly determined that the plaintiff's complaint was subject to dismissal to the extent that it alleged that the defendants violated Executive Law § 296 (3). The modified work schedule accommodation the plaintiff sought involved his schedule at the nonparty Kings County Hospital Center, which, although "affiliated" with the plaintiff's now former employer, the defendant State University of New York, Down-

state College of Medicine (hereafter SUNY), is not a facility owned and operated by SUNY. In any event, the defendants established, *prima facie*, their entitlement to judgment as a matter of law with evidence showing that, while the plaintiff suffered from a disability related to prostate cancer surgery, he never proposed a reasonable accommodation that the defendants refused to make (*see Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]; *Evans v City of New York*, 64 AD3d 468 [2009]; *Pimentel v Citibank, N.A.*, 29 AD3d 141, 146 [2006]). Further, the defendants demonstrated, *prima facie*, that the action not to renew the plaintiff's term appointment as a clinical associate professor at SUNY was motivated by legitimate nondiscriminatory reasons (*see Matter of McEniry v Landi*, 84 NY2d at 558; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119 [2007]; *Timashpolsky v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 306 AD2d 271, 273 [2003]). In opposition, the plaintiff failed to raise a triable issue of fact with evidence that he proposed a reasonable accommodation that the defendants refused to make. Moreover, the plaintiff failed to raise a triable issue of fact with evidence from which one could infer that the reasons not to renew his term appointment as a clinical associate professor at SUNY were pretextual (*see Evans v City of New York*, 64 AD3d at 468; *Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d at 119).

Accordingly, the Supreme Court correctly granted that branch of the defendants' motion which was for summary judgment dismissing the second cause of action, which alleged employment discrimination based on disability. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

28 MIRO MACHOVEC, Respondent, v PETER SVOBODA, Appellant. [992 NYS2d 279]—

Process—Service of Process—Hearing

In an action to recover damages for breach of a lease, the defendant appeals from an order of the Supreme Court, Richmond County (Minardo, J.), dated May 28, 2013, which denied his motion, *inter alia*, to vacate a judgment dated November 1, 2011, entered upon his default in appearing or answering the complaint.

Ordered that the order is reversed, on the law, with costs, and the matter is remitted to the Supreme Court, Richmond County, for a hearing to determine whether the defendant was properly served with process, and for a new determination of the motion thereafter.

The defendant leased property from the plaintiff on Staten

Island. In 2010, in the midst of a dispute over the rent and an alleged oral modification of their agreement, the plaintiff commenced this action against the defendant. According to the process server's affidavit of service, the process server personally delivered a copy of the summons and complaint to the defendant on September 7, 2010. The defendant, who denies that he was served with a copy of the summons and complaint, did not answer or otherwise appear in the action.

In November 2010, the plaintiff mailed an additional copy of the summons and complaint to the defendant as a prerequisite to obtaining a default judgment under CPLR 3215. The defendant received the mailing, but ignored it on advice of counsel because of a perceived defect in the summons. The defendant expressly told counsel that he had not received a copy of the summons and complaint by any other means. In November 2011, the plaintiff obtained a default judgment against the defendant.

In early 2013, the defendant moved to vacate the judgment and extend the time to answer the complaint pursuant to, *inter alia*, CPLR 5015 (a) (1), or to vacate the judgment and dismiss the complaint pursuant to CPLR 3211 (a) (8) and 5015 (a) (4). The Supreme Court denied the motion without explanation and without holding a hearing to determinate the propriety of service of process.

A process server's affidavit of service gives rise to a presumption of proper service (*see Wells Fargo Bank, N.A. v Final Touch Interiors, LLC*, 112 AD3d 813, 814 [2013]; *Matter of Romero v Ramirez*, 100 AD3d 909, 910 [2012]; *Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216, 220 [2011]). To be entitled to vacatur of a default judgment and dismissal of a complaint under CPLR 5015 (a) (4), a defendant must overcome the presumption raised by the process server's affidavit of service. A sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit will defeat the presumption of proper service (*see Deutsche Bank Natl. Trust Co. v DaCosta*, 97 AD3d 630, 631 [2012]; *Scarano v Scarano*, 63 AD3d 716, 716 [2009]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 344 [2003]). If the presumption is rebutted, a hearing to determine the propriety of service of process is necessary. At the hearing, the burden is on the plaintiff to prove jurisdiction by a preponderance of the evidence (*see Matter of Romero v Ramirez*, 100 AD3d at 910; *Tikvah Enters., LLC v Neuman*, 80 AD3d 748, 749 [2011]; *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2009]).

Here, the defendant expressly denied that he had ever been

served with legal papers. Additionally, the defendant stated that he did not meet the description of the person described in the affidavit of service of the summons and complaint, and he cited specific, significant discrepancies between his appearance and the description of the person served in the process server's affidavit of service. Although the defendant's description of his own appearance was as of the date of his affidavit, which was 2¹/₂ years after the date the process server allegedly served a copy of the summons and complaint, some of the discrepancies would not have been affected by the passage of that time (*cf. Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897 [2013]; *Kopman v Blue Ridge Ins. Co.*, 296 AD2d 479, 480 [2002]). Given the defendant's unequivocal denial that he had been served, and the presence of significant discrepancies between the description in the affidavit of service and the defendant's own affidavit, the Supreme Court should have held a hearing before deciding that branch of the motion. Accordingly, we reverse the order and remit the matter to the Supreme Court, Richmond County, for a hearing to determine whether the defendant was properly served with process, and for a new determination of the defendant's motion thereafter. Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

29 KRISTIN MANGILIT-PRADLIK, Plaintiff, and ANTHONY J. PRADLIK, Appellant, v VALVOLINE INSTANT OIL CHANGE GE 6604-WHITE PLAINS et al., Respondents. [991 NYS2d 368]—

Pleading—Amendment

Disclosure—Penalty for Failure to Disclose—Spoliation of Evidence

In an action to recover damages for negligence, defamation, and intentional infliction of emotional distress, the plaintiff Anthony J. Pradlik appeals, as limited by his brief, from so much of an order of the Supreme Court, Westchester County (O. Bellantoni, J.), dated December 12, 2012, as denied the plaintiffs' motion for leave to amend the complaint, denied their separate motion pursuant to CPLR 3126 to impose a sanction upon the defendants for spoliation of evidence, and granted those branches of the defendants' cross motion which were for summary judgment dismissing the causes of action to recover damages for defamation and intentional infliction of emotional distress.

Ordered that the order is affirmed insofar as appealed from, with costs.

The Supreme Court providently exercised its discretion in denying the plaintiffs' motion for leave to amend the complaint.

“Leave to amend a pleading should be freely given (*see* CPLR 3025 [b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit” (*Ortega v Bisogno & Meyerson*, 2 AD3d 607, 609 [2003]; *see Reyes v Brinks Global Servs. USA, Inc.*, 112 AD3d 805, 806 [2013]). Here, the proposed amendments were patently devoid of merit (*see Reyes v Brinks Global Servs. USA, Inc.*, 112 AD3d at 806; *Torres v Louzoun Enters., Inc.*, 105 AD3d 945, 946 [2013]; *see also Vargas v Crown Container Co., Inc.*, 114 AD3d 762, 764 [2014]; *Pappas v Paspas*, 271 AD2d 420, 421 [2000]).

Moreover, it was not an improvident exercise of discretion for the Supreme Court to deny the plaintiffs’ separate motion to impose a sanction upon the defendants for spoliation of evidence. “The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence” (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714 [2013], quoting *Lentz v Nic’s Gym, Inc.*, 90 AD3d 618, 618 [2011]). “The party requesting sanctions for spoliation of evidence has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised the movant’s ability to prove a claim or defense” (*Giuliano v 666 Old Country Rd., LLC*, 100 AD3d 960, 962 [2012]; *see Mendez v La Guacatala, Inc.*, 95 AD3d 1084, 1085 [2012]; *Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2009]). “[A] court may impose a sanction less severe than the striking of the responsible party’s pleading or no sanction ‘where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense’ ” (*Falcone v Karagiannis*, 93 AD3d 632, 634 [2012], quoting *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007]; *see Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 610, 611 [2011]). Here, the plaintiffs failed to establish that the defendants intentionally or negligently disposed of critical evidence, or that the loss of the evidence fatally compromised their ability to prove their claims (*see Scivoli v Levit*, 79 AD3d 1011, 1013 [2010]).

The Supreme Court properly granted those branches of the defendants’ cross motion which were for summary judgment dismissing the causes of action to recover damages for defamation and intentional infliction of emotional distress. As to the cause of action alleging defamation, the defendants made a prima facie showing that the plaintiffs did not suffer any special damages, and that the alleged defamatory statements did not constitute slander per se (*see Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]; *Zherka v Gribler*, 101 AD3d 864, 864

[2012]; *Matherson v Marchello*, 100 AD2d 233, 235 [1984]). Moreover, the defendants established, prima facie, that the acts allegedly committed by employees of the defendant Valvoline Instant Oil Change GE 6604-White Plains did not rise to the level of extreme and outrageous conduct required to sustain a cause of action to recover damages for intentional infliction of emotional distress (see *Curtis-Shanley v Bank of Am.*, 109 AD3d 634, 635 [2013]; *Baumann v Hanover Community Bank*, 100 AD3d 814, 816-817 [2012]; *Waynes v BJ's Wholesale Club, Inc.*, 97 AD3d 659, 661 [2012]). In opposition to the defendants' prima facie showing, the plaintiffs failed to raise a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The plaintiff's remaining contention is without merit. Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

30 *MERCHANTS INSURANCE GROUP, Appellant, v PETER COUTRIER, Respondent.* [991 NYS2d 370]—In a subrogation action to recover benefits paid to the plaintiff's insured, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Molia, J.), dated December 18, 2012, which granted the defendant's motion, in effect, to amend an order of the same court dated February 1, 2008, vacating a default judgment against the defendant, so as to direct the return of his wages garnished in connection with the default judgment.

Ordered that the order dated December 18, 2012, is affirmed, with costs.

Under the circumstances of this case, the plaintiff's retention of the defendant's wages garnished in connection with a default judgment against the defendant and in the plaintiff's favor is inconsistent with the vacatur of the default judgment. Accordingly, the Supreme Court properly exercised its discretion in granting the defendant's motion. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

31 *JOSEPH MOCHKIN, Appellant, et al., Plaintiff, v JUDA MOCHKIN, Also Known as JUDA MOCKIN and Others, Respondent.* [992 NYS2d 90]—

Stipulations—Stipulation of Settlement

In an action, inter alia, for an accounting, the plaintiff Joseph Mochkin appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Schmidt, J.), entered April 22, 2012, as granted that branch of the defendant's motion which was to further extend the time for payment of the balance of settlement funds provided for in a so-ordered stipulation of settlement dated July 25, 2011.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff Joseph Mochkin (hereinafter the appellant) is the son of the defendant. In 2006, the appellant commenced this action in the Supreme Court, Kings County, against the defendant concerning the plaintiff 513 Properties Inc. (hereinafter 513). The appellant alleged that he and the defendant were each 50% shareholders in 513, which owns real property in Brooklyn consisting of a mixed-use building with residential units and commercial space. Since 2003, 513's property has been encumbered by a mortgage held by Astoria Federal Savings and Loan (hereinafter Astoria).

The appellant and the defendant settled the action in a stipulation of settlement dated July 25, 2011, which was so-ordered by the Supreme Court. Pursuant to the stipulation of settlement, the appellant agreed to relinquish all claims to 513 and its property in exchange for receiving \$750,000 from the defendant. As directed in the stipulation of settlement, the defendant made an initial payment of \$50,000 to the appellant in the fall of 2011. The stipulation of settlement provided that the remaining \$700,000 was to be paid to the appellant on or before July 25, 2012. It further provided that the Supreme Court would retain jurisdiction "in all matters related hereto." In an effort to raise the necessary funds to pay the appellant, the defendant sought refinancing with W. Financial Fund, L.P. During the course of this transaction, it was discovered that a notice of pendency had been filed against 513's property in an action that the appellant commenced against Astoria, challenging the validity of its mortgage (hereinafter the Astoria action).

In July 2012 the defendant moved to intervene in the Astoria action and to compel the appellant to cancel the notice of pendency. In an order dated July 12, 2012, the Supreme Court extended the due date of the final settlement payment to August 24, 2012, subject to the defendant's right to seek a further extension if necessary, due to the appellant's conduct. In an order dated August 14, 2012, the court directed the appellant to immediately cancel the notice of pendency and to discontinue the Astoria action upon his receipt of the settlement funds. The appellant failed to cancel the notice of pendency, and the defendant thereafter moved in August 2012 for a further extension of time to pay the \$700,000 balance. In an order dated November 28, 2012, the court extended the payment deadline for 120 days from the date of service of a copy of the order with notice of entry. In that order, the court expressly found that the appellant had breached the implied covenant of good faith and

fair dealing by commencing the Astoria action and filing the notice of pendency. Regarding the order dated November 28, 2012, the appellant filed a notice of appeal in this Court under docket No. 2013-06499, but he subsequently withdrew the appeal. In March 2013, the defendant moved for a further extension of time to pay the remaining \$700,000. In the order now appealed from, the Supreme Court granted that branch of the defendant's motion by tolling the running of the 120-day period set forth in the November 28, 2012, order until, as is relevant here, the appellant discontinued the Astoria action and cancelled the notice of pendency.

Contrary to the appellant's contention, the Supreme Court providently exercised its discretion in granting that branch of the defendant's motion which was to further extend the time for payment of the balance of the settlement funds. " 'A settlement agreement entered into by parties to a lawsuit does not terminate the action unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement. Absent such termination, the court retains its supervisory power over the action and may lend aid to a party who had moved for enforcement of the settlement' " (*Palmieri v Town of Babylon*, 87 AD3d 625, 626 [2011], quoting *Teitelbaum Holdings v Gold*, 48 NY2d 51, 53 [1979]). Further, CPLR 2004 provides, in pertinent part, that "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown" (CPLR 2004). In addition to the statutory authority, a court has authority under the common law, in its discretion, to grant relief from a judgment or order in the interest of justice, taking into account the equities of the case and the grounds for the requested relief (see *Hodge v Development at Helderberg Meadows, LLC*, 114 AD3d 1122 [2014]; *Hoo Corp. v 109 Graham Ave. Corp.*, 288 AD2d 266, 267 [2001]).

Here, the appellant and the defendant executed a stipulation of settlement which was so-ordered by the Supreme Court. It did not contain any provision terminating or discontinuing the action, and no judgment was entered in accordance with its terms. It provided, however, that the Supreme Court would retain jurisdiction in all related matters. Under the circumstances of this case, and pursuant to CPLR 2004 and the court's common-law supervisory authority, the Supreme Court providently exercised its discretion in granting that branch of the defendant's motion which was to further extend the time for payment of the balance of the settlement funds provided for in the so-ordered stipulation of settlement dated July 25, 2011.

The appellant's remaining contentions either are without merit, are not properly before this Court, or need not be addressed in light of our determination. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur. **[Prior Case History: 39 Misc 3d 1223.]**

32 CHERISE MUNION, Respondent, v TRUSTEES OF COLUMBIA UNIVERSITY IN CITY OF NEW YORK, Appellant. [991 NYS2d 460]—

Workers' Compensation—Exclusiveness of Remedy—Special Employee

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Queens County (Siegal, J.), entered November 15, 2013, which denied its motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is granted.

On March 31, 2011, the plaintiff, an employee of nonparty TemPositions, was working as a coat checker at the Faculty House of Columbia University. After arriving at the Faculty House, while walking to the coatroom, she tripped and fell over the floor saddle located between the coat room corridor and a reception area. Shortly after the accident, the plaintiff began receiving workers' compensation benefits under a TemPositions policy. The plaintiff commenced this action against the trustees of Columbia University (hereinafter the defendant). The defendant moved for summary judgment dismissing the complaint on the grounds that it was the plaintiff's special employer pursuant to Workers' Compensation Law §§ 11 and 29 (6), and that the alleged defect was trivial as a matter of law and, thus, not actionable. The Supreme Court denied the motion. The defendant appeals.

“[T]he receipt of workers' compensation benefits is the exclusive remedy that a worker may obtain against an employer for losses suffered as a result of an injury sustained in the course of employment” (*Charles v Broad St. Dev., LLC*, 95 AD3d 814, 816 [2012] [internal quotation marks omitted]; see Workers' Compensation Law §§ 11, 29 [6]). “ ‘A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer’ ” (*Alfonso v Pacific Classon Realty, LLC*, 101 AD3d 768, 769 [2012], quoting *Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 150 [2010]). “A special employee is ‘one who is transferred for a limited time of whatever duration to the service of another,’ and limited liability inures to the benefit of both the general and special employer” (*Fung v Japan Airlines Co., Ltd.*, 9 NY3d

351, 359 [2007], quoting *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

“[A] person’s categorization as a special employee is usually a question of fact” (*Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557). However, “the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact” (*id.* at 557-558). “Many factors are weighed in deciding whether a special employment relationship exists, and generally no single one is decisive . . . Principal factors include who has the right to control the employee’s work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer’s or the general employer’s business . . . The most significant factor is who controls and directs the manner, details, and ultimate result of the employee’s work” (*Schramm v Cold Spring Harbor Lab.*, 17 AD3d 661, 662 [2005]; see *Gonzalez v Woodbourne Arboretum, Inc.*, 100 AD3d 694, 698 [2012]; *Digirolomo v Goldstein*, 96 AD3d 992, 993-994 [2012]).

“The receipt of Workers’ Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer” (*Pena v Automatic Data Processing, Inc.*, 105 AD3d 924, 924 [2013]; see *Hofweber v Soros*, 57 AD3d 848, 849 [2008]).

The defendant established its *prima facie* entitlement to judgment as a matter of law dismissing the complaint. The defendant submitted the affidavit of an attorney employed by the New York State Insurance Fund, who averred that the plaintiff had been receiving Workers’ Compensation benefits under a TemPositions policy since April 8, 2011, thus establishing, *prima facie*, that the plaintiff received Workers’ Compensation benefits from her general employer. The defendant further demonstrated, through the deposition testimony and affidavit of the general manager of the Faculty House and the affidavit of TemPositions’ chief executive officer, that the defendant controlled and directed the manner, details, and ultimate result of the plaintiff’s work. The defendant also had the authority to discharge the plaintiff, and the work she performed was in furtherance of the defendant’s business (see *Navallo v R.P. Brennan Gen. Contrs.*, 87 AD3d 683 [2011]; *Giovannucci v Petrone*, 51 AD3d 632 [2008]). In addition, the plaintiff, at her own deposition, the transcript of which was submitted by the defendant in support of its motion, stated, *inter alia*, that TemPositions told her where and to whom to report, but that the defendant’s

supervisors instructed her on her work duties. Thus, the defendant established, *prima facie*, that it was the plaintiff's special employer.

In opposition to the defendant's *prima facie* showing, the plaintiff failed to raise a triable issue of fact (*see Navallo v R.P. Brennan Gen. Contrs.*, 87 AD3d at 684; *Giovannucci v Petrone*, 51 AD3d 632 [2008]).

Accordingly, the Supreme Court should have granted the defendant's motion for summary judgment dismissing the complaint on the ground that the action was barred by the exclusivity provisions of the Workers' Compensation Law, since the defendant was the plaintiff's special employer, and she received Workers' Compensation benefits from her general employer.

In light of our determination, we need not address whether the defendant met its *prima facie* burden of demonstrating that the alleged defect was trivial as a matter of law. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

33 MARIA NURENA, Appellant, v WESTCHESTER COUNTY et al., Respondents. [992 NYS2d 86]—

Municipal Corporations—Notice of Claim—Late Notice—Failure to Serve Timely Notice

In an action, *inter alia*, to recover damages for employment discrimination on the basis of disability in violation of Executive Law § 296, the plaintiff appeals from an order of the Supreme Court, Westchester County (Jamieson, J.), dated June 3, 2013, which denied her motion for leave to serve a late notice of claim and, in effect, directed the dismissal of the complaint.

Ordered that the order is affirmed, with costs.

“In determining whether to grant an application for leave to serve a late notice of claim or to deem a late notice of claim timely served *nunc pro tunc*, the court must consider whether (1) the public corporation or its attorney or insurance carrier acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter, (2) the claimant made an excusable error concerning the identity of the public corporation against which the claim should be asserted, (3) the claimant demonstrated a reasonable excuse for the failure to serve a timely notice of claim (*see* General Municipal Law § 50-e [5]), and (4) the delay would substantially prejudice the public corporation in its defense on the merits” (*Platt v New York City Health & Hosps. Corp.*, 105 AD3d 1026, 1027 [2013]; *see Matter of Mitchell v Town of Greenburgh*, 96 AD3d 852, 852 [2012]; *Matter of Gershanow v*

Town of Clarkstown, 88 AD3d 879, 880 [2011]). “While the presence or the absence of any one of the factors is not necessarily determinative, whether the municipality had actual knowledge of the essential facts constituting the claim is of great importance” (*Matter of Iacone v Town of Hempstead*, 82 AD3d 888, 888-889 [2011] [citations omitted]; see *Matter of Gonzalez v City of New York*, 60 AD3d 1058, 1059 [2009]; *Matter of Felice v Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 147 [2008]). “A petition for leave to serve a late notice of claim is addressed to the sound discretion of the court” (*Matter of Harper v City of New York*, 69 AD3d 939, 940 [2010]; see *Matter of Blair v Pleasantville Union Free School Dist.*, 52 AD3d 827, 827 [2008]; *Matter of McLean v Valley Stream Union Free School Dist.* 30, 48 AD3d 571, 571-572 [2008]).

Here, in support of her motion, the plaintiff did not furnish a reasonable excuse for her failure to serve a timely notice of claim. Further, contrary to the plaintiff’s contention, her December 9, 2009, letter, sent approximately three months after the 90-day statutory period had elapsed, did not provide the defendant Westchester County with actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the statutory period (see *Matter of Sanchez v City of New York*, 116 AD3d 703 [2014]; *Matter of Hampson v Connetquot Cent. Sch. Dist.*, 114 AD3d 790, 791 [2014]; *Matter of Valila v Town of Hempstead*, 107 AD3d 813, 815 [2013]). Additionally, the plaintiff failed to satisfy her initial burden of demonstrating a lack of substantial prejudice to the defendants should service of the late notice of claim be allowed. Thus, the Supreme Court providently exercised its discretion in denying the plaintiff’s motion for leave to serve a late notice of claim.

“The failure to timely serve a notice of claim in a tort action against an employee of a municipality who was acting within the scope of his [or her] public employment and in the discharge of his [or her] duties when the tort allegedly was committed requires dismissal of the complaint” (*Dorce v United Rentals N. Am., Inc.*, 78 AD3d 1110, 1110 [2010]; see generally General Municipal Law § 50-e [1] [b]; *Analisa Salon, Ltd. v Elide Props., LLC*, 46 AD3d 721, 725 [2007]; *Smith v Scott*, 294 AD2d 11, 18-19 [2002]). Contrary to the plaintiff’s contentions, under the circumstances of this case, her failure to serve a notice of claim requires the dismissal of the complaint insofar as asserted against the defendants Thomas Belfiore and Demosthenes Long as well as the County, as these individual defendants were acting within the scope of their public employment and in the discharge of their duties when they committed the acts alleged by

the plaintiff. Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

34 1375 EQUITIES CORP., Appellant, v BUILDGREEN SOLUTIONS, LLC, Doing Business as BGS, Respondent. [992 NYS2d 288]—

Contracts—Breach or Performance of Contract—Summary Judgment

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Kings County (F. Rivera, J.), dated March 15, 2013, which denied its motion for summary judgment on the issue of liability on the first cause of action and dismissing the counter-claims.

Ordered that the order is reversed, on the law, with costs, and the plaintiff's motion for summary judgment on the issue of liability on the first cause of action and dismissing the counter-claims is granted.

The plaintiff established its prima facie entitlement to judgment as a matter of law on the issue of liability on its breach of contract cause of action by submitting the contract and evidence of breach (*see Maser Consulting, P.A. v Viola Park Realty, LLC*, 91 AD3d 836 [2012]). The contract set forth a money-back guarantee in the event that a minimum of 15% in fuel consumption was not saved by installing the temperature control system provided by the defendant. The contract further provided that the savings were to be calculated by reference to the "Heat Degree Days" formula, with calculations "certified by a CPA."

Whether or not a contract is ambiguous is a question of law to be resolved by the court (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]; *JP Morgan Chase Bank, N.A. v Cellpoint Inc.*, 54 AD3d 366 [2008]). Where a court determines that the terms of the agreement are ambiguous and the intent of the parties becomes a matter of inquiry, parol evidence is permitted to determine that intent (*see Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Weiner v Anesthesia Assoc. of W. Suffolk*, 203 AD2d 455 [1994]). Where the movant submits evidence to support its construction, the opposing party may not defeat the motion merely by alleging that the term is ambiguous; it "must also set forth the extrinsic evidence, in evidentiary form, upon which it relies to support the construction it urges" (*Weiner v Anesthesia Assoc. of W. Suffolk*, 203 AD2d at 456; *see Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d at 291; *Posh Pillows v Hawes*, 138 AD2d 472 [1988]).

On its motion, the plaintiff submitted its fuel delivery invoices

for two comparative periods before and after installation of the temperature control system, and the affidavit of its certified public accountant, explaining that “Heat Degree Days” is a governmental and industry standard and providing his calculations based upon the invoices. The calculations showed less than a 15% savings in fuel consumption. The plaintiff further submitted an affidavit by its vice president, averring that the defendant refused his demands that it honor the money-back guarantee. These submissions established, *prima facie*, the proper construction of the term “Heat Degree Days” in the contract, and that the defendant breached the contract by failing to honor the money-back guarantee. In opposition, the defendant submitted an attorney’s affirmation, which lacked probative value and was insufficient to raise a triable issue of fact (*see Shickler v Cary*, 59 AD3d 700 [2009]; *Blumenfeld v DeLuca*, 24 AD3d 405 [2005]; *Sirico v Beukelaer*, 14 AD3d 549 [2005]).

Moreover, contrary to the defendant’s contention, it failed to show that the motion should have been denied as premature. “A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2013]; *see CPLR 3212 [f]*; *Suero-Sosa v Cardona*, 112 AD3d 706, 708 [2013]; *Anzel v Pistorino*, 105 AD3d 784 [2013]; *Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053 [2012]). Hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is insufficient to defeat the motion (*see Buchinger v Jazz Leasing Corp.*, 95 AD3d at 1054; *Lauriello v Gallotta*, 59 AD3d 497, 499 [2009]; *Brewster v Five Towns Health Care Realty Corp.*, 59 AD3d 483, 484 [2009]; *Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621 [2008]). In opposition to the motion, the defendant failed to articulate how discovery might lead to evidence relevant to the discrete ground upon which the plaintiff moved for summary judgment or, given the plaintiff’s submissions on the motion, that the facts essential to oppose the motion were in the exclusive knowledge and control of the plaintiff (*see Suero-Sosa v Cardona*, 112 AD3d at 708; *Cajas-Romero v Ward*, 106 AD3d at 852; *Weintraub v Levine*, 22 AD3d 664 [2005]).

Finally, by establishing the defendant’s breach of the contract, the plaintiff established its *prima facie* entitlement to judgment as a matter of law dismissing the counterclaims. In opposition, the defendant failed to raise a triable issue of fact (*see Zucker-*

man v City of New York, 49 NY2d 557, 562 [1980]). Accordingly, the Supreme Court should have granted the plaintiff's motion in its entirety. Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

35 FRED PESCATORE et al., Appellants, et al., Plaintiff, v DUNE ALPIN FARM PROPERTY OWNERS ASSOCIATION, INC., et al., Respondents, et al., Defendant. [992 NYS2d 97]—

Appeal—Academic and Moot Questions

In an action, inter alia, for injunctive relief based on alleged violations of scenic easements and a restrictive covenant, the plaintiffs Fred Pescatore, Joseph Kremer, Anthony Brown, and Winifred Brown appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Spinner, J.), dated August 1, 2012, as denied their motion, made jointly with the plaintiff Kenneth Wyse, for a preliminary injunction, and granted the cross motion of the defendants La Pampa Polo Club, LLC, La Pampa Polo Club and School, Dennis M. Banks, and Dawn Neway, and that branch of the separate cross motion of the defendants Dune Alpin Farm Property Owners Association, Inc., Board of Directors of Dune Alpin Farm Property Owners Association, Inc., and Dune Alpin Farm Corp., which were to dismiss the complaint pursuant to CPLR 3211 (a).

Ordered that the appeal is dismissed as academic, without costs or disbursements.

In this action, the plaintiffs sought to enjoin the operation of a commercial polo club and school on certain real property pursuant to a certain lease. It is undisputed that during the pendency of this appeal, the lease expired by its own terms and was not renewed. Accordingly, the appeal has been rendered academic (*see Anika Halal Live Poultry Corp. v Montague-Lee Ltd. Partnership*, 110 AD3d 934 [2013]; *Matter of Fredericks v Ambrose*, 100 AD3d 632 [2012]). Contrary to the appellants' contention, this matter does not warrant invoking the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

To the extent that the appellants argue that the entitlement of the parties to an award of attorneys' fees will be directly affected by the determination of this appeal, we note that the issue of an award of attorneys' fees has previously been determined on the merits. A separate appeal was taken from an order and judgment of the Supreme Court entered March 21, 2013, which awarded attorneys' fees in this matter, and that appeal was dismissed for failure to prosecute by decision and order of this Court dated June 27, 2014 (*see S.M.F. v SLS Residential, Inc.*, 72 AD3d 1014 [2010]; *see also FMA/Constr. Mgt. Corp. v*

Yaabetz, 158 AD2d 664 [1990]). Mastro, J.P., Lott, Sgroi and Cohen, JJ., concur.

36 ALEXANDER RABINOVICH, Appellant, v OKSANA SHEVCHENKO, Respondent. [991 NYS2d 345]—

Husband and Wife and Other Domestic Relationships—Support—Maintenance

In a matrimonial action in which the parties were divorced by judgment of divorce dated June 23, 2011, the plaintiff appeals from an order of the Supreme Court, Suffolk County (McNulty, J.), dated December 3, 2012, which denied, without a hearing, his motion for a downward modification of his obligation to pay the defendant lifetime maintenance in the sum of \$5,000 per month.

Ordered that the order is affirmed, with costs.

Domestic Relations Law § 236 (B) (9) (b) provides that, in a matrimonial action, the court may modify the maintenance award of any prior order or judgment upon a showing of “a substantial change in circumstance . . . including financial hardship.” The party seeking the modification of a maintenance award has the burden of establishing the existence of the change in circumstances that warrants the modification (*see Taylor v Taylor*, 107 AD3d 785, 786 [2013]; *Matter of Sannuto v Sannuto*, 21 AD3d 901, 902 [2005]), and the change is to be measured by a comparison between the payor’s financial circumstances at the time of the motion and at the time the order of which modification is sought was made (*see Taylor v Taylor*, 107 AD3d at 786). Here, the Supreme Court did not err in denying, without a hearing, the plaintiff’s motion for a downward modification of the maintenance obligation because the plaintiff failed to make even a threshold showing of a substantial change in circumstances that would warrant such a modification (*see Wight v Wight*, 232 AD2d 844, 845 [1996]; *Martin v Martin*, 194 AD2d 769 [1993]). Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

37 SALLY SARETTO, Respondent, v SPYROS PANOS et al., Defendants, and VASSAR BROTHERS HOSPITAL et al., Appellants. [992 NYS2d 88]—

**Limitation of Actions—Estoppel to Plead Statute of Limitations
Negligence—Negligent Supervision—Negligent Hiring**

In an action, inter alia, to recover damages for medical malpractice, the defendant Vassar Brothers Hospital appeals, as limited by its brief, from so much of an order of the Supreme Court, Dutchess County (Lubell, J.), dated November 29, 2012, as denied its motion pursuant to CPLR 3211 (a) (5) to dismiss

the complaint insofar as asserted against it as time-barred, and the defendant Mid Hudson Medical Group, P.C., separately appeals, as limited by its brief, from so much of the same order as denied that branch of its motion which was pursuant to CPLR 3211 (a) (7) to dismiss the claims in the complaint to recover damages for negligent hiring and supervision insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from by the defendant Vassar Brothers Hospital, on the law, and the motion of that defendant pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against it as time-barred is granted; and it is further,

Ordered that the order is affirmed insofar as appealed from by the defendant Mid Hudson Medical Group, P.C.; and it is further,

Ordered that one bill of costs is awarded to the defendant Vassar Brothers Hospital payable by the plaintiff, and one bill of costs is awarded to the plaintiff, payable by the defendant Mid Hudson Medical Group, P.C.

According to the plaintiff, in or about June 2008, she sought treatment for her left knee from the defendant Spyros Panos, a physician employed by the defendant Mid Hudson Medical Group, P.C. (hereinafter Mid Hudson). On August 7, 2008, Panos performed surgery on the plaintiff's knee at Vassar Brothers Hospital (hereinafter Vassar). On April 10, 2012, the plaintiff commenced this action against Vassar and Mid Hudson, among others, inter alia, to recover damages for medical malpractice.

The Supreme Court should have granted Vassar's motion pursuant to CPLR 3211 (a) (5) to dismiss the complaint insofar as asserted against it as time-barred. Contrary to the plaintiff's contention, the motion was not properly denied on the ground that discovery might have revealed evidence that would estop Vassar from raising a statute of limitations defense. In opposition to Vassar's motion, the plaintiff argued that, with further discovery, she hoped to be able to establish that Vassar possessed knowledge of Panos's medical malpractice, and that this knowledge, coupled with Vassar's "allowing" Panos "to continue" his malpractice to the detriment of other patients, was a fraud perpetrated by Vassar on the public that estopped it from asserting a statute of limitations defense. Even if the plaintiff were able to establish these facts, however, they would not give rise to an estoppel (*see Plain v Vassar Bros. Hosp.*, 115 AD3d 922, 923 [2014]; *Nelson v Hudson Val. Ctr. at St. Francis, LLC*, 115 AD3d 917, 918 [2014]; *Butcher v Panos*, 115 AD3d 900, 901 [2014]).

However, the Supreme Court properly denied that branch of Mid Hudson's motion which was pursuant to CPLR 3211 (a) (7) to dismiss the claims to recover damages for negligent hiring or supervision insofar as asserted against it. " 'Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training' " (*Quiroz v Zottola*, 96 AD3d 1035, 1037 [2012], quoting *Talavera v Arbit*, 18 AD3d 738, 738 [2005]; see *Neiger v City of New York*, 72 AD3d 663, 664 [2010]). Since Mid Hudson did not concede that Panos acted completely within the scope of his employment when committing all of the acts alleged in the complaint, the Supreme Court did not err in refusing to direct the dismissal of the claims against Mid Hudson to recover damages for negligent hiring and supervision (see *Pickering v State of New York*, 30 AD3d 393, 394 [2006]; cf. *Cheng Feng Fong v New York City Tr. Auth.*, 83 AD3d 642, 643 [2011]). Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

38 PETER JASON SCHELCHERE et al., Appellants, v FRANCIS R. HALLS, Respondent. [991 NYS2d 345]—

Pleading—Amendment—Complaint

In an action to recover damages for personal injuries, the plaintiffs appeal from an order of the Supreme Court, Kings County (Bayne, J.), dated November 20, 2013, which denied their motion for leave to amend the complaint to assert additional causes of action alleging negligent infliction of emotional distress and breach of contract.

Ordered that the order is affirmed, with costs.

Leave to amend pleadings should be freely given, provided that the proposed amendment does not prejudice or surprise the opposing party and is not palpably insufficient or patently devoid of merit (see *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Countrywide Home Loans, Inc. v Gibson*, 111 AD3d 875, 876 [2013]; *Kruger v EMFT, LLC*, 87 AD3d 717, 718 [2011]). A motion to amend is addressed to the sound discretion of the court, and its determination will not lightly be set aside (see *Edenwald Contr. Co. v City of New York*, 60 NY2d at 959; *Pappas & Marshall v Ross Logistics*, 222 AD2d 424 [1995]; *Caruso v Anpro, Ltd.*, 215 AD2d 713 [1995]).

Here, given the plaintiffs' extensive and unexplained delay in seeking to amend their complaint based on facts that were known to them since the onset of the litigation (see *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [2003]; *Whalen v 50*

Sutton Place S. Owners, 276 AD2d 356, 357 [2000]; *Caruso v Anpro, Ltd.*, 215 AD2d 713, 714 [1995]), the prejudice to the defendant that would result from the amendment, and the plaintiffs' improper submission of a portion of their request for leave to amend and supporting evidence for the first time in their reply papers on the motion (see *Bjorke v Rubenstein*, 38 AD3d 580, 581 [2007]; *Drake v Drake*, 296 AD2d 566 [2002]; *Wright v Cetek Technologies*, 289 AD2d 569, 570 [2001]), the Supreme Court providently exercised its discretion in denying the plaintiffs' motion for leave to amend the complaint. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

39 SEGWAY OF NEW YORK, INC., Doing Business as FORMULA ONE EXTREME, Respondent, v UDIT GROUP, INC., Doing Business as REVOLUTION POWERSPORTS, et al., Appellants. [992 NYS2d 524]—

Process—Service of Process

Process—Service of Process—Improper Return Date and Misstatement of Courthouse Address Not Technical Defects

In an action to recover on a promissory note and two personal guarantees on the note, commenced by motion for summary judgment in lieu of complaint pursuant to CPLR 3213, the defendants appeal from an order of the Supreme Court, Nassau County (Jaeger, J.), entered October 26, 2012, which, after a hearing, denied their motion to vacate a judgment of the same court dated January 13, 2012, which was entered upon their failure to oppose the plaintiff's motion for summary judgment in lieu of complaint in favor of the plaintiff and against them in the total sum of \$204,292.96, and thereupon to dismiss the action for lack of personal jurisdiction.

Ordered that the order entered October 26, 2012, is reversed, on the law, with costs, and the defendants' motion to vacate the judgment and thereupon to dismiss the action for lack of personal jurisdiction is granted.

The defendant Udit Group, Inc., doing business as Revolution Powersports (hereinafter the corporate defendant), allegedly purchased motorcycles from the plaintiff and executed a promissory note in favor of the plaintiff, in which the corporate defendant agreed to repay the plaintiff the principal sum of \$172,000. The individual defendants allegedly executed guarantees on the note, pursuant to which they agreed to be personally liable for the debt of the corporate defendant in the event that the corporate defendant did not satisfy its obligation.

The plaintiff subsequently commenced this action pursuant to CPLR 3213 by motion for summary judgment in lieu of complaint to recover on the note and the guarantees. Although

the motion intake clerk initially rejected the notice of motion on the ground that the address of the courthouse at which the motion was made returnable was incorrect, the notice of motion was eventually accepted by the motion intake clerk. The defendants failed to appear on the return date or otherwise oppose the motion for summary judgment, and the motion was granted upon the defendants' default. A judgment was subsequently entered in favor of the plaintiff and against the defendants in the total sum of \$204,292.96.

The defendants moved to vacate the judgment entered upon their failure to oppose the motion for summary judgment. In an order dated June 8, 2011, the Supreme Court, *inter alia*, directed a hearing on the issue of whether service of process had been properly effected upon each defendant. At the hearing, the plaintiff presented the testimony of a process server, who testified as to how he had served each of the defendants. The defendants presented the testimony of witnesses to support their contentions that service had not occurred in the manner alleged by the plaintiff.

In an order entered October 26, 2012, the Supreme Court credited the testimony of the process server and denied the defendants' motion to vacate the judgment entered upon their default. In denying the defendants' motion, the court, in effect, rejected the defendants' contention that various defects in the summons and notice of motion deprived the court of personal jurisdiction over the defendants.

In reviewing findings of fact made after a hearing to determine the validity of service of process, as a general matter, this Court will "not lightly disturb findings that are based upon conflicting evidence and implicate the credibility of witnesses" (*Washington Mut. Bank v Holt*, 113 AD3d 755, 756 [2014]). This Court nevertheless "possesses authority to review a determination rendered after a hearing that is as broad as that of the hearing court, and may render the determination it finds warranted by the facts, taking into account that, in a close case, the hearing court had the advantage of seeing the witnesses" (*id.* at 756; see *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]).

Here, the record supports the Supreme Court's determination to credit the process server's testimony that he served copies of the summons and notice of motion upon the defendants in a manner consistent with that set forth in his affidavits of service. Accordingly, we decline to disturb the court's factual determination in this regard (see generally *Matter of Kelley v Lynaugh*, 112 AD3d 862, 865 [2013]; *Macklowe v Trustees of*

Freeholders & Commonalty of Town of E. Hampton, 110 AD3d 964, 965 [2013]; *cf. Washington Mut. Bank v Holt*, 113 AD3d 755 [2014]).

However, the Supreme Court erred in applying CPLR 2001 so as to disregard the facial defects in the summons and notice of motion that were identified by the defendants. That section “may be used to cure only a ‘technical infirmity’ ” (*Ruffin v Lion Corp.*, 15 NY3d 578, 582 [2010], quoting *Matter of Miller v Board of Assessors*, 91 NY2d 82, 87 [1997]). “In deciding whether a defect in service is merely technical, courts must be guided by the principle of notice to the defendant—notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections” (*Ruffin v Lion Corp.*, 15 NY3d at 582 [internal quotation marks omitted]). Where a defect creates a “greater possibility” of frustrating the core principles of notice to the defendant, the defect must be regarded as substantial and courts may not disregard it under CPLR 2001 (*id.* at 583; *see Brown v State of New York*, 114 AD3d 632, 633 [2014]).

Here, the notice of motion for summary judgment in lieu of complaint did not provide timely notice of the motion to the defendant Andrew Udit, who was served by substituted service pursuant to CPLR 308 (2), inasmuch as the notice of motion set a return date that was prior to the expiration of the 30-day period within which that defendant was statutorily entitled to appear (*see* CPLR 320 [a]; 3213). Furthermore, the copies of the notice of motion served upon the defendants with the summons pursuant to CPLR 3213 contained an affirmative misstatement of the address at which the motion could be defended (*cf.* CPLR 2214 [a]). We deem it appropriate to take judicial notice (*see Consolidated Edison Co. of N.Y. v Public Serv. Commn. of State of N.Y.*, 47 NY2d 94, 110 [1979], *revd on other grounds* 447 US 530 [1980], *revd sub nom. on other grounds Central Hudson Gas & Elec. Corp. v Public Serv. Comm’n of N.Y.*, 447 US 557 [1980]; *Appelbaum v Deutsch*, 111 AD2d 21, 22 [1985], *affd* 66 NY2d 975 [1985]; *Dougherty v 425 Dev. Assoc.*, 93 AD2d 438, 447 [1983]; *see also* Jerome Prince, *Richardson on Evidence* §§ 2-202, 2-203 [Farrell 2008]) of the fact that the incorrect address given in the notice of motion pertained to an actual roadway located in Mineola, New York, and was not merely a misspelling of the correct address for the relevant courthouse. As such, the motion for summary judgment in lieu of complaint was made returnable to a location in Mineola at which the Supreme Court was not located, and at which the motion could

not have been opposed. These defects in the notice of motion, under the particular circumstances of this case and in the context of an action commenced pursuant to CPLR 3213, created a greater possibility of frustrating the core principles of notice to the defendants (see *Ruffin v Lion Corp.*, 15 NY3d at 583; *Brown v State of New York*, 114 AD3d at 633). Accordingly, these defects constitute “jurisdictional defect[s] that courts may not overlook” pursuant to CPLR 2001 (*Ruffin v Lion Corp.*, 15 NY3d at 582; see *Matter of Cartier v County of Nassau*, 281 AD2d 477, 478 [2001]; *Matter of Hawkins v McCall*, 278 AD2d 638, 638 [2000]; *Matter of Lincoln Plaza Tenants Corp. v Dinkins*, 171 AD2d 577, 577 [1991]; *Matter of Common Council of City of Gloversville v Town Bd. of Town of Johnstown*, 144 AD2d 90, 92 [1989]). Since the Supreme Court failed to acquire personal jurisdiction, “all subsequent proceedings are thereby rendered null and void” (*Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897 [2013] [internal quotation marks omitted]), and the default judgment entered against the defendants is “a nullity” (*Prudence v Wright*, 94 AD3d 1073, 1074 [2012]; see *Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889 [2009]; *Harkless v Reid*, 23 AD3d 622, 623 [2005]; *Steele v Hempstead Pub Taxi*, 305 AD2d 401, 402 [2003]).

The parties’ remaining contentions either are without merit or have been rendered academic in light of our determination.

Accordingly, the defendants’ motion to vacate the judgment dated January 13, 2012, and thereupon to dismiss the action for lack of personal jurisdiction, should have been granted (see CPLR 5015 [a] [4]). Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

40 RODNEY SHERMAN, Respondent, v NEW YORK STATE THRUWAY AUTHORITY, Appellant. [991 NYS2d 344]—

Negligence—Snow and Ice—Storm in Progress

In a claim to recover damages for personal injuries, the defendant appeals, as limited by its brief, from so much of an order of the Court of Claims (Mignano, J.), dated February 1, 2013, as denied its motion for summary judgment dismissing the claim.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the defendant’s motion for summary judgment dismissing the claim is granted.

Contrary to the determination of the Court of Claims, the defendant, in support of its motion, established that there was a storm in progress at the time of the accident. The deposition testimony of the claimant, which was supported by certified

climatological data, demonstrated that precipitation was falling when the claimant allegedly slipped and fell on ice on a sidewalk at the Troop T barracks in Newburgh on February 25, 2011, and for a substantial period of time prior to the accident. Inasmuch as the weather condition in question was in progress when the claimant's accident occurred, the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the claim (*see Meyers v Big Six Towers, Inc.*, 85 AD3d 877 [2011]; *Mazzella v City of New York*, 72 AD3d 755, 755 [2010]; *see also Jefferson v Long Is. Coll. Hosp.*, 234 AD2d 589 [1996]). In opposition to the defendant's prima facie showing, the claimant failed to raise a triable issue of fact.

Accordingly, the Court of Claims should have granted the defendant's motion for summary judgment dismissing the claim. Skelos, J.P., Balkin, Hall and Maltese, JJ., concur.

41 AYSHA SIDDIQUA, Respondent-Appellant, v JAMES J. ANARELLA et al., Defendants, and JOHN A. DEBELLO, Appellant-Respondent. [991 NYS2d 355]—

Trial—Verdict—Setting Verdict Aside

In an action to recover damages for podiatric malpractice, the defendant John A. DeBello appeals, as limited by his brief, from so much of an order of the Supreme Court, Queens County (Rosengarten, J.), dated October 4, 2012, as denied those branches of his motion which were pursuant to CPLR 4404 (a) to set aside a jury verdict in favor of the plaintiff and against him on the issues of liability and damages and for judgment as a matter of law or, alternatively, to set aside the jury verdict as contrary to the weight of the evidence and for a new trial, and granted that branch of his motion which was to set aside the jury verdict on the issue of damages as excessive only to the extent of granting a new trial on the issue of damages for future pain and suffering unless the plaintiff stipulated to reduce the award for future pain and suffering from \$750,000 to \$450,000, and the plaintiff cross-appeals from so much of the same order as denied her cross motion for additur with respect to the jury verdict awarding damages for past pain and suffering.

Ordered that the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The standard on a defendant's motion to set aside a verdict pursuant to CPLR 4404 (a) as a matter of law is whether the jury could find for the plaintiff by any rational process. In this analysis, the evidence in favor of the plaintiff must be accepted as true and the plaintiff given every favorable inference that can reasonably be drawn therefrom (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

A jury verdict should not be set aside as contrary to the weight of the evidence unless the evidence so preponderates in favor of the losing party that the verdict could not have been reached on any fair interpretation of the evidence (*see* CPLR 4404 [a]; *Lolik v Big v Supermarkets*, 86 NY2d 744, 746 [1995]; *Nicastro v Park*, 113 AD2d 129 [1985]). It is for the jury to determine the credibility of witnesses and great deference in this regard is accorded to the jury, which had the opportunity to see and hear the witnesses (*see Barthelemy v Spivack*, 41 AD3d 398 [2007]). Where conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert (*see id.*; *Nuzzo v Feinman*, 219 AD2d 624 [1995]).

Contrary to the defendant's contention, there was a rational process by which the jury could have found in favor of the plaintiff (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Moreover, the jury verdict on the issue of liability was based on a fair interpretation of the evidence and was not contrary to the weight of the evidence (*see Barthelemy v Spivack*, 41 AD3d 398 [2007]; *Nicastro v Park*, 113 AD2d 129 [1985]).

The defendant's contentions that the Supreme Court should have set aside the award for past pain and suffering, and further reduced the award for future pain and suffering are without merit (*see Nuzzo v Feinman*, 219 AD2d 624 [1995]; *Murphy v A. Louis Shure, P.C.*, 156 AD2d 85 [1990]). The plaintiff's contention raised on the cross appeal is without merit. Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

42 LIDY TELSAINT, Appellant, v CITY OF NEW YORK, Respondent. [1992 NYS2d 80]—

Negligence—Snow and Ice

Trial—Verdict—Setting Verdict Aside

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Sweeney, J.), dated January 14, 2013, as granted that branch of the defendant's motion which was pursuant to CPLR 4404 (a) to set aside a jury verdict in favor of her on the issues of liability and damages and for judgment as a matter of law.

Ordered that the order is reversed insofar as appealed from, on the law, without costs or disbursements, that branch of the defendant's motion which was pursuant to CPLR 4404 (a) to set aside the jury verdict on the issues of liability and damages and for judgment as a matter of law is denied, the determination in the order denying, as academic, that branch of the defendant's motion which was pursuant to CPLR 4404 (a) to set aside the

jury verdict on the issue of liability as contrary to the weight of the evidence and for a new trial is vacated, and that branch of the motion is denied on the merits, and the determination in the order denying, as academic, that branch of the defendant's motion which was pursuant to CPLR 4404 (a) to set aside, as excessive, the jury verdict on the issue of damages awarding the plaintiff the principal sums of \$750,000 for past pain and suffering and \$1,500,000 for future pain and suffering is vacated, and that branch of the motion is granted to the extent of directing a new trial on the issue of damages for past and future pain and suffering only, unless within 30 days after the service upon the plaintiff of a copy of this decision and order, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Kings County, a written stipulation consenting to reduce the award of damages for past pain and suffering from the principal sum of \$750,000 to the principal sum of \$350,000 and the award of damages for future pain and suffering from the principal sum of \$1,500,000 to the principal sum of \$900,000.

The plaintiff slipped and fell on ice on a sidewalk abutting the defendant's property, and was injured. Snow had fallen five days before the accident, and the snow had been shoveled into piles on either side of the sidewalk, with a path cleared in the middle for pedestrians. The temperatures had fluctuated in the days leading up to the accident, causing the piles of snow to melt and then freeze into the ice on which the plaintiff slipped. The plaintiff commenced this action against the defendant. A jury found the defendant liable, and awarded the plaintiff the sums of \$750,000 for past pain and suffering and \$1,500,000 for future pain and suffering. The Supreme Court granted that branch of the defendant's motion which was pursuant to CPLR 4404 (a) to set aside the verdicts and for judgment as a matter of law, concluding that the plaintiff failed to adduce legally sufficient evidence that the defendant had constructive notice of the slippery condition of the sidewalk.

For a court to conclude that a jury verdict is not supported by legally sufficient evidence, there must be no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusions reached by the jury on the basis of the evidence presented at trial (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Anthony v New York City Tr. Auth.*, 38 AD3d 484, 485-486 [2007]; *Nicastro v Park*, 113 AD2d 129, 132 [1985]).

Under the circumstances presented here, the jury rationally could have concluded that the defendant had constructive notice of the icy condition that caused the plaintiff to slip and fall

(see *Anthony v New York City Tr. Auth.*, 38 AD3d at 485; cf. *Fitzgerald v Adirondack Tr. Lines, Inc.*, 23 AD3d 907 [2005]). To establish the existence of constructive notice, a plaintiff must show that the defect was visible and apparent and that the defect existed for a sufficient length of time prior to an accident to permit the defendant to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Anthony v New York City Tr. Auth.*, 38 AD3d at 485-486). Here, the jury rationally could have concluded from the testimony that ice originated from the piles of snow on the sidewalk that had melted and then frozen, and that this condition existed for a sufficient period of time to allow the defendant to discover and remedy it (see *Roca v Gerardi*, 243 AD2d 616, 617 [1997]).

Since the Supreme Court granted that branch of the defendant's motion which was to set aside the jury verdict and for judgment as a matter of law, it denied, as academic, the alternative branches of the defendant's motion which were to set aside the jury verdict as contrary to the weight of the evidence and for a new trial or to set aside, as excessive, the jury verdict on the issue of damages for past and future pain and suffering. Under the circumstances of this case, in which the complete record of the trial is before us, and in the interest of judicial economy, we address the merits of these alternative branches of the defendant's motion (see *Cusumano v City of New York*, 104 AD3d 639, 641 [2013]).

A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence (see *Lolik v Big v Supermarkets*, 86 NY2d 744, 745-746 [1995]; *Nicastro v Park*, 113 AD2d 129, 130 [1985]). Here, the jury's findings on the issue of liability were based on a fair interpretation of the evidence and, thus, were not contrary to the weight of the evidence.

However, the damages awarded to the plaintiff for past and future pain and suffering deviated materially from what would be reasonable compensation to the extent indicated herein (see CPLR 5501 [c]; *Williams v New York City Tr. Auth.*, 95 AD3d 1003, 1005 [2012]; *Eun Sook Maing v Po Ching Fong*, 71 AD3d 1077, 1078 [2010]; *Rivera v Lincoln Ctr. for Performing Arts, Inc.*, 16 AD3d 274 [2005]; cf. *Fishbane v Chelsea Hall, LLC*, 65 AD3d 1079 [2009]). Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

43 CLIFTON TURNER, Appellant, v STATE OF NEW YORK, Respondent. [991 NYS2d 363]—In a claim to recover damages for

unjust conviction and imprisonment pursuant to Court of Claims Act § 8-b, the claimant appeals from an order of the Court of Claims (Marin, J.), dated November 14, 2012, which denied his motion to admit into evidence an affidavit of a recanting witness.

Ordered that the appeal is dismissed, with costs.

The appeal must be dismissed because it concerns an evidentiary ruling which, even when made in advance of trial on motion papers, is neither appealable as of right nor by permission (*see* CPLR 5701; *Elliott v Guervil*, 98 AD3d 470 [2012]; *Cotgreave v Public Adm'r of Imperial County [Cal.]*, 91 AD2d 600, 601 [1982]). Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

44 MARCOS VALLEJO, Appellant, v ROSEANNA MARIE EBERT, Respondent. [991 NYS2d 656]—

Animals—Knowledge of Vicious Propensity—Dog Bite

In an action to recover damages for personal injuries, the plaintiff appeals (1), as limited by his brief, from so much of an order of the Supreme Court, Kings County (Partnow, J.), dated August 12, 2013, as granted the defendant's cross motion for summary judgment dismissing the complaint and denied those branches of his motion which were to compel the deposition of nonparty witnesses, hold them in contempt for their failure to appear for a deposition, and arrest and detain them until they were deposed, and (2) a judgment of the same court dated September 27, 2013, which, upon the order, is in favor of the defendant and against him dismissing the complaint. The notice of appeal from the order is deemed also to be a notice of appeal from the judgment (*see* CPLR 5501 [c]).

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the defendant.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

To recover in strict liability in tort for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities (*see Petrone v Fernandez*, 12 NY3d 546 [2009]; *Roche v Bryant*, 81 AD3d 707 [2011]; *Varvaro v*

Belcher, 65 AD3d 1225 [2009]; *Merino v Martinez*, 63 AD3d 1123 [2009]; *Christian v Petco Animal Supplies Stores, Inc.*, 54 AD3d 707 [2008]). Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm (see *Bard v Jahnke*, 6 NY3d 592, 597 [2006]; *Collier v Zambito*, 1 NY3d 444, 446-447 [2004]; *Curbelo v Walker*, 81 AD3d 772 [2011]; *Rosenbaum v Rauer*, 80 AD3d 686 [2011]; *Galgano v Town of N. Hempstead*, 41 AD3d 536 [2007]).

Here, the defendant established her prima facie entitlement to judgment as a matter of law (see *Roche v Bryant*, 81 AD3d 707 [2011]; *Miletich v Kopp*, 70 AD3d 1095 [2010]; *Christian v Petco Animal Supplies Stores, Inc.*, 54 AD3d 707 [2008]). Evidence submitted in support of the motion, including a transcript of the deposition testimony of the defendant, showed that the dog had been living with the defendant's family, which included a small child, without incident, for approximately four or five years before it bit the plaintiff. Prior to the incident, the defendant had not seen the dog exhibit aggressive behavior. In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defendant was aware, or should have been aware, that her dog had vicious propensities (see *Collier v Zambito*, 1 NY3d 444 [2004]). The mere presence of a "Beware of Dog" sign on the defendant's property, and the fact that the dog might have been confined when there was a celebration at the premises, were insufficient to raise a triable issue of fact (see *Collier v Zambito*, 1 NY3d at 447; *Roche v Bryant*, 81 AD3d 707 [2011]; *Sers v Manasia*, 280 AD2d 539 [2001]).

To the extent that the complaint alleged a common-law negligence cause of action, the Supreme Court properly awarded summary judgment to the defendant dismissing the cause of action because "New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal" (*Egan v Hom*, 74 AD3d 1133, 1134 [2010]; see *Hastings v Sauve*, 21 NY3d 122, 125-126 [2013]; *Petrone v Fernandez*, 12 NY3d at 550).

Since further discovery would not have affected the outcome of the cross motion for summary judgment, the plaintiff's contentions that the Supreme Court should have granted those branches of his motion which were to compel the deposition of nonparty witnesses, hold them in contempt for their failure to appear for their scheduled depositions, and arrest and detain them until they were deposed have been rendered academic by

our determination. Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

45 In the Matter of OLEG CASSINI, Deceased. CHRISTINA CASSINI, Appellant; MARIANNE NESTOR CASSINI et al., Respondents. [992 NYS2d 93]—

Trusts—Supplemental Needs Trust—Summary Judgment

In a probate proceeding in which Marianne Nestor Cassini, the executor of the estate of Oleg Cassini, petitioned to settle the account of the estate and, together with Richard Rowe, a cotrustee of a certain testamentary trust established for the benefit of Daria Cassini, to settle the account of that trust, Christina Cassini appeals from an order of the Surrogate's Court, Nassau County (McCarty, III, S.), dated September 30, 2013, which denied her motion for summary judgment granting certain objections to the account of the trust.

Ordered that the order is modified, on the law, by deleting the provision thereof, in effect, denying that branch of Christina Cassini's motion which was for summary judgment granting her objections regarding the claim of Marianne Nestor Cassini against the trust, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed, with costs to Christina Cassini, payable by Marianne Nestor Cassini personally.

Oleg Cassini (hereinafter the decedent) died on March 17, 2006, and was survived by his wife, Marianne Nestor Cassini (hereinafter Marianne), and two daughters from his marriage to Gene Tierney, Daria Cassini (hereinafter Daria) and the objectant Christina Cassini (hereinafter Christina). Marianne was appointed executor of the decedent's estate.

The decedent's will established a trust for the benefit of Daria (hereinafter the trust), who was disabled and for whom Richard Rowe had been appointed as her guardian by the State of New Jersey. The trust was to be funded with \$500,000, and the net income of the trust was directed to be paid to Daria for her lifetime, with the remainder payable to Christina upon Daria's death. Marianne was nominated as trustee of Daria's trust. An intermediate accounting of the decedent's estate, dated December 31, 2010, shows that a \$500,000 distribution was made from the estate to the "Daria Tierney Cassini Trust."

In 2008, Marianne, acting as trustee under the decedent's will, established the Daria Cassini Supplemental Needs Trust (hereinafter the SNT) and named herself and Richard Rowe as trustees. The SNT provided that, upon the death of Daria, the balance would be paid to Christina. Daria's testamentary trust was decanted into the SNT (*see generally* EPTL 10-6.6).

Daria died on September 11, 2010. In July 2011, Marianne and Rowe together petitioned to settle the account of the SNT. Christina was listed as an interested party and the status of her interest was described as follows: “[o]n information and belief, Christina Tierney Cassini Granata Belmont purports to be the remainderman of the within Trust and entitled to the balance on hand.” Schedule J of the accounting indicated that the balance of the trust (\$387,696.46) had been tendered to Marianne, and stated: “On information and belief, it is Marianne’s position that the monies used to fund the trust emanated from assets to which she has a claim, that she was under no legal obligation to establish the trust with funds not emanating solely from the Estate of Oleg Cassini and that, although the [SNT] ostensibly provides for the distribution of the remainder to [Christina], the balance on hand is not properly payable to [Christina] but to Marianne.”

Christina filed objections to the account of the SNT, and subsequently moved for summary judgment granting certain of those objections. To obtain summary judgment, the movant must make a “prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Matter of Maeder*, 203 AD2d 464 [1994]). If the moving party meets this burden, the burden then shifts to the nonmoving party to “‘establish the existence of material issues of fact which require a trial of the action’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

In support of her motion, Christina established that she is the remainder beneficiary of the SNT and, thus, entitled to the balance of the trust. In opposition, Marianne’s unsupported claims were insufficient to raise an issue of fact as to whether she has a claim against the trust (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Brown Bark I, L.P. v Imperial Dev. & Constr. Corp.*, 65 AD3d 510, 512 [2009]; *Matter of Maeder*, 203 AD2d 464 [1994]). Accordingly, the Surrogate’s Court should have granted that branch of Christina’s motion which was for summary judgment granting her objections regarding Marianne’s claim against the trust.

However, Christina failed to make a prima facie showing of entitlement to judgment as a matter of law on the additional objections which were the subject of the motion for summary judgment (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324), and those branches of her motion which were for summary judgment granting those objections were properly denied. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

46 In the Matter of ROKHAYA CISSE, Appellant, v CHRISTOPHER GRAHAM, Respondent. (Proceeding No. 1.) In the Matter of CHRISTOPHER GRAHAM, Respondent, v ROKHAYA CISSE, Appellant. (Proceeding No. 2.) [991 NYS2d 465]—

Parent, Child and Family—Custody—Modification

In two related proceedings pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Queens County (Negrón, Ct. Atty. Ref.), dated April 5, 2013, which, among other things, after a hearing, granted the father's petition to modify a prior order of custody and visitation of the same court (Clark, J.) dated June 30, 2004, so as to award him custody of the parties' child, and denied her petition, in effect, to modify the visitation provisions of that order.

Ordered that the order dated April 5, 2013, is affirmed, with costs.

To warrant modification of an existing court-sanctioned custody arrangement, there must be a showing of a change in circumstances such that modification is required to protect the best interests of the child (*see* Family Ct Act § 652 [a]; *Matter of Begy v Begy*, 115 AD3d 951 [2014]; *Matter of Hixenbaugh v Hixenbaugh*, 111 AD3d 636, 637 [2013]; *Matter of Quintanilla v Morales*, 110 AD3d 1081 [2013]). We recognize, as does the dissent, that the authority of the appellate court is as broad as that of the Family Court, and that simple deference to the Family Court's findings would be an abdication of our authority (*see Matter of Fallo v Tallon*, 118 AD3d 991 [2014]). However, we may not substitute our judgment for that of the hearing court where its custody determination depended upon its assessment of the credibility of the witnesses, and those determinations, as well as its findings as to a change in circumstances and the best interests of the child, are founded on a sound and substantial basis in the record, as they are here (*see Matter of Quintanilla v Morales*, 110 AD3d at 1081-1082; *Matter of Cornejo v Salas*, 110 AD3d 1068 [2013]).

Here, although the order appealed from determines the father's petition to modify a prior order of custody and visitation dated June 30, 2004 (hereinafter the 2004 custody order), which was entered upon the stipulation of the parties, we are also reviewing the Family Court's denial of the mother's petition, in effect, to modify the visitation provisions of that order. In that regard, it is worth noting that the mother alleged, *inter alia*, that a change in circumstances had occurred since the entry of the 2004 custody order in that the parties' child had since been enrolled at a school in Manhattan, the father had

moved from Queens to Suffolk County, and the mother had changed jobs. Accordingly, she cannot now be heard to complain that there was no change of circumstances. The mother contended that the visitation provisions needed to be modified so as to be “conducive to [the child’s] academic schedule.” The evidence at the hearing established that there had indeed been a change in circumstances, as alleged by the mother. Furthermore, the evidence in the record supports the Family Court’s finding that in the intervening years since the issuance of the 2004 custody order, the child, who was 12 years old at the time the order appealed from was issued, “has matured and made clearer her needs, her desires, and bases for those desires.” Finally, the record supports the Family Court’s determination that the best interests of the child would most likely be accomplished by a change of custody and affording the mother a liberal and well-defined schedule of visitation. After a thorough recitation of the testimony of the various witnesses, save for the in camera examination of the child (*see Matter of Lincoln v Lincoln*, 24 NY2d 270 [1969]), and an evaluation of the credibility of the witnesses, the Family Court’s well-reasoned decision and order offers the mother the opportunity to accomplish precisely what she sought in her petition and what she and the child desire, which is the opportunity to spend more quality time with each other.

Contrary to the mother’s contention, which the dissent apparently accepts, that the Family Court focused on incidents remote in time and penalized her for being a working mother, the Family Court properly considered the totality of the circumstances in making its findings (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Hixenbaugh v Hixenbaugh*, 111 AD3d at 637). In so doing, the court weighed several factors in varying degrees of importance, as demanded by the facts of this case, “including, inter alia, (1) the original placement of the child, (2) the length of that placement, (3) the child’s desires, (4) the relative fitness of the parents, (5) the quality of the home environment, (6) the parental guidance given to the child, (7) the parent’s financial status, (8) his or her ability to provide for the child’s emotional and intellectual development, and (9) the willingness of the parent to assure meaningful contact between the child and the other parent” (*Matter of Mingo v Belgrave*, 69 AD3d 859, 859-860 [2010]; *see Cuccurullo v Cuccurullo*, 21 AD3d 983, 984 [2005]).

Under the terms of the 2004 custody order, the mother was awarded custody, and the father was awarded extensive, well-defined visitation. The child resided with the mother, and the

father's visitation, as relevant to the parties' petitions, included the first, third, and fifth (where applicable) weekend of each month, commencing on Friday, after school, until Sunday evening, as well as Tuesday and Thursday evenings following school until 8:00 p.m. The order appealed from, at its core, reverses those terms such that the father has custody of the child, subject to the mother's substantially similar visitation on the first, third, and fifth (where applicable) weekends of the month and two weekday visits from the close of school until 8:30 p.m. and during other secular and religious holidays.

The Family Court properly considered the father's testimony that there were instances early on, under the 2004 custody order, when the mother substantially interfered with his ability to visit with the child and that she failed to provide him access to academic records and inform him of school-related activities (see *Bliss v Ach*, 56 NY2d 995, 998 [1982]; *Matter of Tori v Tori*, 67 AD3d 1021 [2009]; *Matter of Lovitch v Lovitch*, 64 AD3d 710, 712 [2009]; *Falabella v Murray*, 265 AD2d 450 [1999]). However, contrary to the mother's contention that the Family Court placed too much weight on such remote events, the court cited those events principally in the context of its evaluation of which parent was more likely to foster the child's relationship with the other. In that regard, the fact that the mother, by her petition, sought to reduce the father's visitation during the week, as well as on weekends, cannot be ignored. The Family Court credited the court-appointed forensic psychologist's opinion that, although the mother acknowledged the importance of fostering the child's relationship with the father, she had not demonstrated the ability to transform those words into deeds. The father, on the other hand, was found less likely to interfere with the child's relationship with the mother and more likely to address her emotional needs. Toward that end, it cannot be overlooked that the child expressed a significant bond with the father's wife (hereinafter the stepmother), who testified that she grew up in an environment involving stepparents, that she understands the child's feelings, and that she understands her role as a stepmother is not to supplant that of the mother.

Although the father moved to West Babylon, Suffolk County, where he currently resides with his wife and their three children, that move was not the genesis of the difficulties the child has encountered in developing the relationship with her mother that she desires. At the hearing, the mother acknowledged that her new work schedule and the child's school schedule leave little time for them to spend quality time together during the school/work week. The mother acknowledged that her work

schedule is not as flexible as it was at the time the 2004 custody order was issued. The mother enrolled the child at the United Nations International School (UNIS) in Manhattan, which requires early morning travel from the mother's home in Queens. As a result of the mother's work schedule and the child's enrollment in a school not in close proximity to the mother's home, on the days when the child is not visiting with the father, the child is either in aftercare or attending swimming lessons until approximately 6:00 p.m., when the mother picks her up and they travel home to Queens. Dinner and school work leave little time for social interaction between the mother and child. Although the mother attempted to minimize the amount of time during the evenings and weekends when she is required to attend to the demands of her job, the Family Court properly declined to credit this testimony in light of other credible evidence to the contrary, including the testimony of the forensic psychologist, who interviewed the child, and the testimony of the witnesses presented by the mother. The dissent's acceptance of the mother's account simply is not supported by the record. Indeed, it is contrary to accounts of the mother and the mother's sister concerning the time the mother spends with the child.

While the mother's attention to the demands of her job and her placement of a premium on the child's academics were acknowledged by the Family Court to be quite laudable, the record supports the court's determination that the mother failed to strike a proper balance between the child's academics and her need to socialize with her own peers. Indeed, the record establishes that the child has no play dates with her schoolmates and does not socialize with other children who reside in the LeFrak City community where she and the mother reside. The Family Court found this to be inexplicable, and specifically rejected the mother's contention that this was due to the father's extensive visitation schedule. More significantly, the record further establishes that the combination of the demands of the mother's work, her emphasis on academics, and her decision to enroll the child in a school far from the community in which she lives have actually interfered with the child's ability to spend quality time with the mother. Time at home with the mother is spent either studying or doing chores that cannot be accomplished during the week, and other time with the mother is spent visiting family in New Jersey. Frequently, the time the mother spends with the child on those family visits is limited, as the mother returns to New York to work while the child stays in New Jersey. To be sure, although the child loves her mother dearly, she is astute and was able to articulate to the fo-

rensic psychologist that even when she is in her mother's physical presence, she often felt alone.

Although a child's preferences are not determinative of how a court should decide questions of custody and visitation, they may be instructive as to what is in the child's best interests (see *Dintruff v McGreevy*, 34 NY2d 887, 888 [1974]; *Cieri v Cieri*, 56 AD3d 409, 410 [2008]). Here, the child desires to reside with her father, and expressed her hope that her mother would move to the West Babylon community as well. In contrast to her living and social environment in LeFrak City, the record demonstrates that her father and his family, even though limited to "visitation," provide a better home environment and better care for the child, and that the child perceives it as such. The stepmother's testimony that the child confides in her regarding social and school issues, even to the extent of discussing her relationship with the mother, was corroborated by the forensic psychologist, who testified that the child views her relationship with her half-siblings and her stepmother as a "safe haven." The close familial relationship the child has developed with her father, stepmother, and half-siblings should be encouraged, since, "[b]y building identity, countering feelings of isolation, and encouraging healthy adjustments to and with others, [it] provide[s] an important additional dimension to long-term stability" (*Matter of Ebert v Ebert*, 38 NY2d 700, 704 [1976]).

In addition, the child is well-integrated with the West Babylon community. The child gets along well with her half-siblings and their friends. She has her own friends in the community, attends her half-siblings' school events and sporting events, goes to church with the family, and takes religion and Irish stepdancing classes. This is quite simply the type of family and community socialization that she does not have when she is in the mother's home.

The record also supports the Family Court's rejection of the mother's contention that transfer of custody, with the attendant transfer from the UNIS school, would remove the child from a multicultural environment that the mother properly considers to be very important for a biracial child. The church that the family attends in West Babylon has one priest from Ghana and another from Korea. The record does not support the mother's contention that the UNIS school is any more diverse than the West Babylon school district, or that it is any better equipped to nurture the child's biracial identity. Further, the Family Court specifically cited an example wherein the stepmother and half-siblings supported the child's biracial identity. When the child purchased a figurine depicting a black dancer for her father for

Father's Day, one of the younger half-siblings followed suit by purchasing a black sports figurine for the father.

Although the recommendations of court-appointed evaluators and the attorney for the child are not determinative, they are factors to be considered and are entitled to some weight (see *Matter of Shannon J. v Aaron P.*, 111 AD3d 829, 831 [2013]; *Baker v Baker*, 66 AD3d 722, 723-724 [2009]; *Matter of Kozlowski v Mangialino*, 36 AD3d 916, 917 [2007]). Here, the attorney for the child took no position at the hearing but, on appeal, contends that evidence in the record provided a sound and substantial basis for the Family Court's determination. The forensic psychologist, like the mother and the child, was quite concerned that the child and mother have difficulty finding time to spend quality time together, especially during the week. Again, the child expressed a sense of loneliness when she is with the mother. The forensic psychologist opined that the mother's lack of attunement to the emotional needs of the child was evidenced by the mother's purchase of toys for the child to play with while the mother was at home attending to the demands of her job. It was his view that a change in the custodial and visitation arrangement should be made so that the child could spend more continuous quality time with each parent. The order appealed from strives to achieve that purpose. It recognizes that the father's work schedule as a teacher permits him to be home in the afternoon not long after the child will arrive home from school and that, rather than spending time in aftercare, as she does now, the child will be with the father and his family and socializing with her peers while still having time to attend to her academic pursuits. More significantly, the Family Court order offers the mother more weekend time with the child and the option for weekday visitation, with the hope that the mother's "lack of attunement" with the child will be ameliorated by the opportunity of more continuous one-to-one attention to the emotional needs of the child.

The order also addresses the forensic psychologist's concern with the mother's unwillingness to enroll the child in therapy, notwithstanding repeated encouragement to do so. The father has expressed a willingness to enroll the child in therapy, and the Family Court order makes a specific directive to that effect.

Since the Family Court's determination that there had been a sufficient change in circumstances requiring a change in custody to protect the best interests of the subject child is supported by a sound and substantial basis in the record, the court's determination will not be disturbed (see *Matter of Feliccia v Spahn*, 108 AD3d 702, 703 [2013]; *Matter of DeViteri v Saldana*, 95 AD3d

1221, 1222 [2012]; *Matter of Tori v Tori*, 67 AD3d 1021 [2009]; *Matter of Lovitch v Lovitch*, 64 AD3d at 712).

The mother's remaining contentions either are without merit or have been rendered academic in light of the foregoing. Skelos, J.P., Dillon and Maltese, JJ., concur.

Roman, J., dissents, and votes to reverse the order, deny the father's petition, and grant the mother's petition to the extent of remitting the matter to the Family Court, Queens County, to set forth a new visitation schedule, in accordance with the following memorandum: The Family Court's determination to award the father custody of the 13-year-old subject child, who has been raised by the mother since birth, lacks a sound and substantial basis in the record. The father failed to demonstrate that there had been a sufficient change of circumstances since the issuance of the prior custody order such that a modification of custody is required to protect the best interests and welfare of the child. Therefore, I respectfully dissent.

The record reveals that there are significant differences in the parties' cultural and religious backgrounds. The mother is a Muslim who was born in Senegal, and the father is a Roman Catholic. The parties, who were never married, have one child together, a daughter born on March 24, 2001. Their relationship ended before the birth of the child. In an order dated June 30, 2004 (hereinfter the 2004 custody order), the Family Court awarded custody of the child to the mother and visitation to the father, with the visitation to occur pursuant to a stipulation signed by the parties. In November 2007, the mother filed a petition to modify the father's visitation schedule to make visitation more "conducive to [the child's] academic schedule." In September 2008, the father filed a petition to modify the 2004 custody order so as to award him sole custody of the child. In his petition, the father alleged that there had been a change in circumstances in that the mother had frustrated his visitation rights, the child wished to reside with him, and the mother left the child in aftercare everyday until 6:00 p.m. Following a hearing, the Family Court issued an order transferring custody to the father, and the mother appeals. In September 2013, this Court stayed enforcement of the order appealed from pending hearing and determination of the appeal.

To modify an existing court-sanctioned custody arrangement, there must be a showing of a change in circumstances such that modification is necessary to ensure the continued best interests of the child (*see Matter of Dezil v Garlick*, 114 AD3d 773, 773 [2014]; *Matter of Sparacio v Fitzgerald*, 73 AD3d 790, 790 [2010]; *Matter of Russell v Russell*, 72 AD3d 973, 974 [2010]).

The best interests of the child are determined by a review of the totality of the circumstances (see *Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]; *Matter of Sparacio v Fitzgerald*, 73 AD3d at 791). “Along with the factors considered in any custody determination, the court must also consider the stability and continuity afforded by maintaining the present arrangement” (*Gonzalez v Gonzalez*, 17 AD3d 635, 636 [2005]; see *Cervera v Bressler*, 90 AD3d 803, 805 [2011]). The authority of this Court in custody determinations is as broad as that of the hearing court (see *Matter of Orellana v Orellana*, 112 AD3d 720, 722 [2013]; *Matter of Moran v Cortez*, 85 AD3d 795, 796 [2011]), and while mindful that the hearing court has an advantage in being able to observe the demeanor and assess the credibility of witnesses, “[a]n appellate court would be seriously remiss if, simply in deference to the finding of a Trial Judge, it allowed a custody determination to stand where it lacks a sound and substantial basis in the record” (*Matter of Gloria S. v Richard B.*, 80 AD2d 72, 76 [1981]; see *Matter of Caruso v Cruz*, 114 AD3d 769, 772 [2014]; *Matter of James A.-S. v Cassandra A.-S.*, 107 AD3d 703, 706 [2013]).

Here, the Family Court’s determination to transfer custody of the subject child, who was 12 years old at the time the order appealed from was issued, lacked a sound and substantial basis in the record. The Family Court failed to accord sufficient weight to the child’s need for stability and to the impact of uprooting her from the care of her mother, with whom she has resided for her entire life, as well as removing her from her current home, school, and activities (see *Matter of Sidorowicz v Sidorowicz*, 101 AD3d 737, 738 [2012]; *Matter of Russell v Russell*, 72 AD3d at 974-975; *Matter of Larkin v White*, 64 AD3d 707, 709 [2009]). This Court has consistently recognized that “‘[p]riority in custody disputes should usually be given to the parent who was first awarded custody . . . because this policy assures stability in the child’s life’” (*Matter of Conway v Gartmond*, 108 AD3d 667, 668 [2013], quoting *Matter of Ross v Ross*, 96 AD3d 856, 857 [2012]; see *Matter of Sidorowicz v Sidorowicz*, 101 AD3d at 738; *White v Mazzella-White*, 84 AD3d 1068, 1069 [2011]; *Matter of Russell v Russell*, 72 AD3d at 974; *Matter of Ganzenmuller v Rivera*, 40 AD3d 756, 756 [2007]; *Matter of Salvati v Salvati*, 221 AD2d 541, 542 [1995]; *Matter of Lobo v Muttee*, 196 AD2d 585, 587 [1993]; *Richman v Richman*, 104 AD2d 934, 935 [1984]; see also *Friederwitzer v Friederwitzer*, 55 NY2d 89, 94 [1982]). Indeed, in an attempt to assure stability, this Court has declined to separate a child from the custodial parent even in cases where the child was much younger, and, thus, had been in the care of that parent for a far shorter period of time than the

subject child, who, as noted above, was 12 years old when the Family Court rendered its decision (*see e.g. Matter of Larkin v White*, 64 AD3d at 708-709 [in awarding the father sole custody, the hearing court failed to afford sufficient weight to the child's need for stability, where the child was six years old and the mother had been the child's primary caregiver since birth]; *Matter of Salvati v Salvati*, 221 AD2d at 542-543 [the Family Court failed to give sufficient weight to the facts that the child, who was almost four years old at the time of the hearing, had resided with his father for his entire life and that the father had been his primary caregiver even before the parties separated]; *see also Matter of Lobo v Muttee*, 196 AD2d at 587-588 [remitting for a new hearing and noting that the Family Court "failed to give sufficient weight to the fact that the child, who was five years old at the time of the hearing, had resided with his father his entire life and that the father had been the primary caretaker after the mother left the marital residence"])). Where, as here, "there is no indication that a change of custody will result in significantly enhancing the child's welfare, it is generally considered in the child's best interests not to disrupt his [or her] life" (*Matter of Salvati v Salvati*, 221 AD2d at 543; *see Matter of Ross v Ross*, 96 AD3d at 857; *Gonzalez v Gonzalez*, 17 AD3d at 636).

In this matter, the evidence at the hearing established that the child is well cared for by the mother, and that there is a strong bond between her and the child. The court-appointed forensic evaluator described the mother as a loving, dedicated, and nurturing parent "who is able to monitor and guide her child" and "clearly able to provide a stable environment," and the child reported having a good relationship with the mother. The evaluator noted in his report that "it could also be argued that as [the child] approaches adolescence [she] might benefit from her mother's wisdom and similar 'cultural' experience (i.e., being the product of two different cultures) as [the child] tries to negotiate her emerging sense of identity." By contrast, the father seemingly minimized the significance of these issues. As the Family Court recounted in its order, "[w]hen asked about bi-cultural and bi-racial issues the child faces, the father replied that the child's skin color is one component, much as red hair is one component of a person." Notably, the evaluator expressed concern about the "psychological repercussions" that a transfer of custody might have on the child and "the price she might pay."

Further, nothing in the record suggests that the father would be able to provide a better home environment or better care for

the child (*see e.g. Cervera v Bressler*, 90 AD3d at 805). The child resides with the mother in LeFrak City, Queens, in a three-bedroom apartment shared with her maternal grandmother, a budget coordinator for UNICEF, and her maternal grandfather, a retired editor for the United Nations. According to the forensic evaluator, the child reported feeling close to her maternal grandparents. The father, a school teacher in Queens County, currently resides in West Babylon, Suffolk County, with his current wife and their three children, who were ages eight, six, and four at the time the order appealed from was issued. At the mother's residence, the child has her own bedroom, which is significant as she enters adolescence. At the father's residence, however, the child shares a bedroom with her four-year-old half sibling. Additionally, the record suggests that the mother is better able to provide for the child's financial needs. The mother testified that she was earning \$91,000 per year with the potential for an increase in annual salary to approximately \$120,000. However, the record lacks evidence concerning the father's financial ability to provide for the child, in addition to his three other children.

The primary change in circumstances in this case since the issuance of the 2004 custody order was brought about by the father's decision to relocate to Suffolk County in approximately 2007. Significantly, while that order prohibited the mother from relocating with the child more than 25 miles from the location where she then resided, the father moved substantially in excess of that distance from Forest Hills, Queens, to West Babylon, Suffolk County, with his current wife to accommodate their growing family. The father's relocation created an unreasonable midweek travel schedule for the child, causing her to be driven for approximately 1½ hours twice a week to the father's home for visitation. As a result, the child often has to do her homework in the car. After visitation, the child is then driven home later in the evening. The forensic evaluator noted that the father did not appear to be aware of the toll that the weekday travel to West Babylon takes on the child. Thus, by her 2007 petition, the mother understandably sought to alleviate the child's travel burden by making visitation more conducive to the child's academic schedule. A court-ordered change in custody to the father was diametrically in opposition to the mother's request for a modification of the visitation schedule. The Family Court's determination transferring custody did not, contrary to the majority's suggestion, afford the mother, who has had custody of the child for her entire life, "precisely what she asked for in her petition."

Further, the mother cannot be faulted for having enrolled the

child at the Manhattan campus of the United Nations International School (UNIS), which the mother pays for without assistance from the father. The child has been enrolled at that school since entering kindergarten in September 2006, well before the father relocated to Suffolk County, and approximately two years before he filed his custody petition. Moreover, it is undisputed that the child is thriving academically. The forensic evaluator testified that UNIS appeared to be a good fit for the child since, as the mother stressed, UNIS emphasized diversity. Additionally, the mother had enrolled the child in extracurricular activities, including swimming, tennis, tap dancing, and soccer. The child was also participating in a school play and attending play rehearsals after school. The record also reflects that the child has established friendships at UNIS.

The Family Court stated that it did not fault the mother for her employment obligations and applauded her success. However, the court, in effect, unfairly penalized her for her career and work schedule. “[T]he custody-seeking mother who works outside the home should not be penalized for her employment, any more than should the father” (*Linda R. v Richard E.*, 162 AD2d 48, 55 [1990]). The mother, who attended Columbia University and Stony Brook University for her undergraduate studies, received her Master’s Degree in financial engineering from Polytechnic Institute in January 2007, and subsequently became an associate analyst for Moody’s Investors Service. At the time of the hearing, the mother was also studying for her Chartered Financial Analyst exams. She testified that her hours of employment were Monday through Friday, from approximately 9:00 a.m. to 5:00 p.m. Nevertheless, the mother was able to leave work at 3:00 p.m. on Mondays and Wednesdays to pick the child up from school and take her to Baruch College to be part of a swim team. Although the mother, at times, would work from home in the evening, she generally did so after the child went to bed. The child also enjoyed spending time with the maternal grandmother. There was testimony that the maternal grandmother’s relationship with the child was “incredible,” that they were “basically inseparable,” and that they engaged in numerous activities together, including going to the nail salon, shopping, watching movies, and cooking. Under these circumstances, the evidence adduced at the hearing did not demonstrate that a change of custody was warranted based upon the mother’s work schedule (see *Matter of Chery v Richardson*, 88 AD3d 788, 789 [2011]; *Matter of Moreau v Sirles*, 268 AD2d 811, 813 [2000]).

Further, it is not clear that the father is more likely than the

mother to foster a relationship between the child and the noncustodial parent. In his prior evaluation, the forensic evaluator found that the father had “impressed as struggling to contain a great deal of anger that he harbors towards the [mother].” Additionally, the evaluator stated that the father had, at times, appeared to “have acted out his anger against the [mother] in [a] retaliatory manner,” and noted that the father’s “filing for custody in the heels of [the mother’s] filing for a modification of the visitation order could be interpreted as being consistent with such hypothesis.” Significantly, although the parties stipulated that the child was to be exposed to both Catholic traditions and Muslim traditions, the father had the child participate in her First Communion without the mother’s consent. This conduct, which was the subject of a prior appeal to this Court (*see Matter of Cisse v Graham*, 87 AD3d 1008 [2011]), reflects poorly on the father’s ability to foster an appropriate relationship with the mother if awarded custody. Although the mother had previously interfered at times with the father’s visitation, the record indicates that this issue was resolved well before the Family Court’s determination (*see Matter of Ross v Ross*, 96 AD3d at 857-858; *Cervera v Bressler*, 90 AD3d at 805-806; *Matter of Chery v Richardson*, 88 AD3d at 789; *Matter of Fallarino v Ayala*, 41 AD3d 714, 715 [2007]). As the Family Court found, “[t]o the extent that the father alleges in his petition that the mother was interfering with his relationship, it appears that in recent years nothing has occurred giving rise to this claim.”

Lastly, although the mother was reluctant to enroll the child in therapy, as recommended by the forensic evaluator, she attributed this reluctance to the fact that her own participation in therapy had been used against her and she did not want the same thing to happen to the child. Nevertheless, she testified that she was not opposed to the child participating in therapy, and had enrolled the child in a counseling program at her school. Moreover, it is noted that while the father asserts that the mother ceased the child’s current therapy sessions, the mother maintains that the child is currently enrolled in ongoing therapy in Manhattan near her school.

The child has lived since her birth 13 years ago in her mother’s home. Sole custody has rested with the mother for the entire 13-year span. The record reflects that the mother is a financially stable, upwardly mobile professional who has paid for and provided her daughter with a private school education at a school particularly attuned to the child’s cultural and racial diversity. The child is thriving academically and has participated

in varied extracurricular activities. As noted above, the primary change in circumstances that occasioned the mother's petition to modify the visitation schedule was caused by the actions of the father. To meet the needs of his growing family, the father disregarded the 25-mile limitation that had been placed on any relocation by the mother, and moved out to Suffolk County. The father's relocation, which focused on improving the circumstances for his wife and their three young children, was not in any way made to address the needs or best interests of the child. In sum, no sound and substantial basis exists in this record for uprooting the child from the residence of her mother and the only school she has ever known. Accordingly, I would reverse the order, deny the father's petition, and grant the mother's petition to the extent of remitting the matter to the Family Court, Queens County, to devise a visitation schedule which reduces the weekday travel the child must endure between the father's house in West Babylon and the mother's residence in LeFrak City, but which allows for the continuation of the meaningful relationship between the father's family and the child (*see Mathie v Mathie*, 65 AD3d 527, 531 [2009]).

47 In the Matter of TAMARA D. ADMINISTRATION FOR CHILDREN'S SERVICES, Respondent; RANDOLPH P., Appellant. [991 NYS2d 377]—In a child neglect proceeding pursuant to Family Court Act article 10, the father appeals from (1) an order of fact-finding of the Family Court, Kings County (White, J.), dated June 8, 2012, which, after a hearing, found that he neglected the subject child, and (2), as limited by his brief, from so much of an order of disposition of the same court dated December 21, 2013, as, in effect, denied his application for a suspended judgment.

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as the order of fact-finding was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

Ordered that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

The Family Court's finding that the father neglected the subject child is supported by a preponderance of the credible evidence (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Ariella S. [Krystal C.]*, 89 AD3d 1092 [2011]; *Matter of Kiara C. [David C.]*, 85 AD3d 1025 [2011]; *Matter of Ndeye D. [Benjamin D.]*, 85 AD3d 1026 [2011]).

Also, given the father's failure to admit responsibility for his

neglectful actions and to take corrective measures, including participation in the services offered to him prior to disposition, the Family Court did not improvidently exercise its discretion in denying his application for a suspended judgment at disposition (see *Matter of Victoria C. [Cassandra C.]*, 106 AD3d 1084, 1085 [2013]; *Matter of Phillips N. [Joy N.]*, 104 AD3d 690, 691-692 [2013]; *Matter of Ganesha B. [Nyesha H.]*, 78 AD3d 500 [2010]). Dillon, J.P., Lott, Austin and Barros, JJ., concur.

48 In the Matter of JESSICA FIGUEROA, Appellant, v JOHN B. RHEA et al., Respondents. [991 NYS2d 373]—

Public Housing—Denial of Remaining Family Member Status
Public Housing—Succession Rights—Estoppel

In a proceeding pursuant to CPLR article 78 to review a determination of the New York City Housing Authority dated April 11, 2012, which adopted the recommendation of a hearing officer dated March 22, 2012, made after a hearing, denying the petitioner's grievance challenging the denial of her request to succeed to the tenancy of her late grandmother's apartment as a remaining family member, the petitioner appeals from a judgment of the Supreme Court, Kings County (Edwards, J.), dated April 1, 2013, which denied the amended petition and dismissed the proceeding.

Ordered that the appeal is dismissed, without costs or disbursements, and the judgment is vacated; and it is further,

Adjudged that the determination is confirmed, the amended petition is denied, and the proceeding is dismissed on the merits, without costs or disbursements.

Since the amended petition raises a question of whether the challenged determination is supported by substantial evidence, and the objections in point of law raised by the respondents could not have terminated the proceeding, the Supreme Court should have transferred the proceeding to this Court (see CPLR 7804 [g]). Nevertheless, because the record is now before this Court, we will treat the matter as one transferred here and will review the administrative determination de novo (see *Matter of Whitehead v New York City Hous. Auth.*, 102 AD3d 974, 974 [2013]; *Matter of Cortes v New York City Hous. Auth.*, 88 AD3d 996, 996-997 [2011]; *Matter of Roman v New York City Hous. Auth.*, 63 AD3d 845, 846 [2009]).

Substantial evidence in the record supports the determination of the New York City Housing Authority (hereinafter the NYCHA) that the petitioner never obtained written permission for permanent occupancy from the housing manager of the public housing development in which she lived with her grand-

mother, and did not continuously reside in her grandmother's apartment for a period of at least one year prior to her grandmother's death so as to become a "remaining family member" with the right of succession to the apartment pursuant to the NYCHA's published policy (see *Matter of Marcus v New York City Hous. Auth.*, 106 AD3d 1088, 1089 [2013]; *Matter of Cortes v New York City Hous. Auth.*, 88 AD3d at 997; *Matter of Blake v New York City Hous. Auth.*, 78 AD3d 1175, 1175-1176 [2010]; *Matter of Roman v New York City Hous. Auth.*, 63 AD3d at 846; *Matter of Hargrove v Van Dyke Hous.*, 63 AD3d 741, 742 [2009]). Had the request to permanently add the petitioner to her grandmother's household been granted, the petitioner would still have been ineligible for remaining family member status, since her grandmother died less than one year after that request was made (see *Matter of Perez v New York City Hous. Auth.*, 99 AD3d 624, 624-625 [2012]; *Matter of Mehu v New York City Hous. Auth.*, 97 AD3d 750, 750 [2012]; *Matter of McNeal v Hernandez*, 58 AD3d 417, 418 [2009]). Accordingly, the petitioner's challenge to the NYCHA's denial of the permanent occupancy request, and the NYCHA's objections thereto, are without merit.

Furthermore, while the petitioner contends that she resided in the apartment with the implicit approval of the housing manager of the subject public housing development, and commenced her residency prior to the permanent occupancy request, the NYCHA may not be estopped from denying remaining family member status even if it failed to explain the applicable policies or assist the tenant of record with the necessary forms, or if it acquiesced in the petitioner's occupancy (see *Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008]; *Matter of Rahjou v Rhea*, 101 AD3d 422, 422 [2012]; *Matter of Perez v New York City Hous. Auth.*, 99 AD3d 624, 625 [2012]; *Rosello v Rhea*, 89 AD3d 466, 466 [2011]; *Matter of Muhammad v New York City Hous. Auth.*, 81 AD3d 526, 527 [2011]). Accordingly, the petitioner could not succeed to the tenancy of her late grandmother's apartment as a remaining family member, and the NYCHA's determination to deny her grievance was supported by substantial evidence in the record (see *Matter of Marcus v New York City Hous. Auth.*, 106 AD3d 1088 [2013]; *Matter of Perez v New York City Hous. Auth.*, 99 AD3d 624 [2012]; *Matter of Blake v New York City Hous. Auth.*, 78 AD3d 1175 [2010]). Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

49 In the Matter of ANNE GRAVEL, Appellant, v JAMES MAKRIANES, Respondent. [991 NYS2d 452]—

Parent, Child and Family—Custody—Relocation of Custodial Parent

In related child custody proceedings pursuant to Family Court Act article 6, the mother appeals, as limited by her brief, from so much of an order of the Family Court, Suffolk County (Rouse, J.), dated April 3, 2013, as, without a hearing, denied her petitions to relocate to Michigan with the parties' two minor children.

Ordered that the order is affirmed insofar as appealed from, with costs.

The parties' judgment of divorce, entered April 22, 2003, provided that the parties were to have joint custody of the subject children, who were born August 15, 1996, and January 15, 1998, respectively. By petitions dated January 2, 2013, the mother sought permission to relocate to Michigan with the subject children, and the father opposed her request and moved to dismiss the petitions. After considering the parties' written submissions and taking testimony from the parents, the Family Court denied the petitions. The mother appeals.

In order to modify an existing custody arrangement, there must be a showing of a change in circumstances (*see Matter of Dorsa v Dorsa*, 90 AD3d 1046 [2011]). In determining whether relocation is appropriate, each "request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*Matter of Tropea v Tropea*, 87 NY2d 727, 739 [1996]; *see Matter of Caruso v Cruz*, 114 AD3d 769 [2014]).

In making its determination here, the Family Court, which had presided over several past petitions between the parties, considered the submissions of the parties and their sworn testimony concerning the mother's relocation request. The father had been intimately involved in the children's lives since their birth and was their exclusive caregiver during the mother's temporary move to Michigan (*see Matter of McBryde v Bodden*, 91 AD3d 781 [2012]). By remaining in New York, the children could remain in their schools and maintain the relationships they had formed with their friends and community. Although the parties agreed, in a stipulation that was incorporated but not merged into the judgment of divorce, that the mother could relocate outside the Town of East Hampton if the father's child support payments were lowered to under \$500 per week, such an agreement is not dispositive. Rather, it is a factor to be considered along with all of the other factors the court should consider when determining whether relocation is in the best

interests of the children, including the distance between their current home and the proposed home in Michigan (*see McMahan v McMahan*, 62 AD3d 968 [2009]; *Rheingold v Rheingold*, 4 AD3d 406 [2004]; *see also Matter of Tropea v Tropea*, 87 NY2d at 741-742; *Petroski v Petroski*, 24 AD3d 1295, 1296-1297 [2005]; *Savage v Morrison*, 262 AD2d 1077 [1999]). In her sworn testimony, the mother admitted that she had not spoken to the children about moving to Michigan, and further failed to demonstrate that their lives would be enhanced economically, emotionally, or educationally by the proposed move to Michigan. The Family Court's determination that the proposed relocation would have a negative impact on the children's relationship with the father, and would not be in their best interests, has a sound and substantial basis in the record (*see Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]; *Matter of Tropea v Tropea*, 87 NY2d 727 [1996]; *Matter of Hirtz v Hirtz*, 108 AD3d 712, 714 [2013]; *Matter of Steadman v Roumer*, 81 AD3d 653, 654 [2011]).

Contrary to the mother's contention, under the circumstances presented here, it was not necessary for the Family Court to have conducted a full evidentiary hearing in this matter, as it possessed "adequate relevant information to enable it to make an informed and provident determination with respect to the best interests of the children" (*Piccinini v Piccinini*, 103 AD3d 868, 870 [2013]; *see Matter of Katz v Shomron*, 116 AD3d 777, 778 [2014]).

Accordingly, the Family Court properly denied the mother's petitions to relocate. Dickerson, J.P., Hall, Roman and Cohen, JJ., concur.

50 In the Matter of FRANCO LOMBARDI, Respondent, v MARIA VALENTI, Formerly Known as MARIA LOMBARDI, Appellant. [991 NYS2d 457]—

Parent, Child and Family—Custody—Modification

In a custody and visitation proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Orange County (Woods, J.), entered April 30, 2013, which, after a hearing, inter alia, granted that branch of the father's petition which was, in effect, to modify an order of custody and visitation of the same court dated May 24, 2012, entered upon stipulation of the parties, so as to award him sole legal and physical custody of the parties' child, with a specified schedule of parenting time for the mother, and directed the parties to each pay the sum of \$750 to Community Mediation Services, Inc.

Ordered that the order entered April 30, 2013, is reversed, on the law and the facts, without costs or disbursements, and that branch of the father's petition which was, in effect, to modify an order of custody and visitation dated May 24, 2012, entered upon stipulation of the parties, so as to award him sole legal and physical custody of the parties' child, with a specified schedule of parenting time for the mother, is denied.

"To warrant modification of an existing court-sanctioned child custody arrangement, there must be a showing of a change in circumstances, such that the modification is required to protect the best interests of the child" (*Matter of Cortez v Cortez*, 111 AD3d 717, 717 [2013]; see Family Ct Act § 652 [a]; *Matter of Morillo v Nunez*, 91 AD3d 875, 876 [2012]; *White v Mazzella-White*, 84 AD3d 1068, 1069 [2011]; *Matter of Chabotte v Faella*, 77 AD3d 749, 749 [2010]). The best interests of the child are determined by a review of the totality of the circumstances (see *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Matter of Cortez v Cortez*, 111 AD3d at 717; *Matter of Griffin v Moore-James*, 104 AD3d 685, 686 [2013]; *Matter of Sidorowicz v Sidorowicz*, 101 AD3d 737, 738 [2012]).

"In custody matters, the credibility determinations of the Family Court are entitled to deference, as the Family Court was in the best position to evaluate the credibility of witnesses" (*Matter of Cortez v Cortez*, 111 AD3d at 717; see *Matter of Laura C. [Eduardo C.]*, 108 AD3d 666, 667 [2013]; *Matter of Pietrafesa v Pietrafesa*, 108 AD3d 557, 558 [2013]). However, the authority of an appellate court is as broad as that of the Family Court (see *Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]; *Matter of Ellis v Burke*, 108 AD3d 764, 765 [2013]; *Matter of Edwards v Rothschild*, 60 AD3d 675, 676 [2009]), and "[a]n appellate court would be seriously remiss if, simply in deference to the finding of a Trial Judge, it allowed a custody determination to stand where it lack[ed] a sound and substantial basis in the record" (*Matter of Gloria S. v Richard B.*, 80 AD2d 72, 76 [1981]; see *Matter of Cortez v Cortez*, 111 AD3d at 717; *Matter of Iams v Estate of Iams*, 106 AD3d 910, 911 [2013]; *Matter of Moran v Cortez*, 85 AD3d 795, 797 [2011]; *Matter of Ruggiero v Noe*, 77 AD3d 959, 961 [2010]).

Here, the Family Court's determination that a modification of the parties' child custody arrangement so as to award the father sole legal and physical custody of the subject child was in the child's best interests is not supported by a sound and substantial basis in the record. Under the circumstances of this case, the father's relocation closer to both the child's school and the mother's home was not a change in circumstances sufficient to

warrant a change in the parties' custody arrangement. Further, although there was some evidence that the mother had interfered with the father's relationship with the parties' child in an attempt to marginalize rather than foster the parent-child bond, we conclude that her behavior was not sufficient to warrant a change of custody at this time (*see Matter of Ross v Ross*, 96 AD3d 856, 857-858 [2012]; *see also Cervera v Bressler*, 90 AD3d 803, 805-806 [2011]). Moreover, the Family Court failed to accord sufficient weight to the child's need for stability and the impact of uprooting her from the mother's residence (*see Matter of Sidorowicz v Sidorowicz*, 101 AD3d 737, 738 [2012]; *see also Matter of Russell v Russell*, 72 AD3d 973, 975 [2010]). Rather, the evidence demonstrated that it would be in the best interests of the now seven-year-old child, who had been in the primary physical custody of the mother since she was approximately 2½ years old, to remain with the mother (*see Cervera v Bressler*, 90 AD3d at 806). Accordingly, the Family Court should have denied that branch of the father's petition which was, in effect, to modify the parties' child custody arrangement so as to award him sole legal and physical custody of the parties' child, with a specified schedule of parenting time for the mother.

In light of our determination, there will be no need for the parties to submit to mediation in order to implement and effectuate the terms of the visitation schedule set by the Family Court. Accordingly, we also reverse so much of the order appealed from as directed the parties each to pay \$750 to Community Mediation Services, Inc., which is the authorized community dispute resolution center designated by the Family Court, Queens County, to resolve certain family disputes in that county.

The mother's remaining contentions are either based on matter dehors the record or not properly before this Court. Skelos, J.P., Dickerson, Chambers and Duffy, JJ., concur.

51 In the Matter of WILLIAM L. McCORMICK (Admitted as WILLIAM LANGTON McCORMICK), a Disbarred Attorney. [991 NYS2d 362]—Motion by William L. McCormick for reinstatement to the bar as an attorney and counselor-at-law. Mr. McCormick was admitted to the bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on October 18, 1972, under the name William Langton McCormick. By decision and order on motion of this Court dated January 23, 1995, the Grievance Committee for the Tenth Judicial District was authorized to institute and prosecute a disciplinary proceeding against Mr. McCormick and the issues were referred to the

Honorable Joseph Jaspan, as Special Referee, to hear and report. By opinion and order of this Court dated December 4, 1995, Mr. McCormick was disbarred, effective immediately, based on eight charges of professional misconduct (*see Matter of McCormick*, 219 AD2d 230 [1995]). By decision and order on motion of this Court dated June 27, 2013, Mr. McCormick's motion for reinstatement was held in abeyance and the matter was referred to the Committee on Character and Fitness to investigate and report on Mr. McCormick's current fitness to practice law.

Upon the papers filed in support of the motion and the papers filed in relation thereto, and upon the report of the Committee on Character and Fitness and the exhibits annexed thereto, it is

Ordered that the motion is granted; and it is further,

Ordered that, effective immediately, William Langton McCormick is reinstated as an attorney and counselor-at-law and the Clerk of the Court is directed to restore the name of William Langton McCormick to the roll of attorneys and counselors-at-law. Eng, P.J., Mastro, Rivera, Skelos and Dillon, JJ., concur.

52 In the Matter of PUTNAM COUNTY PROBATION DEPARTMENT, Respondent, v FREDERICK J. DIMICHELE, Appellant. [991 NYS2d 366]—

Parent, Child and Family—Support—Revocation of Suspension of Jail Sentence

In related child support proceedings pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Putnam County (Reitz, J.), dated August 20, 2013, which, without a hearing, in effect, revoked an order of the same court dated October 11, 2007, suspending his commitment and placing him on probation, and directed that he be incarcerated.

Ordered that the order dated August 20, 2013, is reversed, on the law, without costs or disbursements, and the matter is remitted to the Family Court, Putnam County, for a hearing pursuant to Family Court Act § 433.

At the outset, due to the enduring consequences which may potentially flow from the revocation of the order suspending the father's commitment, the fact that the father has been released from prison due to the expiration of his commitment does not render the instant appeal academic (*see generally Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]; *Matter of Peck v Evans*, 118 AD3d 1086 [2014]).

Turning to the merits, while the Family Court had the discretion to revoke the suspension of the jail sentence it had previ-

ously imposed upon finding that the father had willfully failed to obey a lawful order of support (*see* Family Ct Act § 454 [3] [a]), the court erred in doing so without first affording the father a hearing (*see* Family Ct Act § 433 [a]; *see also* *Matter of Davis v Bond*, 104 AD3d 1227 [2013]; *Matter of Conlon v Kortz*, 86 AD3d 670 [2011]; *Matter of Horike v Freedman*, 81 AD3d 1091 [2011]; *Matter of Thompson v Thompson*, 59 AD3d 1104 [2009]; *Matter of DeVries v DeVries*, 59 AD3d 619, 620 [2009]).

Accordingly, we reverse the order and remit the matter to the Family Court, Putnam County, for a hearing on the petition pursuant to Family Court Act § 433. Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

53 In the Matter of JOSEPH SARAVIA, Appellant, v TERESA GODZIEBA, Respondent. [991 NYS2d 476]—

Parent, Child and Family—Custody

In related child custody and visitation proceedings pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Suffolk County (Orlando, Ct. Atty. Ref.), dated July 10, 2013, which granted the mother's cross petition for sole custody of the subject child and awarded him only certain visitation, and, in effect, denied his petition for sole custody of the subject child.

Ordered that the order is modified, on the facts and in the exercise of discretion, by adding a provision thereto directing that when one parent is working, that parent, prior to making babysitting arrangements with a nonparent, shall first afford the other parent the opportunity to care for the subject child during such work period; as so modified, the order is affirmed, without costs or disbursements.

The mother and the father, who were never married, are the parents of a son who is almost three years of age, having been born in September 2011. After the birth of the subject child, the parties resided together for approximately six months until the mother, with the child, moved out. In June 2012, the father filed a petition for sole legal and physical custody of the child, and the mother cross-petitioned for sole legal and physical custody of the child. After a hearing at which the parties and one other witness testified, the Family Court awarded the mother sole legal and physical custody of the child, with visitation to the father. The father appeals.

In making an initial custody determination, the court must consider what arrangement is in the best interests of the child under the totality of the circumstances (*see* *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]; *Kramer v Griffith*, 119 AD3d

655 [2014]). “Where, as here, the court has conducted a complete evidentiary hearing on the issues of custody and visitation, its findings must be accorded great weight, and its custody and visitation determination will not be disturbed unless it lacks a sound and substantial basis in the record” (*Iacono v Iacono*, 117 AD3d 988, 988 [2014]). Here, there is a sound and substantial basis in the record to support the Family Court’s determination that it was in the best interests of the child to award sole custody to the mother, with visitation to the father (see *Matter of Chichilnitskiy v Faiman*, 119 AD3d 681 [2014]; *Iacono v Iacono*, 117 AD3d at 988-989; *Matter of Ramirez v Velez*, 78 AD3d 1062 [2010]). The evidence at the hearing established that both parents love the child, are gainfully employed, maintain their own homes, and can adequately provide for the child’s overall development. However, the Family Court, having the benefit of observing and listening to the witnesses, including the testimony of both parties, found that the mother was better suited to place the child’s interests ahead of her own and to foster the child’s relationship with the other parent. Accordingly, the Family Court’s determination awarding custody to the mother will not be disturbed (see *Matter of Felty v Felty*, 108 AD3d 705 [2013]). In addition, the visitation schedule set by the Family Court provides the father with reasonable visitation privileges (see *Matter of Grunwald v Grunwald*, 108 AD3d 537, 539 [2013]). Nonetheless, we find that under the circumstances of this case, where both parties have different work schedules and have expressed a desire to care for the child during the periods when the other parent is working, it would be in the best interests of the child for each parent, prior to arranging for a nonparent to babysit the child during a work period, to first afford the other parent the opportunity to care for the child during that time.

Contrary to the father’s contention on appeal, an award of joint custody or equal parenting time would not have been in the child’s best interests, as the parties were sometimes antagonistic toward each other and demonstrated an inability to cooperate on certain important matters concerning the child (see *Braiman v Braiman*, 44 NY2d 584, 590 [1978]; *Matter of Lawrence v Davidson*, 109 AD3d 826 [2013]).

The father’s remaining contentions are without merit. Skelos, J.P., Dillon, Maltese and Barros, JJ., concur.

54 In the Matter of ARTHUR SMYLES et al., Appellants, v BOARD OF TRUSTEES OF INCORPORATED VILLAGE OF MINEOLA et al., Respondents. [992 NYS2d 83]—

In a proceeding pursuant to CPLR article 78 to review a determination of the Board of Trustees of the Incorporated Village of Mineola, dated October 11, 2012, which, after a hearing, denied the petitioners' application for a special use permit, the petitioners appeal from (1) an order of the Supreme Court, Nassau County (Asarch, J.), entered February 25, 2013, which denied the petition, and (2) a judgment of the same court (Cozzens, Jr., J.), entered March 25, 2013, which, upon the order, is in favor of the respondents and against them dismissing the proceeding.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the respondents.

The appeal from the intermediate order must be dismissed since an intermediate order made in a CPLR article 78 proceeding is not appealable as of right (*see* CPLR 5701 [b] [1]; *Matter of Seraydar v Three Vil. Cent. School Dist.*, 90 AD3d 936 [2011]), and any possibility of taking a direct appeal therefrom terminated with the entry of the judgment in the proceeding (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Matter of Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 71 AD3d 1040 [2010]). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a]).

"Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right" (*Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 195 [2002] [citation omitted]). The burden of proof on an applicant seeking a special exception, commonly known as a special use permit, is lighter than that carried by an applicant for a zoning variance (*see Matter of Kabro Assoc., LLC v Town of Islip Zoning Bd. of Appeals*, 95 AD3d 1118 [2012]; *Matter of White Castle Sys., Inc. v Board of Zoning Appeals of Town of Hempstead*, 93 AD3d 731 [2012]). A denial of a special use permit must be supported by evidence in the record and may not be based solely upon community objection (*see Matter of Green 2009, Inc. v Weiss*, 114 AD3d 788 [2014]; *Matter of White Castle Sys., Inc. v Board of Zoning Appeals of Town of Hempstead*, 93 AD3d 731 [2012]). However, where evidence supporting the denial exists, deference must be given to the discretion

of the authorized board, and a court may not substitute its own judgment for that of the authorized board, even if a contrary determination is supported by the record (see *Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d at 196; *Matter of Moy v Board of Town Trustees of Town of Southold*, 61 AD3d 763 [2009]; *Matter of MacGregor v Derevlany*, 7 AD3d 624 [2004]; *Matter of Leon Petroleum v Board of Trustees of Inc. Vil. of Mineola*, 309 AD2d 804 [2003]).

Here, evidence in the record, including testimony by experts in traffic and real estate and by neighboring property owners, supports the findings of the Board of Trustees of the Incorporated Village of Mineola (hereinafter the Board) that the proposed expansion of the subject day care facility into vacant retail space would result in a dangerous traffic situation, an over-intensification of land use with respect to available parking, and a hazard with respect to the provision of emergency services. Contrary to the petitioners' contention, the Board was entitled to base its decision upon, among other things, its members' personal knowledge and familiarity with the community (see *Matter of Russia House at Kings Point, Inc. v Zoning Bd. of Appeals of Vil. of Kings Point*, 67 AD3d 1019 [2009]; *Matter of Thirty W. Park Corp. v Zoning Bd. of Appeals of City of Long Beach*, 43 AD3d 1068 [2007]). Accordingly, the Board's determination to deny a special use permit on the ground that it would not be in the best interests of the health, safety, and welfare of the community was supported by the record, and was not arbitrary and capricious.

Additionally, the Board's alleged failure to comply with the time limitations of Village Law § 7-725-b (6) does not mandate the annulment of its determination (see *Matter of Frank v Zoning Bd. of Town of Yorktown*, 82 AD3d 764 [2011]; cf. *Matter of Barsic v Young*, 22 AD3d 488, 490 [2005]). The appropriate remedy for the Board's alleged failure to act would have been the commencement of a special proceeding to compel the Board to issue a determination on the petitioners' application (see *Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 89 AD3d 1178 [2011]; *Nyack Hosp. v Village of Nyack Planning Bd.*, 231 AD2d 617 [1996]). Since the Board ultimately issued such a determination, the petitioners' contention in this regard has been rendered academic.

The petitioners' remaining contention is without merit (see *Quinones v Board of Mgrs. of Regalwalk Condominium I*, 242 AD2d 52 [1998]; *People v Town of Clarkstown*, 160 AD2d 17 [1990]). Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

55 In the *Matter of RANI Z.*, a Person Alleged to be a Juvenile Delinquent, Appellant. [991 NYS2d 376]—In a juvenile delin-

quency proceeding pursuant to Family Court Act article 3, Rani Z. appeals from (1) an order of fact-finding of the Family Court, Kings County (McElrath, J.), dated March 18, 2013, made after a fact-finding hearing, finding that he committed acts which, if committed by an adult, would have constituted the crime of criminal contempt in the second degree, and (2) an order of disposition of the same court dated October 25, 2013, which, upon the order of fact-finding, inter alia, adjudged him to be a juvenile delinquent and placed him on probation for a period of 12 months.

Ordered that the appeal from the order of fact-finding is dismissed, without costs or disbursements, as that order was superseded by the order of disposition and is brought up for review on the appeal from the order of disposition; and it is further,

Ordered that the order of disposition is affirmed, without costs or disbursements.

Contrary to the appellant's contention, the Family Court properly determined that there was probable cause for the arresting officer to take the appellant into custody, since "[t]he facts and circumstances known to the arresting officer would have warranted a reasonable person, who possessed the same expertise as the officer, to conclude that a crime was being or had been committed and that the appellant committed it" (*Matter of Eric C.*, 281 AD2d 543, 544 [2001]; see *Matter of Uriah M.*, 107 AD3d 997, 998 [2013]).

Viewed in totality, moreover, the record shows that the appellant received meaningful representation during the probable cause hearing, and there was no showing that any of counsel's alleged deficiencies constituted anything other than a legitimate, albeit unsuccessful, strategy (see *People v Caban*, 5 NY3d 143, 152 [2005]; *Matter of Dylan Mc. [Michelle M. Mc.]*, 105 AD3d 1049, 1050 [2013]).

The appellant's challenge to the legal sufficiency of the evidence is unpreserved for appellate review (see *Matter of Keir B.*, 115 AD3d 855 [2014]). In any event, viewing the evidence in the light most favorable to the presentment agency (see *Matter of David H.*, 69 NY2d 792, 793 [1987]), we find that it was legally sufficient to establish, beyond a reasonable doubt, that the appellant committed acts which, if committed by an adult, would have constituted the crime of criminal contempt in the second degree (see Penal Law § 215.50 [3]). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (see *Matter of Javan P.*, 81 AD3d 833, 834 [2011]; *Matter of Hasan C.*, 59 AD3d 617, 617-618 [2009]), we neverthe-

less accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *Matter of Javan P.*, 81 AD3d at 834; *Matter of Hasan C.*, 59 AD3d at 618). Upon reviewing the record here, we are satisfied that the Family Court's fact-finding determinations were not against the weight of the evidence (see Family Ct Act § 342.2 [2]; cf. *People v Romero*, 7 NY3d 633 [2006]). Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

56 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DANIELLE BARONE, Appellant. [991 NYS2d 366]—Appeal by the defendant, as limited by her motion, from a sentence of the Supreme Court, Richmond County (Rooney, J.), imposed June 21, 2013, upon her plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's valid waiver of her right to appeal precludes review of her contention that the sentence imposed was excessive (see *People v Bradshaw*, 18 NY3d 257, 264-267 [2011]; *People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]). Eng, P.J., Dillon, Lott, Sgroi and Maltese, JJ., concur.

57 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CARLTON BELTON, Appellant. [991 NYS2d 375]—Appeal by the defendant from a judgment of the County Court, Orange County (Berry, J.), rendered August 16, 2013, convicting him of attempted robbery in the second degree, upon his plea of guilty, and sentencing him, as a persistent violent felony offender, to an indeterminate term of imprisonment of 15 years to life.

Ordered that the judgment is modified, on the law, by vacating the sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the County Court, Orange County, for resentencing in accordance herewith.

The parties agree on the chronology concerning the defendant's commission of, and sentencing for, the relevant crimes underlying his adjudication as a persistent violent felony offender. Based on this undisputed chronology, as the People correctly concede, the defendant was improperly adjudicated a persistent violent felony offender (see *People v Morse*, 62 NY2d 205 [1984]; *People v Rivera*, 97 AD3d 704, 704 [2012]; *People v Davis*, 43 AD3d 448, 449 [2007]; *People v Cooper*, 245 AD2d 569, 569 [1997]; *People v Barclay*, 201 AD2d 739, 739-740 [1994]). Accordingly, we modify the judgment by vacating the sentence imposed, and remit the matter to the County Court, Orange County, for resentencing. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

58 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
DARIO CAMPBELL, Appellant. [991 NYS2d 341]—

Crimes—Indictment—Multiplicitous Counts

Crimes—Unlawful Search and Seizure

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Modica, J.), rendered June 13, 2011, convicting him of assault in the first degree and robbery in the first degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Hollie, J.), of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

Ordered that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the conviction of assault in the first degree under count five of the indictment, vacating the sentence imposed thereon, and dismissing that count of the indictment; as so modified, the judgment is affirmed.

The defendant's contention that the counts of assault in the first degree under count five of the indictment (Penal Law § 120.10 [4]) and robbery in the first degree under count six of the indictment (Penal Law § 160.15 [1]) were multiplicitous is unpreserved for appellate review (*see People v Cruz*, 96 NY2d 857, 858 [2001]; *People v Smalls*, 81 AD3d 860, 861 [2011]; *People v Clymer*, 26 AD3d 443 [2006]). Nevertheless, under the circumstances presented here, we review this contention in the interest of justice.

“[An indictment] is multiplicitous when a single offense is charged in more than one count” (*People v Alonzo*, 16 NY3d 267, 269 [2011]; *see People v Smalls*, 81 AD3d at 861; *People v Quinones*, 8 AD3d 589 [2004]; *People v Aarons*, 296 AD2d 508 [2002]; *People v Senisi*, 196 AD2d 376, 381-382 [1994]). Here, the record reflects that the jury charges regarding the count of assault in the first degree under count five of the indictment and the count of robbery in the first degree under count six of the indictment were essentially identical since one cannot commit robbery in the first degree under Penal Law § 160.15 (1) without simultaneously committing assault in the first degree under Penal Law § 120.10 (4) (*see People v Smalls*, 81 AD3d at 861). As such, those charges were multiplicitous (*see id.*).

While the People are correct that, in this case, the dismissal of the multiplicitous count of assault in the first degree will not affect “the quantum of punishment to be imposed” (*People v Smith*, 113 AD2d 905, 908 [1985]), “the second conviction, even

if it results in no greater sentence, is an impermissible punishment” (*Ball v United States*, 470 US 856, 865 [1985]). Accordingly, as we did in *People v Smalls*, we will vacate the multiplicitous conviction of assault in the first degree under count five of the indictment, vacate the sentence imposed thereon, and dismiss that count of the indictment (*see id.* at 861; *People v Aarons*, 296 AD2d at 508).

Contrary to the defendant’s contention that his statements to the police were the product of an unlawful arrest, the hearing court properly found that the police had probable cause to arrest him (*see People v Prego*, 102 AD3d 814 [2013]; *People v Capela*, 97 AD3d 760 [2012]). Under the circumstances, and “bearing in mind that ‘[p]robable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt’ ” (*People v Blasich*, 73 NY2d 673, 680 [1989], quoting *People v Bigelow*, 66 NY2d 417, 423 [1985]), it was reasonable for the police to conclude that it was more probable than not that the defendant was one of the four participants in a shooting and robbery that had occurred the previous night (*see People v Carrasquillo*, 54 NY2d 248, 254 [1981]; *People v Capela*, 97 AD3d at 761). Accordingly, the hearing court properly denied that branch of the defendant’s omnibus motion which was to suppress his statements to law enforcement officials. Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

59 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DREW CASSEUS, Appellant. [991 NYS2d 147]—

Crimes—Right to Counsel—Effective Representation

Appeal by the defendant from a judgment of the Supreme Court, Richmond County (Rooney, J.), rendered February 27, 2012, convicting him of murder in the second degree, attempted murder in the second degree, assault in the second degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant’s convictions arose from an incident in which his friend, Jonathan Vazquez, and the complainant, Thomas Re, became involved in a fistfight. During the fight, when it became clear that Vazquez was losing the contest, the defendant fired several gunshots in the direction of the combatants. One of the bullets struck Re in the leg, while another killed Vazquez. The defendant ultimately was convicted, *inter alia*, of attempted murder in the second degree based on his shooting at Re, and murder in the second degree, under a theory of transferred intent, for the killing of Vazquez.

The defendant's contention that the evidence was legally insufficient to support his convictions of murder in the second degree and attempted murder in the second degree is unpreserved for appellate review (see CPL 470.05; *People v Hawkins*, 11 NY3d 484, 492 [2008]). In any event, viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt of these crimes beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt as to these convictions was not against the weight of the evidence (see *People v Romero*, 7 NY3d 633 [2006]).

Contrary to the People's contention, the defendant's assertion that the trial court should have granted his request for a justification charge is preserved for appellate review. However, the trial court properly declined to give a justification charge since, viewing the record in the light most favorable to the defendant, there was no reasonable view of the evidence to support such an instruction (see Penal Law § 35.15 [2] [a]; *People v Reynoso*, 73 NY2d 816, 818 [1988]; *People v Watts*, 57 NY2d 299, 301-302 [1982]; *People v Cotsifas*, 100 AD3d 1015 [2012]; *People v Small*, 80 AD3d 786, 786-787 [2011]; *People v Dickerson*, 67 AD3d 700, 700-701 [2009]; *People v Ryan*, 55 AD3d 960, 963 [2008]; *People v Ojar*, 38 AD3d 684, 685 [2007]).

The defendant's contention that he was deprived of the effective assistance of counsel because his trial attorney failed to request submission of manslaughter in the first degree as a lesser included offense of intentional murder is unpersuasive. Rather, counsel's decision reflected a legitimate trial strategy of a reasonably competent attorney (see *People v Evans*, 16 NY3d 571, 575 [2011]; *People v Satterfield*, 66 NY2d 796, 799 [1985]), since it was consistent with the defendant's statements to the police that he merely fired his weapon for the purpose of breaking up the fight, and not with the intent to kill or injure anyone. By declining to request the lesser included offense of manslaughter in the first degree and seeking only the submission of manslaughter in the second degree, trial counsel logically elected to remove from the jury's consideration the possibility of a "compromise" guilty verdict on the former offense. Hence, if

convinced of the defendant's culpability for the homicide but not that he possessed the mens rea for murder in the second degree, the jurors could only have found that he acted recklessly, as the defendant's own statements suggested. The fact that this reasonable strategy proved unsuccessful does not equate with ineffective assistance of counsel, and the defendant's assertions to the contrary "'confus[e] true ineffectiveness with mere losing tactics and accord[] undue significance to retrospective analysis'" (*People v McGee*, 20 NY3d 513, 521 [2013], quoting *People v Benevento*, 91 NY2d 708, 712 [1998]). In this regard, we do not share our dissenting colleague's view that had manslaughter in the first degree been charged, the outcome of the trial may have been more favorable to the defendant. The jury's separate conviction of the defendant for the attempted intentional murder of Re reflected its finding that the defendant acted with the specific intent to kill when shooting at Re. There is no reason to believe that the jurors would have found that he contemporaneously fired the errant shot that killed Vazquez with a less culpable mens rea of intent to seriously injure Re so as to support a conviction of manslaughter in the first degree. Thus, under the circumstances, and upon a review of the entire record, we conclude that the defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137 [1981]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Mastro, J.P., Dickerson, and Lott JJ., concur.

Hinds-Radix, J., dissents and votes to reverse the judgment appealed from, on the law and as a matter of discretion in the interest of justice, and to order a new trial, with the following memorandum: On the evening of December 28, 2010, the defendant and his friend Jonathan Vazquez, along with some other friends, were standing in front of a corner store in Staten Island. As Thomas Re exited the store, Vazquez challenged him to a fight. Re testified at trial that he took his shirt off to show Vazquez that he was unarmed and was going to fight using his hands. Re and Vazquez moved to the side to avoid surveillance cameras, and Re put Vazquez in a "headlock." Re testified that Vazquez said he was finished, but after Re let him go, Vazquez "sucker punched" him in the lip. Then Re heard a gunshot, which went "in the air," and he saw that the defendant was holding a gun.

One of Re's companions similarly testified at trial that the defendant's first shot went "in the air." The companion further testified that the defendant fired four or five additional shots, but the defendant "wasn't aiming it. It was like he had a ham-

mer in his hand.” Re’s sister’s trial testimony described the defendant as flinging his arm as he fired in the direction of the fight.

One shot entered Re’s inner thigh, just above the knee cap, while another shot hit Vazquez. Re and his companions fled the scene to their car. As they fled, Re’s sister turned and said to the defendant, “Oh, my god, you shot your mans [sic].”

It is undisputed that the gun used by the defendant was previously stored under the back porch of Vazquez’s family’s residence. Upon his arrest, the defendant told the police that, after Vazquez and Re decided to fight each other, Vazquez took the gun out of his coat pocket and gave it to the defendant, with instructions that, “if shit gets crazy, burn that nigger.” When Re had Vazquez pinned on the ground, Vazquez looked at the defendant with, what the defendant interpreted was, a “what-the-hell-are-you-doing face.” The defendant claimed that he fired one shot in the air to break up the fight. Re did not release his chokehold of Vazquez, so the defendant fired another shot towards Re. The defendant claimed that he heard two return shots. The defendant fired one more shot towards Vazquez, and noticed that Vazquez was sprawled on the ground. Vazquez died shortly thereafter of a single gunshot wound to the left side of the head.

According to one of Vazquez’s brothers, shortly after the crime, the defendant returned to Vazquez’s family’s residence and told the brother that it was “crazy out there,” and “he may have shot my brother in the leg.”

The defendant’s conduct, as described by the eyewitnesses, and his statements to police, strongly indicated that he may not have intended to kill anyone, but, rather, to the extent he was aiming the gun at all, he fired in the air or at the legs of the participants to stop the fight. He was charged in the indictment, inter alia, with intentional murder based upon a transferred intent to kill, and manslaughter in the first degree based upon a transferred intent to inflict serious physical injury.

During the charge conference, when discussing charging the jury with lesser included offenses of intentional murder, defense counsel requested a charge of manslaughter in the first degree based upon an affirmative defense of extreme emotional disturbance. When making this request, defense counsel stated, in effect, that extreme emotional disturbance was the only basis upon which he was requesting a charge of manslaughter in the first degree. The trial court rejected this request, noting that no testimony with respect to extreme emotional disturbance was elicited at the trial. Defense counsel did not request the man-

slaughter in the first degree charge for the count of the indictment that was based upon a transferred intent to inflict serious physical injury. However, a reasonable view of the evidence supported this charge (*see People v Sanchez*, 226 AD2d 562, 563-564 [1996]; *People v Cotton*, 191 AD2d 577 [1993]). In fact, the trial court offered to instruct the jury with respect to manslaughter in the first degree based upon an intent to inflict serious physical injury, and defense counsel replied by asking for a moment to think about it. After a short pause, he responded, “Depending on how you ruled on the—I would ask not to have that charged.” The trial court asked for clarification, and defense counsel replied “I will ask to have it not charged.”

Defense counsel’s failure to request or agree to an instruction with respect to manslaughter in the first degree based upon an intent to cause serious physical injury was not supported by any viable trial strategy and was a prejudicial error which may have affected the outcome. Indeed, during deliberations, the jury asked for additional instructions with respect to “murder in the second degree with intent to cause death, manslaughter in the second degree and attempted murder in the second degree.” After about two days of deliberations, the jury reached the verdict under review.

In view of the foregoing, it is apparent from the record that defense counsel’s performance in this regard constituted ineffective assistance of counsel warranting a new trial (*see People v Fisher*, 18 NY3d 964, 967 [2012]).

60 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ADOLPHO GONZALEZ, Appellant. [991 NYS2d 340]—

Crimes—Right of Confrontation—Harmless Error

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Modica, J.), rendered June 13, 2011, convicting him of robbery in the first degree (four counts), assault in the first degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The People correctly concede that the defendant’s rights under the Confrontation Clause (*see* US Const, 6th Amend) were violated when the Supreme Court admitted a nontestifying DNA analyst’s report directly linking the defendant to a firearm recovered from a codefendant’s residence (*see Crawford v Washington*, 541 US 36 [2004]; *People v Brown*, 13 NY3d 332, 338 [2009]; *People v Rawlins*, 10 NY3d 136, 146 [2008]; *People v Oliver*, 92 AD3d 900, 901-902 [2012]; *People v Morrison*, 90 AD3d 1554, 1556-1557 [2011]).

“Confrontation Clause violations are subject to a constitutional harmless error analysis” (*People v Hardy*, 4 NY3d 192, 198 [2005]; see *People v Douglas*, 4 NY3d 777, 779 [2005]; *People v Eastman*, 85 NY2d 265, 276 [1995]; *People v Crimmins*, 36 NY2d 230, 240-241 [1975]). “Constitutional error requires reversal unless the error’s impact was ‘harmless beyond a reasonable doubt’ ” (*People v Hardy*, 4 NY3d at 198, quoting *People v Eastman*, 85 NY2d at 276; see *Schneble v Florida*, 405 US 427, 430 [1972]). This determination is based on a review of the “‘entire record’ ” (*People v Hardy*, 4 NY3d at 198, quoting *People v Eastman*, 85 NY2d at 276).

Here, in addition to the erroneously admitted report, the People presented evidence directly linking the defendant to the firearm in question. Specifically, the nontestifying analyst’s supervisor explained how she herself analyzed the raw data from the defendant’s buccal swab and swabs taken from the firearm, and drew her own conclusions. Thus, because the erroneously admitted report was cumulative, as the expert who did testify reached that same conclusion after comparing the same raw data relied upon by the nontestifying analyst (see *People v Rawlins*, 10 NY3d at 157; *People v Hortiz*, 60 AD3d 692, 693 [2009]), the error was harmless beyond a reasonable doubt (cf. *People v Hardy*, 4 NY3d at 198). Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

61 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JASON MARCELLE, Appellant. [991 NYS2d 658]—

Crimes—Confession—Noncustodial Statements
Crimes—Defendant as Witness

Appeal by the defendant from a judgment of the Supreme Court, Kings County (J. Goldberg, J.), rendered April 17, 2009, convicting him of manslaughter in the first degree, endangering the welfare of a child (three counts), and assault in the second degree (two counts), after a nonjury trial, and imposing sentence. The appeal brings up for review the denial, after a hearing, of that branch of the defendant’s omnibus motion which was to suppress his statements to law enforcement officials.

Ordered that the judgment is affirmed.

The defendant was convicted of manslaughter in the first degree, three counts of endangering the welfare of a child, and two counts of assault in the second degree, upon evidence that he, on one occasion, poured hot water onto his three-year-old daughter’s feet and, on another occasion, struck her with enough force to almost completely lacerate her liver, which led to her death.

“The credibility determinations of the Supreme Court following a suppression hearing are entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record” (*People v Cuyler*, 95 AD3d 900, 900-901 [2012]). Contrary to the defendant’s contention in his pro se supplemental brief, the evidence presented at the suppression hearing supports the Supreme Court’s determination that a reasonable person, innocent of any crime, would not have believed that he was in custody at the time his statements were made prior to the administration of *Miranda* warnings (see *Miranda v Arizona*, 384 US 436, 444 [1966]; *People v Yukl*, 25 NY2d 585, 589 [1969]). Accordingly, the statements were not the product of a custodial interrogation improperly conducted without the administration of *Miranda* warnings, and therefore, the court properly denied that branch of the defendant’s omnibus motion which was to suppress these statements.

The defendant also argues in his pro se supplemental brief that he was not advised by his counsel or the hearing court that he could testify on his own behalf at the joint *Mapp* and *Huntley* hearing (see *Mapp v Ohio*, 367 US 643 [1961]; *People v Huntley*, 15 NY2d 72 [1965]). To the extent the defendant’s contention is based on discussions held off the record between his counsel and himself, his contention is not properly before this Court, as it concerns matter dehors the record (see *People v Cass*, 18 NY3d 553, 556 [2012]). To the extent the defendant’s contention is based on any conduct or omission of the hearing court, it is without merit. “A trial court does not have a general obligation to sua sponte ascertain if the defendant’s failure to testify was a voluntary and intelligent waiver of his right” (*People v Dolan*, 2 AD3d 745, 746 [2003]). There were no exceptional circumstances present which would have mandated the hearing court to inquire into the voluntariness of the defendant’s failure to testify (see *id.* at 746). The defendant also does not point to anything in the record which shows that the court made any rulings or remarks which would have had a chilling effect on the defendant’s right to testify or which would have given the defendant the impression that he could not or should not testify at the hearing.

The defendant’s contention in his pro se supplemental brief that the evidence was legally insufficient to support his conviction of manslaughter in the first degree is unpreserved for appellate review (see CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 491-492 [2008]). In any event, viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to

establish the defendant's guilt of manslaughter in the first degree beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 349 [2007]), we nevertheless accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]). Upon reviewing the record here, we are satisfied that the verdict of guilt of manslaughter in the first degree was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

62 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHANE MORRIS, Appellant. [991 NYS2d 454]—

Crimes—Jurors—Notice to Counsel of Substantive Juror Inquiry—Mode of Proceedings Error

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Aloise, J.), rendered July 14, 2010, convicting him of assault in the first degree and criminal possession of a weapon in the second degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is reversed, on the law, and a new trial is ordered.

The defendant allegedly shot the complainant in the face during an argument over a broken door. The defendant was convicted of assault in the first degree and two counts of criminal possession of a weapon in the second degree.

During deliberations, the jury sent the court a note stating: "We the jury request a readback of Gary Richards' testimony." Richards was a witness who was with the complainant at the time that he was shot. Without first reading the note to counsel outside of the presence of the jury, the trial court, with all parties and the jury present, stated on the record that the jury had requested a "read-back of Gary Richards's testimony." It then stated "[w]e are prepared to give it to you right now. This is direct examination of Gary Richards by [the prosecutor]." At that point, the direct examination testimony of Richards was read back to the jury and then the trial court instructed the jury to return to their deliberations. The cross-examination of Richards was not read back to the jury.

On appeal, the defendant contends that the trial court's procedure for handling the jury note requesting a readback of

Richards's testimony violated the procedure for complying with CPL 310.30 set forth in *People v O'Rama* (78 NY2d 270, 277-278 [1991]). Although the defendant failed to object to the manner in which the trial court handled the note, under the circumstances of this case, the *O'Rama* error is not subject to the preservation requirement (see *People v Walston*, 23 NY3d 986, 989-990 [2014]). "[T]he trial court's core responsibility under the statute is both to give meaningful notice to counsel of the specific content of the jurors' request—in order to ensure counsel's opportunity to frame intelligent suggestions for the fairest and least prejudicial response—and to provide a meaningful response to the jury" (*People v Alcide*, 21 NY3d 687, 692 [2013], quoting *People v Kisoon*, 8 NY3d 129, 134 [2007]; see *People v Walston*, 23 NY3d at 988-989). "A court's failure to supply a meaningful notice or response constitutes error affecting the mode of proceedings, and therefore presents a question of law for appellate review even in the absence of a timely objection" (*People v Alcide*, 21 NY3d at 692). While a timely objection to an alleged *O'Rama* error may be required where the jury requests a readback and "defense counsel . . . [has] knowledge of the substance of the court's intended response" (*People v Starling*, 85 NY2d 509, 516 [1995]; see *People v Ramirez*, 15 NY3d 824, 825 [2010]), here, it is not evident from the record that defense counsel was aware that the trial court would give only part of a witness's testimony in response to a jury note, such as the one at issue here, requesting a readback. By failing to apprise counsel of the content of the note and the substance of its intended response before calling in the jury, the trial court "failed to meet its core responsibilities of providing defense counsel with meaningful notice and an opportunity to provide input so that the court could give the jury a meaningful response" (*People v Walston*, 23 NY3d at 990; see *People v Lockley*, 84 AD3d 836, 839 [2011]).

Furthermore, by providing the jury with only a partial readback, the trial court violated its separate obligation under CPL 310.30 to provide a "meaningful response" to the jury (*People v Kisoon*, 8 NY3d at 134). While defense counsel did not object to the partial readback, this error, too, is not subject to the preservation rule, since it is evident from the record that the trial court failed to satisfy this core responsibility (see *id.* at 134-135). Although a defense counsel who is given notice of the trial court's intended response might be expected to object at a time when counsel "had an opportunity to ask [the court] to alter course" (*People v Alcide*, 21 NY3d at 694), counsel here had no such opportunity because he learned of the trial court's response at the same time the jury heard it. The trial court

failed to meaningfully respond to the note when it failed to include in the readback the cross-examination of Richards, which included testimony that was detrimental to the prosecution and relevant to the defense. Among other things, Richards's testimony on cross-examination revealed that he was intoxicated when he was interviewed by the police on the night of the incident. Richards also testified on cross-examination that he truthfully told the police on the night of the incident that the complainant had a dispute with an unknown male, even though Richards testified on direct examination that he had seen the defendant on approximately a dozen prior occasions. Further, Richards testified on cross-examination that the complainant was holding a bag containing a 40-ounce bottle of beer while he was arguing with the defendant, despite testifying on direct examination that the complainant had nothing in his hands. As a result, the trial court's failure to provide the jury with Richards's testimony on cross-examination during the readback seriously prejudiced the defendant (*see People v Clark*, 108 AD3d 797, 800 [2013]; *People v Lewis*, 262 AD2d 584, 584 [1999]; *see also People v Smith*, 68 AD3d 1021, 1022 [2009]; *People v Brown*, 262 AD2d 569, 569 [1999]).

The defendant's contention that the trial court's instructions to the jury on the issue of reasonable doubt were constitutionally inadequate is without merit because the instructions, on the whole, conveyed the correct standard to be employed by the jury (*see People v Fields*, 87 NY2d 821, 823 [1995]; *People v King*, 73 AD3d 1083, 1084 [2010]; *People v Coles*, 62 AD3d 1022, 1023 [2009]; *People v Love*, 37 AD3d 618, 619 [2007]; *People v Sanchez*, 29 AD3d 608 [2006]; *People v Reyes*, 207 AD2d 362, 362-363 [1994]). However, the trial court is cautioned to rely on the most recent version of New York's Criminal Jury Instructions rather than recite from older versions. Dillon, J.P., Leventhal, Hall and Cohen, JJ., concur.

63 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KENNETH ROSS, Appellant. [991 NYS2d 377]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated June 10, 2008 (*People v Ross*, 52 AD3d 624 [2008]), affirming a judgment of the Supreme Court, Kings County, rendered November 13, 2005.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Lott, J.P., Austin, Roman and Cohen, JJ., concur.

64 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WAYNE SALTON, Appellant. [991 NYS2d 370]—Appeal by the defendant from a judgment of the Supreme Court, Queens County (Lasak, J.), rendered October 6, 2010, convicting him of murder in the second degree, robbery in the first degree (four counts), and criminal possession of a weapon in the second degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we find that it was legally sufficient to establish the defendant's guilt of murder in the second degree beyond a reasonable doubt. Moreover, upon our independent review pursuant to CPL 470.15 (5), we are satisfied that the verdict of guilt of that crime was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

The Supreme Court properly refused the defendant's request to charge manslaughter in the first degree as a lesser included offense of murder in the second degree. Viewing the evidence in the light most favorable to the defendant (*see People v Martin*, 59 NY2d 704 [1983]), there was no reasonable view of the evidence to support a finding that the defendant intended to cause serious physical injury to the victim rather than to kill him (*see People v Moreno*, 16 AD3d 438 [2005]; *People v Caimite*, 306 AD2d 417 [2003]).

The defendant's contention that he was deprived of a fair trial by certain remarks made by the prosecutor during summation is largely unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Morency*, 104 AD3d 877 [2013]; *People v Rodney*, 96 AD3d 880 [2012]). In any event, the challenged remarks, for the most part, were fair comment on the evidence or were responsive to defense counsel's summation (*see People v Crawford*, 54 AD3d 961 [2008]; *People v Applewhite*, 50 AD3d 1046 [2008]). Although one of the remarks was improper, it was not so egregious as to deprive the defendant of a fair trial (*see People v Philbert*, 60 AD3d 698 [2009]; *People v Nisvis*, 56 AD3d 574 [2008]).

The defendant's contention that certain counts charging him with robbery in the first degree were multiplicitous is unpreserved for appellate review (*see People v Cruz*, 96 NY2d 857 [2001]), and, in any event, without merit (*see People v Saunders*, 290 AD2d 461 [2002]). Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

65 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHERMAN SIMPSON, Appellant. [991 NYS2d 348]—Appeal by the de-

fendant from a judgment of the Supreme Court, Queens County (Zayas, J.), rendered June 22, 2012, convicting him of assault in the second degree (two counts), criminal mischief in the fourth degree, obstructing governmental administration in the second degree, reckless endangerment in the second degree, false personation, reckless driving, aggravated unlicensed operation of a motor vehicle in the second degree, unlawfully operating or driving a motor vehicle on a public highway, and harassment in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that the evidence was legally insufficient to establish "physical injury" (Penal Law § 10.00 [9]) to support his convictions of assault in the second degree is unpreserved for appellate review as to the count pertaining to Police Officer Cynthia Woods (*see* CPL 470.05 [2]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the requisite physical injury to prove both of his convictions of assault in the second degree beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

There is no merit to the defendant's argument that the injuries sustained by the police officers in their pursuit of him were not caused by his flight. "'[W]here a defendant's flight naturally induces a police officer to engage in pursuit, and the officer is killed [or injured] in the course of that pursuit, the causation element of the crime will be satisfied'" (*People v Cipollina*, 94 AD3d 1549, 1550 [2012], quoting *People v Carn-cross*, 14 NY3d 319, 325 [2010]).

Moreover, the Supreme Court properly permitted the People to impeach one of their own witnesses with her grand jury testimony because her testimony during direct examination at trial affirmatively damaged the People's case (*see* CPL 60.35 [1]; *People v Guevara*, 96 AD3d 781, 782 [2012]; *People v Broomfield*, 163 AD2d 403, 403-404 [1990]; *People v Mercado*, 162 AD2d 722, 723 [1990]). Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

66 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TYSON SYDORIAK, Appellant. [991 NYS2d 478]—

Crimes—Jurors—Notice to Counsel of Substantive Juror Inquiry—Failure of Court to Apprise Counsel of Contents of Juror’s Notes and Substance of Intended Responses

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Holder, J.), rendered May 4, 2011, convicting him of attempted murder in the second degree, upon his plea of guilty, and attempted robbery in the first degree (two counts), attempted robbery in the second degree, criminal possession of a weapon in the second degree, attempted criminal possession of a controlled substance in the second degree, and attempted criminal possession of a controlled substance in the third degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is reversed, on the law, and a new trial is ordered.

Viewing the evidence adduced at trial in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the defendant’s guilt beyond a reasonable doubt. Moreover, upon our independent review pursuant to CPL 470.15 (5), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

However, a new trial is required because of the trial court’s failure to comply with CPL 310.30 in accordance with the procedure set forth in *People v O’Rama* (78 NY2d 270 [1991]). During deliberations, the jury sent several notes to the trial court, three of which are at issue on this appeal. In a note marked as court exhibit 15, the jury made several requests, beginning with the following question: “Can the jury come to a decision on some but not all counts and not be ‘a hung jury?’ ” Without first reading the note to counsel outside the presence of the jury, the trial court, with all parties and the jury present, read the quoted portion of the note into the record, and then immediately responded to the jury’s question by stating: “Well there are provisions in the law that deal with this, however, we haven’t gotten to the point at which those provisions have any relevance at this time.” The jury subsequently sent the court two more notes, which were marked as court exhibits 16 and 17. Once again, without any consultation with counsel, the trial court called the jury into the courtroom, and addressed these two notes as follows: “Okay. I have both notes. One, please repeat the definition of murder in the second degree. Two, please repeat the first five sentences of that definition, and three, please repeat 2. I assume you are talking about 2, number

2, in the verdict sheet, again, with the elements again. All right. And then the second note is please read back Lockwood's testimony regarding why Fresh a/k/a Kenneth Robinson started shooting." The court then immediately provided the instructions and the readback which it understood the jury to have requested.

Although the defendant failed to object to the manner in which the trial court handled the three jury notes in question, under the circumstances of this case, the *O'Rama* error is not subject to the preservation requirement (see *People v Walston*, 23 NY3d 986, 989-990 [2014]). "'[T]he trial court's core responsibility under the statute is both to give meaningful notice to counsel of the specific content of the jurors' request—in order to ensure counsel's opportunity to frame intelligent suggestions for the fairest and least prejudicial response—and to provide a meaningful response to the jury'" (*People v Alcide*, 21 NY3d 687, 692 [2013], quoting *People v Kisoan*, 8 NY3d 129, 134 [2007]; see *People v Walston*, 23 NY3d at 988-989). "A court's failure to supply a meaningful notice or response constitutes error affecting the mode of proceedings, and therefore presents a question of law for appellate review even in the absence of a timely objection" (*People v Alcide*, 21 NY3d at 692). While a timely objection to an alleged *O'Rama* error may be required where "defense counsel . . . [has] knowledge of the substance of the court's intended response" (*People v Starling*, 85 NY2d 509, 516 [1995]; see *People v Ramirez*, 15 NY3d 824, 825 [2010]), here, it is not evident from the record that defense counsel knew how the trial court would respond to the jury's inquiry, in court exhibit 15, as to whether it could return a partial verdict. Nor is it evident from the record that defense counsel was aware of how the court would interpret the phrase "please repeat 2" in court exhibit 16, or that counsel was aware of which testimony the court would deem to be relevant to "why Fresh, a/k/a Kenneth Robinson started shooting," as requested in court exhibit 17. Rather, as far as the record reveals (see *People v Tabb*, 13 NY3d 852 [2009]), defense counsel first learned of the trial court's response at the same time the jury heard it (see *People v Morris*, 120 AD3d 835 [2014] [decided herewith]). By failing to apprise counsel of the contents of the notes and the substance of its intended responses before calling in the jury, the trial court "failed to meet its core responsibilities of providing defense counsel with meaningful notice and an opportunity to provide input so that the court could give the jury a meaningful response" (*People v Walston*, 23 NY3d at 990; see *People v Morris*, 120 AD3d 835 [2014] [decided herewith]; *People v Lockley*, 84 AD3d 836, 839 [2011]).

In light of our determination, we need not reach the defendant's remaining contentions. Skelos, J.P., Lott, Roman and Cohen, JJ., concur.

(August 28, 2014)

1 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RHIAN TAYLOR, Appellant. [992 NYS2d 99]—

**Crimes—Identification of Defendant—Photographic Array
Crimes—Jurors—Notice of Substantive Jury Inquiry**

Appeal by the defendant from a judgment of the Supreme Court, Queens County (McGann, J.), rendered April 29, 2010, convicting him of murder in the second degree, assault in the second degree, criminal possession of a weapon in the second degree (two counts), and reckless endangerment in the first degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that the Supreme Court improperly permitted a detective to testify that defense counsel was present at a lineup observed by a witness is largely unpreserved for appellate review due to his belated objection (*see People v Gray*, 86 NY2d 10 [1995]; *People v Udzenski*, 146 AD2d 245, 250 [1989]). In any event, the Supreme Court properly permitted the detective to so testify, as the fairness of the lineup was in issue (*see People v Hamdam*, 58 AD3d 752 [2009]; *People v Foulks*, 143 AD2d 1038 [1988]; *see also People v Valentine*, 271 AD2d 245 [2000]).

Contrary to the defendant's contention, the Supreme Court did not err in admitting testimony pertaining to a photographic identification of the defendant. While a witness generally is not permitted to testify as to an extrajudicial identification of a photograph of a defendant (*see People v Griffin*, 29 NY2d 91 [1971]), such testimony is appropriate where, as here, the defendant opened the door to this type of inquiry during cross-examination of the witness (*see People v McCrae*, 69 AD3d 759, 761 [2010]; *People v Carvalho*, 60 AD3d 1394 [2009]; *People v Hamilton*, 33 AD3d 937, 938 [2006]; *People v Cuiman*, 229 AD2d 280, 282 [1997]).

The defendant's contention that he was denied his right to receive meaningful notice of a substantive jury inquiry is without merit (*see CPL 310.30*). The defendant expressly agreed that the jury could be given any requested evidence without the necessity of an appearance by either counsel. When the jury

requested to “see the benefits” offered to two of the prosecution’s witnesses, the Supreme Court, in accordance with the agreement, responded by sending into the jury room the cooperation agreement of one of the witnesses, which was the only such agreement that had been admitted into evidence. Subsequently, when the Supreme Court read the note back to the jury, it stated, “I believe we sent in to you the cooperation agreement [of one of the witnesses]. That’s what is in evidence.” There was no further communication from the jury regarding benefits offered to the two prosecution witnesses or the cooperation agreement. While it may have been preferable for the court to seek further clarification from the jury with respect to its request to “see the benefits” (*see People v Porteous*, 193 AD2d 631, 631-632 [1993]), the wording of the subject jury note, particularly when read in conjunction with several other notes, demonstrated that the jury was requesting only the physical exhibit. Under these circumstances, the Supreme Court’s response did not fall outside the acceptable bounds of its discretion, and thus satisfied the requirement of CPL 310.30 (*see People v O’Rama*, 78 NY2d 270, 279 [1991]; *People v Porteous*, 193 AD2d at 632).

The defendant’s remaining contentions are unpreserved for appellate review, and, in any event, without merit. Mastro, J.P., Chambers, Lott and Duffy, JJ., concur.

THIRD DEPARTMENT, AUGUST, 2014

(August 7, 2014)

1 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ABNER ORTOLAZA, Appellant. [991 NYS2d 171]—Appeal from a judgment of the County Court of Ulster County (Williams, J.), rendered July 11, 2012, which resentenced defendant following his conviction of the crime of burglary in the third degree.

Defendant waived indictment and agreed to be prosecuted by a superior court information charging him with burglary in the third degree. He pleaded guilty to this crime and waived his right to appeal. Under the terms of the plea agreement, he was to be sentenced to 3 to 6 years in prison and ordered to pay restitution in the amount requested by the District Attorney. Thereafter, County Court sentenced defendant to the agreed-upon prison term and, among other things, ordered him to pay restitution in the amount of \$976. When it was later determined

that the prison term imposed was illegal,* County Court resentenced defendant to 2 to 6 years in prison, but directed him to pay the same amount of restitution as previously ordered. Defendant now appeals.

Defendant challenges County Court's award of restitution, claiming that there is no record support for the amount that he was ordered to pay. Although defendant is not precluded by his waiver of appeal from raising this claim because the plea agreement did not specify the amount of restitution to be awarded (see *People v Boone*, 101 AD3d 1358, 1358 [2012], *lv denied* 20 NY3d 1096 [2013]; *People v Sherman*, 91 AD3d 982, 983 [2012], *lv denied* 19 NY3d 867 [2012]), it is not preserved for our review given that he did not request a restitution hearing or otherwise object to the amount of restitution awarded at sentencing (see *People v Smith*, 112 AD3d 1232, 1233 [2013], *lv denied* 22 NY3d 1203 [2014]; *People v Bressard*, 112 AD3d 988, 989 [2013], *lv denied* 22 NY3d 1137 [2014]). Under the circumstances presented, we find no reason to take corrective action in the interest of justice (see *People v Rossborough*, 100 AD3d 1149 [2012]; *People v Naumowicz*, 76 AD3d 747, 748 [2010]). Furthermore, we reject defendant's claim that he should not have been ordered to pay the mandatory surcharge or crime victim assistance fee given the absence of proof that he actually paid the restitution awarded (see Penal Law § 60.35 [6]; *People v Quinones*, 95 NY2d 349, 352 [2000]). Therefore, we decline to disturb the judgment of conviction.

Peters, P.J., Stein, McCarthy, Rose and Devine, JJ., concur. Ordered that the judgment is affirmed.

2 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRIAN E. DENSMORE Appellant. [990 NYS2d 373]—

Crimes—Sentence—Second Felony Offender—Right to Challenge Prior Conviction

Devine, J. Appeal from a judgment of the County Court of Ulster County (Williams, J.), rendered December 18, 2012, convicting defendant upon his plea of guilty of the crimes of rape in the second degree (four counts).

In satisfaction of a 10-count indictment, defendant pleaded guilty to four counts of rape in the second degree. County Court thereafter sentenced defendant, as a second felony offender, to an aggregate prison term of 17 years followed by 15 years of postrelease supervision. Defendant appeals and we affirm.

We reject defendant's contention that he was improperly

* Defendant was given an opportunity to withdraw his plea, but declined.

adjudicated as a second felony offender inasmuch as County Court was not obligated to expressly advise him that he had the right to challenge the constitutionality of his prior conviction (*see People v Wood*, 108 AD3d 932, 932-933 [2013]; *People v Smith*, 121 AD2d 771, 772 [1986]). To the contrary, where defendant was provided with a predicate felony statement, declined to controvert the allegations contained therein and admitted to the prior conviction for criminal mischief in the second degree, we find that the court substantially complied with the dictates of CPL 400.21 (3) and that defendant was properly sentenced as a second felony offender (*see People v Wood*, 108 AD3d at 933; *People v Ellis*, 53 AD3d 776, 777 [2008]).

Finally, although certain comments by County Court during sentencing could be characterized as intemperate, given the nature of defendant's crimes—unprotected intercourse with four different girls under the age of 15 after befriending them for that express purpose—we find no abuse of discretion or extraordinary circumstances that would warrant a reduction of his sentence in the interest of justice (*see People v Olson*, 110 AD3d 1373, 1377 [2013]; *People v Beliard*, 101 AD3d 1236, 1239 [2012], *lv denied* 20 NY3d 1096 [2013]).

Lahtinen, J.P., McCarthy, Rose and Lynch, JJ., concur. Ordered that the judgment is affirmed.

3 In the Matter of ROBERT MOORE, Also Known as SAADA SPIVEY, Appellant, v NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, Respondent. [993 NYS2d 386]—

**Extradition—Agreement on Detainers—Return to Sending State Following Prosecution in New York—Propriety of Delay
Crimes—Sentence—What Constitutes Illegal Interruption of Sentence—Extradition Pursuant to Interstate Agreement on Detainers**

Appeal from a judgment of the Supreme Court (Gilpatric, J.), entered August 13, 2010 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to compel respondent to recalculate his sentence.

In 1986, petitioner was convicted of murder in New Jersey and was sentenced to 30 years in prison. In 1987, while serving this sentence, petitioner was temporarily transferred to New York to face charges pursuant to the Interstate Agreement on Detainers Act (*see* 18 USC Appendix 2, § 2 [hereinafter IAD]; CPL 580.20). He was thereafter convicted of murder in New York and sentenced to a prison term of 25 years to life on November 9, 1987, with the sentence to run consecutively to the New Jersey sentence. Following imposition of the New York

sentence, petitioner was initially sent to respondent on November 13, 1987, apparently due to an error by an employee of the New York City Department of Corrections. Upon discovery of the error, he was returned to New Jersey on December 3, 1987 to complete his sentence there pursuant to the terms of the IAD. In 2010, petitioner commenced this CPLR article 78 proceeding seeking to compel respondent to recalculate his sentence to one that runs concurrently with the New Jersey sentence. Supreme Court dismissed the petition, prompting this appeal.

Petitioner contends that his New York sentence should run concurrently with the New Jersey sentence due to the fact that respondent initially received him following the imposition of his New York sentence, in violation of the IAD. We disagree. Pursuant to the IAD, New York was provided only temporary custody of petitioner in order to prosecute him on the murder charge (*see* CPL 580.20, art v [a]). Following prosecution, New York was required to return petitioner to New Jersey “[a]t the earliest practicable time consonant with the purposes of [the IAD]” (CPL 580.20, art v [e]). The IAD does not require an immediate return and, in our view, the modest delay here was neither impracticable nor contrary to the purpose of the IAD.

We also reject petitioner’s contention that his sentences should be ordered to run concurrently due to his belief that his New York sentence commenced in 1987, when he was erroneously received by respondent and, once commenced, it could not be interrupted (*see* CPL 430.10). Petitioner had not been discharged from the New Jersey sentence in 1987. Thus, his consecutive New York sentence could not have commenced at that time (*see* Penal Law § 70.30 [2-a]; *Matter of Mokone v Coughlin*, 157 AD2d 621, 622 [1990], *lv denied* 75 NY2d 711 [1990]), nor did respondent have the authority to change a sentence legally imposed by a court (*see Matter of Hill v Commissioner of Correctional Servs.*, 71 AD3d 1210, 1211 [2010]).

McCarthy, J.P., Garry, Rose, Lynch and Devine, JJ., concur. Ordered that the judgment is affirmed, without costs.

4 THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, v
LESLIE L. BECKER, Appellant. [990 NYS2d 743]—

Crimes—Sex Offenders—Sex Offender Registration Act—Upward Departure—
Conviction Not Addressed in Risk Assessment Instrument

Devine, J. Appeal from an order of the County Court of Schenectady County (Drago, J.), entered September 21, 2012, which classified defendant as a risk level three sex offender and

a sexually violent offender pursuant to the Sex Offender Registration Act.

Defendant was convicted in 2000 of numerous crimes stemming from a sexual assault upon an elderly family member, and was sentenced to an aggregate prison term of 15 years to be followed by postrelease supervision of five years (288 AD2d 766 [2001], *lvs denied* 97 NY2d 751 [2002]). The Board of Examiners of Sex Offenders prepared a risk assessment instrument pursuant to the Sex Offender Registration Act (*see* Correction Law art 6-C) that scored defendant as having 75 points, presumptively classifying him as a risk level two sexually violent offender. Following a hearing, County Court assessed defendant an additional 20 points under risk factor 6 (helplessness of victim). Defendant remained in the risk level two category with a score of 95 points, but County Court nonetheless found an upward departure to be warranted and classified him as a risk level three sexually violent offender. Defendant now appeals.

We affirm. “Upward departure from the presumptive risk level is justified when an aggravating factor, not adequately taken into account by the risk assessment guidelines, is established by clear and convincing evidence” (*People v Nash*, 114 AD3d 1008, 1008 [2014] [citations omitted]; *see People v Muirhead*, 110 AD3d 1386, 1387 [2013], *lv denied* 23 NY3d 906 [2014]). In that regard, County Court was free to consider “reliable hearsay, including information contained in the case summary, risk assessment instrument and presentence investigation report, as well as ‘any victim’s statement’ ” (*People v Burch*, 90 AD3d 1429, 1430-1431 [2011] [citations omitted], quoting Correction Law § 168-n [3]; *see People v Mingo*, 12 NY3d 563, 576 [2009]). Shortly after he was sentenced for the offenses at issue here, defendant was also convicted of unlawful imprisonment in the second degree, a conviction that was not addressed in the risk assessment instrument (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 14 [2006]). County Court considered an affidavit of the victim of that offense, who averred that defendant restrained her for several hours and threatened to rape and kill her, and that she only escaped when other individuals arrived on the scene. This evidence of the separate conviction and the facts underlying it “provide[d] clear and convincing evidence to support the upward departure from the presumptive risk level classification” (*People v Burch*, 90 AD3d at 1431; *see People v Neuer*, 86 AD3d 926, 927 [2011], *lv denied* 17 NY3d 716 [2011]; *see also People v Greene*, 83 AD3d 1304, 1304 [2011], *lv denied* 17 NY3d 706 [2011]).

In light of the foregoing, we need not reach defendant's argument regarding the points assessed under risk factor 6 (see *People v McElhearn*, 56 AD3d 978, 979 [2008]).

Stein, J.P., McCarthy, Garry and Lynch, JJ., concur. Ordered that the order is affirmed, without costs.

5 WOODROW FLEMMING, Appellant, v STATE OF NEW YORK, Respondent. [991 NYS2d 181]—

**State—Claim against State—Sufficiency of Pleadings—Inmate Cell Search
Prisons and Prisoners—Discipline of Inmates—Right to Observe Search of
Cell**

Devine, J. Appeal from a judgment of the Court of Claims (DeBow, J.), entered March 18, 2013, upon a decision of the court in favor of defendant.

Claimant, an inmate, commenced an action alleging, among other things, that he was deprived of personal property as the result of a cell search. Following a trial, the Court of Claims partially granted defendant's motion to dismiss the claim, finding that the notice of claim as it related to allegations that facility officials conspired against claimant and failed to investigate his complaint did not comply with the pleading requirements of Court of Claims Act § 11 (b). The court also denied claimant's trial motion to amend his claim to include allegations of subsequent retaliation against him for filing a grievance related to the cell search. Finally, the court dismissed so much of the claim that alleged that the cell search was a violation of claimant's constitutional rights and found that claimant had failed to prove that the correction officers who conducted the search had failed to follow Department of Corrections and Community Supervision Directive No. 4910. Claimant appeals.

We affirm. Initially, "[p]ursuant to Court of Claims Act § 11 (b), a claim must set forth the nature of the claim, the time when and place where it arose, the damages or injuries and the total sum claimed" (*Morra v State of New York*, 107 AD3d 1115, 1115 [2013]; see *Hogan v State of New York*, 59 AD3d 754, 754 [2009]). We agree with the Court of Claims that claimant's general allegations related to a conspiracy, and the failure of certain correction officers to investigate an unspecified complaint did not "provide a sufficiently detailed description of the particulars of the claim to enable [defendant] to investigate and promptly ascertain the existence and extent of its liability" (*Sinski v State of New York*, 265 AD2d 319, 319 [1999]; accord *Morra v State of New York*, 107 AD3d at 1115-1116).

Regarding the cell search, "Directive No. 4910 (V) (C) (1) allows an inmate to observe a cell search when the inmate is

removed from the cell for the search, unless a determination is rendered that such presence constitutes a safety or security risk” (*Matter of Johnson v Fischer*, 109 AD3d 1070, 1071 [2013]). Here, even assuming that the correction officers who searched claimant’s cell abused their discretion by not allowing him to be present, the officers “were nevertheless exercising a discretionary authority for which [defendant] has absolute immunity” (*Holloway v State of New York*, 285 AD2d 765, 766 [2001]). The Court of Claims also properly dismissed claimant’s 42 USC § 1983 cause of action, as a state is not a “person” under the statute (see *Haywood v Drown*, 556 US 729, 734 n 4 [2009]; *Shelton v New York State Liq. Auth.*, 61 AD3d 1145, 1151 [2009]). Claimant’s New York Constitution causes of action were also properly dismissed, as alternative post-deprivation remedies were available (see *Martinez v City of Schenectady*, 97 NY2d 78, 83 [2001]; *Waxter v State of New York*, 33 AD3d 1180, 1181 [2006]). Finally, we find no basis to disturb the Court of Claims’ determination that there was insufficient evidence in the record to support claimant’s allegations regarding violations of Correction Law § 137 or § 138 or various Department regulations. Claimant’s remaining contentions, including that the Court of Claims erred in denying his motion to amend his claim, have been considered and found to be without merit.

Peters, P.J., Rose, Egan Jr. and Lynch, JJ., concur. Ordered that the judgment is affirmed, without costs.

6 In the Matter of the Claim of STEPHEN GALLO, Respondent, v VILLAGE OF BRONXVILLE POLICE DEPARTMENT et al., Appellants. WORKERS’ COMPENSATION BOARD, Respondent. [991 NYS2d 174]—

Workers’ Compensation—Injuries Arising out of and in Course of Employment—Myocardial Infarction Precipitated by Stair Climbing—Board Determination Supported by Substantial Evidence

Lynch, J. Appeal from a decision of the Workers’ Compensation Board, filed September 10, 2012, which ruled that claimant sustained an accidental injury arising out of and in the course of his employment.

Claimant, a police sergeant, filed a claim for workers’ compensation benefits asserting that he suffered a work-related myocardial infarction on the afternoon of December 18, 2008. He testified that he had experienced mild symptoms while exercising that morning and that, after ascending a flight of stairs at work, he began experiencing shortness of breath, chest pain and arm numbness. He then sought treatment at a hospital and was found to have suffered a myocardial infarction. The

Workers' Compensation Board ultimately ruled, after a mandatory full Board review, that the infarction was precipitated by the stair climbing, and that it constituted an accident arising out of and in the course of claimant's employment. The employer and its workers' compensation carrier now appeal.

We affirm. "In reviewing a Board decision concerning the medical question of causality, we will look to the record to determine whether, read as a totality, it contains substantial and adequate opinion evidence to support the Board's finding" (*Matter of Doersam v Oswego County Dept. of Social Servs.*, 171 AD2d 934, 935 [1991], *affd for reasons stated below* 80 NY2d 775 [1992] [citation omitted]). A heart injury precipitated by work-related physical strain is compensable, even if "a pre-existing pathology may have been a contributing factor" and the physical exertion was no more severe than that regularly encountered by the claimant (*Matter of Lagona v Starpoint Cent. School*, 50 AD2d 236, 237 [1975], *affd* 40 NY2d 1034 [1976]; *see Matter of McCormick Green Bus Lines*, 29 NY2d 246, 248 [1971]; *Matter of O'Donnell v Town of Moriah*, 58 AD2d 702, 702 [1977]). In this case, two cardiologists who examined claimant and reviewed his medical history, including the initial hospital report stating that claimant felt chest pressure and pain at the gym, opined that the stair climbing at work acted upon plaque present due to his preexisting coronary artery disease to trigger a myocardial infarction. Neither cardiologist saw fit to alter his opinion, despite intimations that claimant may have downplayed the degree of discomfort that he experienced before ascending the stairs. No medical evidence that would call the opinions of those physicians into question was considered by the Board and, as such, substantial evidence in the record supports the Board's determination that claimant's myocardial infarction was causally linked to his employment (*see Matter of Brown v Penguin A.C.*, 113 AD3d 1009, 1009 [2014]; *Matter of Boaro v Kings Park Psychiatric Ctr.*, 104 AD3d 1049, 1050 [2013]).

Lahtinen, J.P., McCarthy, Garry and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

7 In the Matter of the Claim of MONICA SCHUSS, Appellant, v DELTA AIRLINES, INC., et al., Respondents. WORKERS' COMPENSATION BOARD, Respondent. [991 NYS2d 177]—

Workers' Compensation—Disqualification for False Representation—Work Activity while Receiving Benefits

Lahtinen, J.P. Appeal from a decision of the Workers' Compensation Board, filed October 9, 2012, which ruled that claimant violated Workers' Compensation Law § 114-a and dis-

qualified her from receiving further workers' compensation benefits.

Claimant sustained a work-related injury to her left hand in February 2010 and was awarded workers' compensation benefits. At a hearing in May 2011, the employer's workers' compensation carrier raised the issue of whether claimant had violated Workers' Compensation Law § 114-a, based upon alleged misrepresentations regarding her work activity while receiving benefits. A Workers' Compensation Law Judge (hereinafter WCLJ) thereafter found that claimant had violated Workers' Compensation Law § 114-a and disqualified her from receiving future benefit payments. The Workers' Compensation Board affirmed the WCLJ's decision and claimant appeals.

We affirm. Pursuant to Workers' Compensation Law § 114-a (1), a claimant who "knowingly makes a false statement or representation as to a material fact . . . shall be disqualified from receiving any compensation directly attributable to such false statement or representation." "A determination by the Board that a claimant violated Workers' Compensation Law § 114-a will not be disturbed if supported by substantial evidence" (*Matter of Poli v Taconic Correctional Facility*, 83 AD3d 1339, 1339-1340 [2011] [citation omitted]). Here, claimant testified on May 11, 2011 that she had not worked for anyone in any capacity during the time following her 2010 injury. The carrier subsequently presented surveillance videos and a written report prepared by a private investigator.* The written report and videos taken on May 2, 2011 through May 4, 2011 reflect claimant leaving her home and driving to a chiropractor's office and remaining there for several hours. Claimant is also shown wearing a uniform bearing that office's logo. Further, claimant was filmed leaving the office with another person, running an errand with that person in that person's automobile, and then returning to the office. In our view, the surveillance videos and report constitute substantial evidence supporting the Board's determination that claimant was working after her 2010 injury and concealed her employment for the purposes of receiving benefits.

Claimant also argues that she was deprived of due process in the manner that the hearings were conducted. Specifically, claimant contends that the WCLJ erred in considering the surveillance videos because she was not provided a copy of them prior to their viewing. Even assuming that she did not receive a

* Contrary to claimant's contention, the record establishes that she was made aware that the carrier had taken surveillance videos of her prior to her testimony (see *Matter of Morelli v Tops Mkts.*, 107 AD3d 1231, 1232 [2013]).

copy of the videos prior to their viewing, she admittedly had previously received a copy of the investigator's written report. That report contains still photographs taken from the videos and provides a thorough time line and full descriptive narrative of claimant's activities depicted in the videos and filmed by the investigator, who testified and was cross-examined by claimant. Accordingly, we find that claimant was aware of the evidence contained in the videos prior to the hearing and we find no error in the WCLJ's consideration of that evidence (*see Workers' Compensation Law* § 118).

We also reject claimant's contention that she was denied due process by the WCLJ's rejection of her request to present testimony in rebuttal to the surveillance evidence. The record reflects that claimant did not request the opportunity to offer rebuttal testimony until after the close of proof and both parties had given summations. Under these circumstances, the WCLJ's denial of her request was not an abuse of discretion and did not constitute a violation of claimant's due process rights (*see Workers' Compensation Law* § 118; *see generally Employer: Kitanntinny Canoe Corp.*, 2006 WL 1696360, *3, 2006 NY Wrk Comp LEXIS 04836, *6 [WCB No. 9040 4794, June 2, 2006]; *Employer: Big v Supermarkets t/a*, 2006 WL 1221546, *2, 2006 NY Wrk Comp LEXIS 03716, *5 [WCB Nos. 5920 6605, 0883 2405, Apr. 27, 2006]). Claimant's remaining claims have been considered and found to be without merit.

McCarthy, Rose, Lynch and Devine, JJ., concur. Ordered that the decision is affirmed, without costs.

8 In the Matter of the Claim of ANDREW FRASER, Appellant, v NYC SCHOOLS CONSTRUCTION ROCIP et al., Respondents. WORKERS' COMPENSATION BOARD, Respondent. [991 NYS2d 176]—

Workers' Compensation—Workers' Compensation Board—Authority to Designate Location of Hearings—Change of Venue Request Denied
Workers' Compensation—Judicial Review—Assessment of Costs against Attorney—Request to Change Venue without Reasonable Basis

Lynch, J. Appeal from a decision of the Workers' Compensation Board, filed October 29, 2012, which, among other things, denied claimant's request for a change of venue.

Claimant, who resides in Suffolk County, filed a claim for workers' compensation benefits alleging that he was injured in the course of his employment as an ironworker in New York City. Claimant signed a form, provided by his attorneys, that gave him three choices of hearing venue preference in Westchester County or Rockland County; claimant circled "White Plains." The Workers' Compensation Board denied the change

of venue “request” and assessed a penalty against claimant’s counsel pursuant to Workers’ Compensation Law § 114-a (3) (ii) for seeking review without reasonable grounds. Claimant appeals, challenging both the denial of venue transfer and the penalty.

Generally, the chair of the Board is authorized to set the time and location for Board hearings (*see* Workers’ Compensation Law § 141; 12 NYCRR 300.7; *Matter of Toledo v Administration for Children Servs.*, 112 AD3d 1209, 1210 [2013]). Inasmuch as claimant failed to demonstrate any connection to White Plains and argued only that such requests should be granted to “accommodate . . . the idiosyncrasies of each claimant,” the Board properly determined that claimant failed to articulate any justification for a change in venue (*see Matter of Toledo v Administration for Children Servs.*, 112 AD3d at 1210; *Matter of Wolfe v New York City Dept. of Corr.*, 112 AD3d 1197, 1198 [2013]). Moreover, given the absence of a legitimate basis for seeking the venue change and the fact that the Board had previously rejected several other similar venue change requests by counsel (*see e.g. Matter of Stewart v NYC Tr. Auth.*, 115 AD3d 1046, 1046-1047 [2014]), substantial evidence supports the Board’s determination that a penalty was warranted because there was no reasonable basis to support the appeal to the Board (*see Matter of Toledo v Administration for Children Servs.*, 112 AD3d at 1210; *Matter of Banton v New York City Dept. of Corr.*, 112 AD3d 1195, 1196-1197 [2013]). Accordingly, we will not disturb the Board’s decision.

Stein, J.P., McCarthy, Garry and Devine, JJ., concur. Ordered that the decision is affirmed, without costs.

9 In the Matter of REGINALD McFADDEN, Petitioner, v ALBERT PRACK, as Director of Special Housing and Inmate Disciplinary Programs, Respondent. [990 NYS2d 376]—

Prisons and Prisoners—Discipline of Inmates—Possession of Escape Paraphernalia, Contraband and Weapon—Evidence Properly Secured Despite Defect on Log Sheet

Prisons and Prisoners—Discipline of Inmates—Inmate with Visual Impairment and Hearing Disability—Reasonable Accommodations

Devine, J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Commissioner of Corrections and Community Supervision which found petitioner guilty of violating certain prison disciplinary rules.

After being escorted to a hospital outside of his correctional facility, petitioner brandished a makeshift handgun he had made

out of various materials and aimed it at three correction officers. The officers were able to subdue him, and petitioner was then taken for further medical attention, where the examining physician noted that petitioner had something hidden in his sock. A search revealed an envelope that contained, among other things, a partial map of Pennsylvania and several names and phone numbers, as well as a piece of styrofoam. Based upon these events, a search was conducted of petitioner's cell, which uncovered, among other things, a frame for a prop gun made out of styrofoam, handmade bullets made out of aluminum foil and a toothbrush sharpened to a point at one end. As a result of the foregoing, petitioner was charged in three misbehavior reports with attempting to escape, violent conduct, creating a disturbance, assault, possessing a weapon (two counts), making threats, possessing escape paraphernalia (two counts), possessing an altered item and possessing contraband. Following a tier III disciplinary hearing covering all of the reports, petitioner was found guilty as charged. The determination was upheld on administrative appeal, resulting in this CPLR article 78 proceeding.

We confirm. Substantial evidence, consisting of the misbehavior reports, related documentation and the hearing testimony, supports the determination of guilt (*see Matter of Curry v Fischer*, 113 AD3d 981, 982 [2014]; *Matter of Oliver v Fischer*, 107 AD3d 1268, 1268-1269 [2013]). Although the correction officer who actually placed the prop gun in the facility evidence drop box failed to write his name on the contraband log sheet (*see* Dept of Corr & Community Supervision Directive No. 4910A § IV), hearing testimony and a "to/from" report establish that the evidence was properly secured, and the defect on the log sheet does not require annulment of the determination (*see Matter of Chapman v Goord*, 49 AD3d 944, 945 [2008]; *Matter of Cole v Goord*, 47 AD3d 1147, 1147 [2008]).

Turning to petitioner's procedural challenges, "there is no indication that the transcript of the hearing was deliberately altered or that significant portions are missing such as to preclude meaningful review" (*Matter of Costello v Smith*, 26 AD3d 566, 567 [2006]; *accord Matter of Gaston v Fischer*, 109 AD3d 1063, 1064 [2013]). Further, we reject his contention that he was not provided reasonable accommodations. Petitioner, who is visually impaired and has a hearing disability, was provided with eyeglasses and hearing aids, and the record demonstrates that he understood the charges against him and knowledgeably participated in the proceedings (*see Matter of Medina v New York State Dept. of Corr. Servs.*, 104 AD3d 976,

977 [2013], *lv denied* 21 NY3d 859 [2013]). We also find no merit in petitioner's contention that the hearing was not timely completed, as the record reflects that proper extensions were obtained, including extensions to accommodate petitioner's disability, and that the hearing began and ended within the authorized time frame (*see Matter of Pooler v Fischer*, 107 AD3d 1256, 1257 [2013], *lv denied* 22 NY3d 855 [2013]; *Matter of McNeil v Fischer*, 95 AD3d 1520, 1521 [2012]). Finally, our review of the record reveals no indication that the Hearing Officer was biased or that the determination flowed from any alleged bias (*see Matter of Guillory v Fischer*, 110 AD3d 1426, 1427 [2013], *appeal dismissed* 22 NY3d 1111 [2014]). Petitioner's numerous remaining claims have been considered and found to be without merit.

Lahtinen, J.P., Stein, Egan Jr. and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

10 In the Matter of SAURIO RODRIGUEZ, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [990 NYS2d 375]—

Prisons and Prisoners—Discipline of Inmates—Conspiring to Smuggle Drugs into Facility

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

During a search of petitioner's cell, a correction officer found a letter to petitioner requesting that he contact another inmate's mother to set up a drug transaction. Upon being interviewed, petitioner confirmed that the letter was about smuggling drugs into the correctional facility. Consequently, petitioner was charged in a misbehavior report with engaging in an unauthorized exchange, possessing drugs, smuggling, exchanging personal identification numbers and violating facility correspondence procedures. Petitioner was found guilty of the charges following a tier III disciplinary hearing and the determination was affirmed on administrative appeal. This CPLR article 78 proceeding ensued.

We confirm. The misbehavior report, confiscated letter and testimony adduced at the hearing provide substantial evidence supporting the determination of guilt (*see Matter of Moore v Fischer*, 63 AD3d 1401, 1401 [2009]; *Matter of Reed v Goord*, 16 AD3d 796, 796 [2005]). Petitioner's denial of the charges presented a credibility issue for the Hearing Officer to resolve (*see Matter of Jones v Prack*, 114 AD3d 985, 985 [2014]; *Matter of*

Ferrer v Prack, 107 AD3d 1254 [2013]). Furthermore, even though no drugs were actually recovered, a violation of the rules occurred when petitioner conspired to smuggle drugs into the facility (see 7 NYCRR 270.3 [b] [2]; *Matter of Booker v Fischer*, 102 AD3d 1045, 1046 [2013]; *Matter of Brown v Fischer*, 98 AD3d 778, 779 [2012]). In view of the foregoing, and given that petitioner's remaining contentions have not been preserved for our review, we find no reason to disturb the determination of guilt.

Peters, P.J., Lahtinen, McCarthy, Rose and Lynch, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

11 THE PEOPLE OF THE STATE OF NEW YORK ex rel. ANTHONY ALBERT, Appellant, v ERIC T. SCHNEIDERMAN, as Attorney General, et al., Respondents. [991 NYS2d 180]—

Crimes—Sentence—Petitioner Not Entitled to Termination of Sentence—Not Convicted of Qualifying Drug Felony

Appeal from a judgment of the Supreme Court (Work, J.), entered October 30, 2013 in Ulster County, which denied petitioner's application, in a proceeding pursuant to CPLR article 70, without a hearing.

Petitioner was convicted of attempted criminal possession of a weapon in the third degree and, in 1997, was sentenced to a prison term of two years to life. Petitioner was released to parole supervision, which subsequently was revoked on multiple occasions. After petitioner was charged with new drug offenses in 2013, his parole again was revoked and a time assessment of one year was imposed. Petitioner then commenced this habeas corpus proceeding, arguing that he was entitled to mandatory termination of his sentence pursuant to Executive Law § 259-j (former [3-a]). Supreme Court dismissed the petition, and this appeal ensued.

Initially, respondents advise us that petitioner again has been released to parole supervision. Nonetheless, because “the maximum expiration date of his sentence remains affected by the issues presented,” we will not dismiss this matter as moot and will instead consider it as a CPLR article 78 proceeding (*People ex rel. Speights v McKoy*, 88 AD3d 1039, 1040 [2011]; see *People ex rel. Howard v Yelich*, 87 AD3d 772, 773 [2011]). As to the merits, inasmuch as petitioner was not convicted of a qualifying drug felony, he is not entitled to relief under the provisions of Executive Law § 259-j (former [3-a]) and current Correction Law § 205 (4) (see *People ex rel. Williams v Kirkpatrick*, 111 AD3d 1327, 1327 [2013]). Petitioner's remaining contention

was not raised before Supreme Court, and, hence, is unpreserved for our review.

Lahtinen, J.P., McCarthy, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

12 In the Matter of DARNELL CREDELL, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [990 NYS2d 369]—

Prisons and Prisoners—Discipline of Inmates—Harassment and Threats of Violence—Handwriting Analysis of Letter Sent to Facility Teacher
Prisons and Prisoners—Discipline of Inmates—Right to Call Witnesses—Requested Witness's Testimony Immaterial and Irrelevant to Charges

Lynch, J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Franklin County) to review a determination of respondent which found petitioner guilty of violating a certain disciplinary rule.

In February 2013, a facility teacher at the Bare Hill Correctional Facility received, through facility mail, two letters containing graphic and threatening content. Following an investigation, a misbehavior report was issued charging petitioner with harassment, threats of violence and threats. Following a tier III disciplinary hearing, petitioner was found guilty of all three charges and the determination was affirmed on administrative appeal. Petitioner then commenced this CPLR article 78 proceeding challenging the determination.

We confirm. The documentary evidence, including the two letters and petitioner's handwriting samples, and the hearing testimony of the investigator provide substantial evidence supporting the determination of guilt (*see Matter of Christian v Venettozzi*, 114 AD3d 975, 975 [2014]; *Matter of Logan v Fischer*, 109 AD3d 1043, 1043 [2013], *lv denied* 22 NY3d 856 [2013]; *Matter of Smith v Fischer*, 108 AD3d 987, 988 [2013]). The record demonstrates that the Hearing Officer properly conducted her own handwriting analysis after examining the letters and comparing them to the exemplars of petitioner's handwriting (*see Matter of Christian v Venettozzi*, 114 AD3d at 975; *Matter of Logan v Fischer*, 109 AD3d at 1043; *Matter of Smith v Fischer*, 108 AD3d at 988). Further, petitioner's insistence that he did not write the letters created an issue of credibility for the Hearing Officer to resolve (*see Matter of Christian v Venettozzi*, 114 AD3d at 975; *Matter of Smith v Fischer*, 108 AD3d at 988).

Petitioner's claim that he was denied his right to call a witness is without merit since the testimony he sought from her was not material or relevant to the charges (*see Matter of Burr*

v Fischer, 95 AD3d 1538, 1538-1539 [2012], *lv denied* 19 NY3d 811 [2012]; *Matter of Tafari v Fischer*, 94 AD3d 1324, 1325 [2012], *lv denied* 19 NY3d 807 [2012]; 7 NYCRR 254.5 [a]). Moreover, the record does not support petitioner's contention that the Hearing Officer relied upon confidential information in rendering her determination (*compare Matter of Collins v Fischer*, 89 AD3d 1355, 1356 [2011], *lv denied* 19 NY3d 803 [2012]). Petitioner's remaining claims have been examined and found to be unpreserved or without merit.

Lahtinen, J.P., McCarthy, Rose and Devine, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

13 In the Matter of DANIEL FELDER, Appellant, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [990 NYS2d 370]—

Prisons and Prisoners—Discipline of Inmates—Assaulting Prison Staff

Appeal from a judgment of the Supreme Court (Lawliss, J.), entered October 16, 2013 in Clinton County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent finding petitioner guilty of violating certain prison disciplinary rules.

Petitioner was charged in four misbehavior reports with violating numerous prison disciplinary rules as a result of him conspiring to assault a prison employee and becoming violent when several correction officers attempted to restrain him. Following a disciplinary hearing on all four reports, petitioner was found guilty of assaulting staff (four counts), violent conduct (four counts), creating a disturbance (two counts), refusing a direct order, refusing a search, and being out of place. The determination was affirmed upon administrative appeal, and this CPLR article 78 proceeding ensued. Supreme Court dismissed the petition, and petitioner now appeals.

We affirm. Petitioner questions the Hearing Officer's failure to provide photographs and medical reports of the injured correction officers after the officers had testified, but any error in that regard was harmless given that the officers testified to their injuries and the record contained overwhelming evidence of petitioner's guilt (*see Matter of Martin v Fischer*, 98 AD3d 774, 775 [2012]; *Matter of Brown v Goord*, 300 AD2d 777, 777 [2002]). Petitioner also asserts that he was deprived of the opportunity to review a to/from memorandum purportedly authored by one of the officers but, inasmuch as the record reveals that said document does not exist, the Hearing Officer cannot be faulted for failing to provide it (*see Matter of Martin v*

Fischer, 109 AD3d 1026, 1027 [2013]). Petitioner's remaining arguments, to the extent they are properly preserved for our review, have been examined and found to lack merit.

Peters, P.J., Stein, McCarthy, Lynch and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

14 In the Matter of LEONARD TULSHIRAM, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [993 NYS2d 523]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Determination confirmed. No opinion.

Stein, J.P., Garry, Rose, Egan Jr. and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

15 In the Matter of MAXINE G. JAMES, Petitioner, v THOMAS P. DiNAPOLI, as State Comptroller, Respondent. [990 NYS2d 734]—

Civil Service—Retirement and Pension Benefits—Accidental Disability Retirement—Failure to Establish Permanent Incapacitation—Conflicting Medical Evidence

Stein, J.P. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which denied petitioner's application for disability retirement benefits.

Petitioner worked as a developmental aide at the Long Island Developmental Disabilities Services Office for 18 years. In 2007, she applied for disability retirement benefits under Retirement and Social Security Law article 15, alleging that she was permanently incapacitated from performing her job duties as the result of an unspecified disability. Her application was denied, and petitioner timely requested a hearing and redetermination. Following a hearing, the Hearing Officer found that petitioner failed to establish that she was permanently incapacitated from performing her job duties. Respondent adopted the Hearing Officer's findings, with one additional conclusion of law, and denied petitioner's application. Petitioner then commenced this CPLR article 78 proceeding.

We confirm. Petitioner bore the burden of establishing that she was permanently incapacitated from the performance of her job duties (*see Matter of Weaver v DiNapoli*, 108 AD3d 974, 975 [2013]; *Matter of Pennachio v DiNapoli*, 95 AD3d 1557, 1557 [2012]). Petitioner relies upon her medical records, particularly

2007 and 2010 reports from her treating chiropractor diagnosing her with cervical disc syndrome with paraspinal myofascitis, cervical radicular neuralgia and lumbosacral dysfunction. The reports also note the possible presence of demyelinating disease, and conclude that she is totally and permanently disabled. Petitioner further relies upon 2011 reports from a neurologist indicating that she “may be suffering [from] demyelinating disease,” albeit one following “a relatively indolent benign course.” In opposition, respondent notes that the neurologist suggested multiple diagnoses but offered no opinion on disability, and that another neurologist who examined petitioner considered her MRI results to be “very non compelling” and concluded that she had no “neurosurgical pathology.” In addition, Leon Sultan, an orthopedic surgeon who examined petitioner on behalf of the New York State and Local Retirement System, observed “symptom magnification . . . without any upper extremity or lower extremity disuse atrophy, reflex impairment or sensory deficit,” and concluded that petitioner was not permanently disabled or unable to perform her job duties.

Respondent’s determination to credit the opinion of one expert over that of another “is dispositive where, as here, the credited expert provides an articulated, rational and fact-based opinion, founded upon a physical examination and review of relevant medical reports and records” (*Matter of Loysen v New York State & Local Retirement Sys.*, 100 AD3d 1168, 1169 [2012] [internal quotation marks and citations omitted]; see *Matter of Occhino v DiNapoli*, 117 AD3d 1156, 1156 [2014]). Although petitioner argues that Sultan’s report cannot be considered rational and fact-based because he did not consider test results that postdated his opinion, the subsequent records did not produce any new definitive diagnoses or new conclusions of disability (cf. *Matter of Baird v New York State & Local Retirement Sys.*, 96 AD3d 1265, 1266 [2012]). Inasmuch as Sultan’s report and those of the examining neurologists—who found no disability—constitute substantial evidence to support respondent’s determination, it will not be disturbed despite the presence of evidence in the record that could support a contrary conclusion (see *Matter of Loysen v New York State & Local Retirement Sys.*, 100 AD3d at 1169; *Matter of Pennachio v DiNapoli*, 95 AD3d at 1558). Petitioner’s remaining contentions have been considered and found to be lacking in merit.

McCarthy, Garry, Lynch and Devine, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

16 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v VINCENT S. IZZO, Appellant. [990 NYS2d 736]—

Crimes—Sex Offenders—Sex Offender Registration Act—“Number of Victims” Risk Factor—Self-Touching while in Contact with Victim Via Webcam
Crimes—Sex Offenders—Sex Offender Registration Act—“Relationship with Victim” Risk Factor—“Grooming” Behavior through Online Contact with Victims

Egan Jr., J. Appeal from an order of the County Court of Chemung County (Hayden, J.), entered August 7, 2013, which classified defendant as a risk level II sex offender pursuant to the Sex Offender Registration Act.

Defendant was charged in a 10-count indictment with, among other things, various sex crimes stemming from his contact with three underage girls. After two counts of the indictment were dismissed due to a typographical error, defendant pleaded guilty to criminal sexual act in the second degree (two counts), unlawful imprisonment in the second degree (two counts), sexual abuse in the third degree (two counts), endangering the welfare of a child and aggravated harassment in the second degree. Pursuant to the terms of the underlying plea agreement, defendant was placed on interim probation for a period of one year. Defendant thereafter admitted to violating the terms of his interim probation by being discharged from a sex offender treatment program, purchasing a computer and sending numerous emails—some of which contained explicit sexual content—to a 17-year-old girl. After two additional counts of the indictment were dismissed as duplicitous, defendant was sentenced to an aggregate prison term of two years followed by three years of postrelease supervision.

In anticipation of defendant’s release from prison, the Board of Examiners of Sex Offenders completed a risk assessment instrument that presumptively classified defendant as a risk level II sex offender (105 points) in accordance with the Sex Offenders Registration Act (*see* Correction Law art 6-C [hereinafter SORA]).¹ The parties agreed to forgo a hearing, and County Court decided the matter upon written submissions and classified defendant as a risk level II sex offender. Defendant now appeals, contending that he was improperly assessed points under

1. In reaching this conclusion, the Board noted that it “conservatively scored” defendant as to those risk factors encompassing course of sexual misconduct (risk factor 4), substance abuse (risk factor 11), acceptance of responsibility (risk factor 12) and conduct while confined/supervised (risk factor 13) and expressed concern regarding defendant’s violation of his interim probation and corresponding “inability to control himself sexually while supervised.” To that end, the Board recommended that, if the evidence presented by the People failed to establish that an assessment of points in the cited categories was warranted, County Court consider an upward departure to a risk level III classification.

risk factors 3 (number of victims) and 7 (relationship between offender and victim) and asserting that a downward departure from the presumptive risk level classification is warranted.

We affirm. Our review of the record—specifically, defendant’s plea allocution and the relevant grand jury testimony—discloses sufficient factual detail to establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), that defendant indeed touched himself in a sexual manner while in contact with one of his victims via a webcam. We therefore conclude that the assessment of 30 points under risk factor 3 for three or more victims was entirely appropriate.

We reach a similar conclusion with respect to the assessment of 20 points under risk factor 7 (relationship between offender and victim). While it is true that the online contact between defendant and his victims precludes a finding that the victims were “strangers” for purposes of SORA (*cf. People v Birch*, 114 AD3d 1117, 1118 [2014]), we nonetheless are persuaded that there is clear and convincing evidence to support County Court’s finding that defendant engaged in “grooming” behavior by cultivating a relationship with each of his victims for the purpose of satisfying his sexual desires. Accordingly, to our analysis, no point-based reduction in defendant’s risk level classification under SORA is warranted.

As for defendant’s assertion that he demonstrated his entitlement to a downward departure from the presumptive risk level classification pursuant to what he has denominated as the “statutory rape exception” under risk factor 2 (*see People v Weatherley*, 41 AD3d 1238, 1238-1239 [2007]), the record indeed reflects that County Court—despite authoring what otherwise was a detailed written decision in this matter—did not expressly reference defendant’s request in this regard. That said, County Court did expressly reference each of the factors relied upon by defendant—the age difference between defendant and his victims, the lack of forcible compulsion, defendant’s prior criminal history and his acceptance of responsibility and/or participation in therapy—elsewhere in its written decision and thoroughly discussed the conduct forming the basis for defendant’s violation of probation. Accordingly, we are satisfied that County Court’s findings provide an adequate basis for intelligent appellate review and, further, that defendant failed to establish, by a preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 859-861 [2014]),² that a downward departure from the presumptive risk level classification was warranted. Defend-

2. To the extent that our prior decisions have held that a defendant’s request for a downward departure from the presumptive risk level classifica-

(n. cont’d)

ant's remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

Peters, P.J. and Clark, J., concur.

Garry, J. (dissenting). We respectfully dissent, finding merit in defendant's arguments that the record lacks clear and convincing evidence that he had three or more victims, relative to risk factor 3, and that he established relationships with the victims for the primary purpose of victimizing them, relative to risk factor 7. Further, in light of the lifelong severe consequences that necessarily result from a risk level II classification, the matter should be remitted for a full and express analysis and determination relative to defendant's request for a downward departure; this weighty decision should not be upheld upon mere implication or inference.

The People must establish the risk level classification by clear and convincing evidence. Reliable hearsay, including grand jury minutes, the presentence investigation report, a victim statement and the case summary, may be used to meet this burden (*see People v Mingo*, 12 NY3d 563, 571-574 [2009]; *People v Belile*, 108 AD3d 890, 890 [2013], *lv denied* 22 NY3d 853 [2013]). As relevant here, the risk assessment guidelines provide that a defendant should be assessed 20 points for risk factor 3 if there were two victims, or 30 points for three or more victims (*see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* at 10 [2006]). Here, the record lacks clear and convincing proof of prohibited sexual conduct with the third victim referenced in the indictment—as to whom defendant pleaded guilty to endangering the welfare of a child and aggravated harassment in the second degree. During the plea allocution, defendant admitted that he had engaged in conversations of a sexual nature with this victim, and the victim testified before the grand jury that defendant had contacted her by webcam video, during which time he touched himself in the area of his genitals, over his clothing. There was no physical sexual contact between the two at any time. As defendant argues, the grand jury testimony included too little factual detail to constitute clear and convincing evidence that he was masturbating. Although this might be inferred, it was not clearly revealed; viewed objectively, the testimony demonstrates

tion must be based upon clear and convincing evidence (*see e.g. People v Mercado*, 117 AD3d 1367, 1368 [2014]; *People v Carter*, 106 AD3d 1202, 1204 [2013]), those decisions should not be followed in light of the Court of Appeals' recent pronouncement in *Gillotti*.

nothing more than a brief swipe of defendant's hand in his genital region, accompanied by innuendo. Our precedent establishes a significantly higher standard of misconduct (*compare People v Clavette*, 96 AD3d 1178, 1179-1180 [2012], *lv denied* 20 NY3d 851 [2012]; *People v Ramirez*, 53 AD3d 990, 990 [2008], *lv denied* 11 NY3d 710 [2008]). Therefore, we would reduce this assessment by 10 points.

We further find that the record supports defendant's contention that he was improperly assessed 20 points under risk factor 7 because his conduct was not "directed at a stranger or a person with whom a relationship had been established or promoted for the primary purpose of victimization" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 12 [2006]). The majority accepts County Court's finding that defendant and the victims were not "strangers," but that defendant had engaged in "grooming" behavior; we disagree. An example of grooming behavior provided in the guidelines is that of a scout leader who chose the position in order to gain access to his victims (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 12 [2006]). As defendant argues, the record does not establish this type of calculated behavior on his part, nor was there a showing of emotional manipulation, undue influence or other customary indicia of grooming conduct. Instead, the record is replete with evidence—including three expert evaluations—establishing that defendant is significantly lacking in sexual and social maturity, has difficulty in understanding and interpreting social cues, functions socially at the level of a young teenager of roughly the same age as his victims, and would be unable to maintain appropriate relationships with young women of his chronological age. Without condoning defendant's conduct, as he was fully aware that the girls were significantly younger than he and deliberately chose to ignore this fact, we do not find clear and convincing evidence that he purposefully "groomed" the victims for the sole purpose of victimizing them (*see People v Pelaez*, 112 AD3d 684, 684-685 [2013]; *compare People v Tejada*, 51 AD3d 472, 472 [2008]; *see also* Rebecca Williams, Ian A. Elliot & Anthony R. Beech, *Identifying Sexual Grooming Themes Used by Internet Sex Offenders*, 34 *Deviant Behavior* 2, 135-152 [2013]). Therefore, we would reduce defendant's assessment by 20 points in this category.

As thus reduced, the 75 assessed points would place defendant squarely at the cusp of a risk level II sex offender. For this reason and those stated above, his request for a downward

departure from the presumptive risk level merits a most close and careful review. Courts have the discretion to depart from the presumptive risk level where there is “an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines” (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). A three-step analysis is required: first, evaluating, as a matter of law, whether such circumstances are shown, second, determining whether the proponent has met his or her burden of proof and, third, exercising discretion “by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant’s dangerousness and risk of sexual recidivism” (*People v Gillotti*, 23 NY3d 841, 861 [2014]). As the majority notes, it has recently been determined that defendant’s burden of proof in seeking a downward departure is preponderance of the evidence, rather than the higher standard of clear and convincing evidence (*id.* at *13-14).

This record lacks any express determination by County Court of defendant’s contention that he established the existence of mitigating circumstances calling for a downward departure. Although the majority accepts an implied finding basing the determination primarily upon defendant’s probation violation, the statute requires findings of fact and conclusions of law to be expressly rendered (*see* Correction Law § 168-n [3]). In light of this requirement, it is necessary to remit for further review and determination of this issue (*see People v Filkins*, 107 AD3d 1069, 1070 [2013]; *People v Burke*, 68 AD3d 1175, 1177 [2009]). This is particularly true upon the record presented here; as stated above, there is significant evidence that, at the time of the underlying offenses, defendant was not functioning at the level ordinarily expected for his age. This Court has not yet applied the “statutory rape exception” that has been well established in the Fourth Department in cases where there is no great disparity between the ages of the offender and the victim(s), and there are other indicia of willing, albeit legally prohibited, sexual conduct (*see e.g. People v Goossens*, 75 AD3d 1171, 1171-1172 [2010]; *People v Weatherley*, 41 AD3d 1238, 1238-1239 [2007]). These issues bear examination and review. In light of the record evidence, we should not lightly dismiss defendant’s assertion that the circumstances underlying his crimes fail to provide any compelling evidence of his danger of re-offense and risk to the

community.* The majority accepts County Court's implied finding that defendant's violation of the terms of his initial probation may reveal a compulsive and dangerous condition; however, in evaluating the sexual conduct of adolescents and young adults, we must exercise the greatest level of care and scrutiny, making a full effort to avoid imposing grave permanent consequences for sexual misconduct when the risk of long-term recidivism is not clearly shown. For these reasons, we would reverse and remit for further proceedings.

Rose, J., concurs. Ordered that the order is affirmed, without costs.

17 In the Matter of KATHRYN K. VASSILOPOULOS, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed June 18, 2013, which denied claimant's application to reopen a prior decision.

Decision affirmed. No opinion.

Lahtinen, J.P., McCarthy, Rose, Lynch and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

18 In the Matter of the Claim of NEY F. LIMA, Appellant, v NEWPORT PAINTING & DECORATING et al., Respondents. WORKERS' COMPENSATION BOARD, Respondent. [990 NYS2d 419]—

Workers' Compensation—Injuries Arising out of and in Course of Employment—Fall from Scaffolding while Painting—Credibility Determination

Lahtinen, J. Appeal from a decision of the Workers' Compensation Board, filed February 25, 2013, which, among other things, ruled that claimant did not sustain a work-related injury.

Claimant, alleging that he fell from scaffolding while painting and suffered injuries to his neck, left shoulder and lower back, filed a claim for workers' compensation benefits. The employer controverted the claim and, following a hearing at which a coworker testified that she was working with claimant at the time of the alleged accident and that he did not fall, a Workers' Compensation Law Judge found the employer's witness to be more credible than claimant and disallowed the claim. Thereafter, the Board affirmed the Workers' Compensation Law Judge's decision and denied claimant's request to reopen the hearing to receive the testimony of an additional employee. Claimant now appeals.

We affirm. According appropriate deference to the Board's

* Notably, the victim involved in the probation violation was 17 years old, and defendant met her in a college setting.

credibility determination, the record contains substantial evidence to support its decision that claimant did not sustain a workplace accident (*see Matter of Roller v Mastic Beach Ambulance Co., Inc.*, 106 AD3d 1292, 1293 [2013], *lv denied* 21 NY3d 865 [2013]; *Matter of Cicciarelli v Westchester Health Care Corp.*, 86 AD3d 733, 734 [2011]).

We also conclude that the Board did not abuse its discretion in denying claimant's request to reopen his claim (*see Matter of Danin v Stop & Shop*, 115 AD3d 1077, 1078 [2014]; *Matter of Burris v Olcott*, 95 AD3d 1522, 1523 [2012]).

Peters, P.J., Garry, Rose and Devine, JJ., concur. Ordered that the decision is affirmed, without costs.

19 In the Matter of the Claim of CHANTEL THOMAS-FLETCHER, Appellant, v NEW YORK CITY DEPARTMENT OF CORRECTIONS, Respondent. WORKERS' COMPENSATION BOARD, Respondent. [990 NYS2d 420]—

Workers' Compensation—Judicial Review—Assessment of Costs against Attorney—Request to Change Venue without Reasonable Basis

Rose, J. Appeal from a decision of the Workers' Compensation Board, filed June 25, 2013, which, among other things, assessed a monetary penalty against claimant's counsel pursuant to Workers' Compensation Law § 114-a (3) (ii).

Claimant, who resides in New York City, was injured in the course of her duties as a correction officer for the New York City Department of Corrections and applied for workers' compensation benefits. She thereafter signed an undated form on her counsel's letterhead requesting that hearings on her claim be held in the City of White Plains, Westchester County on the ground that it was "the most convenient location." A Workers' Compensation Law Judge denied the request, based upon the Board's statement of general policy providing that venue change requests involving a municipal corporation "shall not be granted except to a district office where the employer is located" and assessed costs of \$500 against claimant's counsel pursuant to Workers' Compensation Law § 114-a (3) (ii). Upon review, the Workers' Compensation Board affirmed the denial of the request and, upon its finding that counsel had based its appeal for full Board review on arguments that counsel knew had been previously rejected by the Board, increased the penalty to \$750. Claimant now appeals.

We affirm. Claimant's challenge to the denial of the change of venue request is not preserved for our review as it was not raised before the Board (*see Matter of Barone v Interstate Maintenance Corp.*, 73 AD3d 1302, 1303 [2010]). Regarding the chal-

lenge to the assessment of costs, the Board is permitted to assess reasonable counsel fees against counsel where a proceeding has been instituted or commenced “without reasonable grounds” (Workers’ Compensation Law § 114-a [3] [ii]), and a request for a change of venue is considered to constitute a proceeding for the purposes of the statute (see *Matter of Banton v New York City Dept. of Corr.*, 112 AD3d 1195, 1196 [2013]). Here, inasmuch as White Plains has no obvious connection to claimant, who lives and works in New York City, substantial evidence supports the Board’s determination that the change of venue request was made without a reasonable basis (see *Matter of Toledo v Administration for Children Servs.*, 112 AD3d 1209, 1210 [2013]; *Matter of Wolfe v New York City Dept. of Corr.*, 112 AD3d 1197, 1198 [2013]; *Matter of Banton v New York City Dept. of Corr.*, 112 AD3d at 1196-1197). Finally, under these circumstances, we discern no abuse of discretion in the Board’s assessment of \$750 in costs (see Workers’ Compensation Law § 114-a [3] [ii]). Claimant’s remaining contentions have been considered and found to be without merit.

Peters, P.J., Egan Jr., Lynch and Devine, JJ., concur. Ordered that the decision is affirmed, without costs.

20 In the Matter of NIKKO VAUGHN, Petitioner, v NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION et al., Respondents. [993 NYS2d 523]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Ulster County) to review a determination of respondent Superintendent of Eastern Correctional Facility which found petitioner guilty of violating certain prison disciplinary rules.

Determination confirmed. No opinion.

Peters, P.J., Stein, McCarthy, Garry and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

21 In the Matter of JEVON HENRY, Appellant, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [990 NYS2d 421]—Appeal from a judgment of the Supreme Court (McGrath, J.), entered May 14, 2013 in Albany County, which dismissed petitioner’s application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent finding petitioner guilty of violating certain prison disciplinary rules.

Petitioner, an inmate, commenced this CPLR article 78 proceeding seeking to challenge a tier III prison disciplinary determination finding him guilty of violating various prison

disciplinary rules, including assault, violent conduct and gang activity. Supreme Court dismissed the petition and petitioner appeals.

We affirm. Petitioner contends that the Hearing Officer did not make an adequate inquiry into the refusal of a certain inmate witness to testify. Inasmuch as the record reveals that petitioner did not raise this objection at the hearing, the issue is unpreserved for review (see *Matter of Love v Prack*, 89 AD3d 1307, 1308 [2011]; *Matter of Brown v Selsky*, 37 AD3d 891, 891 [2007]). Similarly unpreserved due to his failure to specifically object at the hearing are petitioner's claims that he was improperly denied a witness (see *Matter of Tucci v Selsky*, 94 AD3d 1294, 1295 [2012]; *Matter of Barclay v Knowles*, 79 AD3d 1550, 1551 [2010]), and that he was denied the right to present documentary evidence (see *Matter of Knight v Bezio*, 82 AD3d 1381, 1382 [2011], *lv dismissed* 17 NY3d 788 [2011]; *Matter of Smith v Dubray*, 58 AD3d 968, 969 [2009]). Accordingly, the petition was properly dismissed.

McCarthy, J.P., Garry, Rose, Lynch and Devine, JJ., concur. Ordered that the judgment is affirmed, without costs.

22 In the Matter of MICHAEL X. WELDON, Petitioner, v THOMAS P. DiNAPOLI, as State Comptroller, Respondent. [990 NYS2d 741]—

Civil Service—Retirement and Pension Benefits—Accidental Disability Retirement—Failure to Establish Permanent Incapacitation

Peters, P.J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which denied petitioner's application for State Police disability retirement benefits.

Petitioner, a State Police investigator, applied for State Police disability retirement benefits, claiming that he is permanently incapacitated from performing his job duties due to injuries suffered to his left shoulder sustained in incidents that occurred in 2003 and 2008. The application was initially denied and petitioner requested a hearing and redetermination. Following hearings, the Hearing Officer upheld the denial of the application, concluding that petitioner had not established that he was permanently incapacitated from performing his job duties. Respondent upheld that determination and this CPLR article 78 proceeding ensued.

We confirm. "An applicant for disability retirement benefits bears the burden of proving that he or she is permanently incapacitated from performing his or her job duties" (*Matter of*

Cepeda v New York State Comptroller, 115 AD3d 1146, 1146 [2014], *lv denied* 23 NY3d 906 [2014] [citations omitted]). Here, petitioner submitted his medical records, which contain evidence of a disability, but lack a finding of permanency (see *Matter of Weaver v DiNapoli*, 108 AD3d 974, 975 [2013]; *Matter of Carmody-Kapral v New York State & Local Retirement Sys.*, 105 AD3d 1212, 1212 [2013]).* In contrast, the New York State and Local Police and Fire Retirement System presented the medical reports and testimony of a neurologist and an orthopedic surgeon, both of whom examined petitioner and reviewed his records. The neurologist found no objective evidence of a neurologic condition that would indicate a permanent disability. The orthopedic surgeon opined that petitioner suffers from chronic regional pain syndrome and had a temporary total disability. He further opined that, although petitioner had undergone physical therapy, that therapy was focused on pain relief, and that his condition could improve with aggressive physical therapy aimed at functional improvement. Although he believed that petitioner's prognosis for returning to work was only fair, he could not find that his condition was permanent. Accordingly, respondent's determination is supported by substantial evidence and will not be disturbed (see *Matter of Weaver v DiNapoli*, 108 AD3d at 975; *Matter of Cooke v DiNapoli*, 96 AD3d 1340, 1341 [2012]).

Garry, Rose, Egan Jr. and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

23 In the Matter of the Claim of DARREN ANDERSON, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed March 26, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits because his employment was terminated due to misconduct.

Decision affirmed. No opinion.

Peters, P.J., Stein, Garry, Egan Jr. and Devine, JJ., concur. Ordered that the decision is affirmed, without costs.

24 In the Matter of RORY DOLAN, Petitioner, v ANTHONY ANNUCCI, as Acting Commissioner of Corrections and Community Supervision, Respondent. [990 NYS2d 417]—

* Although petitioner testified that the Workers' Compensation Board and Social Security Administration had found him to be permanently incapacitated, such determinations are not binding upon respondent (see *Matter of Zuckerberg v New York State Comptroller*, 46 AD3d 1057, 1059 [2007], *lv denied* 10 NY3d 712 [2008]).

Prisons and Prisoners—Discipline of Inmates—Creating Disturbance—Credibility Determination

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating a prison disciplinary rule.

Following a verbal altercation with another inmate in the laundry area and bathroom of their housing unit, petitioner was charged in a detailed misbehavior report with creating a disturbance. That report, as well as the testimony of the correction officer who authored it, provided substantial evidence for the determination that petitioner was guilty as charged (*see Matter of Green v Bradt*, 91 AD3d 1235, 1237 [2012], *lv denied* 19 NY3d 802 [2012]; *Matter of Hale v Selsky*, 57 AD3d 1136, 1137 [2008], *appeal dismissed* 12 NY3d 776 [2009]). Petitioner's contrary testimony that he was not arguing with the other inmate and was only speaking loudly because of the nearby washing machines and dryers presented a credibility issue for the Hearing Officer to resolve (*see Matter of Hale v Selsky*, 57 AD3d at 1137). Further, the record does not support petitioner's assertion that the Hearing Officer was biased or that the determination flowed from that alleged bias (*see Matter of Ferguson v Fischer*, 116 AD3d 1314, 1314 [2014]). Petitioner's remaining contentions are either unpreserved or lack merit.

Garry, J.P., Rose, Egan Jr., Devine and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

25 In the Matter of the Claim of WORRELL BAILEY, Respondent, v BEN CICCONE, INC., et al., Appellants. WORKERS' COMPENSATION BOARD, Respondent. [990 NYS2d 418]—Rose, J. Appeals from a decision and an amended decision of the Workers' Compensation Board, filed October 25, 2012 and March 21, 2013, which, among other things, directed the employer's workers' compensation carrier to make a deposit into the aggregate trust fund pursuant to Workers' Compensation Law § 27 (2).

In a prior decision, this Court affirmed an award of benefits to claimant, who developed consequential neuromuscular disease and an anxiety disorder after contracting Lyme disease during the course of his employment (104 AD3d 1017, 1017-1018 [2013]). The Workers' Compensation Board has since classified claimant as permanently totally disabled as a result of his work-related injury and directed the employer's workers' compensation carrier to deposit the present value of unpaid benefits, \$341,123.64, into the aggregate trust fund. The

employer and carrier (hereinafter collectively referred to as the employer) appeal.

We affirm. The employer argues that the Board erred by imposing a mandatory, rather than discretionary, deposit into the aggregate trust fund because claimant was not classified with a statutory permanent total disability under Workers' Compensation Law § 15 (1). The employer concedes, however, that it did not raise this issue either before the Workers' Compensation Law Judge or in its initial application for review by the Board panel, and the Board did not address it. While the employer did raise the issue in an application for rehearing and/or full Board review, a party's arguments addressed to full Board review are not preserved by its appeal from a Board panel decision (see *Matter of Rogers v Community Health Ctr.*, 299 AD2d 604, 605 [2002], *lv denied* 99 NY2d 508 [2003]). Nor does the appeal from the amended decision bring the issue up for review. The amended decision did not address the argument raised on this appeal and, even assuming that the amended decision could be read as denying the arguments raised in the application to the full Board, our review of that decision would be limited to determining whether the denial of full Board review was arbitrary and capricious (see *Matter of Barone v Interstate Maintenance Corp.*, 73 AD3d 1302, 1303 [2010]; *Matter of D'Errico v New York City Dept. of Corrections*, 65 AD3d 795, 795-796 [2009], *appeal dismissed* 13 NY3d 899 [2009]), an issue that has not been addressed in the employer's briefs.

Peters, P.J., Lahtinen, Garry and Devine, JJ., concur. Ordered that the decision and amended decision are affirmed, without costs.

26 In the Matter of SARAH R. BATES, Petitioner, v NEW YORK STATE AND LOCAL POLICE AND FIRE RETIREMENT SYSTEM, Respondent. [991 NYS2d 172]—

Civil Service—Retirement and Pension Benefits—Accidental Disability Retirement—Failure to Establish Permanent Incapacitation—Conflicting Medical Evidence

Egan Jr., J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Comptroller which denied petitioner's applications for performance of duty and accidental disability retirement benefits.

In January 2009, petitioner, a firefighter, applied for performance of duty and accidental disability retirement benefits, claiming that she was permanently disabled due to injuries to her back sustained in incidents that occurred in 2000 and 2007. After the applications initially were denied, petitioner requested a hearing and redetermination. Following a hearing, the Hearing Officer upheld the denials, finding that petitioner had not

established that she was permanently incapacitated from performing her job duties and that neither incident constituted an accident within the meaning of Retirement and Social Security Law § 363. The Comptroller thereafter upheld the Hearing Officer's decision, prompting petitioner to commence this CPLR article 78 proceeding.*

We confirm. As the applicant, petitioner bore the burden of establishing that she was permanently incapacitated from performing her duties as a firefighter (*see Matter of Pavone v DiNapoli*, 114 AD3d 1012, 1013 [2014]). “Where, as here, there is conflicting medical evidence, [the Comptroller] is vested with the exclusive authority to weigh such evidence and credit the opinion of one medical expert over another” (*Matter of Gatewood v DiNapoli*, 60 AD3d 1266, 1267 [2009] [citation omitted]; *accord Matter of Arroyo v DiNapoli*, 93 AD3d 980, 981 [2012]).

The Comptroller credited the medical opinion of Austin Leve, the board-certified orthopedic surgeon who testified for respondent, over the opinions of petitioner's treating orthopedic surgeon and her rheumatologist, and we disagree with petitioner's contention that Leve's opinion lacked a proper foundation. The record establishes that Leve's opinion was based upon a physical examination of petitioner in August 2009 and a review of the pertinent medical records. Based upon such examination and review, Leve opined that, although petitioner had subjective complaints, there were no objective findings indicating that she was permanently incapacitated from performing her job duties. Although petitioner is correct that Leve did not review an MRI performed on her subsequent to his examination, Leve testified that he was aware of the MRI results and that such results did not change his opinion. Inasmuch as Leve's opinion was rational, fact-based and founded upon a physical examination of petitioner and a review of relevant medical records, we decline to disturb the Comptroller's determination, notwithstanding other evidence in the record that could support a contrary result (*see Matter of Mareello v DiNapoli*, 111 AD3d 1052, 1053 [2013]; *Matter of Cantelmo v New York State Comptroller*, 105 AD3d 1306, 1307-1308 [2013]).

Peters, P.J., Stein, Rose and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

* As petitioner did not address the Comptroller's findings that the 2000 and 2007 incidents were not accidents within the meaning of Retirement and Social Security Law § 363 in her brief, any arguments concerning the denial of her application for accidental disability retirement benefits are deemed abandoned (*see Matter of Dymond v Hevesi*, 24 AD3d 938, 938 n [2005]).

27 In the Matter of BRIAN CONGELOSI, Appellant, v DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION et al., Respondents. [990 NYS2d 422]—Appeal from a judgment of the Supreme Court (Connolly, J.), entered December 31, 2013 in Albany County which, in a combined proceeding pursuant to CPLR article 78 and action for declaratory judgment, among other things, granted respondents’ motion for summary judgment dismissing the petition/complaint.

Petitioner was convicted of numerous offenses in 1996, including two counts of murder in the second degree, and is presently serving an aggregate prison sentence of 16 years to life. His 2012 request for parole release was denied after a hearing and, when he did not receive a timely response to his administrative appeal, he commenced this combined CPLR article 78 proceeding and declaratory judgment action. Petitioner then sought to amend the petition/complaint twice, first to include material regarding his unsuccessful administrative appeal and then to challenge the denial of parole release following his unsuccessful 2013 reappearance before the Board of Parole. Respondents opposed both motions and moved for summary judgment dismissing the petition/complaint. Supreme Court denied the motions to amend and granted respondents’ motion, prompting this appeal by petitioner.

We affirm. As an initial matter, Supreme Court did not abuse its discretion in denying petitioner’s motions to amend and supplement his petition/complaint, given the lack of any demonstrable merit to the proposed amendments (*see* CPLR 3025 [b]; *Matter of Green v Bradt*, 91 AD3d 1235, 1237 [2012], *lv denied* 19 NY3d 802 [2012]; *Matter of Miller v Goord*, 1 AD3d 647, 648 [2003]). Turning to respondents’ motion for summary judgment, Supreme Court properly determined that petitioner’s challenge to the 2012 Board decision had been rendered moot by the denial of his subsequent request for parole release (*see Matter of Ellison v Evans*, 100 AD3d 1159, 1160 [2012]). To the extent that any of petitioner’s arguments regarding the Board’s compliance with a 2011 amendment to Executive Law § 259-c (4) were “meaningfully separable” from that challenge (*id.*), Supreme Court properly determined that they lacked merit (*see Matter of Partee v Evans*, 117 AD3d 1258, 1259 [2014]; *Matter of Montane v Evans*, 116 AD3d 197, 200-203 [2014], *lv granted* 23 NY3d 903 [2014]).

Peters, P.J., Rose, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

28 In the Matter of the Claim of MICHELLE M. PASTORE, Appellant. COMMISSIONER OF LABOR, Respondent. [990 NYS2d 423]—

Unemployment Insurance—Benefits—Recovery of Overpayments—Waiver of Repayment Unavailable

Appeal from a decision of the Unemployment Insurance Appeal Board, filed March 20, 2013, which, among other things, charged claimant with a recoverable overpayment of emergency unemployment compensation benefits.

Claimant resigned from her position as a medical case manager in 2010 and obtained unemployment insurance benefits upon her representation that she had lost her job due to lack of work. The Unemployment Insurance Appeal Board determined in 2011 that she had voluntarily separated from employment without good cause and made willful misrepresentations in that regard, resulting in her disqualification from receiving benefits. Claimant was then charged with a recoverable overpayment of \$10,125 in federally-funded emergency unemployment compensation benefits (*see* Pub L 110-252, tit IV, § 4001 [b] [1], 122 US Stat 2323; *Matter of Umpierre [Commissioner of Labor]*, 80 AD3d 1123, 1123 [2011]). The Board rejected claimant's application for a waiver of repayment, and she appeals from that decision.

We affirm. Because claimant failed to appeal from the decision disqualifying her from receiving unemployment insurance benefits, we cannot consider her arguments with regard thereto (*see Matter of Molden [Commissioner of Labor]*, 284 AD2d 776, 776 [2001]; *Matter of Fontaine [Commissioner of Labor]*, 283 AD2d 825, 826 [2001]). Substantial evidence supports the decision of the Board that is before us, namely, that claimant misrepresented the circumstances of her separation from employment in order to obtain emergency unemployment compensation benefits and "that a waiver of repayment was not called for as a matter of equity or good conscience" (*Matter of Silver [Commissioner of Labor]*, 84 AD3d 1634, 1635 [2011]; *see Matter of Babcock [Commissioner of Labor]*, 106 AD3d 1316, 1316 [2013]).

Lahtinen, J.P., McCarthy, Rose, Lynch and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

29 In the Matter of the Claim of TERRI L. TWEEDIE, Appellant. COUNTY OF DELAWARE, Respondent; COMMISSIONER OF LABOR, Respondent. [990 NYS2d 372]—

Unemployment Insurance—Benefits—Disqualification—Refusing Offer of Suitable Employment without Good Cause

Appeal from a decision of the Unemployment Insurance Appeal Board, filed April 3, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits

because she refused an offer of suitable employment without good cause.

Claimant left her position as an investigator in the employer's child protective unit and found other employment. When that employment ended, she applied for unemployment insurance benefits. Shortly thereafter, the employer offered claimant a new position as a caseworker at the same salary as her previous employment. Claimant declined the offer, citing health and child care reasons. The application for benefits was initially denied, due to a determination that she had refused an offer of suitable employment without good cause. Following hearings, an Administrative Law Judge found that claimant had demonstrated good cause for refusing the employment. The Unemployment Insurance Appeal Board thereafter reversed and sustained the initial determination denying benefits. Claimant now appeals.

We affirm. "A claimant who refuses to accept a job for which he or she is reasonably suited by training and experience will be disqualified from receiving unemployment insurance benefits" (*Matter of Schirra [Commissioner of Labor]*, 45 AD3d 1067, 1068 [2007] [internal quotation marks and citations omitted]; accord *Matter of Guido [Commissioner of Labor]*, 108 AD3d 919, 920 [2013]; see Labor Law § 593 [2]). Here, claimant was offered a position for which she was qualified, but she averred that she was advised by a nurse practitioner to refuse the employer's offer due to claimant's anxiety over the time commitment required of the job and a lack of child care. However, the nurse practitioner testified that she did not advise claimant as to what kind of job claimant should take, and that her belief that claimant suffered from anxiety over her employment was based upon claimant's subjective complaints. Whether claimant had good cause to refuse the job offer presented a factual issue for the Board to resolve (see *Matter of Ruiz [Commissioner of Labor]*, 70 AD3d 1098, 1099 [2010]; *Matter of Murphy [Ross]*, 82 AD2d 970, 970 [1981]), and inasmuch as substantial evidence supports the Board's decision, we decline to disturb it (see *Matter of Niedert [Commissioner of Labor]*, 98 AD3d 1160, 1161 [2012]; *Matter of Ruiz [Commissioner of Labor]*, 70 AD3d at 1098; *Matter of Davis [Commissioner of Labor]*, 297 AD2d 851, 852 [2002]).

Stein, J.P., Garry, Egan Jr., Lynch and Devine, JJ., concur. Ordered that the decision is affirmed, without costs.

30 In the Matter of the Claim of WALTER W. McCARTHY, Appellant. COMMISSIONER OF LABOR, Respondent. [990 NYS2d 424]—

Unemployment Insurance—Benefits—Disqualification—Voluntarily Leaving

Employment without Good Cause—Dissatisfaction with Work Schedule

Appeal from a decision of the Unemployment Insurance Appeal Board, filed April 22, 2013, which, among other things, ruled that claimant was disqualified from receiving unemployment insurance benefits because he voluntarily left his employment without good cause.

Claimant took a job as a plumber based on the representations of his union business agent as to the hours he would be working, but left the job after it became apparent that those representations had been inaccurate. Prior to quitting, claimant made no effort to address the issue with either the employer or his union (*see Matter of Sampica [Commissioner of Labor]*, 252 AD2d 702, 703 [1998]). Dissatisfaction with one's work schedule does not constitute good cause for leaving one's employment, and substantial evidence accordingly supports the decision of the Unemployment Insurance Appeal Board disqualifying claimant from receiving unemployment insurance benefits (*see Matter of della Croce [Commissioner of Labor]*, 117 AD3d 1249, 1249 [2014]; *Matter of Hurley [Commissioner of Labor]*, 67 AD3d 1153, 1154 [2009]). Inasmuch as claimant falsely reported when applying for benefits that he had left the job due to a lack of work, substantial evidence similarly supports the Board's finding that he had made a willful misrepresentation to obtain benefits (*see Matter of DeGennaro [Commissioner of Labor]*, 68 AD3d 1274, 1275 [2009]).

Lahtinen, J.P., Stein, McCarthy, Rose and Egan Jr., JJ., concur. Ordered that the decision is affirmed, without costs.

31 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; OLUTOYIN BELINDA OLAKANPO, Respondent. [990 NYS2d 425]—

Attorney and Client—Disciplinary Proceedings—Failure to Comply with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 1994, was suspended by this Court's order dated September 24, 2009 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (65 AD3d 1447 [2009]).

Respondent now requests reinstatement on the ground that she has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and she is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

32 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; ROBERT PAUL HINE, Respondent. [990 NYS2d 425]—

Attorney and Client—Disciplinary Proceedings—Failure to Comply with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 1997, was suspended by this Court's order dated September 24, 2009 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (65 AD3d 1447 [2009]).

Respondent now requests reinstatement on the ground that he has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and he is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

(August 21, 2014)

1 In the Matter of PAMELA A. CROCKETT, a Suspended Attorney, Respondent. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner. [991 NYS2d 489]—

Attorney and Client—Disciplinary Proceedings—Neglect of Client Matters—Conversion and Mishandling of Client Funds—One-Year Suspension

Per Curiam. Respondent was admitted to practice by this Court in 1994. She was admitted to practice in Maryland in 2004, where she maintains an office for the practice of law.

By petition dated October 4, 2013, petitioner charged respondent with 10 charges of professional misconduct alleging neglect of a client matter and failure to provide competent representation (*see* former Code of Professional Responsibility DR 6-101 [a] [former 22 NYCRR 1200.30 (a)]; Rules of Professional

Conduct [22 NYCRR 1200.0] rules 1.1 [a], [b]; 1.3 [b]),* failure to communicate with her client (*see* former Code of Professional Responsibility DR 1-102 [a] [5] [former 22 NYCRR 1200.3 (a) (5)]; Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.4, 8.4 [d]), improper handling and conversion of the settlement check and funds (*see* former Code of Professional Responsibility DR 1-102 [a] [4], [5], [7]; DR 9-102 [a], [c] [1], [4] [former 22 NYCRR 1200.3 (a) (4), (5), (7); 1200.46 (a), (c) (1), (4)]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 8.4 [c], [d], [h]; 1.15 [a], [c] [1], [4]), commingling personal and client funds (*see* former Code of Professional Responsibility DR 1-102 [a] [5], [7]; DR 9-102 [a] [former 22 NYCRR 1200.3 (a) (5), (7); 1200.46 (a)]; Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.15 [a]; 8.4 [d], [h]), failure to maintain complete attorney escrow account records and render accounts (*see* former Code of Professional Responsibility DR 1-102 [a] [5], [7]; DR 9-102 [c] [1], [3]; [d] [former 22 NYCRR 1200.3 (a) (5), (7); 1200.46 (c) (1), (3); (d)]; Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.15 [c] [1], [3]; [d]; 8.4 [d], [h]), failure to produce escrow account records as requested by petitioner (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.15 [i]), failure to comply with the rules regarding the disbursement of funds for missing clients (*see* former Code of Professional Responsibility DR 9-102 [f] [former 22 NYCRR 1200.46 (f)]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.15 [f]), failure to deposit client funds in an appropriately titled and functioning attorney escrow account (*see* Judiciary Law § 497; former Code of Professional Responsibility DR 9-102 [b] [former 22 NYCRR 1200.46 (b)]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.15 [b]), failure to maintain an attorney escrow account in compliance with appropriate rules (*see* former Code of Professional Responsibility DR 1-102 [a] [5]; DR 9-102 [b] [1] [former 22 NYCRR 1200.3 (a) (5); 1200.46 (b) (1)]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.15 [b] [1]), and failure to comply with the attorney registration requirements for the 2010-2011 and 2012-2013 biennial periods as required by Judiciary Law § 468-a and Rules of the Chief Administrator of the Courts (22 NYCRR) § 118.1 (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 8.4 [d]).

Respondent filed an answer in which she admitted six of the charges in their entirety and made both admissions and denials

* Some of the charges herein involve conduct occurring before and after April 1, 2009, the effective date of the Rules of Professional Conduct, and thus both the Rules of Professional Conduct and the former Code of Professional Responsibility are applicable.

with respect to the remaining four charges. By order dated March 6, 2014, this Court suspended respondent from the practice of law pursuant to this Court's rules (*see* 22 NYCRR 806.4 [f]) pending consideration of the disciplinary charges filed against her (*Matter of Crockett*, 115 AD3d 1051 [2014]). After a hearing pursuant to this Court's rules (*see* 22 NYCRR 806.5), the Referee sustained the petition in its entirety. Petitioner now moves to confirm the Referee's report. Respondent has not responded to the motion.

We find that a fair preponderance of the evidence supports the Referee's determination and we, therefore, grant petitioner's motion and confirm the Referee's report with respect to the charges in the petition (*see Matter of Galvin*, 87 AD3d 1223 [2011]). In addition, we find respondent guilty of the professional misconduct as charged and specified in the petition (*see Matter of Coleman*, 116 AD3d 1219 [2014]).

Turning to the appropriate disciplinary sanction for respondent's serious professional misconduct, we initially note that petitioner has not referenced any prior disciplinary history, and the subject charges primarily concerned only one client who was negligently and incompetently represented. Nevertheless, respondent clearly converted and mishandled client funds, and the record further demonstrates cause for concern relative to respondent's knowledge, ethics and practice in this state. Accordingly, in order to protect the public, deter similar misconduct and preserve the reputation of the bar, we conclude that respondent should be suspended from the practice of law for a period of one year (*see Matter of Gallagher*, 112 AD3d 1057 [2013]; *Matter of Davis*, 106 AD3d 1184 [2013]). Furthermore, we direct that, upon any application for reinstatement, in addition to the requirements set forth in our rules (*see* 22 NYCRR 806.12 [b]), respondent submit documentation that, during the period of suspension, she has come into compliance with all attorney registration requirements and completed four credit hours of accredited continuing legal education (hereinafter CLE) in ethics and professionalism, four credit hours of CLE in law practice management and four credit hours of CLE in New York practice, all in addition to the CLE required of all attorneys in this state (*see* 22 NYCRR part 1500).

Stein, J.P., Garry, Rose, Egan Jr. and Clark, JJ., concur. Ordered that petitioner's motion to confirm the Referee's report is granted; and it is further ordered that respondent is found guilty of the professional misconduct charged and specified in the petition of charges; and it is further ordered that respondent is suspended from the practice of law for a period of one

year, effective immediately, and until further order of this Court; and it is further ordered that, while so suspended from practice, respondent is commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another; and respondent is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto; and it is further ordered that respondent shall comply with the provisions of this Court's rules regulating the conduct of suspended attorneys (*see* 22 NYCRR 806.9).

2 In the Matter of RONALD J. KURPIERS II, a Suspended Attorney, Respondent. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner. [991 NYS2d 514]—

Attorney and Client—Disciplinary Proceedings—Order Imposing Discipline Based upon Discipline in Another State—Voluntary Resignation

Per Curiam. Respondent was admitted to practice by this Court in 2005. He was suspended from the practice of law, effective March 3, 2014, due to his failure to comply with the attorney registration requirements (*Matter of Attorneys in Violation of Judiciary Law § 468-a*, 113 AD3d 1020, 1022 [2014]). Respondent maintains an office for the practice of law in Florida, where he was admitted in 2002.

By order dated May 22, 2012, the Supreme Court of Florida suspended respondent from the practice of law in that state for 91 days based upon findings of guilt that respondent engaged in conduct prejudicial to the administration of justice involving dishonesty, fraud, deceit or misrepresentation. That court later publicly reprimanded respondent, by order dated March 11, 2013, on the basis of different charges concerning his violation of trust accounting rules and conduct prejudicial to the administration of justice. By order dated February 18, 2014, respondent was reinstated in Florida and placed on probation for three years. As a result of the discipline imposed in Florida, petitioner moves for an order imposing discipline pursuant to this Court's rules (*see* 22 NYCRR 806.19). In response thereto, respondent has tendered his resignation by affidavit, dated June 27, 2014, in substantial compliance with the rules of this Court (*see* 22 NYCRR 806.8).

We accept respondent's resignation, which petitioner advises it does not oppose, and, in accordance with our rules, order his disbarment from the practice of law (*see* 22 NYCRR 806.8 [b]). Petitioner's motion for an order imposing discipline is, accordingly, denied.

Stein, J.P., McCarthy, Garry, Devine and Clark, JJ., concur. Ordered that respondent's resignation application is accepted; and it is further ordered that petitioner's motion is denied; and it is further ordered that respondent is disbarred and his name is stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately; and it is further ordered that respondent is commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another; and respondent is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto; and it is further ordered that respondent shall comply with the provisions of this Court's rules regulating the conduct of disbarred attorneys (*see* 22 NYCRR 806.9).

3 In the Matter of CRYSTAL COLLINS et al., Appellants, v NEW YORK STATE BOARD OF ELECTIONS, Respondent, and RUTH H. THOMPSON, Respondent. [991 NYS2d 672]—

Elections—Designating Petitions—Signers' Town and City Completed by Third Party

Per Curiam. Appeal from an order and judgment of the Supreme Court (McDonough, J.), entered August 4, 2014 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to Election Law § 16-102, to declare invalid the designating petition naming respondent Ruth H. Thompson as the Democratic Party candidate for the public office of State Senator for the 36th Senate District in the September 9, 2014 primary election.

On July 7, 2014, respondent Ruth H. Thompson filed a designating petition with respondent New York State Board of Elections seeking the Democratic Party nomination for the office of State Senator for the 36th Senate District in the September 9, 2014 primary election. Petitioners, in turn, filed objections. Following a hearing before the State Board, 922 signatures were invalidated, leaving 2,723 remaining, a number that was sufficient to render the designating petition valid. Petitioners commenced this proceeding pursuant to Election Law § 16-102 seeking to have additional signatures stricken on various grounds and the designating petition declared invalid. Supreme Court declined to strike any additional signatures, held that the designating petition was valid and dismissed the petition. Petitioners now appeal.

Petitioners contend that Thompson failed to strictly comply with the requirements of Election Law § 6-130 because her designating petition contained preprinted information, completed by a third party, concerning the signers' town or city next to the line on which they signed their names.* They maintain that the signers or, at the very least, their subscribing witnesses should have completed this information and that their failure to do so renders the petition invalid. We are not persuaded.

Election Law § 6-130 provides, very simply, that “[t]he sheets of a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed.” The statute does not specifically state that the town or city information must be supplied by the signer or a subscribing witness, and there is no basis for inferring that this is a requirement. Notably, Election Law § 6-134 (7) provides that “[a] signer need only place his [or her] signature upon the petition, and need not himself [or herself] fill in the other required information.” It does not, as petitioners claim, create an exception permitting only a subscribing witness to fill in a signer's town or city information, and *Matter of Tischler v Hikind* (98 AD3d 926 [2012]), upon which they rely, does not support this interpretation. Although petitioners cite to a number of cases wherein the courts have invalidated designating petitions for lack of compliance with Election Law § 6-130 due to the inaccurate or incomplete town or city information of the signers, these are cases in which the signers themselves either failed to provide complete information or supplied inaccurate information (see e.g. *Matter of Stoppenbach v Sweeney*, 98 NY2d 431, 433 [2002]; *Matter of Liepshutz v Palmateer*, 112 AD2d 1101, 1103 [1985], *affd* 65 NY2d 965 [1985]; *Matter of Scamacca v Mahoney*, 104 AD2d 730, 730 [1984]). Significantly, none involved a situation, like the one at hand, where the town or city was already printed on the petition and was complete and accurate.

Contrary to petitioners' claim, we are not persuaded that allowing such a practice increases the likelihood of fraud, particularly where, as here, the information on the petition was correct. Indeed, it has been held that where a designating petition contains missing or incorrect town or city information on the “witness identification information” portion of the subscribing witness statement, the defect is not fatal provided that the

* Given that all of the sheets of the designating petition contain this preprinted information, all of the signatures contained therein are affected.

correct information is set forth elsewhere in the petition (see *Matter of Arcuri v Hojnacki*, 32 AD3d 658, 660 [2006], *lv denied* 7 NY3d 707 [2006]; *Matter of Curley v Zacek*, 22 AD3d 954, 955 [2005], *lv denied* 5 NY3d 714 [2005]; *Matter of Berkowitz v Harrington*, 307 AD2d 1002, 1003 [2003]). Given that all of the information required by Election Law § 6-130 was included on the designating petition at issue and was both complete and accurate, the statutory requirements were satisfied. Accordingly, Supreme Court properly dismissed the application.

McCarthy, J.P., Garry, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the order and judgment is affirmed, without costs.

4 In the Matter of RICHARD S. CONTI et al., Respondents, v MATTHEW J. CLYNE et al., as Commissioners Constituting the Albany County Board of Elections, et al., Appellants. (Proceeding No. 1.) In the Matter of WILLIAM F. FARAGON et al., Respondents, v MATTHEW J. CLYNE et al., as Commissioners Constituting the Albany County Board of Elections, et al., Appellants. (Proceeding No. 2.) In the Matter of WILLIAM F. FARAGON et al., Respondents, v MATTHEW J. CLYNE et al., as Commissioners Constituting the Albany County Board of Elections, et al., Appellants. (Proceeding No. 3.) [991 NYS2d 663]—

Process—Service of Process—Commencement by Filing
Process—Service of Process—Technical Defect in Manner of Service
Elections—Designating Petitions

Per Curiam. Appeals from a judgment of the Supreme Court (McNamara, J.), entered August 8, 2014 in Albany County, which, among other things, granted petitioners' applications, in three proceedings pursuant to Election Law § 16-102, to annul determinations of the Albany County Board of Elections invalidating the designating petitions naming petitioners as candidates for the party positions of delegate and alternate delegate to the Democratic Party Judicial Nominating Convention, Third Judicial District, from the 109th and 110th Assembly Districts in the September 9, 2014 primary election.

These proceedings arise out of designating petitions filed by candidates for the party positions of delegate and alternate delegate to the Democratic Party Judicial Nominating Convention for the Third Judicial District. Petitioners in proceeding No. 1 are candidates in the 109th Assembly District, while petitioners in proceedings Nos. 2 and 3 are candidates in the 110th As-

sembly District (*see* Election Law § 6-124).^{*} Objectors allege that, in the event that petitioners succeed in their primary candidacies, petitioners would then seek to nominate Margaret Walsh, currently an Albany County Family Court Judge, at the subsequent Democratic Party Judicial Nominating Convention as the Democratic Party candidate for the public office of Justice of the Supreme Court for the Third Judicial District (*see* Election Law § 6-106). Walsh is already running for reelection as Albany County Family Court Judge on the Democratic Party line. Objections were filed to the designating petitions in both Assembly Districts, alleging that they were invalid because Walsh could not simultaneously run for both offices (*see Matter of Lutfy v Gangemi*, 35 NY2d 179, 181 [1974]; *Matter of Burns v Wiltse*, 303 NY 319, 323-326 [1951]; *see also* County Law § 411). The Albany County Board of Elections agreed with said objections and invalidated the petitions.

Petitioners commenced the present proceedings to annul the Board's determinations. Respondents answered and argued that, among other things, the petitions were jurisdictionally defective because petitioners had failed to file them with the Albany County Clerk and that personal jurisdiction had not been obtained over respondent John H. Cunningham in proceeding No. 1. The objectors, namely, Cunningham in proceeding No. 1 and respondent Richard P. Jacobson in proceeding Nos. 2 and 3, also cross-petitioned for an order declaring the designating petitions to be invalid. Supreme Court ultimately dismissed the cross petitions and annulled the determinations of the Board. Respondents now appeal.

Dealing first with the issue of subject matter jurisdiction, the record reflects that petitioner Christopher T. Higgins personally delivered the orders to show cause, petitions, and filing fees to the office of the Albany County Clerk. After paying the fees, Higgins took the papers to the Clerk of the Supreme and County Courts in order to have a judge assigned, to whom the papers were transmitted directly. While the papers were not physically placed in the County Clerk's case file, they were nevertheless deemed filed when Higgins delivered them to the County Clerk in the first instance, and Supreme Court correctly found petitioners to have complied with the filing requirements of CPLR 304 and 2102 (*see* CPLR 304 [c]; *Resch v Briggs*, 51 AD3d 1194, 1196 [2008]; *Matter of Ryan v Carlo*, 224 AD2d 804, 804 [1996], *lv denied* 87 NY2d 808 [1996]; *compare Matter of Mendon Ponds Neighborhood Assn. v Dehm*, 98 NY2d 745, 746

^{*} Proceeding No. 3 was apparently commenced to correct a typographical error in the order to show cause in proceeding No. 2.

[2002]). The County Clerk should have retained the papers and provided a date-stamped copy of them to Higgins when they were delivered (*see* CPLR 304 [c]), but the failure to do so constituted nothing more than a ministerial error in the method of filing that may be overlooked pursuant to CPLR 2001 (*see Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 327-328 [2011]).

We further agree with Supreme Court that petitioners obtained personal jurisdiction over Cunningham in proceeding No. 1. Service upon Cunningham was effected by Higgins, which runs afoul of the requirement that “papers may [only] be served by any person *not* a party” (CPLR 2103 [a] [emphasis added]). While there has been disagreement among the Appellate Divisions as to the effect of this type of error, this Court has consistently held that it “is a mere irregularity which does not vitiate service” (*Matter of Schodack Concerned Citizens v Town Bd. of Town of Schodack*, 148 AD2d 130, 133 [1989], *lv denied* 75 NY2d 701 [1989]; *see Matter of Sullivan v Albany County Bd. of Elections*, 77 AD2d 959, 959 [1980]). We perceive no reason to depart from our precedent, particularly in light of the Court of Appeals’ holding that CPLR 2001, as amended in 2007, permits a court to overlook technical defects in the manner of service that do not prejudice the person or persons being served (*see Ruffin v Lion Corp.*, 15 NY3d 578, 582 [2010]).

Turning to the merits, respondents argue that permitting delegates to run who would allegedly support Walsh at the judicial nominating convention raises the appearance of her staging impermissible runs for two judicial posts at the same time. Assuming without deciding that any legitimate concerns exist as to the eligibility of Walsh as a candidate for Supreme Court (*but see* Election Law § 6-146 [5]), however, the obvious point is that she is not a named candidate in the designating petitions at issue here. The present matters relate to delegates and alternate delegates to the judicial nominating convention and, upon appeal, respondents do not dispute that petitioners “could, if elected, take and hold the office[s]” they seek (*Matter of Burns v Wiltse*, 303 NY at 325; *cf.* Election Law § 6-122 [2]). The Board instead invalidated the petitions out of a misguided interest in what the candidates might do at the convention if elected, a matter that plainly does “not appear[] upon the face of the petition[s]” and is beyond the Board’s power to review (*Schwartz v Heffernan*, 304 NY 474, 480 [1952]; *see Matter of Lucariello v Commissioners of Chautauqua County Bd. of Elections*, 148 AD2d 1012, 1012-1013 [1989], *lv denied* 73 NY2d 707 [1989]). Supreme Court thus properly invalidated the determina-

tions of the Board, which amounted to little more than an unreasonable and unjustified restraint upon the right of primary voters to choose among eligible and qualified candidates (*see* NY Const, art II, § 1; *Matter of Hopper v Britt*, 204 NY 524, 532 [1912]). Moreover, given the absence of any legally cognizable defect in the designating petitions or the candidates named thereon, petitioners satisfied their “burden of demonstrating that [the] designating petition[s] should be validated” such as to warrant the grant of the petitions and dismissal of the cross petitions (*Matter of Mannarino v Goodbee*, 109 AD3d 683, 685 [2013]).

McCarthy, J.P., Garry, Egan Jr. and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

5 In the Matter of PAUL C. VANSAVAGE, Respondent, v DENVER JONES, Appellant, et al., Respondents. (Proceeding No. 1.) In the Matter of DENVER JONES, Individually and on Behalf of all Signers of a Petition Filed Pursuant to Election Law § 6-134, Appellant, v GREGORY PETERSON et al., as Commissioners Constituting the New York State Board of Elections, Respondents, and PAUL C. VANSAVAGE et al., Respondents. (Proceeding No. 2.) [991 NYS2d 666]—

Elections—Designating Petitions—Fraud
Elections—Designating Petitions—Witness Identification Information
Elections—Designating Petitions—Validity of Signatures

Per Curiam. Appeal from an order of the Supreme Court (McNamara, J.), entered August 18, 2014 in Albany County, which, among other things, granted petitioner’s application, in proceeding No. 1 pursuant to Election Law § 16-102, to declare invalid the designating petition naming respondent Denver Jones as the Republican Party candidate for the public office of State Senator for the 52nd Senate District in the September 9, 2014 primary election.

Denver Jones filed a designating petition with the New York State Board of Elections seeking to be nominated as the Republican Party candidate for the public office of State Senator for the 52nd Senate District in the September 9, 2014 primary election. After objections were filed, the State Board issued a determination on August 1, 2014 that invalidated Jones’ designating petition, finding that, of the 1,713 signatures claimed to be filed, 743 signatures were invalid, leaving Jones with 970 signatures, 30 short of the 1,000 signatures required to receive the designation. In the interim, Paul C. VanSavage commenced proceeding No. 1 pursuant to Election Law § 16-102

seeking to invalidate Jones' designating petition on numerous grounds, including fraud. Subsequent to the State Board's determination, Jones commenced proceeding No. 2 pursuant to Election Law § 16-102 seeking to validate the designating petition. Following a hearing, Supreme Court found, among other things, that Jones' designating petition was permeated by fraud and invalidated it. Jones appeals.

Initially, Supreme Court erred in invalidating the designating petition based upon alleged fraud on the part of Jones. A designating petition will be invalidated if the challenger shows, by clear and convincing evidence, " 'that the entire petition is permeated with fraud or that the candidate participated in, or can be charged with knowledge of, fraudulent activity' " (*Matter of Valenti v Bugbee*, 88 AD3d 1056, 1057 [2011], quoting *Matter of Kraham v Rabbitt*, 11 AD3d 808, 809 [2004]). Here, VanSavage contends that Jones participated in the fraudulent activity himself inasmuch as, while collecting signatures on petitions, he falsely attested to signatures he knew to be nonauthentic. To that end, VanSavage presented a handwriting expert who testified that, on various pages on which Jones was the subscribing witness, several of the signatures were written by the same person.

In response, Jones testified to a particular incident in a pizza parlor during which, after handing the petition to a group of four people who had each identified themselves and stated that they were Republican voters, he turned to answer a question from another patron. Jones related that, while he had assumed that the petition was being passed around to be signed by each person, he mistakenly stopped paying attention and it was possible that one of those people had signed for the other three. Jones further stated that he did not examine the signatures afterward and that he was unaware that there was a problem until the day he received objections to his petition. Jones also testified that he had no recollection of the other instances in which it appeared that more than one signature was provided by the same person, but he stated that he would not allow people to take petitions into their homes for other people to sign and would not accept the signatures of one spouse for another. Inasmuch as Supreme Court explicitly found Jones' testimony to be "very candid and honest" and VanSavage failed to submit any evidence that Jones knowingly accepted fraudulent signatures, we do not find clear and convincing evidence that Jones "acted fraudulently or did anything that would warrant invalidating the entire designating petition" (*Matter of Nolin v McNally*, 87 AD3d 804, 806 [2011]; see *Matter of Bonner v Negron*, 87 AD3d 737, 739-740 [2011]).

The petition not having been invalidated based upon fraud, it is still incumbent upon Jones to demonstrate that he has the 1,000 valid signatures necessary to qualify for inclusion on the ballot. In that vein, we turn first to his contention that Supreme Court erred in upholding the invalidation of the signatures appearing on sheets 5-7, 14-17, 19-22 and 25-26 of the designating petition because the “Witness Identification Information” portion of the subscribing witness statement requesting “Town or City” and “County” were left blank. The witness identification information on designating petitions is intended to allow for “the rapid and efficient verification of signatures within the restrictive time periods imposed by the Election Law” to facilitate the discovery of fraud (*Matter of Zobel v New York State Bd. of Elections*, 254 AD2d 520, 522 [1998]; see *Matter of Curley v Zacek*, 22 AD3d 954, 956 [2005], *lv denied* 5 NY3d 714 [2005]). Thus, where the complete residence address of the subscribing witness appears elsewhere on the same page of the petition, an error in providing the witness identification information has been held to be “an inconsequential violation” and not a fatal defect (*Matter of Curley v Zacek*, 22 AD3d at 956; see *Matter of Arcuri v Hojnacki*, 32 AD3d 658, 660 [2006], *lv denied* 7 NY3d 707 [2006]). Here, the subscribing witness provided her complete address in the “Statement of Witness” section on each of the petition pages at issue and her name and complete address also appears at the top of each page as a member of the committee to fill vacancies. In addition, she submitted an affidavit that stated that she carried the petition pages at issue and that her correct residential address appeared on each page. Thus, absent any indication of fraud or record evidence that the subscribing witness did not reside at the address provided, we find that the signatures contained on those pages of the petition should not have been invalidated (see *Matter of Arcuri v Hojnacki*, 32 AD3d at 660; *Matter of Curley v Zacek*, 22 AD3d at 956; see also *Matter of Powers v Kozlowski*, 54 AD3d 540, 541-542 [2008], *lv denied* 11 NY3d 701 [2008]). Accordingly, a total of 125 signatures should be reinstated to Jones’ total.¹

Jones next contends that Supreme Court erred in invalidating the petition sheets circulated by Daniel McNett, pages 76 to 94, on the grounds that McNett’s voter registration had been cancelled because he did not reside at the address claimed on his registration form and because he had previously been convicted of a felony. Because disenfranchisement is a drastic punishment, Election Law § 5-402 requires that a voter’s

1. One signature on page 14 of the designating petition had been invalidated by the State Board on separate grounds.

registration may not be cancelled until after a board of elections has notified the voter of its intention to cancel and gives him or her the opportunity to be heard (see *Matter of Engel v Board of Elections of State of N.Y.*, 143 AD2d 291, 292 [1988], *lv denied* 72 NY2d 805 [1988]; *Nesci v Canary*, 112 AD2d 1056, 1057 [1985], *lv denied* 65 NY2d 607 [1985]). Here, the record demonstrates that McNett was a registered voter during the first two weeks of July 2014, when he collected signatures for Jones and they were submitted to the State Board, and the process for cancelling his registration did not commence until July 22, 2014. Accordingly, the signatures that McNett collected were valid, and Supreme Court erred in finding otherwise; thus, 44 signatures should be added to Jones' total (see *Matter of Hudson v Board of Elections of City of N.Y.*, 207 AD2d 508, 509 [1994]; *Matter of Engel v Board of Elections of State of N.Y.*, 143 AD2d at 292; *Nesci v Canary*, 112 AD2d at 1057; see generally *Matter of Robelotto v Burch*, 242 AD2d 397, 398 [1997]).²

Jones lastly contends that the State Board erred in invalidating pages 95, 97, 98, 102 and 111 of his designating petition, all carried by Marc Romain, on various grounds. We first address pages 95 and 97, which were disallowed based upon certain changes to the witness statements. While alterations to a witness statement that are unexplained and uninitialed will ordinarily result in the invalidation of the petition page even where the alterations result in the provision of correct information, the underlying signatures need not be nullified where an explanation is provided by affidavit or testimony (see *Matter of Oberman v Romanowski*, 65 AD3d 992, 993 [2009]; *Matter of Curley v Zacek*, 22 AD3d at 957). Here, Romain submitted an affidavit that explained the alterations he made to the witness name on page 95 and to the date on page 97 of the petition. In light of this uncontroverted explanation, the State Board erred in invalidating all of the signatures contained on pages 95 and 97 of Jones' petition and, consequently, the 15 signatures on those two pages not invalidated by the State Board for other reasons should be counted (see *Matter of Rosmarin v Belcastro*, 44 AD3d 1055, 1056 [2007]; *Matter of Curley v Zacek*, 22 AD3d

2. Although the State Board ostensibly counted all of the valid signatures on the pages witnessed by McNett in its total of 970, the record demonstrates otherwise. Examining the State Board's staff work sheet of objections with respect to petition pages 83, 84, 85 and 86, individual objections were sustained to, respectively, no signatures, three signatures, three signatures and nine signatures on those pages. Inexplicably, however, the State Board invalidated all of the signatures on those pages in its final tally. Because no other reason appears in the record for having invalidated the 44 remaining signatures, we find those to be properly added back to Jones' total.

at 957). Similarly, absent any allegation of fraud, the overstatement of the signature totals on pages 102 and 111 of Jones' petition was not such a gross irregularity as to warrant invalidation of the entire pages and, thus, the 19 signatures on those two pages not invalidated by the State Board for other reasons should have been counted (see *Matter of Rancourt v Magill*, 87 AD3d 656, 657 [2011]; see generally *Matter of Barrett v Scaringe*, 112 AD2d 1095, 1096-1097 [1985], *affd* 65 NY2d 946 [1985]). However, with respect to page 98 of the petition, we find that the State Board properly invalidated all of the signatures on that page, inasmuch as Romain failed to provide a complete residence address (see *Matter of Henry v Trotto*, 54 AD3d 424, 426-427 [2008]; *Matter of Gleason v Longo*, 133 AD2d 289, 290 [1987]; *Matter of Liepshutz v Palmateer*, 112 AD2d 1101, 1103 [1985], *affd* 65 NY2d 965 [1985]).

Both VanSavage and Jones further contend that there were additional signatures on Jones' designating petition that should have been invalidated or validated. Supreme Court declined to take evidence with respect to those arguments and this Court is unable to resolve those questions based upon the record before us. For that reason, we remit to Supreme Court for further proceedings on issues not decided herewith. Pursuant to our determinations here, 203 signatures that were declared invalid by either Supreme Court or the State Board should be reinstated to the total found valid by the State Board, giving Jones 1,173 signatures on his designating petition and presumptively qualifying him to participate in the primary election.

McCarthy, J.P., Garry, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as granted the application in proceeding No. 1 and dismissed the application in proceeding No. 2; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

6 In the Matter of MARY MAHER et al., Respondents, v NEW YORK STATE BOARD OF ELECTIONS, Respondent, and DANIEL CASTRICONE, Appellant. (And Another Related Proceeding.) [992 NYS2d 153]—

Elections—Designating Petitions—Term of Office
Elections—Acceptance of Nomination

Per Curiam. Appeal from an order of the Supreme Court (Maney, J.), entered August 11, 2014 in Albany County, which, among other things, granted petitioners' application, in a proceeding pursuant to Election Law § 16-102, to declare in-

valid the designating petition naming respondent Daniel Castricone as the Conservative Party candidate for the public office of Member of the Assembly for the 98th Assembly District (Full Term) in the September 9, 2014 primary election.

In January 2014, the former Member of the Assembly for the 98th Assembly District began serving in another elected capacity, thereby creating a vacancy in that office. Two months later, respondent New York State Board of Elections certified two offices to be filled relative to this Assembly seat at the November 2014 general election—one for the unexpired term created by the subject vacancy and one for a full two-year term. Respondent Daniel Castricone (hereinafter respondent), who is not a member of the Conservative Party, thereafter circulated designating petitions indicating that he was seeking the nomination of the Conservative Party for the office of Member of the Assembly for the 98th Assembly District (Full Term) and the office of Member of the Assembly for the 98th Assembly District (To Fill Vacancy for Remainder of Term). On July 14, 2014, shortly after the period in which to collect signatures concluded, the State Conservative Party filed two separate certificates authorizing respondent as a candidate for the offices at issue. Although respondent insists that he thereafter filed two certificates of acceptance—one for each office—the State Board has only one certificate of acceptance on file, in which respondent acknowledges his acceptance of his designation as the Conservative Party candidate for the office of “NY Assembly 98th District New York to fill vacancy for remainder of term.”

In the interim, on or about June 19, 2014, the State Board issued a directive wherein it opined that inasmuch as no special election had been called by the Governor to fill the vacancies existing in various State Senate and Assembly seats (*see* Public Officers Law § 42 [4]), including the one at issue here, “such office should be filled at the upcoming General Election and the office should appear only ONCE on the ballot, for the full term.” Hence, at the time that respondent began circulating his designating petitions, there was but one office to be filled—Member of the Assembly for the 98th Assembly District for the full two-year term.¹

1. The first day to collect signatures with respect to a petition designating a candidate for an office to be filled at a state or local primary election was May 29, 2014, and it appears that respondent’s representatives began collecting signatures for him on June 15, 2014. The record does not reflect whether respondent and/or his representatives thereafter became aware of the State Board’s June 19, 2014 directive.

Petitioners thereafter commenced this proceeding pursuant to Election Law § 16-102 seeking to declare invalid the designating petition naming respondent as the Conservative Party candidate for the office of Member of the Assembly for the 98th Assembly District (Full Term) in the September 9, 2014 primary election, citing respondent's allegedly defective certificate of acceptance.² The parties agreed to forgo a hearing and, after reviewing the parties' submissions and the relevant documentary evidence, Supreme Court, among other things, declared respondent's designating petition to be null and void and restrained the State Board from placing his name on the primary election ballot as the Conservative Party candidate for the office of Member of the Assembly for the 98th Assembly District (Full Term). This appeal by respondent ensued.

Pursuant to Election Law § 6-134 (1), "[i]f two or more offices having the same title are to be filled for different terms, the terms of office shall be included as part of the title of the office" on the underlying designating petition. No corresponding requirement, however, appears in Election Law § 6-146, which governs the declination or acceptance of a party nomination or designation. Rather, the statute requires only that where, as here, an individual is "designated or nominated for a public office other than a judicial office by a party of which he [or she] is not a duly enrolled member, . . . such person shall, in a certificate signed and acknowledged by him [or her], and filed as provided in [Election Law article 6], accept the designation or nomination as a candidate of . . . such party . . . , otherwise such designation or nomination shall be null and void" (Election Law § 6-146 [1]). Having reviewed the cited statutes, we find that the requirements governing the execution and filing of a certificate of acceptance under Election Law § 6-146 (1) are separate and distinct from the rules governing the form and content of a designating petition as set forth in Election Law § 6-134 (1) (*cf. Moncayo v Withers*, 154 AD2d 598, 598 [1989], *lv denied* 74 NY2d 614 [1989]) and, therefore, respondent was not required to include—on his certificate of acceptance—the term of the office that he was seeking.

Nor are we persuaded that the inclusion of such information invalidated respondent's certificate of acceptance. Inasmuch as Election Law § 6-146 (1) did not require respondent to specify

2. Respondent thereafter commenced a proceeding in Orange County seeking an order validating his designating petition. Upon the parties' consent, the two proceedings were joined and, after being advised that the State Board had validated respondent's designating petition, respondent's petition to validate was withdrawn.

the term of the office at issue (*cf. Matter of Conklin v Canary*, 112 AD2d 1062, 1062 [1985], *affd* 65 NY2d 952 [1985]), the inclusion of such information was mere surplusage, and any error in this regard does not afford a basis upon which to invalidate respondent's designating petition (*cf. Matter of Finn v Sherwood*, 87 AD3d 1044, 1046 [2011] [erroneous reference to general rather than primary election did not warrant invalidation of designating petition]; *Matter of Reagon v LeJeune*, 307 AD2d 1015, 1015 [2003] [same])—particularly in view of the fact that there could be no confusion as to the office for which respondent was filing his acceptance (*cf. Matter of Mizel v New York State Bd. of Elections*, 232 AD2d 721, 722 [1996]).³ Notably, there is no dispute that respondent's certificate of acceptance was duly acknowledged (*compare Matter of Meehan v Giunta*, 74 AD3d 972, 973-974 [2010]; *Matter of Bunger v Berger*, 196 AD2d 867, 868 [1993], *lv denied* 82 NY2d 656 [1993]; *Matter of Rhodes v Salerno*, 90 AD2d 587, 587-588 [1982], *affd* 57 NY2d 885 [1982]) and timely filed (*compare Matter of Dixon v Clyne*, 87 AD3d 812, 813 [2011], *appeal dismissed* 17 NY3d 824 [2011]; *Matter of Hockley v Westchester County Bd. of Elections*, 66 AD3d 898, 899 [2009], *lv denied* 13 NY3d 710 [2009]; *Matter of Carnahan v Ward*, 44 AD3d 1249, 1250 [2007]), and no defect in the manner of filing has been alleged (*compare Matter of Gentner v Albany County Bd. of Elections*, 309 AD2d 962, 963-964 [2003]). Accordingly, in light of the fact that the certificate of acceptance set forth respondent's name and address, identified the relevant political party, specified the office for which he was accepting the underlying designation and was duly notarized, we discern no valid basis upon which to invalidate respondent's designating petition (*see Matter of Finn v Sherwood*, 87 AD3d at 1045-1046). Petitioner's remaining contentions, to the extent not specifically addressed, have been examined and found to be lacking in merit.

McCarthy, J.P., Garry, Egan Jr., Lynch and Clark, JJ., concur.

3. The State Board was required to certify the offices to be filled at the November 2014 general election at least eight months prior thereto (*see* Election Law § 4-106 [1]), and if any such office is for an unexpired term, to so state (*see* Election Law § 4-106 [3]). Hence, at the time that the State Board filed such certification in March 2014, there indeed were two offices to be filled for Member of the Assembly for the 98th Assembly District. However, once the Governor elected not to call a special election with respect thereto, as acknowledged by the State Board in its June 2014 directive, there was only one "office" to be filled for Member of the Assembly for the 98th Assembly District, "meaning the new upcoming Assembly term, not the vacancy" (*Matter of Barron v Board of Elections in City of N.Y.*, 11 NY3d 745, 747-748 [2008]), which "shall be filled" at the November 2014 general election (Public Officers Law § 42 [4]).

Ordered that the order is reversed, on the law, without costs, petition dismissed and the designating petition at issue herein naming respondent Daniel Castricone as the Conservative Party candidate for the public office of Member of the Assembly for the 98th Assembly District is declared valid.

7 In the Matter of SAM SLOAN, as Candidate for Governor of the State of New York, et al., Appellants, v DOUGLAS A. KELLNER et al., as Commissioners Constituting the New York State Board of Elections, et al., Respondents, et al., Respondent. [991 NYS2d 674]—

Elections—Board of Elections

Per Curiam. Appeal from an order and judgment of the Supreme Court (Ceresia, J.), entered August 15, 2014 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to Election Law § 16-102, to declare valid the designating petition naming petitioners Sam Sloan, Nenad Bach and Geeta Rankoth as Democratic Party candidates for certain statewide public offices in the September 9, 2014 primary election.

Petitioners, Sam Sloan, Nenad Bach and Geeta Rankoth, filed a designating petition nominating them as Democratic Party candidates for the respective public offices of Governor, Lieutenant Governor and Comptroller of the State of New York. The designating petition further nominates a nonparty, Neil V. Grimaldi, as Democratic Party candidate for the public office of Attorney General of the State of New York.* Objections were filed with regard to the candidacy of Rankoth and asserted, among other things, that the petition contained fewer than one third of the 15,000 signatures required for any of the four candidacies (*see* Election Law § 6-136 [1]). The New York State Board of Elections agreed and invalidated the designating petition in its entirety. Petitioners thereafter commenced this proceeding seeking a declaration that the State Board's composition is unconstitutional and an order directing that they be included on the primary ballot. Supreme Court dismissed the petition, and petitioners appeal.

We affirm. As Supreme Court properly found, the present proceeding is jurisdictionally defective due to the "failure to name and serve all those who filed objections to the designating petition" (*Matter of Gadsen v Board of Elections of City of N.Y.*, 57 NY2d 751, 752 [1982]; *see Matter of Biscone v Scaringe*, 59 AD2d 794, 794 [1977], *affd* 42 NY2d 1075 [1977]).

* Grimaldi's application to be added as a petitioner was denied by Supreme Court as untimely.

Assuming without deciding that the above jurisdictional defect only applies to Rankoth—against whose candidacy objections were filed—petitioners also argue that the composition of the State Board does not give equal weight to each voter as required by the Equal Protection Clause of the 14th Amendment to the US Constitution (*see Reynolds v Sims*, 377 US 533, 560-561 [1964]). They are incorrect, as the underlying principle of one vote per person does not apply to an appointive board, especially where it is charged with administrative duties (*see Rosenthal v Board of Ed. of Cent. High Sch. Dist. No. 3 of Town of Hempstead*, 497 F2d 726, 729 [2d Cir 1974]; *see also Hadley v Junior College Dist. of Metropolitan Kansas City*, 397 US 50, 54 [1970]; *Sailors v Board of Ed. of Kent County*, 387 US 105, 111 [1967]; *compare Board of Estimate of City of New York v Morris*, 489 US 688, 694-696 [1989]). The State Board was thus properly constituted, and was free to hold that the designating petition, which lacked the necessary number of signatures to support any of petitioners' candidacies, was facially defective and invalid in its entirety (*see Election Law § 6-154* [1]; *Matter of Hunting v Power*, 54 Misc 2d 120, 122 [1967], *affd* 28 AD2d 826 [1967], *affd* 20 NY2d 680 [1967]).

Petitioners' remaining arguments have been considered and found to lack merit.

McCarthy, J.P., Garry, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the order and judgment is affirmed, without costs.

FOURTH DEPARTMENT, AUGUST, 2014

(August 8, 2014)

1 MARY KALK BIELBY, Appellant, v DANIEL MIDDAGH, Individually and as Sheriff of Oneida County, et al., Respondents. [991 NYS2d 813]—

Judgments—Res Judicata—State Action Not Barred by Prior Federal Action—Federal Court Declined Pendent Jurisdiction over State Law Claims

Judgments—Collateral Estoppel—Litigation of Issue in Prior Federal Action

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered October 26, 2012. The order and judgment granted the motions of defendants to dismiss the amended complaint.

It is hereby ordered that the order and judgment so appealed from is unanimously modified on the law by denying those parts of the motion of defendants Daniel Middaugh, individually and as Sheriff of Oneida County, Peter Paravati, individually and as

Undersheriff of Oneida County Sheriff's Department, County of Oneida, and Patricia Copperwheat, individually and as an employee of the Oneida County Sheriff's Department seeking dismissal of the seventh and eighth causes of action and reinstating those causes of action of the amended complaint against those defendants, and by denying the motion of defendant estate of James English and reinstating the amended complaint with respect to that defendant, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages relative to the termination of her employment with the Oneida County Sheriff's Department (OCSD). Plaintiff worked in an office of the OCSD as a secretary for defendant Peter Paravati, who was the Undersheriff of defendant County of Oneida (County), and her job duties required her to, inter alia, receive bail money delivered to her from the County jail by correction officers, including James English, and to prepare bail monies for deposit into the bail account. Plaintiff was also required to prepare deposit slips for bail monies that she received.

In July 2001, defendant Joseph Lisi, an OCSD lieutenant, conducted an internal investigation into missing bail monies and, following that investigation, plaintiff admitted to falsifying bail account records. Plaintiff, who was by then represented by counsel, subsequently entered into an agreement with the Oneida County District Attorney's office pursuant to which she resigned her position effective July 16, 2001 and paid \$16,827.74 to the County. That payment represented the amount of the shortfall in the County's bail account calculated by defendant Patricia Copperwheat, an OCSD account supervisor. In exchange for her resignation and the payment, plaintiff was allowed to—and ultimately did—plead guilty to one count of official misconduct, a class A misdemeanor (Penal Law § 195.00 [1]). Defendants Daniel Middaugh, the Sheriff of the County, Paravati, the County and Copperwheat (collectively, county defendants) moved for an order dismissing the amended complaint against them pursuant to CPLR 3211 and 3212. Defendant estate of James English also moved for summary judgment dismissing the amended complaint against it pursuant to CPLR 3212, while defendant Lisi made a separate motion seeking an order dismissing the amended complaint against him pursuant to CPLR 3211 and 3212. Supreme Court granted the motions based on, inter alia, its conclusion that the action is barred by the doctrines of res judicata and collateral estoppel because an action that plaintiff had commenced in the United States

District Court against Middaugh, Paravati, English, Lisi and the County was previously determined on the merits against plaintiff. We conclude that those doctrines are inapplicable here, but we affirm parts of the order and judgment on other grounds (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]).

With respect to *res judicata*, i.e., claim preclusion, we note that “ ‘a valid final judgment bars future actions between the same parties on the same cause of action’ (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). ‘As a general rule, “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” ’ (*id.*, quoting *O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Thus, *res judicata* applies ‘. . . to issues which were or could have been raised in the prior [action]’ (*Matter of Eagle Ins. Co. v Facey*, 272 AD2d 399, 400 [2000])” (*Zayatz v Collins*, 48 AD3d 1287, 1289 [2008]; *see Matter of Hunter*, 4 NY3d 260, 269 [2005]). Dismissal of an action by a federal court, however, does not have *res judicata* effect when the federal court declines to exercise its pendent jurisdiction over related state law claims, or otherwise dismisses those claims without prejudice (*see McLearn v Cowen & Co.*, 60 NY2d 686, 688 [1983]; *Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196 [2013]; *cf. Troy v Goord*, 300 AD2d 1086, 1087 [2002]).

Applying those rules here, we conclude that *res judicata* does not bar the state action. The District Court’s decision in the federal action specifically states that the Court was declining supplemental, i.e., pendent, “jurisdiction over plaintiff’s state law claims.” We further conclude that the County’s “transactional analysis approach” to this issue is without merit (*see generally Hunter*, 4 NY3d at 269).

Collateral estoppel, by contrast, precludes a party “from relitigating an issue that has already been decided against that party” (*Zayatz*, 48 AD3d at 1289; *see Tuper v Tuper*, 34 AD3d 1280, 1282 [2006]). “Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling . . . The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party . . . The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a

full and fair opportunity to contest the prior determination” (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002] [citations omitted]).

Applying those rules here, we conclude that plaintiff is collaterally estopped from asserting only that part of the 11th cause of action asserting a claim for constructive discharge against the County. The 11th cause of action has two components, i.e., a claim for constructive discharge, and a claim for wrongful termination. “Constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee’s working conditions so intolerable that the employee is forced into an involuntary resignation” (*Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 621-622 [2006] [internal quotation marks omitted]; see *Thompson v Lamprecht Transp.*, 39 AD3d 846, 848 [2007]) and, inasmuch as the District Court concluded in the federal action that plaintiff had “resigned because of the plea agreement resulting from her official misconduct (falsifying the bail account records),” we conclude that the claim for constructive discharge asserted in the 11th cause of action is barred by collateral estoppel (see generally *Buechel*, 97 NY2d at 303-304). We further conclude that the part of the 11th cause of action asserting a claim for wrongful termination is not barred by collateral estoppel. That claim is premised upon the theory that plaintiff was coerced into resigning, and “[a] resignation under coercion or duress is not a voluntary act and may be nullified” (*Matter of Mangee [Mamorella]*, 239 AD2d 892, 892 [1997]; see *Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451 [1993]). The question whether plaintiff was coerced into resigning was not fully litigated in the federal action, and thus the doctrine of collateral estoppel does not apply to the claim for wrongful termination (cf. *Buechel*, 97 NY2d at 303-304).

We nevertheless affirm parts of the order and judgment on alternative grounds that the court rejected (see *Parochial Bus Sys.*, 60 NY2d at 545-546; *Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130 [2006]). We agree with the county defendants to the extent that they contend that plaintiff’s failure to serve a notice of claim on the County requires dismissal of the tort claims against the County, including the claim for wrongful termination, and the negligence claims against Paravati and Copperwheat (see County Law § 52 [1]; General Municipal Law § 50-e; *Matter of Csaszar v County of Dutchess*, 95 AD3d 1009, 1010 [2012]). We further conclude that the cause of action for intentional infliction of emotional distress should be dismissed as time-barred (see CPLR 215 [3]),

and that plaintiff's constitutional tort claims fail to state a cause of action (see *Martinez v City of Schenectady*, 97 NY2d 78, 83-84 [2001]; cf. Civil Service Law § 75-b). We also dismiss both plaintiff's cause of action for breach of her employment contract on the ground that plaintiff failed to proceed pursuant to her collective bargaining agreement (see *Matter of Board of Educ., Commack Union Free School Dist. v Ambach*, 70 NY2d 501, 508 [1987], cert denied 485 US 1034 [1988]), and plaintiff's cause of action against Middaugh, Paravati, Lisi and Copperwheat for tortious interference with plaintiff's employment contract (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424-425 [1996]; *LaBarte v Seneca Resources Corp.*, 285 AD2d 974, 977 [2001]). Plaintiff failed to state a claim for prima facie tort (see generally *Posner v Lewis*, 18 NY3d 566, 570 n 1 [2012]; *Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1501 [2010]), and we further conclude that plaintiff's negligence causes of action should be dismissed (see *Ciapa v Misso*, 103 AD3d 1157, 1158 [2013]; *Alabisi v Bonda*, 262 AD2d 948, 948 [1999]), and that the punitive damages claim should be dismissed as against all defendants except for the estate of James English (see *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613, 616-617 [1994]; cf. *Englert v Schaffer*, 61 AD3d 1362, 1363 [2009]).

In sum, only plaintiff's seventh and eighth causes of action, which allege that Middaugh, Paravati, and the County breached their agreement with plaintiff not to publish information about plaintiff's official misconduct, and plaintiff's causes of action against the estate of James English remain for trial, and we therefore modify the order and judgment accordingly. Present—Centra, J.P., Fahey, Peradotto, Lindley and Valentino, JJ.

2 STATE BANK OF TEXAS, Respondent, v KANAM, LLC, Defendant, and MILIND K. OZA et al., Appellants. (Appeal No. 1.) [991 NYS2d 818]—

Judgments—Default Judgment—Vacatur—Lack of Jurisdiction to Entertain Summary Judgment Motion—Inadequate Notice of Return Date

Appeal from an order of the Supreme Court, Chautauqua County (John A. Michalek, J.), entered September 25, 2012. The order, among other things, denied the motion of defendants Milind K. Oza and Nayna M. Oza to vacate a prior order and judgment of the court dated June 28, 2012.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following memorandum: In appeal No. 1, the individual defendants (defendants), the

personal guarantors of the note at issue, appeal from an order denying their motion to vacate the order and judgment entered on their default, which granted plaintiff's motion for summary judgment on the complaint and counterclaims, and awarded plaintiff \$501,633.50. In appeal No. 2, defendants appeal from an order that, inter alia, denied their motion for leave to reargue or renew the motion to vacate. We conclude in appeal No. 1 that the court erred in denying the motion to vacate without conducting a traverse hearing to determine whether defendants were properly served with plaintiff's motion for summary judgment. We therefore reverse the order in appeal No. 1 and remit the matter to Supreme Court to decide the motion to vacate following a traverse hearing. In light of our determination in appeal No. 1, we dismiss as moot the appeal from the order in appeal No. 2.

We conclude that defendants established in support of the motion to vacate that there is an issue of fact whether their counsel received adequate notice of the return date for plaintiff's motion for summary judgment, thus raising the possibility that the court did not have "jurisdiction to entertain the motion" (*Financial Servs. Veh. Trust v Law Offs. of Dustin J. Dente*, 86 AD3d 532, 532 [2011]; see *Nowak v Oklahoma League for Blind*, 289 AD2d 995, 995 [2001]; *Hibbard v Shaad*, 99 AD2d 670, 670 [1984]; see generally CPLR 5015 [a] [4]). It is undisputed that plaintiff's counsel failed to enter the return date of June 28, 2012 on the notice of motion mailed with the other motion papers to defendants' counsel on May 30, 2012 (May 30 package) (*cf. Bush v Hayward*, 156 AD2d 899, 900 [1989], *lv denied* 75 NY2d 709 [1990]). It is also undisputed that a subsequent notice of motion mailed as part of a "proof of service packet" was not delivered to defendants' counsel until two days before the return date (see *Bigaj v Gehl*, 154 AD2d 893, 893 [1989]). In opposition to defendants' motion to vacate, plaintiff contended that the May 30 package mailed to defendants' counsel contained a cover letter stating the time, place, and date that the motion for summary judgment would be heard. In an affirmation, defendants' counsel denied that a cover letter was included in the May 30 package and averred that he therefore did not submit papers in opposition or appear in court on the return date. Although plaintiff submitted the affidavits of its counsel's secretary and a mailroom employee to whom the secretary delivered the May 30 package in support of its position that the cover letter was included in the May 30 package, we note that the affidavits were inconsistent with respect to whether the cover letter was included in the contents of the May 30 package and whether the May 30 package was sealed

before the secretary delivered it to the mailroom employee (see generally *Daulat v Helms Bros., Inc.*, 32 AD3d 410, 411 [2006]). In our view, those inconsistencies constitute “convincing supporting circumstances” for the position of defendants’ counsel that the cover letter was not in the May 30 package (*Matter of Futterman v New York State Div. of Hous. & Community Renewal*, 264 AD2d 593, 595 [1999], *lv dismissed* 94 NY2d 846, 847 [1999]). Under all of the circumstances of this case, we conclude that the “affirmation from [defendants’ counsel] that [he] never received [the cover letter] . . . is sufficient” to raise the issue whether defendants’ counsel received adequate notice in the May 30 package of the return date for plaintiff’s motion for summary judgment (*Adames v New York City Tr. Auth.*, 126 AD2d 462, 462 [1987]; see *Matter of Harrell v Fischer*, 114 AD3d 1092, 1092-1093 [2014]; *Daulat*, 32 AD3d at 411; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 344 [2003]; see generally *Matter of Bart-Rich Enters., Inc. v Boyce-Canandaigua, Inc.*, 8 AD3d 1119, 1120 [2004]). Present—Scudder, P.J., Fahey, Lindley, Valentino and Whalen, JJ.

3 STATE BANK OF TEXAS, Respondent, v KANAM, LLC, Defendant, and MILIND K. OZA et al., Appellants. (Appeal No. 2.) [990 NYS2d 426]—Appeal from an order of the Supreme Court, Chautauqua County (John A. Michalek, J.), entered September 25, 2012. The order denied the motion of defendants Milind K. Oza and Nayna M. Oza seeking, *inter alia*, leave to renew.

It is hereby ordered that said appeal is unanimously dismissed without costs.

Same memorandum as in *State Bank of Texas v KANAM, LLC* ([appeal No. 1] 120 AD3d 900 [2014]). Present—Scudder, P.J., Fahey, Lindley, Valentino and Whalen, JJ.

4 DAVID KRAJNICK, Respondent, v FORBES HOMES, INC., Doing Business as FORBES CAPRETTO, Respondent, and BURCHVILLE CONSTRUCTION, INC., Appellant. [991 NYS2d 196]—

Labor—Safe Place to Work—Statutory Agent—Lack of Authority or Control
Labor—Safe Place to Work—Common-Law Negligence—Installation of Makeshift Ladder

Indemnity—Contractual Indemnification—Scope of Indemnification Provision

Indemnity—When Claim for Indemnification Available—Common-Law Indemnification

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glowonia, J.), entered February 27, 2013. The order, among other things, denied the motion of defendant Burchville Construction, Inc., for summary judgment, granted the cross motion of plaintiff for partial summary judgment on liability

pursuant to Labor Law § 240 (1) and granted the motion of defendant Forbes Homes, Inc., doing business as Forbes Capretto, for conditional indemnification and contribution against Burchville Construction, Inc.

It is hereby ordered that the order so appealed from is unanimously modified on the law by denying that part of plaintiff's cross motion against defendant Burchville Construction, Inc., granting in part the motion of defendant Burchville Construction, Inc. and dismissing the Labor Law cause of action against it, and denying that part of the motion of defendant Forbes Homes, Inc., doing business as Forbes Capretto, for summary judgment on its cross claim for indemnification and contribution against defendant Burchville Construction, Inc. and as modified the order is affirmed without costs in accordance with the following memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working at premises owned by defendant Forbes Homes, Inc., doing business as Forbes Capretto (Forbes). Defendant Burchville Construction, Inc. (Burchville) contracted with Forbes to perform the framing work on a new home construction project undertaken by Forbes at the premises as general contractor. When the construction of the home was in the final stages, plaintiff's employer, the supplier of the window units in the home, sent him to the work site to conduct a final operational inspection of all the windows. While in the attic checking a window installed on a vertical wall, plaintiff attempted to reach the window by using a makeshift ladder already in place and consisting of two boards, each two inches by four inches, nailed across the vertical framing members under the window. Plaintiff fell between the attic floor joists to the floor of the foyer below and sustained injuries.

Insofar as relevant to this appeal, Burchville moved for summary judgment dismissing the complaint and all cross claims against it, and plaintiff cross-moved for, inter alia, partial summary judgment on liability on the Labor Law § 240 (1) claim against Burchville. In addition, Forbes moved, inter alia, for summary judgment on its cross claim for conditional contractual and common-law indemnification or contribution against Burchville. Supreme Court, also as relevant on appeal, denied Burchville's motion, granted that part of plaintiff's cross motion with respect to Burchville, and granted that part of Forbes' motion with respect to Burchville.

We agree with Burchville that the court erred in granting that part of plaintiff's cross motion with respect to Burchville and in denying that part of its motion with respect to the Labor

Law cause of action against it. We therefore modify the order accordingly. By the express terms of Labor Law §§ 240 (1) and 241 (6), the nondelegable duties imposed by those statutes apply only to “contractors and owners and their agents.” Labor Law § 200 is a codification of “landowners’ and general contractors’ common-law duty to maintain a safe workplace” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). Here, in the absence of any evidence that Burchville exercised any authority or control over the work site or the injury-producing work, we conclude that Burchville was not a statutory agent of either an owner or general contractor (*see Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427-1428 [2011]).

We conclude, however, that the court properly denied that part of Burchville’s motion with respect to the common-law negligence cause of action. Even assuming, *arguendo*, that Burchville met its initial burden with respect to that cause of action, we conclude that plaintiff raised an issue of fact whether Burchville’s employees negligently installed the makeshift ladder. An award of summary judgment in favor of a subcontractor dismissing a negligence cause of action is improper where, as here, there is a triable issue of fact whether the subcontractor created an unreasonable risk of harm that was a proximate cause of the plaintiff’s injuries (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 523 [2010], *lv dismissed* 16 NY3d 794 [2011]). Thus, the court properly denied that part of Burchville’s motion (*see Severino v Hohl Indus. Servs.*, 300 AD2d 1049, 1049 [2002]; *see also Poracki v St. Mary’s R.C. Church*, 82 AD3d 1192, 1195-1196 [2011]).

We further conclude that the court erred in granting that part of Forbes’ motion seeking summary judgment on its cross claim for contractual and common-law indemnification or contribution against Burchville, and we therefore further modify the order accordingly. Contrary to Burchville’s contention, however, the court properly denied that part of its motion for summary judgment dismissing that cross claim against it. With respect to contractual indemnification, we note that the contract required Burchville to indemnify Forbes only if Burchville was negligent and, contrary to Burchville’s contention, there are triable issues of fact with respect thereto (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188 [2008]). With respect to common-law indemnification and/or contribution, we conclude that, although Burchville established as a matter of law that it did not supervise or direct the injury-producing work (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]), there are issues of fact whether Burchville was the party

responsible for the allegedly negligent placement of the makeshift ladder. We thus conclude that summary judgment was not appropriate with respect to common-law indemnification or contribution (*see Carro v Lyons Falls Pulp & Paper, Inc.*, 56 AD3d 1276, 1277-1278 [2008]). Present—Scudder, P.J., Centra, Carni, Lindley and DeJoseph, JJ.

5 DiPIZIO CONSTRUCTION COMPANY, INC., Respondent, v ERIE CANAL HARBOR DEVELOPMENT CORPORATION, Appellant. (Appeal No. 1.) [991 NYS2d 683]—

Contracts—Construction—Construction Agreement—Disposal of Nonhazardous Contaminated Soil

Contracts—Construction—Construction Agreement—Granite Substitution

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 1, 2013. The order granted the motion of plaintiff-petitioner for partial summary judgment and denied the cross motion of defendant-respondent for partial summary judgment.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, plaintiff-petitioner's motion is denied, defendant-respondent's cross motion is granted and the fourth and sixth causes of action are dismissed.

Memorandum: Plaintiff-petitioner, DiPizio Construction Company, Inc. (DiPizio), and defendant-respondent, Erie Canal Harbor Development Corporation (Erie), entered into a construction agreement (Contract) pursuant to which DiPizio was to provide construction services for a certain revitalization project. DiPizio thereafter commenced this hybrid breach of contract action and CPLR article 78 proceeding contending, inter alia, that Erie had breached the Contract and the New York State Finance Law. DiPizio thereafter moved for partial summary judgment on liability on the fourth and sixth causes of action, and Erie cross-moved for partial summary judgment dismissing those causes of action. Supreme Court granted DiPizio's motion and denied Erie's cross motion. We now reverse.

In the fourth cause of action, DiPizio contended that Erie breached the Contract when it refused to accept DiPizio's material handling plan (MHP), which sought to dispose of nonhazardous contaminated soil at a facility approved by the New York State Department of Environmental Conservation (DEC) rather than a sanitary or industrial landfill. In the sixth cause of action, DiPizio contended that Erie breached the Contract when it refused to approve DiPizio's proposal to substitute Chester Gray granite for Virginia Mist granite.

Resolution of this appeal depends on the principles of contract interpretation. “It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, ‘[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible’ ” (*New York State Thruway Auth. v KTA-Tator Eng’g Servs., P.C.*, 78 AD3d 1566, 1567 [2010]; see *RLI Ins. Co. v Smiedala*, 96 AD3d 1409, 1411 [2012]). Therefore, “[e]ffect and meaning must be given to every term of the contract . . . , and reasonable effort must be made to harmonize all of its terms” (*Village of Hamburg v American Ref-Fuel Co. of Niagara*, 284 AD2d 85, 89 [2001], *lv denied* 97 NY2d 603 [2001]; see *Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799 [2010]). It is likewise well settled that “[t]he interpretation of an unambiguous contractual provision is a function for the court . . . , and [t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation . . . To be entitled to summary judgment, the moving party has the burden of establishing that its construction of the [contract] is the only construction [that] can fairly be placed thereon” (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [2009] [internal quotation marks omitted]).

We conclude that DiPizio failed to meet its burden on the motion and that Erie met its burden on the cross motion by establishing that its construction of the Contract is the only construction that can fairly be made. The “Contract Documents” included, inter alia, the Contract, the project manuals and addenda, the information to bidders and the special conditions. The provisions concerning the MHP are found in Project Manual Section 312003 Part 3.1, which deals with the identifying information that was to be included in the MHP. Pursuant to Part 3.1(A) (7), the information contained in the MHP was to include identification of the primary and backup facilities for disposal of nonhazardous contaminated soil. That provision of the Contract states that “[t]he primary and backup facilities may be a recycling/treatment facility or a [DEC] approved lined landfill or *other facility approved by [DEC] to accept this material*” (emphasis added). Part 3.2 specifies the manner in which contaminated soil stockpiles and excavated materials are to be removed from the site. Part 3.2 (E) provides that “[a]t a minimum, if soil testing indicates the excavation material is not hazardous, based on the known contaminants present[,] these wastes *must* be disposed of at a sanitary or industrial landfill permitted to receive such wastes” (emphasis added).

DiPizio sought to dispose of the nonhazardous contaminated

soil at a DEC approved facility that was *not* a sanitary or industrial landfill. DiPizio contended that, inasmuch as Part 3.1(A) (7) permits the use of such a facility, Erie's refusal to approve of that disposal plan constitutes a breach of the Contract. The Contract, however, also incorporated the terms of all of the information sent to bidders, including responses to requests for information (RFIs) that were sent to bidders before DiPizio executed the Contract. In one such response, Erie's project manager specifically stated that "[f]or excess material requiring removal from site[,] . . . 'these wastes *must* be disposed of at a sanitary or industrial landfill permitted to receive such wastes' " (emphasis added). Moreover, in response to two different RFIs made by DiPizio before DiPizio executed the Contract, Erie's project manager clearly and unambiguously stated that any plan to use DEC approved facilities in lieu of landfills was in violation of Section 312003 Part 3.2 (E) and was "not consistent with the project requirements."

To the extent that DiPizio and the court relied upon an internal letter between Erie's project manager and Erie recognizing that the reason for DiPizio's low bid was its desire to seek an acceptable DEC alternative to the landfill, we conclude that the document was not part of the Contract Documents and is thus extrinsic evidence that we may not consider where, as here, the Contract is not ambiguous (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]). It is well settled that " 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face' " (*id.*).

Although Section 312003 Part 3.1(A) (7) at first glance seems to permit use of a DEC approved facility in lieu of a landfill, upon closer inspection it is clear that the section concerns only the identification information that must be included in the MHP. The section concerning the actual disposal of nonhazardous contaminated soil and the responses to the RFIs, as incorporated into the Contract, contain specific mandatory provisions requiring that such material be disposed of at a sanitary or industrial landfill. " '[W]here two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect' " (*Burgdorf v Kasper*, 83 AD3d 1553, 1555 [2011]). Moreover, "it is a well-established principle of contract interpretation that specific provisions concerning an issue are controlling over general provisions" (*Huen N.Y., Inc. v Board of Educ. Clinton Cent. School Dist.*, 67 AD3d 1337, 1338 [2009]; *see generally Muzak Corp. v Hotel Taft Corp.*, 1 NY2d

42, 46 [1956]). Relying on those fundamental rules of contract interpretation, we conclude that the Contract clearly and unambiguously requires nonhazardous contaminated soil to be disposed of at a sanitary or industrial landfill.

Inasmuch as Erie “establish[ed] that its construction of the [Contract] is the only construction [that] can fairly be placed thereon” (*Nancy Rose Stormer, P.C.*, 66 AD3d at 1450 [internal quotation marks omitted]), Erie is entitled to partial summary judgment dismissing the fourth cause of action.

With respect to the sixth cause of action, concerning DiPizio’s attempt to substitute Chester Gray granite for Virginia Mist granite, we again conclude that DiPizio failed to meet its burden on the motion and that Erie, in support of its cross motion, established its entitlement to partial summary judgment dismissing that cause of action. Project Manual Section 044310 Part 2.2 discusses the Contract requirements for granite. Part 2.2(A) states that the material must comply with “ASTM C 615,” and Part 2.2 (B) lists the material specifications to which all granite must conform. Part 2.2 (D), however, provides that “Type A Granite *shall be* Virginia Mist granite . . . *or approved equal* . . . [and] Type B Granite shall be Cambrian Black granite . . . *or approved equal*” (emphasis added). Project Manual Section 016000 Part 2.1(A) (6) further provides that, “[f]or products specified by name and accompanied by the term . . . ‘or approved equal,’ ” the proposed substitute product must comply with the “‘Comparable Products’ Article to obtain approval for use.” A Comparable Product is defined in Section 016000 Part 1.3(A) (3) as a “[p]roduct that is demonstrated and approved through submittal process to have the indicated qualities related to type, function, dimension, in-service performance, *physical properties*, appearance, and other characteristics that equal or exceed those of [the] specified product” (emphasis added). Section 8 (D) of the Special Conditions, which are part of the Contract Documents, clearly states that “[t]he Architect’s/Engineer’s decision on substitutions and/or equivalencies shall be final and is not subject to dispute by” DiPizio.

DiPizio contends that the “approved equal” requirement in Section 044310 Part 2.2 (D) applies only to approval of the aesthetic properties of the granite because, otherwise, the material specification requirements of Part 2.2(A) and (B) would be rendered superfluous. Erie contends that the material requirements of Section 044310 Part 2.2(A) and (B) are merely the minimum requirements for any granite to be used on the Project and apply to both Type A and Type B granite. According to Erie, Part 2.2(A) and (B) are not rendered superfluous by the

“approved equal” requirements of Part 2.2 (D) inasmuch as the material specification requirements of Part 2.2 (A) and (B) apply to other types of granite used on the site. Erie thus contends that the “approved equal” requirements for Type A granite apply to all of the qualities of the named granite, including the physical properties.

There is no dispute that Chester Gray granite complies with the material requirements outlined in Part 2.2 (A) and (B) and that the architect ultimately approved the aesthetic properties of the Chester Gray granite. There is also no dispute that Erie’s architect determined that the physical properties of Chester Gray granite were inferior to that of Virginia Mist granite and rejected the substitution on that ground.

In our view, the Contract clearly and unambiguously requires that the proposed substitute for Virginia Mist granite must have the indicated qualities related to, inter alia, physical properties “that equal or exceed those of” Virginia Mist granite. Erie established that the physical properties of Chester Gray granite did not equal or exceed those of Virginia Mist granite and, therefore, Erie had the discretion to deny approval of the proposed substitution. Inasmuch as the decision of Erie’s architect with respect to substitutions is final, we conclude that Erie is entitled to partial summary judgment dismissing that cause of action. Present—Scudder, P.J., Centra, Carni and Lindley, JJ.

6 DiPIZIO CONSTRUCTION COMPANY, INC., Respondent, v ERIE CANAL HARBOR DEVELOPMENT CORPORATION, Appellant. (Appeal No. 2.) [991 NYS2d 199]—

Motions and Orders—Reargument or Renewal—New Evidence—Evidence Not Unavailable at Time of Original Motion

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 1, 2013. The order granted the motion of plaintiff-petitioner seeking leave to renew and, upon renewal, directed that defendant-respondent shall not compromise or take any action that would effectively compromise plaintiff-petitioner’s claims against it.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs and the motion is denied.

Memorandum: Supreme Court erred in granting the motion of plaintiff-petitioner (plaintiff) seeking leave to renew its prior motion to enjoin defendant-respondent (defendant) from terminating the construction agreement (Contract) between the parties (*see DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev.*

Corp. [appeal No. 1], 120 AD3d 905 [Aug. 8, 2014]), and, upon renewal, granting plaintiff the injunctive relief sought. It is well established that a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination,” and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221 [e] [2], [3]; see *Luppino v Mosey*, 103 AD3d 1117, 1118 [2013]). Plaintiff, as the movant, “bore the burden of proving that the new evidence [it] sought to present could not have been discovered earlier with due diligence and would have led to a different result” (*Matter of Lamar Cent. Outdoor, LLC v State of New York*, 64 AD3d 944, 951 [2009]). We conclude that plaintiff failed to meet its burden.

In denying plaintiff’s initial motion for an injunction, the court concluded that plaintiff would not suffer irreparable harm inasmuch as plaintiff had an adequate remedy at law, i.e., monetary damages against defendant. In seeking leave to renew, plaintiff contended that, following the denial of the initial motion, defendant terminated the Contract with plaintiff and thereafter pursued settlement negotiations with plaintiff’s surety, Travelers Insurance Company (Travelers), while excluding plaintiff from the negotiations. Plaintiff thus contended that such new evidence established that plaintiff would be unable to secure money damages against defendant and would have led to a different result on the initial motion for injunctive relief.

It is undisputed that, before the initial motion, Travelers began sending representatives to meetings in an effort to negotiate a settlement between the parties. It is also undisputed that Travelers had entered into a surety agreement with plaintiff long before the initial motion was heard. We therefore conclude that the ongoing negotiations and Traveler’s involvement in the process were “within the purview of plaintiff’s knowledge at the time” of plaintiff’s original motion (*Tibbits v Verizon N.Y., Inc.*, 40 AD3d 1300, 1303 [2007]; see *Kirby v Suburban Elec. Engrs. Contrs., Inc.*, 83 AD3d 1380, 1381 [2011], *lv dismissed* 17 NY3d 783 [2011]). To the extent that plaintiff now contends that its exclusion from the negotiations constitutes new evidence that would change the result, we reject that contention. Plaintiff failed to submit any evidence, such as the surety agreement, to support its contention that the ongoing negotiations between defendant and Travelers constitutes new evidence that will impact plaintiff’s ability to secure its remedy against defendant. If in fact that surety agreement, had it been submitted, would have supported plaintiff’s contention that plaintiff had lost the ability to secure an adequate remedy at law, we conclude that

plaintiff failed to demonstrate that the evidence “was not in existence or not available at the time of [the original motion]” (*Kirby*, 83 AD3d at 1381). Thus, plaintiff could have submitted that surety agreement in support of the original motion. “Although a court has discretion to ‘grant renewal, in the interest of justice, upon facts [that] were known to the movant[] at the time the original motion was made’ . . . , it may not exercise that discretion unless the movant[] establish[es] a ‘reasonable justification for the failure to present such facts on the prior motion’ ” (*id.*, quoting CPLR 2221 [e] [3]). Plaintiff provided no such justification.

Based on our determination, we do not address defendant’s remaining contentions. Present—Scudder, P.J., Centra, Carni and Lindley, JJ.

7 DiPIZIO CONSTRUCTION COMPANY, INC., Respondent, v ERIE CANAL HARBOR DEVELOPMENT CORPORATION, Appellant. (Appeal No. 3.) [990 NYS2d 426]—Appeal from an amended order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 4, 2013. The amended order granted the motion of plaintiff-petitioner for partial summary judgment and denied the cross motion of defendant-respondent for partial summary judgment.

It is hereby ordered that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779 [1978]). Present—Scudder, P.J., Centra, Carni and Lindley, JJ.

8 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MUSTAFA BURRELL, Appellant. [990 NYS2d 427]—

Crimes—Assault—Physical Injury—Weight of Evidence

Crimes—Right to be Present at Trial—Presence at *Ventimiglia* Hearing

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered March 21, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

It is hereby ordered that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the evidence is legally insufficient to establish that the victim sustained a physical injury. As defendant correctly concedes, he failed to preserve that contention for our review inasmuch as he failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19

[1995]). In any event, defendant's contention is without merit. Viewing the evidence in the light most favorable to the People (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that the victim sustained a physical injury within the meaning of Penal Law § 10.00 (9) (see *People v Terrero*, 31 AD3d 672, 673 [2006], *lv denied* 7 NY3d 852 [2006]; *People v Mack*, 268 AD2d 599, 600 [2000]). Defendant cut the victim's neck with a knife, causing bleeding and requiring stitches (see *Terrero*, 31 AD3d at 673; *People v Amin*, 294 AD2d 863, 863 [2002], *lv denied* 98 NY2d 672 [2002]; *Mack*, 268 AD2d at 600). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that he is entitled to a new trial because County Court failed to give limiting instructions with respect to *Molineux* evidence establishing that he had been involved in a prior altercation with the victim. As defendant correctly concedes, that contention is "unpreserved for our review because his attorney did not request a limiting instruction and failed to object to the court's failure to provide one" (*People v Williams*, 107 AD3d 1516, 1516 [2013], *lv denied* 21 NY3d 1047 [2013]; see CPL 470.05 [2]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

Defendant likewise failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during summation inasmuch as he failed to object to any of the challenged comments (see *People v Ward*, 107 AD3d 1605, 1606 [2013], *lv denied* 21 NY3d 1078 [2013]). In any event, we conclude that "[a]ny 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial'" (*People v Johnson*, 303 AD2d 967, 968 [2003], *lv denied* 100 NY2d 583 [2003]).

We agree with defendant, however, that it is unclear from the record whether he was present for a portion of the *Ventimiglia* hearing conducted in chambers, and thus we are unable to determine whether defendant's right to be present at a material stage of the trial was violated (see generally *People v Russo*, 283 AD2d 910, 910 [2001], *lv dismissed* 96 NY2d 867 [2001]). We therefore hold the case, reserve decision and remit the matter to County Court for a reconstruction hearing on the issue whether defendant was present at that portion of the *Venti-*

miglia hearing (*see id.* at 910-911). Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

9 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ZORAIDA Y. FIGUEROA-NORSE, Appellant. [991 NYS2d 201]—

**Crimes—Confession—Noncustodial Statements—Police Interview at Hospital
Crimes—Confession—Voluntariness—Length of Questioning and Promises
Made by Police**

Crimes—Assault—Sufficiency and Weight of Evidence

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered January 17, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of assault in the second degree (Penal Law § 120.05 [8]) and endangering the welfare of a child (§ 260.10 [1]) based on life-threatening injuries she caused to her then eight-year-old foster child. The victim sustained a head injury that rendered her unconscious and required surgery to relieve pressure on her brain. She was in a coma for approximately one month and, at the time of trial, suffered paralysis on the left side of her body as a result of the injury. In addition, the victim sustained an injury to her abdomen that resulted in perforation of her digestive system and also required surgery. Due to the nature of her head injury, the victim could not recall how she was injured. Defendant was arrested after her brother informed the police that she had assaulted the child at his home.

Defendant contends that County Court erred in refusing to suppress statements she made to the deputy sheriff who questioned her at the hospital where the victim was taken. According to defendant, her statements were involuntary because they were not preceded by *Miranda* warnings. We reject that contention. “In determining whether a defendant was in custody for *Miranda* purposes, ‘[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant’s position’ ” (*People v Kelley*, 91 AD3d 1318, 1318 [2012], *lv denied* 19 NY3d 963 [2012], quoting *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Here, defendant was not restrained in any way, nor was she told that she had to answer the deputy sheriff’s questions. Although defendant was with the deputy sheriff at the hospital for approximately

10 hours, the questioning was not continuous, and defendant was given multiple breaks to use the bathroom and obtain beverages. Defendant declined an offer of food and had contact by cell phone with her brother and mother. At one point, defendant left the hospital on her own to retrieve items from her vehicle, and then returned to the hospital for further questioning. Moreover, the record of the *Huntley* hearing establishes that the questioning was investigatory rather than accusatory in nature (see *People v Smielecki*, 77 AD3d 1420, 1421 [2010], *lv denied* 15 NY3d 956 [2010]; *People v Murphy*, 43 AD3d 1276, 1277 [2007], *lv denied* 9 NY3d 1008 [2007]). Finally, defendant did not make any admissions and was allowed to go home after the interview was completed. Under the circumstances, we conclude that “a reasonable person in defendant’s position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required” during the interview (*People v Lunderman*, 19 AD3d 1067, 1068 [2005], *lv denied* 5 NY3d 830 [2005]; see *People v Jones*, 110 AD3d 1484, 1485 [2013], *lv denied* 22 NY3d 1157 [2014]; *People v Zuke*, 87 AD3d 1290, 1291 [2011], *lv denied* 18 NY3d 887 [2012]).

We likewise reject defendant’s contention that the statements were involuntary within the meaning of CPL 60.45 (2) because her will was overborne by the length of the questioning and promises made to her by the deputy sheriff. Defendant was not coerced by the use or threatened use of physical force, and, even assuming, arguendo, that the deputy sheriff promised defendant that she could talk to the victim’s surgeon if she cooperated with the police, as defendant testified at the *Huntley* hearing, we conclude that such promise did not create “a substantial risk that the defendant might falsely incriminate [herself]” (CPL 60.45 [2] [b] [i]). Indeed, as noted, defendant did not incriminate herself during the interview, and she was not arrested until five days later.

Defendant contends that she was deprived of her right to a proper jury because a prospective juror did not serve on the jury despite not having been struck or challenged. Because defendant did not object to the failure of that prospective juror to be seated on the jury, however, she failed to preserve that contention for our review (see *People v Hayes*, 71 AD3d 1477 [2010], *lv denied* 15 NY3d 751 [2010]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We note in any event that we perceive no prejudice to defendant arising from the failure of the prospective juror to be seated. As the Court of Ap-

peals explained in a different context, “[e]ven if a juror is wrongly but not arbitrarily excused, the worst the court will have done in most cases is to have replaced one impartial juror with another impartial juror” (*People v Culhane*, 33 NY2d 90, 108 n 3 [1973]; see *People v Arnold*, 96 NY2d 358, 362 [2001]).

Defendant also failed to preserve for our review her contention that the court should have removed a seated juror who the court noticed had “nodded off” during the preliminary instructions and opening statements (see CPL 470.05 [2]). The court learned from the juror during a discussion at the bench that she was tired due to her diabetes medication, and the court decided to adjourn the trial until the next morning to allow the juror to get a good night’s sleep. Although present for the discussion at the bench with the juror, defense counsel did not object to the court’s course of action or request that the juror be removed as “grossly unqualified” (CPL 270.35 [1]). We note that there is no indication in the record that the juror missed any of the evidence presented at trial, and we decline to exercise our power to review defendant’s contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject defendant’s contention that the evidence is legally insufficient to support the conviction. Viewing the evidence in the light most favorable to the People, as we must (see *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that “ ‘there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime[s] proved beyond a reasonable doubt’ ” (*People v Danielson*, 9 NY3d 342, 349 [2007]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant’s brother testified that he observed defendant strike the victim in the face between five and seven times on the day in question. According to defendant’s brother, the victim then ran from the house bleeding from the nose and mouth, and defendant later carried the victim back inside and placed her in the basement as a form of “timeout.” When defendant’s brother checked on the victim approximately 20 minutes later, the victim was unconscious. Contrary to defendant’s contention, her brother’s testimony was not “incredible as a matter of law,” i.e., “ ‘unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory’ ” (*People v Bush*, 107 AD3d 1581, 1582 [2013], *lv denied* 22 NY3d 954 [2013]; see *People v Harris*, 56 AD3d 1267, 1268 [2008], *lv denied* 11 NY3d 925 [2009]). We note in addition that defendant admitted at trial that she lied to the deputy sheriff when she said that the victim had fallen out of her arms and landed on the driveway, and that she told the

same lie to several other people, including the victim's paternal grandfather, the victim's psychologist, and a social worker whom defendant phoned while driving the victim to the hospital. Defendant also admittedly lied when she told numerous people that the victim consumed some type of rancid liquid and had been vomiting all day.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally id.*). The jury was entitled to credit the testimony of defendant's brother over that of defendant, and we afford great deference to the jury's credibility determinations. "[T]hose who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890 [2006]; *see People v Roberts*, 111 AD3d 1308, 1309 [2013], *lv denied* 23 NY3d 967 [2014]; *People v Allen*, 93 AD3d 1144, 1147 [2012], *lv denied* 19 NY3d 956 [2012]).

Even assuming, arguendo, that we agree with defendant that the court erred in denying her request to admit in evidence a statement given to the police by a neighbor of defendant's brother who had died prior to trial (*see generally People v Robinson*, 89 NY2d 648, 652-653 [1997]), we conclude that such error is harmless. The proof of guilt is overwhelming, and there is no reasonable possibility that defendant would have been acquitted if the statement had been admitted (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]).

We have reviewed defendant's remaining contentions and conclude that they lack merit. Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

10 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RODNEY T. MOBLEY, Appellant. [991 NYS2d 193]—

Crimes—Unlawful Search and Seizure—Recovery of Handgun from Defendant's Person—Lack of Reasonable Suspicion Justifying Pat Frisk

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 12, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those

parts of the motion seeking to suppress tangible property and statements are granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Monroe County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with defendant that Supreme Court erred in denying his motion to suppress tangible property, i.e., a handgun, and his subsequent oral statements to the police because the police lacked reasonable suspicion to justify a search of his person.

On September 5, 2008, City of Rochester (City) police officers and New York State Troopers were patrolling allegedly high crime areas of the City. At approximately 7:30 p.m., a city police officer (the observing officer) was in an unmarked vehicle parked at the corner of North and Helena Streets. He observed defendant approximately 30 to 35 feet away, standing with a group of five or six men at the corner of North and Grace Streets, and he saw defendant use his right hand to “cup” a weighted object in his right pants pocket as he readjusted his clothing. The observing officer radioed another officer in a marked New York State police vehicle (the uniformed officer) that “a kid” on the corner “had made movements towards his right side,” and requested that the uniformed officer “step out with” defendant. When the marked police vehicle approached defendant on North Street, defendant quickly turned away and walked down Grace Street. The observing officer then drove the unmarked vehicle past defendant, and the observing officer’s partner exited the vehicle, identified himself as a police officer and ordered defendant to stop and “show his hands.” At that point, the marked vehicle approached on Grace Street and the uniformed officer observed an object in defendant’s left hand. After the uniformed officer exited the marked vehicle, he observed defendant place the object into his left rear pants pocket. The uniformed officer seized defendant’s hands, patted his left rear pants pocket, felt a hard object, reached into that pocket and removed a cell phone. He then patted defendant’s right front pocket and felt the outline of a gun.

A police officer may stop a person to search for weapons where the officer “reasonably suspects that such person is committing, has committed or is about to commit” a crime (CPL 140.50 [1]), and the officer “reasonably suspects that he [or she] is in danger of physical injury” (CPL 140.50 [3]). “A stop based on reasonable suspicion will be upheld so long as the intruding officer can point to ‘specific and articulable facts which, along with any

logical deductions, reasonably prompted th[e] intrusion’ ” (*People v Brannon*, 16 NY3d 596, 602 [2011]). In contrast, however, “actions that are ‘at all times innocuous and readily susceptible of an innocent interpretation . . . may not generate a founded suspicion of criminality’ ” (*People v Riddick*, 70 AD3d 1421, 1422 [2010], *lv denied* 14 NY3d 844 [2010]; see *People v De Bour*, 40 NY2d 210, 216 [1976]). If the intruding officer lacks personal knowledge sufficient to establish reasonable suspicion, information that the intruding officer received “as a result of communication with” a fellow officer is presumed reliable (*People v Ketcham*, 93 NY2d 416, 419 [1999] [internal quotation marks omitted]; see *People v Ramirez-Portoreal*, 88 NY2d 99, 113 [1996]). Nevertheless, a radio call from a fellow officer that defendant had made movements towards his right side “absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant had committed or was about to commit a crime” (*People v Ingram*, 114 AD3d 1290, 1293 [2014] [internal quotation marks omitted]; see *People v Cady*, 103 AD3d 1155, 1156 [2013]; *Riddick*, 70 AD3d at 1422-1423). “The mere fact that defendant was located in an alleged high crime area does not supply that requisite reasonable suspicion, in the absence of ‘other objective indicia of criminality’ ” (*Riddick*, 70 AD3d at 1423; see *People v Powell*, 246 AD2d 366, 369 [1998], *appeal dismissed* 92 NY2d 886 [1998]). Moreover, flight from an approaching police vehicle does not provide the requisite reasonable suspicion absent “specific circumstances indicating that the suspect may be engaged in criminal activity” (*People v Sierra*, 83 NY2d 928, 929 [1994]; see *Riddick*, 70 AD3d at 1422).

In addition, we note that there was no evidence that the officer “reasonably suspect[ed] that he [was] in danger of physical injury” (CPL 140.50 [3]; see *Powell*, 246 AD2d at 369-370). We conclude that defendant’s act of emptying the contents of his left hand, i.e., a cell phone, into his pocket in responding to a police command to “show his hands” was an innocuous act (see *Powell*, 246 AD2d at 369). The intruding officer—here, the uniformed officer—did not observe, nor was he aware of, any threatening gestures or weapons (see *id.*; cf. *People v Sims*, 106 AD3d 1473, 1474 [2013], *appeal dismissed* 22 NY3d 992 [2013]). Because the officer lacked reasonable suspicion that defendant was committing a crime and had no reasonable basis to suspect that he was in danger of physical injury, we further conclude that the ensuing pat frisk of defendant was unlawful (see CPL 140.50 [1], [3]; *Riddick*, 70 AD3d at 1424; *Powell*, 246 AD2d at 369-370).

Inasmuch as the pat frisk was unlawful, “the handgun seized by the police should have been suppressed . . . , and the statements made by defendant to the police following the unlawful seizure also should have been suppressed as fruit of the poisonous tree” (*Riddick*, 70 AD3d at 1424). As a result, defendant’s guilty plea must be vacated and, because our determination results in the suppression of all evidence of the charged crime, the indictment must be dismissed (*see id.*; *People v Stock*, 57 AD3d 1424, 1425 [2008]). We therefore remit the matter to Supreme Court for proceedings pursuant to CPL 470.45. Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

11 In the Matter of the Estate of JOHN WAGNER, Deceased. CANANDAIGUA NATIONAL BANK AND TRUST COMPANY et al., Respondents; COLIN DESROSIERS et al., Appellants. (Appeal No. 1.) [990 NYS2d 434]—Appeal from an order of the Surrogate’s Court, Monroe County (Edmund A. Calvaruso, S.), entered July 18, 2013. The order, among other things, terminated a testamentary trust.

It is hereby ordered that said appeal is unanimously dismissed.

Same memorandum as in *Matter of Wagner* ([appeal No. 2] 120 AD3d 919 [2014]). Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

12 In the Matter of the Estate of JOHN WAGNER, Deceased. CANANDAIGUA NATIONAL BANK AND TRUST COMPANY et al., Respondents; COLIN DESROSIERS et al., Appellants. (Appeal No. 2.) [991 NYS2d 235]—

Trusts—Testamentary Trusts—Termination of Trust as Uneconomical—Distribution of Trust Assets

Appeal from a decree of the Surrogate’s Court, Monroe County (Edmund A. Calvaruso, S.), entered September 3, 2013. The decree granted the petition to terminate a testamentary trust and ordered that the remaining balance of the trust be delivered to Sally Baumann.

It is hereby ordered that the decree so appealed from is modified on the law by vacating the third decretal paragraph and as modified the decree is affirmed without costs, and the matter is remitted to Surrogate’s Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner and trustee Canandaigua National Bank and Trust Company (CNB) commenced this proceeding in Surrogate’s Court to terminate the testamentary trust of decedent John Wagner pursuant to EPTL 7-1.19 as uneconomical. Decedent’s grandchildren, i.e., the objectants-appellants herein (hereafter,

grandchildren), moved for summary judgment seeking the principal of the trust, and Sally Baumann cross-moved for the same relief. Article v (B) of decedent's will established a trust for Baumann's benefit during her lifetime, permitting Baumann to live in decedent's residence and to receive the net income from the trust, and authorizing CNB, in its discretion, to use the principal for capital improvements to the residence. Decedent granted Baumann no right to the trust principal, but provided that, upon Baumann's death, the remaining trust principal, i.e., the property funding the trust, would be distributed to decedent's grandchildren, per stirpes.

Article VII (E) of decedent's will provided that, if "any trust" were terminated as uneconomical, the trust assets would be distributed to the "income beneficiary or beneficiaries" at the time of termination. It is undisputed on appeal that the subject trust was terminated as uneconomical pursuant to EPTL 7-1.19 because the costs of administering the trust exceeded the income generated by the trust.

In appeal No. 1, the grandchildren appeal from an order granting CNB's petition to terminate the trust and directing that the trust principal be distributed to Baumann and, in appeal No. 2, they appeal from the decree entered upon that order. As a preliminary matter, we note that, inasmuch as the order in appeal No. 1 is subsumed in the decree in appeal No. 2, we dismiss the appeal from the order in appeal No. 1 (*see* CPLR 5501 [a] [1]; SCPA 2701 [1] [b]; *Matter of Kalkman [Coulter]*, 77 AD3d 1287, 1289 [2010]).

We agree with the grandchildren that the Surrogate erred in granting Baumann's cross motion for summary judgment and in directing that the trust principal be distributed to her. In determining the distribution of assets upon termination of an uneconomical trust, we must "effectuate the intention of the creator" of the trust (EPTL 7-1.19). In determining decedent's intention, we must engage in "a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed" (*Matter of Fabbri*, 2 NY2d 236, 240 [1957]; *see Matter of Sawyer*, 4 AD3d 800, 801-802 [2004]). If a "dominant purpose" can be discerned from reading the will, the individual provisions of the will must be read and given effect in light of that purpose (*see Fabbri*, 2 NY2d at 240). "[W]here a will is capable of two interpretations, the one should be adopted which prefers persons of the testator's blood" (*Matter of Symonds*, 79 AD2d 24, 26 [1981]).

Here, there are two provisions in the will regarding the distribution of the trust principal. Article v (B) (4) provides that,

upon the beneficiary's death, the property of the trust is to be distributed equally to the grandchildren. Article VII (E), however, states that the trustee may terminate any uneconomical trust and distribute the assets of the trust to the current income beneficiary, i.e., Baumann. We conclude that decedent intended to benefit both Baumann and the grandchildren and, thus, that the Surrogate erred in awarding the entire trust principal to Baumann. We also recognize, however, that decedent intended the trust to benefit Baumann during her lifetime and, thus, that the trust principal cannot be awarded entirely to the grandchildren. In light of those competing interests, we remit the matter to Surrogate's Court to determine "[t]he distribution of the trust assets . . . in such manner, proportions and shares as in the judgment of the court will effectuate the intention of the creator" (EPTL 7-1.19 [a] [2]).

All concur except Peradotto and Lindley, JJ., who dissent and vote to affirm in the following memorandum.

Peradotto and Lindley, JJ. (dissenting). We respectfully dissent. In our view, Surrogate's Court properly determined that the language of decedent's will is clear and unambiguous, and that the will must therefore be enforced according to its terms. We would thus affirm the decree in appeal No. 2. It is well settled that "testamentary instruments are strictly construed so as to give full effect to the testator's clear intent" (*Matter of Covert*, 97 NY2d 68, 74 [2001]; see *Matter of Murray*, 84 AD3d 106, 113 [2011], *lv denied* 18 NY3d 874 [2012]), and that the best evidence of the testator's intent is found in the clear and unambiguous language of the will itself (see *Matter of Walker*, 64 NY2d 354, 357-358 [1985]; *Matter of Cord*, 58 NY2d 539, 544 [1983], *rearg denied* 60 NY2d 586 [1983]). Although the testator's intent "must be gleaned not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed" (*Matter of Fabbri*, 2 NY2d 236, 240 [1957]; see *Matter of Brignole*, 32 AD3d 538, 538-539 [2006]), a court "may not rewrite a will 'in order to give effect to an intention which possibly the testator may have had but which is not revealed by the language used in the will' " (*Matter of Rutherford*, 125 AD2d 312, 313 [1986], quoting *Matter of Nelson*, 268 NY 255, 258 [1935]; see *Matter of Cincotta*, 106 AD3d 998, 998 [2013], *lv denied* 22 NY3d 857 [2013]).

Here, unlike the majority, we perceive no conflict between article v (B) of decedent's will and article VII (E). Article v (B) provides, inter alia, that the trust "beneficiary[, i.e., Sally Baumann,] shall retain no right to receive the trust principal or

to have my Trustee distribute the trust principal to the beneficiary for her benefit or her estate,” and that, upon Baumann’s death, the “remaining trust property” shall be distributed in equal shares to decedent’s grandchildren, i.e., the objectants-appellants herein (hereafter, grandchildren). Article VII (E) provides that, if the Trustee terminates the trust because it is uneconomical, the assets of the trust shall be given to “the current income beneficiary[, i.e., Baumann,] or beneficiaries in the proportions in which they are entitled to the income therefrom.”

The two articles may be read in harmony as providing that, if the trust exists upon Baumann’s death, the trust principal shall go to the grandchildren, but that the principal shall go to Baumann if the trust is terminated as uneconomical while Baumann is still alive. We thus agree with the Surrogate that a “plain reading of the Will compels a logical progression that once the Trust is collapsed, the prohibition against principal distributions is no longer operable and the corpus on hand is payable to the Beneficiary.”

In our view, the conclusion reached by the majority is premised on the unstated assumption that decedent made a mistake in his will, and that he did not intend for Baumann to receive the trust proceeds upon termination of the trust as uneconomical, as clearly and unambiguously provided for in article VII (E). We agree with the Surrogate that the principles set forth in *Wright v Wright* (118 NYS 994, 996 [1909], *aff’d* 140 App Div 634 [1910]) apply to this case, i.e., that a “court should not read into a man’s will language which he did not use, or so construe it that his intention, as expressed in the will, will be thwarted, and the court cannot devise a new scheme for a testator or make a new will.” Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

13 JOSEPH LAUZONIS, Respondent, v COLLEEN LAUZONIS, Appellant. [992 NYS2d 586]—

Parent, Child and Family—Custody—Relocation Outside School District—Necessity of Hearing

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 28, 2013. The order, among other things, denied defendant’s motion to relocate outside the Lewiston-Porter School District.

It is hereby ordered that the order so appealed from is unanimously modified on the law by vacating the first and third ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Ni-

agara County, for further proceedings in accordance with the following memorandum: In this divorce action, defendant mother sought permission to relocate with the parties' children from Lewiston to Grand Island. An order of custody and visitation provided that "neither party shall relocate the children out of their current school district without written consent from the other parent or a court order approving of same." At the time of entry of that order, the children attended school in the Lewiston-Porter School District in Niagara County. Plaintiff father thereafter cross-moved for sole custody of the children. Supreme Court denied defendant's motion and ordered a hearing on plaintiff's cross motion for sole custody. We agree with defendant that the court erred in denying her motion without conducting a hearing. We therefore modify the order accordingly, and we remit the matter to Supreme Court for a hearing to determine whether the relocation is in the children's best interests (see *Matter of Chambers v Renaud*, 72 AD3d 1433, 1435 [2010]).

It is well settled that relocation cases must be considered on a case-by-case basis "with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child[ren]" (*Matter of Tropea v Tropea*, 87 NY2d 727, 739 [1996]). While a geographic restriction agreed to by the parties and included in a separation agreement "is a relevant factor to consider in determining the child[ren]'s best interests, it is not dispositive" (*Matter of Mineo v Mineo*, 96 AD3d 1617, 1618 [2012] [internal quotation marks omitted]; see *Tropea*, 87 NY2d at 741 n 2; *Matter of Bobroff v Farwell*, 57 AD3d 1284, 1284-1286 [2008]; *Carlson v Carlson*, 248 AD2d 1026, 1028 [1998]).

Here, the court failed to consider whether the proposed relocation was in the children's best interests, instead denying defendant's motion on the ground that "there [was] no change in circumstances warranting a hearing on the issue of defendant's relocation." That was error (see *Matter of Chancer v Stowell*, 5 AD3d 1082, 1083 [2004]; see also *Matter of Adams v Bracci*, 91 AD3d 1046, 1046-1047 [2012], *lv denied* 18 NY3d 809 [2012]). Generally, "[d]eterminations affecting custody and visitation should be made following a full evidentiary hearing" (*Matter of Naughton-General v Naughton*, 242 AD2d 937, 938 [1997]; see *Matter of Pollard v Pollard*, 63 AD3d 1628, 1628 [2009]), and we conclude that the submissions of defendant in support of her motion "established the need for a hearing on the issue whether [her] relocation is in the best interests of the child[ren]" (*Matter of Stevens v Stevens*, 286 AD2d 890, 890 [2001]; see *Liverani v Liverani*, 15 AD3d 858, 858-859 [2005]).

While no single factor is determinative in a relocation case, “economic necessity . . . may present a particularly persuasive ground for permitting the proposed move” (*Tropea*, 87 NY2d at 739; see *Matter of Thomas v Thomas*, 79 AD3d 1829, 1830 [2010]; *Matter of Cynthia L.C. v James L.S.*, 30 AD3d 1085, 1085-1086 [2006]). Here, defendant averred that she was unable to find appropriate, affordable housing or a suitable teaching position in the high-priced Lewiston area (see *Piccinini v Piccinini*, 103 AD3d 868, 870 [2013]; *Matter of Eddington v McCabe*, 98 AD3d 613, 615 [2012]; *Carlson*, 248 AD2d at 1027). Although plaintiff disputed several of defendant’s factual assertions, particularly with respect to the extent of her job search, he did not assert that the proposed move would be detrimental to the children or to his relationship with the children, and he provided no reason for opposing the move, other than defendant’s alleged failure to show a change in circumstances (see *Piccinini*, 103 AD3d at 870; see generally *Tropea*, 87 NY2d at 740-741). The proposed relocation involves a distance of only about 17 miles, and there is no indication in the record that plaintiff’s access to the children would be significantly affected by the move (see *Mineo*, 96 AD3d at 1619; *Carlson*, 248 AD2d at 1028). Further, there is no indication in the record that the quality of the education provided by the Grand Island School District is inferior to that of the Lewiston-Porter School District, or that the children’s lives would be enhanced educationally by remaining within the Lewiston-Porter School District (see *Mineo*, 96 AD3d at 1619; *Carlson*, 248 AD2d at 1028; see also *Bobroff*, 57 AD3d at 1286).

Contrary to the further contention of defendant with respect to plaintiff’s cross motion, however, we conclude that plaintiff made “a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified” (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [2003] [internal quotation marks omitted]; see *Matter of DiPaolo v Avery*, 93 AD3d 1240, 1241 [2012]; *Matter of Bell v Raymond*, 67 AD3d 1410, 1411 [2009]). It is well established that “the continued deterioration of the parties’ relationship is a significant change in circumstances justifying a change in custody” (*Matter of Gaudette v Gaudette*, 262 AD2d 804, 805 [1999], *lv denied* 94 NY2d 790 [1999]; see *Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561 [2010]). Here, plaintiff asserted in support of his cross motion that there had been a “complete break[]down in communication” between the parties since entry of the custody order. According to plaintiff, defendant had him arrested on baseless grounds, filed a false child protective services report against him, and refused to discuss

important decisions concerning the children's health, education, and counseling. Plaintiff further averred that defendant "actively tried to tarnish [his] reputation in the community," disparaged him in the children's presence, and "actively trie[d] to alienate . . . the children" from him (see *Matter of Fox v Fox*, 93 AD3d 1224, 1224-1225 [2012]; *Matter of Ciannamea v McCoy*, 306 AD2d 647, 648 [2003]; *Matter of Fiori v Fiori* [appeal No. 1], 291 AD2d 900, 900 [2002]). Although defendant disputes plaintiff's assertions, "[i]t is well established that determinations affecting custody should be made following a full evidentiary hearing, not on the basis of conflicting allegations" (*Matter of Smith v Brown*, 272 AD2d 993, 993 [2000]; see *Pollard*, 63 AD3d at 1628). Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

14 MARVIN ZIELONKA, Respondent, v TOWN OF SARDINIA et al., Appellants. [991 NYS2d 491]—

Labor—Whistleblower Law—Reasonable Belief of Improper Governmental Action—Order to Commit Unlawful Act

Appeal from an order of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered October 9, 2013. The order denied the motion of defendants to dismiss the complaint and/or for summary judgment.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting the motion in part, dismissing the complaint in its entirety against defendants Town Council of Town of Sardinia and Town of Sardinia Town Supervisor and dismissing the second cause of action against defendant Town of Sardinia, and as modified the order is affirmed without costs.

Memorandum: Plaintiff was employed as code enforcement officer for defendant Town of Sardinia (Town) until his termination by defendant Town Council of Town of Sardinia (Council). Following his termination, plaintiff commenced this action against the Town, the Council, and defendant Town of Sardinia Town Supervisor (Supervisor) under Civil Service Law § 75-b, the public employees' whistleblower statute, alleging, inter alia, that his "termination was in retaliation for his refusal to perform" unauthorized functions and for his "act[ing] as a whistle-blower in reporting" those unauthorized directives "to the Town's outside attorney and others." Supreme Court denied defendants' pre-answer "motion to dismiss and/or for summary judgment," and defendants appeal.

We agree with defendants that the court erred in denying their motion insofar as it sought dismissal of the complaint

against the Council and the Supervisor, and we therefore modify the order accordingly. Civil Service Law § 75-b protects a “public employee” from discharge or discipline by a “public employer” (§ 75-b [2] [a]). The statute applies only to governmental entities that actually employ the plaintiff (*see* § 75-b [1] [a]; *Frank v State of N.Y., Off. of Mental Retardation & Dev. Disabilities*, 86 AD3d 183, 188 [2011]; *Moore v County of Rockland*, 192 AD2d 1021, 1024 [1993]). Furthermore, the Town cannot be held liable for punitive damages absent an express provision in the statute (*see Krohn v New York City Police Dept.*, 2 NY3d 329, 335-336 [2004]; *Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1142 [2008]). We therefore further modify the order by granting that part of the motion seeking dismissal of the second cause of action against the Town.

We reject defendants’ contention, however, that the court erred insofar as it denied their motion to dismiss the first cause of action against the Town for failure to state a cause of action. The public employees’ whistleblower statute prevents a public employer from, *inter alia*, terminating a public employee “because the employee discloses to a governmental body information . . . which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action” (Civil Service Law § 75-b [2] [a]). The term “improper governmental action” refers to “any action by a public employer or employee, or an agent” thereof, “which is undertaken in the performance of [his or her] official duties . . . and which is in violation of any federal, state or local law, rule or regulation” (§ 75-b [2] [a]). The list of governmental bodies to which disclosure may be made includes, as relevant herein, a member of a town’s legislature (*see* § 75-b [1] [c] [iii]). In addition, the statute requires that the employee, prior to disclosing the information, must have “made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and . . . provide[d] the appointing authority or designee a reasonable time to take appropriate action” (§ 75-b [2] [b]). The term “appointing authority” refers to “the officer, commission or body having the power of appointment to subordinate positions” (Civil Service Law § 2 [9]), which in this case is the Supervisor and the Council.

We conclude that plaintiff adequately alleged that he reasonably believed that he had been directed to perform an unlawful act. Civil Service Law § 75-b does not require an actual violation of the law for a subsequent action to be maintained thereunder (*see Bordell v General Elec. Co.*, 88 NY2d 869, 871 [1996]; *Barker v Peconic Landing at Southold, Inc.*, 885 F Supp 2d 564,

570 [2012]; *see also* Labor Law § 740). Plaintiff need have had only “a reasonable belief of a possible violation” of the law (*Bordell*, 88 NY2d at 871; *see* § 75-b [2] [a] [ii]). Here, plaintiff alleged, *inter alia*, that he “could not legally” issue a stop work order to a developer working on a project, as he had been directed by the Supervisor, because “the developer had all of the necessary permits,” and defendant’s submissions do not conclusively establish that the developer lacked the necessary permits (*see generally Gibraltar Steel Corp. v Gibraltar Metal Processing*, 19 AD3d 1141, 1142 [2005]). Construing the complaint liberally (*see Youssef v Triborough Bridge & Tunnel Auth.*, 24 AD3d 661, 661 [2005]; *see also* CPLR 3026), and accepting plaintiff’s factual allegations and all possible favorable inferences as true (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that plaintiff adequately alleged that he believed that he had been ordered to commit an unlawful act and that his belief was reasonable.

We reject defendants’ contention that plaintiff’s purported act of insubordination for failing to carry out the allegedly unlawful directive constitutes a “‘separate and independent basis’” for the termination (*cf. Ragle v County of Onondaga*, 267 AD2d 1088, 1089 [1999], *lv denied* 94 NY2d 764 [2000]), inasmuch as the purported act of insubordination related directly to plaintiff’s act of disclosure. We further conclude that plaintiff adequately alleged that he made a good faith effort to inform either the Council or the Supervisor (*see generally Brohman v New York Convention Ctr. Operating Corp.*, 293 AD2d 299, 299-300 [2002]), prior to disclosure to a governmental body (*see* Civil Service Law § 75-b [2] [a], [b]). Plaintiff averred in his affidavit that he disclosed allegedly unlawful directives to the Supervisor and to at least one person who qualifies as a member of a governmental body, i.e., a town councilman (*see* § 75-b [1] [c] [iii]). Lastly, the transcript from plaintiff’s examination pursuant to General Municipal Law § 50-h, which plaintiff submitted in opposition to the motion, supports the inference that plaintiff had multiple conversations with the Supervisor and the Town Attorney, giving them ample opportunity to withdraw the allegedly unlawful directive (*see* Civil Service Law § 75-b [2] [b]), before disclosing that directive to the Town Councilman (*see generally Leon*, 84 NY2d at 87-88). Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

15 GENERAL MOTORS, LLC, Respondent, v B.J. MUIRHEAD Co., INC., Appellant. [991 NYS2d 205]—

Contracts—Construction—Agreement to Procure Insurance—No Requirement to Name Additional Insured

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 15, 2013. The order denied the motion of defendant to dismiss the complaint and granted the cross motion of plaintiff for summary judgment.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the cross motion is denied, the motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff and defendant entered into an agreement, as set forth in a purchase order, whereby defendant would provide certain maintenance services at a plant owned and operated by plaintiff. The agreement provided that defendant “shall maintain insurance coverage with carriers acceptable to [plaintiff] and in the amounts set forth in the Special Terms,” which in turn required, inter alia, that defendant obtain insurance for “liability arising from premises.” The parties agree that defendant obtained insurance protecting it from the specified risks. When one of defendant’s employees commenced an action against plaintiff alleging that he was injured by a dangerous condition on the premises, defendant’s insurer declined to defend plaintiff on the ground that plaintiff was not a named insured or otherwise covered by the policy that the insurer issued to defendant. Plaintiff commenced this breach of contract action, contending that defendant failed to comply with the contractual requirement that it obtain insurance protecting plaintiff. Defendant appeals from an order that, inter alia, denied its motion to dismiss the complaint and granted plaintiff’s cross motion for summary judgment.

We agree with defendant that the agreement does not require it to obtain insurance coverage on behalf of plaintiff, and we therefore reverse the order and dismiss the complaint. It is well settled that “a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Furthermore, “[i]n determining whether a[n agreement] is ambiguous, the court first must determine whether the [agreement] ‘on its face is reasonably susceptible of more than one interpretation’ ” (*Gilpin v Oswego Bldrs., Inc.*, 87 AD3d 1396, 1397 [2011], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Here, we reject plaintiff’s contention that the agreement is reasonably susceptible of an interpretation requiring that defendant obtain insurance covering plaintiff. “A provision in a construction contract cannot be interpreted as requiring the procurement of additional insured coverage unless such a requirement is expressly and specifically

stated. In addition, contract language that[, as here,] merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured” (*Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2003]; see *Ramcharan v Beach 20th Realty, LLC*, 94 AD3d 964, 966-967 [2012]; cf. *Timmons v Barrett Paving Materials, Inc.*, 83 AD3d 1473, 1477 [2011], *lv dismissed in part and denied in part* 17 NY3d 843 [2011]). Contrary to plaintiff’s contention, “although the insurance rider in this case required [defendant] to obtain insurance on the [premises], there was no requirement that [plaintiff] be named as an additional insured on the policy” (*Wagner v Ploch*, 85 AD3d 1547, 1548 [2011]). Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

16 MICHAEL FASOLO et al., Appellants, v JOSEPH A. SCARAFILE, Respondent. (Appeal No. 1.) [991 NYS2d 820]—

Partnership—Existence of Relation—Alleged Oral Partnership Agreement to Develop and Sell Residential Property

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered February 20, 2013. The order granted defendant’s motion for summary judgment dismissing plaintiffs’ second amended complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for, inter alia, breach of an alleged oral partnership agreement between Michael Fasolo (plaintiff) and defendant in connection with the development and sale of residential property. In appeal No. 1, plaintiffs appeal from an order that, inter alia, granted defendant’s motion for summary judgment dismissing the second amended complaint. In appeal No. 2, plaintiffs appeal from an order denying their motion for leave to reargue and renew their opposition to defendant’s motion. We note at the outset with respect to appeal No. 2 that the appeal from the order therein must be dismissed to the extent that Supreme Court denied leave to reargue (see *Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [1990]). We otherwise affirm the order in each appeal.

“A partnership is an association of two or more persons to carry on as co-owners a business for profit” (Partnership Law § 10 [1]; see *Czernicki v Lawniczak*, 74 AD3d 1121, 1124 [2010]). “When there is no written partnership agreement between the parties, the court must determine whether a partnership in fact existed from the conduct, intention, and relationship between the parties” (*Czernicki*, 74 AD3d at 1124; see *Bianchi v Midtown*

Reporting Serv., Inc., 103 AD3d 1261, 1261 [2013]; *Griffith Energy, Inc. v Evans*, 85 AD3d 1564, 1565 [2011]). Relevant factors for the court to consider in determining whether a partnership existed include the intent of the parties, whether there was a sharing of profits and losses, and whether there was joint control and management of the business (*see Bianchi*, 103 AD3d at 1261-1262; *Kyle v Ford*, 184 AD2d 1036, 1036-1037 [1992]; *Blaustein v Lazar Borck & Mensch*, 161 AD2d 507, 508 [1990]). “No one factor is determinative [but, rather,] it is necessary to examine the parties’ relationship as a whole” (*Kyle*, 184 AD2d at 1037).

Here, we conclude with respect to the order in appeal No. 1 that defendant met his initial burden of establishing that no partnership existed (*see Cleland v Thirion*, 268 AD2d 842, 843 [2000]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In support of the motion, defendant submitted, *inter alia*, plaintiff’s deposition testimony and tax filings establishing that the parties did not file partnership tax returns and that plaintiff reported income and losses from the business on his personal income tax returns (*see F&K Supply v Willowbrook Dev. Co.*, 304 AD2d 918, 920-921 [2003], *lv denied* 1 NY3d 502 [2003]; *Cleland*, 268 AD2d at 844). The alleged partnership did not have a business name or bank account, and there were no partnership assets or capital contributions, which “strongly suggests that no partnership existed” (*Kyle*, 184 AD2d at 1037; *see Brodsky v Stadlen*, 138 AD2d 662, 663 [1988]; *cf. Czernicki*, 74 AD3d at 1125).

With respect to the residential property at issue, defendant established that it was owned solely by plaintiffs and that defendant had no legal interest in the property. “[A]lthough individual property ownership does not prove the absence of a partnership, it can be evidence that the parties did not intend to create a partnership relation” (J. William Callison & Maureen A. Sullivan, *Partnership Law and Practice* § 5:16; *see F&K Supply*, 304 AD2d at 921). Moreover, plaintiff admitted that defendant never agreed to share plaintiffs’ losses with respect to the property at issue, “which is an ‘essential element’ of a partnership” (*Prince v O’Brien*, 256 AD2d 208, 212 [1998]; *see Needel v Flaum*, 248 AD2d 957, 958 [1998]; *Brodsky*, 138 AD2d at 664; *see generally Partnership Law and Practice* § 5:14). The record further reflects that plaintiffs controlled the project, which weighs heavily against the existence of a partnership (*see F&K Supply*, 304 AD2d at 920-921; *see also Cleland*, 268 AD2d at 843-844; *Needel*, 248 AD2d at 958). Although defendant signed the purchase order for the property, he averred that he did so at plaintiff’s “request and instruction.”

We further conclude that plaintiffs failed to raise a triable issue of fact with respect to the existence of a partnership (see *Cleland*, 268 AD2d at 843-844; *Needel*, 248 AD2d at 958; see generally *Zuckerman*, 49 NY2d at 562). In opposition to the motion, plaintiffs submitted evidence that the parties had a longstanding business and personal relationship and that, on several occasions prior to the dispute at issue, they split the profits from the sales of homes on which they worked together. Although the sharing of business profits constitutes prima facie evidence of the existence of a partnership (see Partnership Law § 11 [4]), it is not dispositive; rather, “all of the elements of the relationship must be considered” (*Blaustein*, 161 AD2d at 508; see *Boyarsky v Froccaro*, 131 AD2d 710, 712 [1987]). Here, the record establishes that the parties did not “carry on” a single business “as co-owners” (§ 10 [1] [emphasis added]). Instead, the evidence establishes that plaintiff and defendant each had their own businesses and that they periodically collaborated on projects for their mutual benefit (see generally Partnership Law and Practice § 5:1). Defendant’s occasional use of partnership terminology is insufficient to raise an issue of fact with respect to the existence of a partnership (see *Kyle*, 184 AD2d at 1037).

Finally, we reject plaintiffs’ contention that the court erred in failing to consider plaintiff’s purported “transcripts” of recorded conversations between the parties. Even assuming, arguendo, that the transcripts were properly before the court (see generally *Matter of Cross v Davis*, 269 AD2d 833, 834 [2000], *lv denied* 95 NY2d 756 [2000]), we conclude that they do not raise an issue of fact whether the parties formed a partnership.

We conclude with respect to the order in appeal No. 2 that the court properly denied that part of plaintiffs’ motion for leave to renew. It is well settled that “[a] motion for leave to renew must be based upon new facts that were unavailable at the time of the original motion” (*Boreanaz v Facer-Kreidler*, 2 AD3d 1481, 1482 [2003]; see CPLR 2221 [e] [2]). Here, the evidence submitted on renewal, i.e., an affidavit of plaintiffs’ accountant, simply defended the accounting attached to the original complaint and did not present any new facts (see *Blazynski v A. Gareleck & Sons, Inc.*, 48 AD3d 1168, 1170 [2008], *lv denied* 11 NY3d 825 [2008]). In any event, we conclude that, “even if renewal had been granted, the . . . information [contained in the affidavit] would not have resulted in the denial of the original motion” (*Cole v Furman* [appeal No. 1], 285 AD2d 982, 982 [2001]). Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

17 MICHAEL FASOLO et al., Appellants, v JOSEPH A. SCARAFILE, Respondent. (Appeal No. 2.) [990 NYS2d 428]—Appeal from

an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered July 11, 2013. The order denied plaintiffs' motion for leave to renew and reargue.

It is hereby ordered that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Fasolo v Scarafile* ([appeal No. 1] 120 AD3d 929 [2014]). Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

18 KAI LIN, Appellant, v DEPARTMENT OF DENTISTRY, UNIVERSITY OF ROCHESTER MEDICAL CENTER et al., Respondents, et al., Defendant. [991 NYS2d 207]—

Judgments—Collateral Attack—Improper Collateral Attack of Prior Litigation for Alleged Fraud

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered January 15, 2013. The judgment and order granted the motions of defendants to dismiss the complaint, prohibited plaintiff from initiating any further actions against defendants without leave of court and granted legal fees and costs to defendants-respondents.

It is hereby ordered that the judgment and order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action asserting causes of action for, inter alia, fraud and spoliation of evidence after her prior dental malpractice action was dismissed and the order dismissing that action was affirmed by this Court (*Kai Lin v Strong Health* [appeal No. 1], 82 AD3d 1585 [2011], *lv dismissed in part and denied in part* 17 NY3d 899 [2011], *rearg denied* 18 NY3d 878 [2012]). Plaintiff appeals from a judgment and order that, inter alia, granted defendants' motions to dismiss the instant complaint and imposed sanctions in the form of an award of legal fees and costs to defendants-respondents (defendants). We reject plaintiff's contention that Supreme Court erred in dismissing the complaint. To the extent that the complaint alleged "fraud, misrepresentation, or other misconduct of an adverse party" committed during the course of the prior litigation, plaintiff's sole remedy was a motion to vacate the court's prior order pursuant to CPLR 5015 (a) (3). "A litigant's remedy for alleged fraud in the course of a legal proceeding 'lies exclusively in that lawsuit itself, i.e., by moving pursuant to CPLR 5015 to vacate the [order] due to its fraudulent procurement, not a second plenary action collaterally attacking the [order]' " (*Vinokur v Penny Lane Owners Corp.*, 269

AD2d 226, 226 [2000]; *see St. Clement v Londa*, 8 AD3d 89, 90 [2004]). In addition, “the tort of third-party negligent spoliation of evidence . . . is not cognizable in this state” (*Ortega v City of New York*, 9 NY3d 69, 73 [2007]). We have considered plaintiff’s other contentions with respect to the dismissal of the complaint, and we conclude that they are without merit. Finally, we reject plaintiff’s contention that the court erred in imposing sanctions. Absent a “clear abuse of discretion, we will not disturb the court’s determination that the conduct in question was frivolous and that it warranted the imposition of” sanctions in the form of legal fees and costs (*Matter of Bedworth-Holgado v Holgado*, 85 AD3d 1589, 1590 [2011]). We decline, however, to grant defendants’ request for the imposition of sanctions based on plaintiff’s pursuit of this appeal. Present—Smith, J.P., Peradotto, Lindley, Sconiers and Whalen, JJ.

19 JESSICA SANCHEZ, Appellant, et al., Plaintiff, v MARY E. DAWSON et al., Respondents. (Appeal No. 1.) [991 NYS2d 494]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Significant Disfigurement—Postaccident Surgical Scar
Insurance—No-Fault Automobile Insurance—Serious Injury—Jury’s Weighing of Expert Testimony

Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 28, 2012. The judgment dismissed the complaint upon a verdict of no cause of action.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries sustained by Jessica Sanchez (plaintiff) when her vehicle was rear-ended by a vehicle driven by defendant Mary E. Dawson, an employee of defendant Birnie Bus Service, Inc. A jury subsequently determined that plaintiff did not sustain a serious injury under the significant disfigurement, permanent consequential limitation of use, significant limitation of use, or 90/180-day categories of Insurance Law § 5102 (d). Contrary to plaintiff’s contention, Supreme Court properly denied her motion to set aside the verdict inasmuch as the jury fairly interpreted the evidence in finding that plaintiff did not sustain a serious injury.

The standard for determining whether a verdict should be set aside is whether “the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence” (*Lolik v Big v Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omit-

ted]). Thus, a verdict should not be set aside unless it is “‘palpably irrational’” (*Quigley v Sikora*, 269 AD2d 812, 813 [2000]) or “‘palpably wrong’” (*Mohamed v Cellino & Barnes*, 300 AD2d 1116, 1117 [2002], *lv denied* 99 NY2d 510 [2003]). “To conclude as a matter of law that a jury verdict is not supported by sufficient evidence, there must be ‘no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial’” (*Mazzella v Capobianco*, 27 AD3d 532, 532 [2006]). We also note that, in evaluating a jury verdict, we accord “‘great deference . . . to the fact-finding function of the jury, [which] is in the foremost position to assess witness credibility’” (*Guthrie v Overmyer*, 19 AD3d 1169, 1170 [2005]).

Contrary to plaintiff’s contention, a fair interpretation of the evidence supports the jury’s determination that a postaccident surgical scar on her neck does not constitute a significant disfigurement (*see San George v Prowse*, 259 AD2d 988, 989 [1999]). A significant disfigurement exists if a reasonable person viewing the plaintiff’s body in its altered state regards “the condition as unattractive, objectionable or the subject of pity or scorn” (*Heller v Jansma*, 103 AD3d 1160, 1161 [2013]; *see Loiseau v Maxwell*, 256 AD2d 450, 450 [1998]). Here, the subject scar, which the jury and the court had an opportunity to view in its entirety, is approximately four inches in length, and we perceive no basis for disturbing the jury’s determination with respect thereto.

Contrary to plaintiff’s further contention, with respect to the remaining categories of serious injury, we conclude that the jury was entitled to credit the testimony of defendants’ witnesses and reject the testimony of plaintiff’s witnesses (*see Guthrie*, 19 AD3d at 1170; *Betit v Weeden*, 251 AD2d 930, 932 [1998]). Indeed, the record establishes that plaintiff’s physicians and expert witnesses were unaware of certain facts that could have impacted their opinions, including a subsequent motor vehicle accident and a college physical education class. With respect to the physical education class, defendants presented the testimony of plaintiff’s former physical education teacher who noted that, after the accident, plaintiff participated in both cardiovascular fitness and strength training, knowledge of which may have affected the opinions of her witnesses on the issue of the extent of plaintiff’s claimed injuries. Inasmuch as plaintiff’s physicians and expert witnesses acknowledged that, if the history as provided to them by plaintiff was inaccurate or incomplete, then their opinions might be inaccurate or incomplete, we

conclude that the jury's determinations with respect to the remaining categories of serious injury constitute a fair interpretation of the evidence and were not " 'palpably irrational' " (*Quigley*, 269 AD2d at 813). Even assuming, arguendo, that plaintiff established a prima facie case of serious injury, the jury nevertheless was entitled to reject the opinions of plaintiff's physicians and expert witnesses (*see Brennan v Bauman & Sons Buses*, 107 AD2d 654, 655 [1985]).

In view of our determination, we see no need to address plaintiff's remaining contention. Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

20 JESSICA SANCHEZ, Appellant, et al., Plaintiff, v MARY E. DAWSON et al., Respondents. (Appeal No. 2.) [990 NYS2d 429]—Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 18, 2013. The order and judgment denied the motion of plaintiff Jessica Sanchez to set aside a jury verdict.

It is hereby ordered that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435 [1989]; *see also* CPLR 5501 [a] [1]). Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

21 ALEXANDRA VILLAFRANK, Appellant, v DAVID N. ROSS, INC., et al., Respondents. [991 NYS2d 823]—

Waters and Watercourses—Diversion of Surface Waters—Diversion by Artificial Means—Drainage System Modifications
Corporations—Individual Liability of Officers—Tortious Conduct

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered February 7, 2013. The order granted the motion of defendants David N. Ross, Inc. and Howard Ross for summary judgment.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated against defendants David N. Ross, Inc. and Howard Ross.

Memorandum: Plaintiff commenced this action seeking injunctive relief and monetary damages based upon damage to her property allegedly caused by defendants' diversion of additional surface water onto her property. We agree with plaintiff that Supreme Court erred in granting the motion of defendants David N. Ross, Inc. (the Ross corporation) and Howard Ross (defendant) for summary judgment dismissing the complaint against them. We therefore reverse the order, deny the motion, and reinstate the complaint against those two parties (collectively, defendants).

Plaintiff and the Ross corporation own neighboring properties in the Town of Westfield, with plaintiff's property located to the west of the Ross property. Because of the topography of the area, surface water on the two properties naturally flows in a northwesterly direction. There is a central drainage ditch between the two properties that flows from the south to the north (hereafter, north-south ditch). The north-south ditch begins on the Ross property, runs along the boundary between the properties, and then extends north onto plaintiff's property. In the 1960s, defendant's father and plaintiff's father-in-law agreed to install an underground clay pipe running from east to west, starting from a catch basin on the Ross property and ending at a creek located on plaintiff's property. The catch basin is located at the southern end of the north-south ditch, and its purpose is to act as a "clean-out in case the lines get plugged." There is also a 700- to 800-foot lateral drainage ditch running from east to west across the Ross property (hereafter, east-west ditch), which empties into the catch basin. Plaintiff alleges that defendants have made various modifications to the original drainage system over time, and that such modifications have diverted additional water from the Ross property onto her property.

A plaintiff "seeking to recover [from an abutting property owner for the flow of surface water] must establish that . . . improvements on the defendant's land caused the surface water to be diverted, that damages resulted and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the defendant's property" (*Cottrell v Hermon*, 170 AD2d 910, 911 [1991], *lv denied* 78 NY2d 853 [1991]; *see Prachel v Town of Webster*, 96 AD3d 1365, 1366 [2012]; *Moone v Walsh*, 72 AD3d 764, 764 [2010]). Here, defendants failed to meet their burden on their motion of establishing their entitlement to judgment as a matter of law inasmuch as their own moving papers raise an issue of fact whether they diverted surface water onto plaintiff's property by artificial means (*see Vanderstow v Acker*, 55 AD3d 1374, 1375 [2008]; *cf. Congregation B'nai Jehuda v Hiye Realty Corp.*, 35 AD3d 311, 312 [2006]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Defendant admitted that, in the summer of 2010, he "upgraded" a clay pipe located within the east-west ditch by removing it and installing 800 feet of perforated plastic pipe. Although that pipe is located entirely on the Ross property, it carries water into the north-south ditch, which ultimately terminates on plaintiff's property. Defendants also acknowledged that they had installed about 1,000 feet north of the catch basin a pipe that drains water from the Ross property and empties it directly

into the north-south ditch. We agree with plaintiff and the court that whether defendants' actions constituted mere "routine maintenance and repair of existing . . . pipes," as defendants contend, raises an issue of fact. Moreover, defendants further acknowledged that there is periodic pooling of water around the catch basin. While defendants emphasize that such pooling occurred entirely on their property, the catch basin is located less than seven feet from the property line and, further, it is undisputed that the accumulated water ends up in the north-south ditch, where it ultimately flows onto plaintiff's property.

Even assuming, *arguendo*, that defendants met their initial burden on the motion, we conclude that plaintiff raised an issue of fact in opposition (*see Prachel*, 96 AD3d at 1366; *Moone*, 72 AD3d at 765; *cf. Tatzel v Kaplan*, 292 AD2d 440, 441 [2002]). Plaintiff submitted, *inter alia*, affidavits of her husband in which he averred that defendants replaced the clay pipe in the east-west ditch in 2010 and "re-routed" that pipe to the north-south ditch, thus diverting additional water onto plaintiff's property. In his 2012 affidavit, plaintiff's husband further averred that defendants "are continuing this diversion process . . . as I have observed more ditching that is being placed with backhoes." A survey prepared in 2011 corroborates plaintiff's assertion that water flowing east to west across the Ross property ends up in the north-south ditch as opposed to flowing west through the clay pipe into the creek as originally agreed by the parties and/or their predecessors. Further, plaintiff submitted an affidavit from an engineering expert who averred that, at some point between 2009 and 2012, defendants dug a new ditch connecting the east-west ditch to the north-south ditch and that, as a result, storm water that previously had flowed into the catch basin and through the underground clay pipe to the creek "is now redirected to the north and ultimately reaches [plaintiff's] property." In addition to the new plastic pipe in the east-west ditch that defendant admittedly installed, the expert observed "numerous perforated plastic pipe[s] under drains . . . on the Ross property to collect subsurface water," which "appear[ed] to be relatively new." The expert opined, within a reasonable degree of engineering certainty, that the "flow rate" and volume of water entering plaintiff's property from the north-south ditch is "more than twice . . . what previously existed," and that "the majority of this increased flow is directly due to the modifications [that defendants] made after 2009" (*see Prachel*, 96 AD3d at 1366).

We further agree with plaintiff that there is an issue of fact whether the drainage system modifications on defendants' prop-

erty were a proximate cause of the alleged damage to her property (*see id.*; *Vanderstow*, 55 AD3d at 1375-1376). Defendants emphasize plaintiff's claimed inability to develop a subdivision on the property, asserting that such inability is the result of a variety of factors unrelated to any conduct on their part. Plaintiff, however, may recover damages for any diminution in the value of her property or the cost of remediation irrespective of the proposed subdivision (*see generally Jenkins v Etlinger*, 55 NY2d 35, 39 [1982]).

Finally, we agree with plaintiff that there is an issue of fact with respect to the individual liability of defendant. It is well established that "[a] corporate officer may be held personally liable for a tort of the corporation if he or she committed or participated in its commission, whether or not his or her acts are also by or for the corporation" (*Apollo H.V.A.C. Corp. v Halpern Constr., Inc.*, 55 AD3d 855, 857 [2008]; *see Gjuraj v Uplift El. Corp.*, 110 AD3d 540, 541 [2013]; *see also Kopec v Hempstead Gardens*, 264 AD2d 714, 716 [1999]). Here, plaintiff alleged, and defendant admitted, that he personally cleaned out the east-west ditch in 2005 and replaced the east-west pipe in 2010. Defendant further admitted that, north of the catch basin, he replaced another pipe that flows into the north-south ditch. We thus conclude that there is an issue of fact whether defendant is individually liable for his allegedly tortious conduct (*see Huggins v Parkset Plumbing Supply, Inc.*, 7 AD3d 672, 673 [2004]; *cf. Kopec*, 264 AD2d at 716; *Clark v Pine Hill Homes*, 112 AD2d 755, 755 [1985]). Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

22 ARTHUR E. BIGELOW, as Administrator of the Estate of TERRANCE BIGELOW, Deceased, Plaintiff, v GENERAL ELECTRIC COMPANY et al., Defendants. GENERAL ELECTRIC COMPANY, Third-Party Plaintiff-Appellant, v CARRIER CORPORATION, Third-Party Defendant-Respondent. [991 NYS2d 497]—

Indemnity—When Claim for Indemnification Available—Common-Law Indemnification—Products Liability—No Indemnification for Defense Costs Assumed by Retailer Where Manufacturer Not at Fault

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered February 6, 2013. The order, among other things, denied the motion of third-party plaintiff for summary judgment granting common-law indemnification and granted the cross motion of third-party defendant for summary judgment dismissing the third-party complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In 2005 plaintiff's decedent was injured in a fire in his mobile home, and he died from those injuries nine days later. The fire originated in the area of an electrical outlet with a window air conditioning unit plugged into it, and an investigation conducted by the Genesee County Sheriff's Office concluded that the cause of the fire was most likely electrical in nature. The subject air conditioning unit was manufactured by third-party defendant, Carrier Corporation (Carrier), and marketed and sold by defendant/third-party plaintiff, General Electric Company (GE), under its brand name. Plaintiff commenced this negligence and strict products liability action against three defendants, including GE, on the theory that the fire was caused by the allegedly defective air conditioning unit. When Carrier refused to provide a defense and indemnification for GE in the main action, GE commenced this third-party action seeking, *inter alia*, common-law indemnification from Carrier in the underlying action.

GE thereafter moved for summary judgment granting "common[-]law indemnification for all potential liability which may arise with respect to plaintiff's claims," and sought reimbursement from Carrier for all fees, costs, and expenses incurred by GE in defending the underlying action. Carrier cross-moved for summary judgment dismissing the third-party complaint on the ground that there had been no determination that GE or Carrier was liable for decedent's injuries and, further, that there was no evidence that the subject air conditioning unit was defective. GE also moved for summary judgment dismissing the complaint in the main action, and Carrier joined in that request by way of a cross motion. In a single decision, the court granted GE's motion in the underlying action, concluding that the air conditioning unit was not defective and that the fire was likely caused by a faulty wiring at the outlet and granted Carrier's cross motion to dismiss the third-party complaint, concluding that GE was not entitled to common-law indemnification from Carrier because there was no finding of fault on the part of Carrier.

The issue in this case is whether GE, a downstream retailer, is entitled to recoup its costs in defending a products liability action from Carrier, an upstream manufacturer, when they both are ultimately absolved of liability. We conclude that GE is not entitled to recoupment, and we therefore affirm.

Indemnification is grounded in the equitable principle that the party who has committed a wrong should pay for the consequences of that wrong (*see North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 291 [1993]; *Oceanic Steam Nav. Co. [Ltd.]*

v Compania Transatlantica Espanola, 134 NY 461, 468 [1892]). Thus, New York courts have consistently held that “common-law indemnification lies only against those who are *actually at fault*” (*Nourse v Fulton County Community Heritage Corp.*, 2 AD3d 1121, 1122 [2003] [emphasis added]; see *Colyer v K Mart Corp.*, 273 AD2d 809, 810 [2000]), i.e., the “*actual wrongdoer*” (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1985] [emphasis added]). In the products liability context, a manufacturer is held accountable as a “wrongdoer” when it releases a defective product into the stream of commerce (see *Rosado v Proctor & Schwartz*, 66 NY2d 21, 25-26 [1985]), and “innocent” sellers who merely distribute the defective product are entitled to indemnification from the at-fault manufacturer (see *Godoy v Abamaster of Miami*, 302 AD2d 57, 62 [2003], *lv dismissed* 100 NY2d 614 [2003]). That common-law right of indemnification “encompasses the right to recover attorneys’ fees, costs, and disbursements incurred in connection with defending the suit brought by the injured party” (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]; see *Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 [2007], *lv dismissed* 9 NY3d 891 [2007]; *Colyer*, 273 AD2d at 810).

Although there are no state court cases in New York that directly address the issue presented here, we note that federal courts and the vast majority of courts in other states have concluded that, in the absence of fault on the part of the manufacturer for producing a defective product, there is no implied right to indemnification for defense costs assumed by downstream distributors (see e.g. *Innovation Ventures, LLC v Ultimate One Distrib. Corp.*, — F Supp 2d —, —, 2014 WL 1311979, *13, 2014 US Dist LEXIS 42960, *66 [ED NY 2014]; *Luna v American Airlines*, 769 F Supp 2d 231, 239 [SD NY 2011]; *Papas v Kohler Co., Inc.*, 581 F Supp 1272, 1274 [MD Pa 1984]; *Merck & Co. v Knox Glass, Inc.*, 328 F Supp 374, 378 [ED Pa 1971]; *Clark v Hauck Mfg. Co.*, 910 SW2d 247, 252-253 [Ky 1995], *overruled on other grounds by Martin v Ohio County Hosp. Corp.*, 295 SW3d 104 [Ky 2009]; *Krasny-Kaplan Corp. v Flo-Tork, Inc.*, 66 Ohio St 3d 75, 78-80, 609 NE2d 152, 154-155 [1993]; *Borchard v WEFco, Inc.*, 112 Idaho 555, 559, 733 P2d 776, 780 [1987]; *Greenland v Ford Motor Co., Inc.*, 115 NH 564, 571, 347 A2d 159, 165 [1975]; *SEMCO Energy, Inc. v Eclipse, Inc.*, 2012 WL 6049655, *6-7, 2012 Mich App LEXIS 2437, *19-25 [2012]; *Automatic Time & Control Co., Inc. v ifm Elecs., GmbH*, 410 Pa Super 437, 438-442, 600 A2d 220, 221-223 [1991]; *Oates v Diamond Shamrock Corp.*, 23 Mass App Ct 446, 448-449, 503 NE2d 58, 59-60 [1987], *review denied* 399 Mass 1104 [1987]). In our view, those cases are persuasive and in accord

with New York law on common-law indemnification and sound considerations of public policy.

Where, as here, it is ultimately determined that the subject product is free from defect, there is no “fault” or “wrongdoing” on the part of the manufacturer (*see generally Rosado*, 66 NY2d at 25-26). In that situation, we see no valid basis for shifting the retailer’s defense costs onto the manufacturer inasmuch as *both* the retailer *and* the manufacturer are innocent parties. Thus, “the retailer is in a position no different from that of any other defendant forced to defend against spurious claims” (*Hanover Ltd. v Cessna Aircraft Co.*, 758 P2d 443, 448 [Utah Ct App 2002]). We therefore conclude that the “‘general rule [that] attorneys’ fees and disbursements are incidents of litigation’ ” and that each litigant is required to bear its own costs should apply (*Mount Vernon City School Dist. v Nova Cas. Co.*, 19 NY3d 28, 39 [2012]; *see Papas*, 581 F Supp at 1274; *Oates*, 23 Mass App Ct at 448-449, 503 NE2d at 59-60). To hold otherwise would require manufacturers to “become the insurer of [the] seller’s defense costs, irrespective of whether the product was defectively manufactured” (*Merck & Co., Inc.*, 328 F Supp at 378; *see Greenland*, 115 NH at 571, 347 A2d at 165; *Automatic Time & Control Co., Inc.*, 410 Pa Super at 440, 600 A2d at 222). We decline to adopt such a rule. Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

23 In the Matter of STATE OF NEW YORK, Respondent, v ANTHONY NERVINA, Appellant. (Appeal No. 1.) [991 NYS2d 208]—

Appeal—Preservation of Issue for Review—Failure to Object to Hearsay Evidence Forming Basis of Expert Opinion

Crimes—Sex Offenders—Civil Commitment or Supervision—Sexually Motivated Crime

Crimes—Sex Offenders—Civil Commitment or Supervision—Mental Abnormality

Crimes—Sex Offenders—Civil Commitment or Supervision—Dangerous Sex Offender Requiring Confinement

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered July 17, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, determined that respondent is a detained sex offender requiring civil management.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In appeal No. 1, respondent appeals from an order determining that he is a dangerous sex offender requiring civil management pursuant to Mental Hygiene Law article 10. The jury found that respondent was sexually motivated in com-

mitting the crime of attempted burglary in the second degree and that he suffers from a mental abnormality (*see* § 10.03 [i]; *see also* Penal Law § 140.25 [2]). In appeal No. 2, respondent appeals from an order revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility. We affirm in both appeals.

With respect to appeal No. 1, we note that the court declined to rule on that part of respondent's pretrial motion to preclude hearsay evidence and expressly directed respondent to raise appropriate objections at the time of trial, which respondent failed to do. This case is therefore distinguishable from *Matter of State of New York v Bass* (119 AD3d 1356 [2014]), in which the respondent's hearsay contention was preserved because the court expressly denied the respondent's motion in limine to preclude evidence on that ground. We therefore conclude that respondent's contention that his due process rights were violated when petitioner's experts provided testimony about the hearsay evidence that formed the basis of their opinions is unpreserved for our review (*see Matter of State of New York v Wilkes* [appeal No. 2], 77 AD3d 1451, 1452 [2010]), and we decline to exercise our power to review that contention in the interest of justice (*see Matter of State of New York v Muench*, 85 AD3d 1581, 1582 [2011]). Contrary to respondent's contention, the recent decision from the Court of Appeals in *People v Finch* (23 NY3d 408 [2014]) does not support his position that, because he objected to hearsay presented at the subsequent SIST violation hearing, he preserved his contention regarding hearsay presented at the previous jury trial. The Court of Appeals held in *Finch* that "a lawyer is not required, in order to preserve a point, to *repeat* an argument that the court has *definitively rejected*" (*id.* at 413 [emphasis added]). The Court did not hold that an attorney's objection at a later proceeding preserves for appellate review an alleged error in an earlier proceeding.

We reject respondent's further contention in appeal No. 1 that the jury's determination that the underlying crime was sexually motivated is against the weight of the evidence (*see Matter of State of New York v Trombley*, 98 AD3d 1300, 1301 [2012], *lv denied* 20 NY3d 856 [2013]). To the extent that respondent contends that the evidence was legally insufficient to establish sexual motivation, we also reject that contention. Petitioner's evidence presented a valid line of reasoning and permissible inferences that could lead a rational jury to the

conclusion that respondent committed the underlying offense “in whole or in substantial part for the purpose of [his] direct sexual gratification” (Mental Hygiene Law § 10.03 [s]; *see Matter of State of New York v Farnsworth*, 107 AD3d 1444, 1445 [2013]).

We reject respondent’s further contention in appeal No. 1 that the jury’s verdict with respect to mental abnormality is against the weight of the evidence. Although respondent’s expert witness testified that respondent did not suffer from a mental abnormality, the jury’s verdict is entitled to deference, and we conclude that “the evidence does not preponderate[] so greatly in [respondent’s] favor that the jury could not have reached its conclusion on any fair interpretation of the evidence” (*Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1474 [2011], *lv denied* 17 NY3d 702 [2011] [internal quotation marks omitted]). Respondent’s further contention in appeal No. 1 that the personality disorders with which petitioner’s expert witnesses diagnosed him cannot serve as the basis for a finding of mental abnormality is without merit (*see Matter of State of New York v Donald DD.*, 107 AD3d 1062, 1063-1064 [2013], *lv granted* 21 NY3d 866 [2013]). The Mental Hygiene Law does not require that the underlying “condition, disease, or disorder” serving as the basis for a finding of mental abnormality have a sexual component to its diagnosis; rather, the law requires only that the underlying “condition, disease or disorder” affect respondent “in a manner that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [respondent] having serious difficulty in controlling such conduct” (§ 10.03 [i]). Here, both of petitioner’s expert witnesses testified that the personality disorders with which they diagnosed respondent predisposed him to commit sex offenses and resulted in respondent’s serious difficulty in controlling his behavior.

Contrary to respondent’s contention in appeal No. 2, we conclude that, at the hearing regarding respondent’s alleged violation of his SIST conditions, petitioner established by clear and convincing evidence that respondent is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law §§ 10.03 [e]; 10.07 [f]). Finally, we reject respondent’s further contention in appeal No. 2 that “the court was required to specifically address the issue of a less restrictive alternative” (*Matter of State of New York v Gooding*, 104 AD3d 1282, 1282 [2013], *lv denied* 21 NY3d 862 [2013]). Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

24 In the Matter of STATE OF NEW YORK, Respondent, v ANTHONY NERVINA, Appellant. (Appeal No. 2.) [990 NYS2d 429]—

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered May 8, 2013 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of State of New York v Nervina* ([appeal No. 1] 120 AD3d 941 [2014]). Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

25 In the Matter of MATTHEW GRAF et al., Appellants, v TOWN OF LIVONIA et al., Respondents. [991 NYS2d 211]—

Appeal—Academic and Moot Questions—Challenge to Zoning Board Approval of Sawmill Project—Project Completion during Pendency of Proceeding

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered September 5, 2013 in a CPLR article 78 proceeding. The judgment denied the petition and dismissed the proceeding.

It is hereby ordered that said appeal is unanimously dismissed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul a determination of respondent Town of Livonia Joint Zoning Board of Appeals (ZBA). The ZBA determined, inter alia, that the sawmill project proposed by respondent Finger Lakes Timber Company, Inc. (FLTC) constituted a permissible “[a]gricultural or farming operation” within the meaning of the Town of Livonia Zoning Code. Petitioners appeal from a judgment denying their petition and dismissing the proceeding.

We agree with respondents that the appeal must be dismissed as moot. Petitioners did not seek injunctive relief or make any other attempts to preserve the status quo during the pendency of their administrative appeal, the CPLR article 78 proceeding, or this appeal, and the sawmill project is now complete (*see Matter of Gerster Sales & Serv., Inc. v Power Auth. of State of N.Y.*, 67 AD3d 1386, 1387 [2009], *lv denied* 14 NY3d 703 [2010]; *Durham v Village of Potsdam*, 16 AD3d 937, 938 [2005], *lv denied* 5 NY3d 702 [2005]; *Matter of G.Z.T. Indus. v Planning Bd. of Town of Fallsburg*, 245 AD2d 741, 742 [1997]; *cf. Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, 1313 [2005], *appeal dismissed* 7 NY3d 803 [2006]). Petitioners nonetheless assert that the appeal is not moot because the controversy does not concern the propriety of the building, but rather the use of FLTC’s land to operate a sawmill. We reject that contention. FLTC sought permission to

erect the building at issue for the express purpose of housing a portable sawmill and other milling equipment. FLTC spent an estimated \$100,000 on the building, which is now complete and being used for its intended purpose (*see generally Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 173-174 [2002]). Further, the ZBA granted FLTC's application for a conditional use permit authorizing its use of a portable sawmill on the property in 2006, well before the determination at issue. Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

26 CYNTHIA M. TALLO, Respondent, v LOUIS J. TALLO, Appellant. [991 NYS2d 500]—

Husband and Wife and Other Domestic Relationships—Separation Agreement—Obligation to Make Distributive Payment

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered April 25, 2013. The order, *inter alia*, directed defendant to pay plaintiff the sum of \$116,667 as a distributive award.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant husband appeals from an order that, *inter alia*, directed him to make a \$116,667 distributive payment to plaintiff wife pursuant to the parties' separation agreement, which was incorporated by reference into their judgment of divorce. Article v of the separation agreement required defendant to make monthly maintenance payments, commencing November 1, 2008 and continuing for a period of five years. Article V also listed five conditions or events that would terminate defendant's maintenance obligation. Article VI of the separation agreement required defendant to make an annual distributive payment from his 401(k) plan to plaintiff on the first business day of each calendar year from 2009 through 2012, provided for a final payment of \$116,667 on January 2, 2013, and further provided that those "sums shall be deemed to be a distributive award." Article VI further provided that, "[d]uring such period(s) of time that said sums are transferred to [plaintiff], [defendant] shall not have the obligation to pay maintenance to [plaintiff] pursuant to Article V." Unlike Article V, Article VI contained no conditions or events that would relieve defendant of his obligation to make those distributive payments.

After defendant refused to make the final distributive payment, plaintiff moved by order to show cause for an order compelling defendant to make the final Article VI payment. We reject defendant's contention that Supreme Court erred in

ordering him to make that payment. “A matrimonial settlement is a contract subject to principles of contract interpretation . . . [, and] a court should interpret the contract in accordance with its plain and ordinary meaning” (*Herzfeld v Herzfeld*, 50 AD3d 851, 851 [2008] [internal quotation marks omitted]; see generally *Kamens v Utica Mut. Ins. Co.*, 6 AD3d 1237, 1239 [2004], *affd* 4 NY3d 460 [2005]). “The interpretation of an unambiguous contractual provision is ‘a function for the court’ ” (*Pyramid Brokerage Co. of Buffalo, Inc. v Atlas Auto Glass, Inc.*, 39 AD3d 1176, 1177 [2007], quoting *Teitelbaum Holdings v Gold*, 48 NY2d 51, 56 [1979]). “[T]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation” (*Nancy Rose Stormer, P.C. v County of Oneida*, 66 AD3d 1449, 1450 [2009] [internal quotation marks omitted]; see *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). “[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms” (*R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002], *rearg denied* 98 NY2d 693 [2002] [internal quotation marks omitted]; see *Pyramid Brokerage Co. of Buffalo, Inc.*, 39 AD3d at 1177). Article VI of the separation agreement expressly and unambiguously required defendant to transfer \$116,667 from his 401(k) to plaintiff on January 2, 2013. The language of the agreement did not indicate that the payment was optional or terminable upon certain events. Although defendant urges us to apply the termination conditions or events contained in Article V to the payments required by Article VI, we decline to do so on the ground that we “may not by construction add . . . terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing” (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]; see *Camperlino v Bargabos*, 96 AD3d 1582, 1583 [2012]). Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

27 In the Matter of SHAWN A. PARKER, Petitioner, v DOUGLAS A. RANDALL, Monroe County Court Judge, Respondent. [990 NYS2d 402]—

Licenses—Firearms—Denial of Pistol Permit Application—Failure to Provide Reason for Denial

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul the determination of respondent. The determination denied petitioner’s application for a pistol permit.

It is hereby ordered that the determination is unanimously annulled on the law without costs, the petition is granted, and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination denying his pistol permit application. A licensing officer, such as respondent herein, has broad discretion to grant or deny a permit under Penal Law § 400.00 (1) (see *Matter of Fromson v Nelson*, 178 AD2d 479, 479 [1991]; *Matter of Covell v Aison*, 153 AD2d 1001, 1002 [1989], *lv denied* 74 NY2d 615 [1989]; *Matter of Anderson v Mogavero*, 116 AD2d 885, 885 [1986]). Under section 400.00 (4-a), the licensing officer must “either deny the application for reasons specifically and concisely stated in writing or grant the application and issue the license applied for.” If the licensing officer denies the application, “[t]he petitioner must be given the specific reasons for the denial . . . and be given an opportunity to respond to the objections to [his] application” (*Matter of Savitch v Lange*, 114 AD2d 372, 373 [1985]; see *Matter of Anderson v Mulroy*, 186 AD2d 1045, 1045 [1992]; see also *Matter of DiMonda v Bristol*, 219 AD2d 830, 831 [1995]). Here, although respondent issued two written decisions denying petitioner’s application—a preliminary, prehearing decision and a final, posthearing decision—he never provided a reason for the denial, despite a specific request from petitioner to do so. Thus, respondent failed to comply with the requirement set forth in section 400.00 (4-a). We therefore annul the determination and remit the matter to respondent to provide petitioner “with the specific reasons . . . for the denial of [his] application . . . and [to] afford [him] the opportunity to present evidence in response” (*Savitch*, 114 AD2d at 373; see *Anderson*, 186 AD2d at 1045). After receipt and review of any such evidence, respondent shall make a new determination on petitioner’s application (see *Savitch*, 114 AD2d at 373). Present—Centra, J.P., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

28 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v FELIPE A. ROMERO, Also Known as JOHN DOE, Appellant. [991 NYS2d 212]—

Crimes—Unlawful Search and Seizure—Probable Cause to Seize Vehicle Following Alert of Narcotics-Sniffing Canine

Crimes—Sentence—Unduly Harsh Sentence

Crimes—Right to Counsel—Effective Representation

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 2, 2010. The judgment convicted defendant, upon a jury verdict, of conspir-

acy in the second degree, criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree and attempted criminal sale of a controlled substance in the first degree.

It is hereby ordered that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment imposed for criminal possession of a controlled substance in the first degree, and attempted criminal sale of a controlled substance in the first degree to determinate terms of 10 years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of conspiracy in the second degree (Penal Law § 105.15), criminal possession of a controlled substance in the first degree (§ 220.21 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and attempted criminal sale of a controlled substance in the first degree (§§ 110.00, 220.43 [1]). Defendant contends that the People failed to meet their burden of establishing the legality of the police conduct in seizing his vehicle until a search warrant could be obtained (*see generally People v Di Stefano*, 38 NY2d 640, 652 [1976]). Defendant agrees that the People established that they had reasonable suspicion to stop his vehicle by presenting the testimony of a police officer summarizing the information obtained by the police from eavesdropping warrants. We conclude that the People further established that the reasonable suspicion ripened into probable cause following the alert of a narcotics-sniffing canine (*see People v Devone*, 57 AD3d 1240, 1243 [2008], *affd* 15 NY3d 106 [2010]; *People v Estrella*, 48 AD3d 1283, 1285 [2008], *affd* 10 NY3d 945 [2008], *cert denied* 555 US 1032 [2008]). Contrary to defendant's contention, Supreme Court did not err in relying on hearsay evidence, i.e., the search warrant application containing the police officers' sworn accounts of the canine alert (*see CPL 710.60 [4]; People v Edwards*, 95 NY2d 486, 491 [2000]; *People v Brink*, 31 AD3d 1139, 1140 [2006], *lv denied* 7 NY3d 865 [2006]).

We agree with defendant, however, that the sentence is unduly harsh and severe insofar as the court imposed determinate terms of imprisonment of 16 years for criminal possession of a controlled substance in the first degree and attempted criminal sale of a controlled substance in the first degree, particularly in light of the sentences received by codefendants. As a matter of discretion in the interest of justice (*see CPL 470.15 [6] [b]*), we therefore modify the judgment by reducing the determinate terms of imprisonment imposed on those counts to 10 years.

Defendant contends in his pro se supplemental brief that the indictment should be dismissed because the People failed to provide a copy of the eavesdropping warrant within 15 days after arraignment (*see* CPL 700.70). That contention is not preserved for our review (*see People v Highsmith*, 254 AD2d 768, 769 [1998], *lv denied* 92 NY2d 983 [1998], *reconsideration denied* 92 NY2d 1033 [1998]; *see also People v Murphy*, 28 AD3d 1096, 1096 [2006], *lv denied* 7 NY3d 760 [2006]) and, in any event, it is without merit. The record establishes that the court granted the People a 75-day extension of time upon their showing of good cause and the absence of prejudice to defendant (*see* CPL 700.70). We reject defendant's further contention in his pro se supplemental brief that he received ineffective assistance of counsel. Viewing the evidence, the law, and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). We have considered the remaining contentions raised in defendant's pro se supplemental brief and conclude that they are without merit. Present—Centra, J.P., Lindley, Sconiers and DeJoseph, JJ.

29 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SCOTT ARNEY, Appellant. [990 NYS2d 752]—

Crimes—Appeal—Valid Waiver of Right to Appeal

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 7, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of assault in the second degree (Penal Law § 120.05 [1]). We reject defendant's contention that his waiver of the right to appeal was invalid. "County Court's plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Buske*, 87 AD3d 1354, 1354 [2011], *lv denied* 18 NY3d 882 [2012] [internal quotation marks omitted]). Defendant's further contention that "the court erred in failing sua sponte to inquire into his state of intoxication at the time of the commission of the crime is actually a challenge to the factual sufficiency of the plea allocution, and it is well settled that defendant's valid waiver of the right to appeal encompasses that

challenge” (*People v Zimmerman*, 100 AD3d 1360, 1361 [2012], *lv denied* 20 NY3d 1015 [2013]). In any event, “[t]he issue of intoxication was raised by [defendant] for the first time in the presentence interview, and thus the court had no duty to make further inquiry at the time of the plea based on information in the presentence report” (*People v Jordan*, 292 AD2d 860, 861 [2002], *lv denied* 98 NY2d 698 [2002]; see *People v Espinal*, 99 AD3d 435, 435 [2012], *lv denied* 20 NY3d 986 [2012]). Because nothing in defendant’s plea allocution cast doubt on the voluntariness of his plea and inasmuch as defendant made no motion to withdraw his plea, defendant’s contention is unpreserved for our review (see *People v Lopez*, 71 NY2d 662, 665 [1988]).

Although defendant’s further contention that he is innocent survives his valid waiver of the right to appeal (see *People v Lewandowski*, 82 AD3d 1602, 1602 [2011]; see also *People v Franco*, 104 AD3d 790, 790 [2013]; *People v Wright*, 66 AD3d 1334, 1334 [2009], *lv denied* 13 NY3d 912 [2009]), that contention is also unpreserved for our review (see *Lewandowski*, 82 AD3d at 1602). In any event, defendant’s assertion of innocence is conclusory and belied by his statements during the plea colloquy (see *id.*; *Wright*, 66 AD3d at 1334).

We further conclude that the contention of defendant that he was denied effective assistance of counsel “does not survive the plea or his valid waiver of the right to appeal because defendant ‘failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [his] attorney[’s] allegedly poor performance’ ” (*Lewandowski*, 82 AD3d at 1602-1603). “ ‘In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel’ ” (*People v Liggins*, 82 AD3d 1625, 1625 [2011], *lv denied* 17 NY3d 797 [2011], quoting *People v Ford*, 86 NY2d 397, 404 [1995]). Here, defendant failed to assert his innocence or raise a possible intoxication defense at sentencing when given the opportunity to address the court and, given the favorable plea negotiated by defense counsel, which significantly reduced his sentencing exposure, we conclude that defendant was afforded meaningful representation (see *People v Neil*, 112 AD3d 1335, 1336 [2013]).

Finally, we agree with defendant that “the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because ‘no mention was made on the record during the course of the allocution concerning the waiver of defend-

ant's right to appeal' with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Peterson*, 111 AD3d 1412, 1412 [2013]; see *People v Maracle*, 19 NY3d 925, 927-928 [2012]; *People v Milon*, 114 AD3d 1130, 1131 [2014]). Nor is the deficiency in the allocution cured by defendant's written waiver of the right to appeal (see *People v Ramos-Roman*, 112 AD3d 1364, 1364 [2013]; *People v Pimentel*, 108 AD3d 861, 862 [2013], *lv denied* 21 NY3d 1076 [2013]; see generally *Maracle*, 19 NY3d at 927-928). We nevertheless conclude that the sentence is not unduly harsh or severe. Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

30 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SEAN BARILL, Appellant. [991 NYS2d 214]—

Crimes—Murder—Justification Defense—Weight of Evidence

Crimes—Argument and Conduct of Counsel—Prosecutor's Cross-Examination of Defendant as Interested Witness

Crimes—Instructions—Denial of Request for Intoxication Charge

Crimes—Instructions—Denial of Request for Missing Witness Charge

Crimes—Pretrial Motions—Abandonment of Request for *Dunaway* Hearing

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered August 15, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1] [intentional murder]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (see *People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, defendant's challenge is without merit (see *People v Wade*, 276 AD2d 406, 406 [2000], *lv denied* 96 NY2d 788 [2001]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *Bleakley*, 69 NY2d at 495). Specifically, we conclude that the jury "did not fail to give the evidence the weight it should be accorded in rejecting defendant's justification defense" and thus that the verdict is not against the weight

of the evidence in that respect (*People v Wolf*, 16 AD3d 1167, 1168 [2005]; see generally *Bleakley*, 69 NY2d at 495). We note that defendant inflicted 41 knife wounds on the victim, there was little sign of a struggle although the victim's blood was found throughout defendant's apartment, and defendant had only small cuts on his fingers that were consistent with his hand slipping on a knife blade as he stabbed the victim, as well as a few scratches on his back. Furthermore, defendant took preliminary steps to conceal the crime by gathering some of the weapons and the clothing he wore during the incident, and bundling those items in a rug. Defendant also wiped the victim's blood off some of the knives, took a shower, changed his clothes and fled the scene, and he then took another shower and had his girlfriend cut his hair. Contrary to defendant's contention that the jury should have credited his testimony that his actions were justified, " '[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury, which saw and heard the witnesses' " (*People v Sorrentino*, 12 AD3d 1197, 1197-1198 [2004], *lv denied* 4 NY3d 748 [2004]).

Defendant's contentions with respect to the integrity of the grand jury proceedings are "not reviewable on appeal because the grand jury minutes are not included in the record on appeal" (*People v Dilbert*, 1 AD3d 967, 967-968 [2003], *lv denied* 1 NY3d 626 [2004]; see generally *People v Hawkins*, 113 AD3d 1123, 1125 [2014], *lv denied* 22 NY3d 1156 [2014]; *People v Lane*, 47 AD3d 1125, 1127 n 3 [2008], *lv denied* 10 NY3d 866 [2008]; *People v Brooks*, 163 AD2d 864, 865 [1990], *lv denied* 76 NY2d 984 [1990]).

We reject defendant's further contention that he was deprived of a fair trial by prosecutorial misconduct. Defendant contends, inter alia, that the prosecutor impermissibly cross-examined him regarding his interest in the outcome of the trial. It is well settled, however, that a defendant is an interested witness as a matter of law (see e.g. *People v Newman*, 107 AD3d 827, 827-828 [2013]; *People v Wilson*, 93 AD3d 483, 484 [2012], *lv denied* 19 NY3d 978 [2012]; *People v Williams*, 81 AD3d 993, 994 [2011], *lv denied* 16 NY3d 901 [2011]), and the prosecutor's cross-examination merely established that fact. Defendant failed to preserve for our review his contention that, on summation, the prosecutor "improperly expressed his personal belief" with respect to the evidence (*People v Morris*, 267 AD2d 1032, 1033 [1999], *lv denied* 95 NY2d 800 [2000]), and in any event that contention is without merit. Defendant's additional contentions with respect to prosecutorial misconduct are also without merit.

Contrary to defendant's further contention, Supreme Court properly denied his request for an intoxication charge. Defendant failed to present evidence "tending to corroborate his claim of intoxication, such as the number of drinks, the period of time during which they were consumed, the lapse of time between consumption and the event at issue, whether he consumed alcohol on an empty stomach, whether his drinks were high in alcoholic content, and the specific impact of the alcohol upon his behavior or mental state" (*People v Gaines*, 83 NY2d 925, 927 [1994]). Consequently, although "there was evidence of defendant's alcohol . . . consumption, there was no evidence that could raise a reasonable doubt as to whether his faculties were so impaired at the time of the crime that he could not have formed the requisite intent" (*People v Malaussena*, 44 AD3d 349, 349 [2007], *aff'd* 10 NY3d 904 [2008]).

Defendant further contends that the court erred in denying his request for a missing witness charge with respect to his girlfriend, who arrived at the scene of the crime after the stabbing. We reject that contention. "There are three preconditions to a missing witness instruction[.] First, the witness's knowledge must be material to the trial. Second, the witness must be expected to give noncumulative testimony favorable to the party against whom the charge is sought . . . Third, the witness must be available to that party" (*People v Hall*, 18 NY3d 122, 131 [2011]; *see People v Gonzalez*, 68 NY2d 424, 427 [1986]). The initial burden of establishing entitlement to the charge rests upon the party seeking the instruction (*see Gonzalez*, 68 NY2d at 427-428; *see generally People v Thomas*, 56 AD3d 1241, 1241 [2008]; *People v Wade*, 38 AD3d 1315, 1316 [2007], *lv denied* 8 NY3d 992 [2007]). Here, in the absence of any evidence establishing that the witness was available to the People or would testify in their favor, "[d]efendant failed to meet his burden of establishing that he was entitled to a missing witness charge with respect to" his girlfriend (*Wade*, 38 AD3d at 1316).

Even assuming, *arguendo*, that defendant initially made a sufficient motion for a *Dunaway* hearing merely by mentioning the name of the case in his request for a *Huntley* hearing (*cf. People v Jones*, 95 NY2d 721, 725-729 [2001]), we conclude that defendant abandoned that request because he "failed to seek a ruling on those parts of his omnibus motion concerning the alleged [*Dunaway*] violation . . . or to object to the admission of his statements in evidence at trial . . . on those grounds" (*People v Nix*, 78 AD3d 1698, 1699 [2010], *lv denied* 16 NY3d 799 [2011], *cert denied* 565 US —, 132 S Ct 157 [2011]; *see People v Wright*, 107 AD3d 1398, 1400 [2013]; *People v Smith*, 13 AD3d 1121,

1122 [2004], *lv denied* 4 NY3d 803 [2005]; *see generally* *People v Rodriguez*, 50 NY2d 553, 557 [1980]).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit. Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

31 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRIAN BROWN, Appellant. [990 NYS2d 755]—

Crimes—Confession—Right to Counsel—Failure to Unequivocally Request Counsel

Crimes—Confession—Voluntariness—No Evidence of Physical Force by Police Crimes—Murder—Attempted Aggravated Murder—Intent to Kill Deputy Sheriff—Sufficiency and Weight of Evidence

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered March 24, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (six counts), attempted aggravated murder, aggravated assault upon a police officer and criminal possession of a weapon in the second degree (three counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, *inter alia*, attempted aggravated murder (Penal Law §§ 110.00, 125.26 [1] [a] [i]) and aggravated assault upon a police officer (§ 120.11), defendant contends that County Court erred in refusing to suppress his confession because it was obtained in violation of his right to counsel. More specifically, defendant contends that, after being advised of his *Miranda* rights, he invoked his right to counsel by stating to the police investigators, “I don’t have an attorney” and “if I can’t afford an attorney, will it make a difference?” We reject that contention. The statement “I don’t have an attorney” does not constitute an unequivocal request for counsel (*see People v Ward*, 134 AD2d 544, 544-545 [1987], *lv denied* 70 NY2d 1012 [1988]; *see also People v Cotton*, 277 AD2d 461, 462 [2000], *lv denied* 96 NY2d 757 [2001]), nor does a statement from a suspect that he or she cannot afford an attorney constitute such a request (*see People v Mandrachio*, 55 NY2d 906, 907 [1982], *cert denied* 457 US 1122 [1982]). Similarly, the statement, “if I can’t afford an attorney, will it make a difference?” was merely “an inquiry about whether or not [defendant] should contact an attorney[, which] does not, without more, constitute an unequivocal invocation of the right to counsel” (*People v Hurd*, 279 AD2d 892, 893 [2001]; *see People v Vaughan*, 48 AD3d 1069, 1071 [2008], *lv denied* 10 NY3d 845 [2008], *cert denied* 555 US 910

[2008]; *People v Williams*, 286 AD2d 918, 919 [2001], *lv denied* 97 NY2d 763 [2002]).

We reject defendant's further contention that his confession was involuntary "in the traditional, pre-*Miranda* sense." There is no evidence in the record that defendant's confession was "obtained from him . . . by the use or threatened use of physical force" by the police (CPL 60.45 [2] [a]; see *People v Kelly*, 309 AD2d 1149, 1151 [2003], *lv denied* 1 NY3d 575 [2003]; cf. *People v Daniels*, 117 AD3d 1573, 1574-1575 [2014]). Indeed, the DVD of defendant's interrogation shows a well-treated suspect who joked and laughed at times with the investigators, and who was afforded food, drink and opportunities for rest (cf. *People v Guilford*, 21 NY3d 205, 209-213 [2013]).

Defendant's remaining contention with respect to the admissibility of his confession is that his waiver of *Miranda* rights was not voluntary, knowing and intelligent because one of the investigators told him that he "did not need an attorney." Because defendant "failed to raise this specific contention at the hearing or in his motion papers, this issue is unpreserved for [our] review" (*People v Grace*, 245 AD2d 387, 388 [1997], *lv denied* 91 NY2d 941 [1998]; see *People v Tutt*, 38 NY2d 1011, 1012 [1976]; *People v Louisias*, 29 AD3d 1017, 1018-1019 [2006], *lv denied* 7 NY3d 814 [2006]). In any event, we conclude that any error in failing to suppress the confession is harmless inasmuch as the proof of guilt is overwhelming and there is no reasonable possibility that the jury would have acquitted defendant if the confession had been suppressed (see *People v Wardlaw*, 18 AD3d 106, 109 [2005], *affd* 6 NY3d 556 [2006]; see generally *People v Crimmins*, 36 NY2d 230, 237 [1975]). We note that, at the time of his arrest, defendant possessed the gun that was used to shoot the deputy sheriff and fired during the two bank robberies. Defendant also possessed more than \$5,000 in cash. Moreover, defendant wrote a letter to the District Attorney while in jail, in which he stated, "The fact of the matter is I broke the law in Oneida County" and that "these crimes I committed [were] done out of love for my mother and desperation for a better life." Finally, defendant matched the description of the person who robbed the banks and shot the deputy sheriff, and he was wearing the same type and color of clothing.

Defendant further contends that the evidence is legally insufficient to establish that he intended to kill the deputy sheriff, which is a necessary element of attempted aggravated murder. We reject that contention as well. "A defendant may be presumed to intend the natural and probable consequences of his actions" (*People v Mahoney*, 6 AD3d 1104, 1104 [2004], *lv*

denied 3 NY3d 660 [2004]; *see People v Ford*, 114 AD3d 1273, 1274 [2014], *lv denied* 23 NY3d 962 [2014]), and “[i]ntent may be inferred from conduct as well as the surrounding circumstances” (*People v Steinberg*, 79 NY2d 673, 682 [1992]; *see People v Kelly*, 79 AD3d 1642, 1642 [2010], *lv denied* 16 NY3d 832 [2011]). Here, defendant’s intent to kill may be inferred from the fact that, with a loaded gun in his hand, he extended his arm directly toward the deputy sheriff and fired at least three shots, one of which struck the deputy sheriff in the foot. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a “valid line of reasoning and permissible inferences which could lead a rational person to the conclusion” that defendant possessed the intent to kill (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v Geddes*, 49 AD3d 1255, 1256 [2008], *lv denied* 10 NY3d 863 [2008]; *People v Sherry*, 41 AD3d 1235, 1236 [2007], *lv denied* 9 NY3d 926 [2007]). Moreover, viewing the evidence in light of the elements of the crime of attempted aggravated murder as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant testified that he intended only to scare the victim, “it was within the province of the jury to assess [his] credibility and reject [his] testimony” (*People v Mercado*, 113 AD3d 930, 932 [2014]).

We have reviewed defendant’s remaining contentions, including those raised in his pro se supplemental brief, and conclude that they lack merit. Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

32 APRIL D’AMICO, Appellant, v CORRECTIONAL MEDICAL CARE, INC., et al., Respondents. [991 NYS2d 687]—

Counties—Liability for Actions of Sheriff and Deputies—Absence of Local Law Assuming Liability

Process—Abuse of Process—Making of False Report to Police

Torts—False Imprisonment—False Arrest—Giving of False Statement to Police

Torts—Malicious Prosecution—Termination of Proceeding in Favor of Accused—Nonfinal Dismissal of Accusatory Instrument

Libel and Slander—Libel Per Se—Making of False Statement in Supporting Deposition to Police

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 19, 2012. The order granted the motions of defendants to dismiss the amended complaint and denied the cross motions of plaintiff for leave to serve an amended complaint.

It is hereby ordered that the order so appealed from is

unanimously modified on the law by denying those parts of the motion of defendants Correctional Medical Care, Inc., Andre Carpio, Maria Carpio, also known as Maria Umar, and Emre Umar seeking dismissal of the first, second and fifth causes of action in the amended complaint against them except insofar as the motion sought dismissal of the fifth cause of action against defendant Emre Umar, and reinstating those causes of action to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for abuse of process, false imprisonment/false arrest, malicious prosecution, libel per se, intentional infliction of emotional distress, and negligence, after she was allegedly falsely accused of stealing a computer from defendant Correctional Medical Care, Inc. (CMC). Plaintiff appeals from an order granting the motions to dismiss of defendants CMC, Andre Carpio (Andre), Maria Carpio, also known as Maria Umar (Maria), and Emre Umar (Emre) (collectively, CMC defendants) and defendants County of Monroe (County) and Monroe County Sheriff (Sheriff) (collectively, County defendants) (*see* CPLR 3211 [a] [5], [7], [8]), and denying plaintiff's cross motions for leave to serve an amended complaint.

Initially, with respect to the CMC defendants, we note that plaintiff properly amended her complaint as of right by filing the verified amended complaint after the CMC defendants moved to dismiss the original complaint (*see* CPLR 3211 [f]; *see also* CPLR 3025 [a]; *STS Mgt. Dev. v New York State Dept. of Taxation & Fin.*, 254 AD2d 409, 410 [1998]), and by contemporaneously serving the amended complaint on the CMC defendants' attorney as part of her cross motion (*see* CPLR 2103 [b]). As a result, the amended complaint superseded the original complaint and became the only complaint in the case (*see Aikens Constr. of Rome v Simons*, 284 AD2d 946, 947 [2001]; *see generally Preston v APCH, Inc.*, 89 AD3d 65, 69-70 [2011]). "We [thus] consider the [CMC defendants'] motion to dismiss as directed against the amended complaint that plaintiff[] . . . submitted in [her] opposition to the motion" (*Ferguson v Sherman Sq. Realty Corp.*, 30 AD3d 288, 288 [2006]; *see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1998]).

With respect to the County defendants, the record establishes that they were served with the amended complaint prior to their service of a responsive pleading. Thus, the amended complaint was served as of right on the County defendants (*see* CPLR 3025 [a]). We further note that plaintiff has abandoned her sixth cause of action for intentional infliction of emotional distress (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [1994]).

Turning to the merits, “[o]n these motions to dismiss, we accept the facts alleged in the [amended] complaint as true and accord plaintiff the benefit of every favorable inference” (*Kirchner v County of Niagara*, 107 AD3d 1620, 1621 [2013]). According to plaintiff, at some time prior to April 2008, CMC entered into a contract with the County whereby CMC would provide medical services to inmates at the Monroe County Jail, which was operated by the Sheriff. Maria served as CMC’s chief executive officer; her husband, Emre, was the company’s president; and Maria’s brother, Andre, was the company’s vice president. Plaintiff was employed by CMC as a health services administrator from April 1, 2008 until she was fired on February 1, 2009. In January 2010, plaintiff filed a sexual harassment lawsuit against CMC and Emre, alleging, inter alia, that she had been subjected to unwelcome sexual conduct by Emre during her employment with CMC. In December 2010, Maria, who was allegedly acting both individually and as CEO of CMC, Emre, and Andre all made statements to an investigator in the Sheriff’s Office, in the form of supporting depositions, accusing plaintiff of stealing a laptop computer belonging to CMC the day after her employment was terminated. Plaintiff alleged that the CMC defendants made such statements with the intent of procuring her arrest for possession of a stolen computer that each defendant knew was, in fact, not stolen. On December 15, 2010, plaintiff was charged by misdemeanor information, which was affirmed by the investigator, with criminal possession of stolen property in the fifth degree, a class A misdemeanor (*see* Penal Law § 165.40). Shortly thereafter, plaintiff was arrested without a warrant and subjected to mandatory processing as a criminal defendant by the investigator and other members of the Sheriff’s Office. On March 1, 2011, upon motion of her attorney, the misdemeanor information was dismissed in Town Court “as being defective on its face.”

With regard to the first and second causes of action for abuse of process and false imprisonment/false arrest, respectively, plaintiff alleged that the County defendants were vicariously liable for the actions of the investigator, who was acting “in the course of his employment with the [County], as a duly appointed Deputy acting under the supervision and control of the [Sheriff].” Plaintiff further alleged in the seventh cause of action that the County, acting through the Sheriff and his deputies and investigators, was negligent in allowing improper allegations of criminal conduct to be brought against her. Although the County defendants are not aggrieved parties on appeal (*see* CPLR 5511), we may consider their contentions as alternative grounds for affirmance inasmuch as they raised the

issue of vicarious liability in Supreme Court (*see Town of Massena v Niagara Mohawk Power Corp.*, 45 NY2d 482, 488 [1978]). It is well settled that “[a] county may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior in the absence of a local law assuming such responsibility” (*Mosey v County of Erie*, 117 AD3d 1381, 1385 [2014] [internal quotation marks omitted]; *see Trisvan v County of Monroe*, 26 AD3d 875, 876 [2006], *lv dismissed* 6 NY3d 891 [2006]). Section 39-10 (B) of the Monroe County Code, of which we take judicial notice (*see St. David’s Anglican Catholic Church, Inc. v Town of Halfmoon*, 11 AD3d 874, 876 [2004], citing CPLR 4511 [a]), provides that Sheriff’s deputies are “included under the term ‘employee’ for convenience of reference within this chapter only,” and that section further provides that “[t]he provisions of this chapter shall not be construed as establishing an employment or respondeat superior relationship between the County of Monroe and the Sheriff of the County of Monroe, the Undersheriff of the County of Monroe or any person appointed by the Sheriff of the County of Monroe, including but not limited to Sheriff’s deputies. The provisions of this chapter shall not be construed as an assumption by the County of Monroe of responsibility or liability for the negligence or tortious conduct of the Sheriff of the County of Monroe, the Undersheriff of the County of Monroe or any person appointed by the Sheriff of the County of Monroe, including but not limited to Sheriff’s deputies.”

Thus, inasmuch as plaintiff asserted against the County causes of action based only on respondeat superior, we conclude that the “amended complaint was properly dismissed against [the County] because the County did not assume liability for the acts of the Sheriff or his deputies” (*Smelts v Meloni* [appeal No. 3], 306 AD2d 872, 873 [2003], *lv denied* 100 NY2d 516 [2003]).

It is also well established that “a Sheriff cannot be held personally liable for the acts or omissions of his deputies while performing criminal justice functions, and that this principle precludes vicarious liability for the torts of a deputy” (*Barr v County of Albany*, 50 NY2d 247, 257 [1980]; *see Mosey*, 117 AD3d at 1385; *Trisvan*, 26 AD3d at 876). We thus conclude that the amended complaint was properly dismissed against the Sheriff inasmuch as all causes of action against him were based only on respondeat superior (*Trisvan*, 26 AD3d at 876).

We conclude, however, that the court erred in dismissing plaintiff’s first cause of action, for abuse of process, against the CMC defendants, and we therefore modify the order accord-

ingly. “A plaintiff asserting a cause of action for abuse of process must plead and prove that there was ‘(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective’ ” (*Liss v Forte*, 96 AD3d 1592, 1593 [2012], quoting *Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). “In addition, the plaintiff must plead and prove actual or special damages . . . , although . . . legal fees incurred in defending against false criminal charges are sufficient” (*id.*; see *Parkin v Cornell Univ.*, 78 NY2d 523, 530 [1991]). We conclude that the court erred in dismissing the cause of action for abuse of process on the ground that there was “no evidence” to support the first element, i.e., that there was no evidence that the CMC defendants caused criminal process to issue against plaintiff. It is well settled that on a motion to dismiss a court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “[T]he court’s role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint” (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [2002], *lv denied* 99 NY2d 502 [2002]). Moreover, contrary to the CMC defendants’ contention, making a false report to the police that results in the issuance of criminal process may support a claim for abuse of process (see *Parkin*, 78 NY2d at 530-531; *Liss*, 96 AD3d at 1592-1593; *Light v Light*, 64 AD3d 633, 634 [2009]). With regard to the second element, plaintiff sufficiently alleged that the CMC defendants intended to harm her by demeaning, humiliating, or defaming her rather than to secure justice for purported criminal conduct. With regard to the third element, plaintiff sufficiently alleged that the CMC defendants were manipulating the process to achieve a collateral objective, i.e., demeaning, humiliating, and defaming plaintiff in an attempt to gain an advantage in the sexual harassment lawsuit (see *Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 404 [1975]; *Danahy v Meese*, 84 AD2d 670, 672 [1981]). Contrary to the CMC defendants’ further contention, plaintiff’s amended complaint was sufficient to state a cause of action for abuse of process against CMC as a corporation. Finally, plaintiff properly pleaded special damages in her amended complaint inasmuch as legal fees incurred in defending against false criminal charges are sufficient to sustain a cause of action for abuse of process (see *Liss*, 96 AD3d at 1593; see also *Parkin*, 78 NY2d at 530).

We further conclude that the court erred in dismissing plaintiff's second cause of action, for false imprisonment/false arrest, against each of the CMC defendants, and we therefore further modify the order accordingly. "With respect to a cause of action for false arrest or false imprisonment . . . , the elements are that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged" (*Burgio v Ince*, 79 AD3d 1733, 1734 [2010]; see *Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]). Here, plaintiff's allegations were sufficient to state a cause of action inasmuch as plaintiff alleged that the CMC defendants, including CMC acting through Maria as its CEO, gave false statements to the police with the intent of having plaintiff arrested; that plaintiff was conscious of the confinement and did not consent thereto; and that, as a result of the actions of the CMC defendants, she was subjected to a warrantless, unprivileged arrest. The CMC defendants contend in response that they cannot be liable for plaintiff's arrest because they merely provided information to the police who thereafter acted on their own in determining that an arrest was legally justified, i.e., supported by probable cause (see generally *Lowmack v Eckerd Corp.*, 303 AD2d 998, 999 [2003]). We note however, that lack of probable cause is not an element of the cause of action for false imprisonment/false arrest, and thus need not be pleaded (see *Broughton*, 37 NY2d at 457; see also *Quigley v City of Auburn*, 267 AD2d 978, 979 [1999]).

We agree with the CMC defendants, however, that the court properly dismissed the fourth cause of action, for malicious prosecution, for failure to state a cause of action (see CPLR 3211 [a] [7]). "The elements of the tort of malicious prosecution are: (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice" (*Zetes v Stephens*, 108 AD3d 1014, 1015 [2013], quoting *Broughton*, 37 NY2d at 457; see *Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]). With regard to the second element, "any [final] termination of a criminal prosecution, such that the criminal charges may not be brought again, qualifies as a favorable termination, so long as the circumstances surrounding the termination are not inconsistent with the innocence of the accused" (*Cantalino v Danner*, 96 NY2d 391, 395 [2001], citing *Smith-Hunter*, 95 NY2d at 199 [2001]; see *Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]). It is well settled, however,

that any disposition of the criminal action that does not terminate it, but permits it to be renewed, cannot serve as a foundation for a malicious prosecution action (*see Smith-Hunter*, 95 NY2d at 197). A dismissal without prejudice qualifies as a final, favorable termination if the dismissal represents the formal abandonment of the proceedings by the prosecutor (*see id.* at 198-199).

Here, plaintiff alleged in the complaint that the misdemeanor information was dismissed in Town Court “as being defective on its face.” Plaintiff’s submissions in opposition to the motion to dismiss (*see Gibraltar Steel Corp. v Gibraltar Metal Processing*, 19 AD3d 1141, 1142 [2005]), however, establish that plaintiff moved to dismiss the misdemeanor information on the ground that it was insufficient on its face because it was not supported by any nonhearsay allegations of fact sufficient to support a conviction (*see* CPL 170.30 [1] [a]; *see also* CPL 170.35 [1] [a]; 100.40 [1] [c]). Town Court dismissed the information without prejudice to the People to refile because, despite its doubts that the People would be able to successfully do so, it could not “foreclose [the People] from curing whatever defect [the misdemeanor information contained].” Inasmuch as the accusatory instrument was ultimately dismissed without prejudice to refile in order to correct the legal insufficiency of the allegations therein, we conclude that the dismissal was not final and thus cannot support a cause of action for malicious prosecution (*see Smith-Hunter*, 95 NY2d at 197; *MacFawn v Kresler*, 88 NY2d 859, 860 [1996]).

Finally, we conclude that the court erred in dismissing plaintiff’s fifth cause of action, for libel per se, against defendants CMC, Maria, and Andre, and we therefore further modify the order accordingly. “The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se” (*Salvatore v Kumar*, 45 AD3d 560, 563 [2007], *lv denied* 10 NY3d 703 [2008]; *see generally* Restatement [Second] of Torts § 558). Making a false statement contained in a supporting deposition provided to the police constitutes libel on its face, i.e., libel per se, if it “‘tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or [to] induce an evil opinion of him [or her] in the minds of right-thinking persons’ ” (*Zetes*, 108 AD3d at 1018-1019, quoting *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379 [1977], *rearg denied* 42 NY2d 1015 [1977], *cert denied* 434 US 969 [1977]). An allegation that a defendant filed

a false report accusing the plaintiff of a serious crime is sufficient to state a valid cause of action to recover damages for libel per se (see *Light*, 64 AD3d at 634; *Burdick v Verizon Communications*, 305 AD2d 1030, 1031 [2003]; see also *Geraci v Probst*, 15 NY3d 336, 344-345 [2010]). “[P]roof of special damages is not required for libel on its face or libel per se” (*Zetes*, 108 AD3d at 1019). In addition, “[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally” (CPLR 3016 [a]). Contrary to the CMC defendants’ contention, the amended complaint sets forth “the particular words complained of” inasmuch as plaintiff attached complete copies of the supporting depositions to her amended pleading and “[a] copy of any writing which is attached to a pleading is a part thereof for all purposes” (CPLR 3014); plaintiff also specifically referenced in her amended complaint the statements at issue from the supporting depositions. Here, plaintiff’s allegations of libel per se are legally sufficient. She alleged that the statements contained in the supporting depositions of Andre and Maria, who was allegedly acting both individually and as CEO of CMC, falsely accused her of committing a serious crime of possession of stolen property (Penal Law § 165.40; see *Epifani v Johnson*, 65 AD3d 224, 234 [2009]; see also *Martin v Hayes*, 105 AD3d 1291, 1292-1293 [2013]) or, arguably, grand larceny in the fourth degree (Penal Law § 155.30 [1]; see generally *Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]); that the statements were published to the Sheriff’s Office and thereafter filed in Town Court; and that the CMC defendants made such statements in bad faith, and for the purpose of humiliating plaintiff and subjecting her to criminal prosecution (see generally *Zetes*, 108 AD3d at 1018-1019; *Light*, 64 AD3d at 634). We also conclude, however, that plaintiff failed to state a cause of action for libel per se against Emre because the statements in his supporting deposition cannot be construed as accusing plaintiff of any crime. Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

33 MICHAEL WROBEL, Appellant-Respondent, v TOWN OF PENDLETON et al., Defendants, COUNTY OF NIAGARA, Respondent-Appellant, and FOIT-ALBERT ASSOCIATES, ARCHITECTURE, ENGINEERING AND SURVEYING, P.C., Respondent. [991 NYS2d 218]—

Labor—Safe Place to Work—Architect/Engineer Not Statutory Agent of Owner—Lack of Supervision or Control

Labor—Safe Place to Work—Fall through Hole in Ground—Liability of Architect/Engineer for Negligence

Labor—Safe Place to Work—Fall through Hole in Ground—Liability of Owner—Absence of Elevation-Related Hazard

Labor—Safe Place to Work—Fall through Hole in Ground—Liability of Owner—Industrial Code Violations

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 12, 2013. The order, among other things, denied the motion of defendant County of Niagara for summary judgment and granted the motion of defendant Foit-Albert Associates, Architecture, Engineering and Surveying, P.C. for summary judgment.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting in part the motion of defendant County of Niagara and dismissing the Labor Law § 240 (1) claim and the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-4.2 (h) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for leg injuries he sustained when he stepped into a hole in the ground while working for the general contractor at a construction site owned by defendant County of Niagara (County). The construction project involved the widening of a County road and the installation of new drainage lines along the road. According to plaintiff, he stepped into the hole, which he described as three or four feet deep and filled with rainwater, while carrying a pipe that he and coworkers intended to install in a trench.

The complaint, as amplified by the bill of particulars, alleges that the County and its architect/engineer, defendant Foit-Albert Associates, Architecture, Engineering and Surveying, P.C. (Foit-Albert), violated Labor Law §§ 200, 240 (1) and 241 (6), and that they were negligent in failing to provide him with a safe place to work. Following discovery, the County and Foit-Albert moved separately for summary judgment dismissing the complaint against them, and plaintiff cross-moved for partial summary judgment on liability on his section 240 (1) and 241 (6) claims. Supreme Court granted Foit-Albert's motion and dismissed the complaint against it, and denied the County's motion and plaintiff's cross motion, finding issues of fact for trial. Plaintiff appeals from the order insofar as it granted Foit-Albert's motion, and the County cross-appeals from the order insofar as it denied its motion.

We conclude with respect to plaintiff's appeal that the court properly granted Foit-Albert's motion. Addressing first Labor Law §§ 240 (1) and 241 (6), it is well settled that the duties of those sections "apply only to '[general] contractors and owners and their agents'" (*Brownell v Blue Seal Feeds, Inc.*, 89 AD3d 1425, 1427 [2011]; see *Russin v Louis N. Picciano & Son*, 54

NY2d 311, 317-318 [1981]). Here, Foit-Albert met its burden of establishing that it was not liable as an agent of the County, i.e., it did not have sufficient supervision or control over the activity that caused plaintiff's injury, or over the safety procedures employed at the site (*see Lopez v Dagan*, 98 AD3d 436, 437 [2012], *lv denied* 21 NY3d 855 [2013]; *Baker v Town of Niskayuna*, 69 AD3d 1016, 1018 [2010]; *Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 341 [2004]). Indeed, professional engineers, architects, and landscape architects who "do not direct or control the work for activities other than planning and design" are specifically immune from liability under Labor Law §§ 240 (1) and 241 (6) (*see* §§ 240 [1]; 241 [9]; *Harvey v Sear-Brown Group*, 262 AD2d 1006, 1006 [1999]; *Carter v Vollmer Assoc.*, 196 AD2d 754, 754 [1993]). Plaintiff failed to raise a triable issue of fact in opposition to those parts of the motion (*see Fecht v City of New York*, 244 AD2d 315, 315-316 [1997]; *cf. Gonnerman v Huddleston*, 48 AD3d 516, 517 [2008]).

Because Foit-Albert "exercised no control or supervision over either plaintiff's work or plaintiff's work site, and thus was not 'responsible for providing plaintiff with a safe workplace'" (*Severino v Hohl Indus. Servs.*, 300 AD2d 1049, 1050 [2002]; *see Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2011]), Foit-Albert was also entitled to dismissal of the Labor Law § 200 claim against it. Further, the court properly granted that part of Foit-Albert's motion with respect to the common-law negligence cause of action inasmuch as there was no showing that it "failed to use due care in the exercise of its professional services" (*Lopez v Dagan*, 98 AD3d 436, 439 [2012], *lv denied* 21 NY3d 855 [2013]; *see Torres v CTE Engrs., Inc.*, 13 AD3d 359, 359-360 [2004]; *Hernandez v Yonkers Contr. Co.*, 306 AD2d 379, 380 [2003]).

We further conclude, however, that the court erred in denying that part of the County's motion seeking summary judgment dismissing the Labor Law § 240 (1) claim against it, and we therefore modify the order accordingly. Where, as here, a plaintiff falls into a hole while walking at ground level, the plaintiff's injury "[is] not caused by [defendants'] failure to provide or erect necessary safety devices in response to 'elevation-related hazards,' and, accordingly, the protections of Labor Law § 240 (1) do not apply" (*Piccuillo v Bank of N.Y. Co.*, 277 AD2d 93, 94 [2000]; *see Alvia v Teman Elec. Contr.*, 287 AD2d 421, 422 [2001], *lv dismissed* 97 NY2d 749 [2002]; *see also Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 580 [2003], *lv denied* 100 NY2d 516 [2003]; *D'Egidio v Frontier Ins. Co.*, 270 AD2d 763, 766 [2000], *lv denied* 95 NY2d 765 [2000]).

The cases relied upon by plaintiff are factually distinguishable because they involve falls into excavated areas, as opposed to mere holes in the ground such as the one here (*see Covey v Iroquois Gas Transmission Sys.*, 89 NY2d 952, 953-954 [1997]; *Wild v Marrano/Marc Equity Corp.*, 75 AD3d 1099, 1099 [2010]; *Congi v Niagara Frontier Transp. Auth.*, 294 AD2d 830, 830 [2002]; *Jiminez v Nidus Corp.*, 288 AD2d 123, 123 [2001]). Unlike the excavation cases, this is not a case where protective devices enumerated in Labor Law § 240 (1), e.g., “scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, [and] ropes” were designed to apply (*see Alvia*, 287 AD2d at 422).

The court also erred in denying that part of the County’s motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the County’s alleged violation of 12 NYCRR 23-4.2 (h). We therefore further modify the order accordingly. Pursuant to that regulation, “[a]ny open excavation adjacent to a sidewalk, street, highway or other area lawfully frequented by any person shall be effectively guarded [or covered].” Although that regulation is sufficiently specific to support his claim (*see Scarso v M.G. Gen. Constr. Corp.*, 16 AD3d 660, 661 [2005], *lv dismissed* 5 NY3d 849 [2005]), we agree with the County that plaintiff, as an employee at the work site, did not fall within the class of people intended to be protected by 12 NYCRR 23-4.2 (h) (*see Ruland v Long Is. Power Auth.*, 5 AD3d 580, 581 [2004]; *Lamela v City of New York*, 560 F Supp 2d 214, 226-227 [2008], *affd* 332 Fed Appx 682 [2d Cir 2009]; *cf. Scarso*, 16 AD3d at 661). As the District Court stated in *Lamela*, the State Commissioner of Labor, by applying 12 NYCRR 23-4.2 (h) to areas “lawfully frequented by any person,” specifically “chose not to include the disjunctive class of ‘persons employed therein’ ” (*id.* at 227).

The court properly denied that part of the County’s motion with respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (b) (1) (i), which provides that “[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing.” That regulation is sufficiently specific to support a section 241 (6) violation (*see Scarso*, 16 AD3d at 661), and we have held that it applies to any “ ‘hazardous opening into which a person may step or fall . . . provided that [it is] one of significant depth and size’ ” (*Ellis v J.M.G., Inc.*, 31 AD3d 1220, 1221 [2006]; *see Pilato v Nigel Enters., Inc.*, 48 AD3d 1133, 1134-1135 [2008]; *cf. Farrell v Dick Enters.*, 227 AD2d 956, 956 [1996]). We agree with the court

that there is a triable issue of fact whether the County violated that regulation.

Finally, we conclude that the court properly found issues of fact that preclude an award of summary judgment to the County on plaintiff's Labor Law § 200 claim and common-law negligence cause of action. Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

34 NICK'S GARAGE, INC., Respondent, v LIBERTY MUTUAL FIRE INSURANCE COMPANY, Appellant. (Appeal No. 1.) [991 NYS2d 695]—

Insurance—Liability Insurance—Standing to Commence Direct Action against Tortfeasor's Insurer—Quantum Meruit and Deceptive Business Practices Claims Not Barred

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 10, 2013. The order denied the motion of defendant to dismiss in part plaintiff's second amended complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs in these two appeals operate automobile repair shops, and they commenced these actions to recover payment for repairs performed on behalf of various assignors, including persons involved in accidents with defendant's insureds (*see generally* 11 NYCRR 216.7 [a] [2]). Insofar as relevant in each appeal, plaintiffs asserted causes of action for quantum meruit and the violation of General Business Law § 349, which prohibits deceptive business practices. In appeal Nos. 1 and 2, defendant moved to dismiss those causes of action in the second amended complaint and the amended complaint, respectively, on the ground that plaintiffs lacked standing under Insurance Law § 3420 because their assignors were strangers to the underlying insurance policies. Supreme Court denied both motions. We now affirm.

When the plaintiff is a stranger to the underlying insurance policy, "Insurance Law § 3420 . . . grants [him or her] a right to sue the tortfeasor's insurer, but only under limited circumstances—[he or she] must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days. Compliance with th[o]se requirements is a condition precedent to a direct action against the insurance company" (*Lang v Hanover Ins. Co.*, 3 NY3d 350, 354 [2004]). That condition precedent, however, applies only when the direct action seeks relief "under the terms of the [insurance] policy or contract" (§ 3420 [a] [2]).

Here, the causes of action for quantum meruit and deceptive

business practices do not seek relief “under the terms of the [insurance] policy or contract.” Rather, those causes of action raise distinct legal theories that are independent of the policy terms. Thus, contrary to defendant’s contention in both appeals, Insurance Law § 3420 does not bar plaintiffs’ causes of action for quantum meruit and deceptive business practices, and the court therefore properly denied the motions to dismiss insofar as they were premised on that ground (*see Nick’s Garage, Inc. v State Farm Gen. Ins. Co.*, 2013 WL 718323, *10, 2013 US Dist LEXIS 26654, *27-28 [ND NY 2013]; *see generally First State Ins. Co. v J & S United Amusement Corp.*, 67 NY2d 1044, 1046 n [1986]; *McNamara v Allstate Ins. Co.*, 3 AD2d 295, 298 [1957]).

Defendant’s remaining contentions in each appeal were raised for the first time in its reply papers, and it is “well settled that contentions raised for the first time in reply papers are not properly before [us]” (*Jacobson v Leemilts Petroleum, Inc.*, 101 AD3d 1599, 1600 [2012]). Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

35 JEFFREY’S AUTO BODY, INC., Respondent, v LIBERTY MUTUAL FIRE INSURANCE COMPANY, Appellant. (Appeal No. 2.) [990 NYS2d 430]—Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 10, 2013. The order denied the motion of defendant to dismiss in part plaintiff’s amended complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Nick’s Garage, Inc. v Liberty Mut. Fire Ins. Co.* ([appeal No. 1] 120 AD3d 967 [2014]). Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

36 KAREN McGRATH et al., Respondents, v TOWN OF IRON-DEQUOIT, Appellant. [990 NYS2d 758]—

Pleading—Amendment—Complaint—Untimely Motion for Leave to Amend—Lack of Prejudice

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 8, 2013. The order granted the motion of plaintiffs for leave to serve a second amended complaint and to vacate the note of issue and certificate of readiness.

It is hereby ordered that said appeal from the order insofar as it concerns the note of issue and certificate of readiness is unanimously dismissed and the order is affirmed without costs.

Memorandum: This action arises from a landslide that oc-

curred on a steeply-sloped parcel of real property owned by defendant, and which allegedly caused part of plaintiffs' adjacent property to subside. Plaintiffs seek damages for diminution of value and the cost of repairs to their property, asserting that defendant created and negligently maintained a private nuisance resulting in the landslide. Supreme Court granted plaintiffs' motion for an order vacating the note of issue and certificate of readiness and for leave to serve a second amended complaint.

We note at the outset that we dismiss the appeal from the order insofar as it granted that part of plaintiffs' motion seeking to vacate the note of issue and certificate of readiness. On appeal, defendant seeks, inter alia, reinstatement of the note of issue and certificate of readiness, but a postargument submission by plaintiffs' attorney establishes that a new note of issue and certificate of readiness have been filed. Consequently, "we conclude that the rights of the parties cannot be affected by the determination of [that part of the] appeal[,] and it is therefore moot" (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; see generally *Matter of Anonymous v New York City Health & Hosps. Corp.*, 70 NY2d 972, 974 [1988], *rearg denied* 71 NY2d 994 [1988]).

Contrary to defendant's contention, we also conclude that the court properly granted that part of the motion seeking leave to serve a second amended complaint. "Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198 [2007], *amended on rearg* 41 AD3d 1324 [2007] [internal quotation marks omitted]; see CPLR 3025 [b]). Although plaintiffs did not make the motion promptly after service of the note of issue and certificate of readiness, it is well settled that " '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' " (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:5 at 477). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position' " (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007]). Here, defendant failed to establish any prejudice arising from plaintiffs' lateness, and thus the court properly granted plaintiffs leave to serve a second amended complaint. Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

37 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MARSHALL D. MYHAND, Also Known as MARSHALL MAYHAND, Appellant. [991 NYS2d 222]—

Crimes—Search Warrant—Probable Cause—Search of Defendant’s Residence for Cocaine—Personal Observations of Police during Controlled Drug Buys
Crimes—Search Warrant—Probable Cause—Search of Defendant’s Residence for Cocaine—Hearsay Information Provided by Confidential Informant and Unwitting Participant—Reliability and Basis of Knowledge

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 17, 2010. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), defendant contends that County Court erred in refusing to suppress evidence obtained as a result of the execution of a search warrant at defendant’s residence. Specifically, defendant contends that the search warrant was not supported by the requisite probable cause. We reject that contention.

“Probable cause does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely [requires] information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place” (*People v Bigelow*, 66 NY2d 417, 423 [1985]). While New York has not adopted the “totality-of-the-circumstances analysis” adopted by the United States Supreme Court in *Illinois v Gates* (462 US 213, 238 [1983], *reh denied* 463 US 1237 [1983]; see *People v Griminger*, 71 NY2d 635, 639 [1988]), the Court of Appeals has held that “[t]he legal conclusion [concerning the existence of probable cause] is to be made after considering all of the facts and circumstances together. Viewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found” (*Bigelow*, 66 NY2d at 423). In our view, this is one of those situations where the pieces of the puzzle fit in such a manner as to support a finding of probable cause.

In support of the application for a search warrant, the authoring officer noted that defendant had two prior convictions of possession of illegal substances, one of which was a 2002 conviction of criminal possession of a controlled substance in the third degree, i.e., possession with intent to sell (Penal Law § 220.16 [1]). The officer then summarized his prior experience with a

particular confidential informant (CI-1), establishing that he had used CI-1 in previous investigations that led to successful prosecutions. Police officers used CI-1 to make a controlled purchase of cocaine from defendant at his former residence. Before and after the purchase, the officers searched CI-1 and his vehicle to ensure that CI-1 was not in possession of any cocaine, and they provided CI-1 with buy money. Immediately after observing CI-1 enter and exit defendant's former residence, the officers searched CI-1 again, recovering a substance that tested positive for cocaine. CI-1 informed the officers that defendant had sold CI-1 the cocaine. The circumstances of that sale are not challenged by defendant.

Following defendant's relocation to a different residence, officers placed that residence under surveillance. The officer who authored the search warrant application described the circumstances of a second purchase of cocaine. The officer and another officer met with CI-1, and they searched CI-1 as well as CI-1's vehicle to ensure that CI-1 was not in possession of cocaine. CI-1 was provided with buy money, and a plan was developed for CI-1 to pick up an "unwitting participant" (UP) who would make the actual purchase. Officers kept CI-1 under observation while CI-1 met with UP, a black male, who entered CI-1's vehicle. Officers continued to keep that vehicle under surveillance as it traveled to an area near defendant's new residence. UP exited the vehicle, walking in the direction of defendant's residence. He returned approximately 15 minutes later, and he entered and then subsequently exited CI-1's vehicle, which was under surveillance by the officers. The officers then met with CI-1, who was found to be in possession of a substance that tested positive for cocaine. CI-1 informed the officers that, in CI-1's presence, UP had telephoned "Dog," i.e., defendant. When the call ended, UP told CI-1 that "Dog" was ready and directed CI-1 to the area near defendant's new residence.

A similar plan was developed for a third purchase of cocaine. The officer who authored the search warrant application and another officer met with CI-1, and they searched CI-1 and CI-1's vehicle to ensure that CI-1 was not in possession of any cocaine. They also again provided CI-1 with a predetermined amount of buy money. CI-1 was observed meeting the same UP used in sale number two. After that meeting, officers observed UP travel in his vehicle to an area near defendant's residence. Officers further observed UP exit his vehicle, enter defendant's residence, and exit that residence with defendant 11 minutes later. While still under observation, UP entered his vehicle and traveled to rendezvous with CI-1. After UP left the area, the offi-

cers met with CI-1, who informed the officers that, when CI-1 met UP, he told CI-1 that “Dog” was ready. CI-1 told the officers that he gave the buy money to UP, who then drove off in his own vehicle. CI-1 also told the officers that, when UP returned, he handed CI-1 a knotted sandwich bag that he told CI-1 he had received from “Dog.” The substance in the bag tested positive for cocaine.

Based on the aforementioned facts, the authoring officer applied for a search warrant to search defendant’s new residence. The application did not seek permission to search any particular person. The issue before us thus is whether the aforementioned information provided the requisite probable cause for the issuance of the search warrant, i.e., was it “sufficient to support a reasonable belief . . . that evidence of a crime may be found” inside defendant’s new residence (*Bigelow*, 66 NY2d at 423). We conclude that it was sufficient.

As a preliminary matter, we conclude that the search warrant application was sufficient without resorting to any hearsay from either CI-1 or UP. With respect to the first sale, officers confirmed that CI-1 was not in possession of any drugs, at which point they provided CI-1 with buy money. The officers then observed CI-1 enter defendant’s residence and then exit that residence shortly thereafter. At that time CI-1 was in possession of cocaine but no longer in possession of the buy money. That evidence stands independent of any hearsay information from CI-1. Hearsay information would be required only if the issue before us concerned the identity of the person in that residence who sold the cocaine to CI-1.

The officers then confirmed that defendant relocated to a new residence. With respect to the second sale, the officers determined that CI-1 was not in possession of any cocaine before CI-1 met with UP, who was then observed by officers going to the area of defendant’s new residence. Officers observed UP return to CI-1, after which the officers confirmed that CI-1 was in possession of cocaine. Again, none of that information requires resort to hearsay from either CI-1 or UP. It is based solely on the personal observations of the officers.

Finally, with respect to the third sale, the officers determined that CI-1 was not in possession of cocaine before CI-1 met with UP for a second time. The officers then observed UP drive his own vehicle to defendant’s new residence. They further observed UP enter and remain inside defendant’s residence for 11 minutes, after which they observed him exiting the residence with defendant. While under continual observation, UP met CI-1 and then drove away. Immediately thereafter, CI-1 was in possession of cocaine.

As defendant correctly contends, we cannot ignore the remote possibility that UP had cocaine on his person or in his vehicle before ever going near or inside defendant's new residence. That possibility, however, is not fatal to our analysis. Although "[h]uman imagination might conjure up possible innocent behavior [by the defendant,] . . . that cannot be the test of probable cause . . . Probable cause does not require proof to a mathematical certainty, or proof beyond a reasonable doubt. Based on the articulated, objective facts before [the issuing Judge], and the reasonable inferences to be drawn therefrom, it was 'more probable than not' that criminal activity was taking place inside" defendant's new residence (*People v Mercado*, 68 NY2d 874, 877 [1986], *cert denied* 479 US 1095 [1987]). In our view, it is more probable than not that the cocaine given to CI-1 was obtained from defendant's residence because, otherwise, UP would have simply sold the cocaine to CI-1 himself.

Even assuming, *arguendo*, that the search warrant application was not sufficient without resorting to any hearsay evidence provided by CI-1 and UP, we conclude that the hearsay information contained in the search warrant application passed the *Aguilar-Spinelli* test and could thus be used to establish probable cause for the search warrant. It is well established that "[p]robable cause may be supplied, in whole or part, through hearsay information . . . New York's present law applies the *Aguilar-Spinelli* rule for evaluating secondhand information and holds that if probable cause is based on hearsay statements, the police must establish that the informant had some basis for the knowledge he [or she] transmitted to them and that he [or she] was reliable" (*Bigelow*, 66 NY2d at 423; *see Grimmer*, 71 NY2d at 639). "Notably, where the information is based upon double hearsay, the foregoing requirements must be met with respect to each individual providing information" (*People v Mabeus*, 63 AD3d 1447, 1450 [2009], citing *People v Ketcham*, 93 NY2d 416, 421 [1999], and *People v Parris*, 83 NY2d 342, 347-348 [1994]).

"If the affidavit rests on hearsay—an informant's report—what is necessary under *Aguilar* is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) *that his information is hearsay, but there is good reason for believing it*" (*Parris*, 83 NY2d at 347, quoting *Spinelli v United States*, 393 US 410, 425 [1969]).

We conclude that the application established the reliability and basis of knowledge of CI-1. Reliability was established by the fact that CI-1 "ha[d] come forward with accurate informa-

tion in the past” (*People v Rodriguez*, 52 NY2d 483, 489 [1981]). Furthermore, the application also established CI-1’s basis of knowledge. With respect to the basis of knowledge prong, “there is no requirement that the information furnished by [the informant] had to be the product of his [or her] personal observations of criminal activity . . . ‘What is required is information of such quality, considering its source and the circumstances in which it came into possession of the informant, that a reasonable observer would be warranted in determining that the basis of the informant’s knowledge was such that it led logically to the conclusion that a crime had been . . . committed’ ” (*People v Greene*, 153 AD2d 439, 443-444 [1990], *lv denied* 76 NY2d 735 [1990], *cert denied* 498 US 947 [1990]). “[T]he basis of knowledge test is . . . intended to weed out, as not of sufficient quality, data received by the informant from others who have not themselves observed facts suggestive of criminal activity” (*People v Elwell*, 50 NY2d 231, 237 [1980]). Inasmuch as CI-1 received data from someone who had himself observed criminal activity, the goal of the basis of knowledge test has been met (*see Greene*, 153 AD2d at 443-444; *cf. People v Rosenholm*, 222 AD2d 909, 910 [1995], *lv denied* 88 NY2d 884 [1996]). Although CI-1 did not personally observe any alleged illegality inside or near defendant’s new residence, the information provided by CI-1 to the officers was “‘of such quality. . . that a reasonable observer would be warranted in determining that the basis of [CI-1’s] knowledge was such that it led logically to the conclusion that a crime had been . . . committed’ ” (*Greene*, 153 AD2d at 444). Notably, UP’s identity was known to CI-1 (*see id.*; *see also Rosenholm*, 222 AD2d at 910).

We further conclude that the application established the reliability and basis of knowledge of UP. Addressing first UP’s basis of knowledge, we note that it is largely undisputed that UP had the requisite basis of knowledge due to his “personal knowledge of the criminal enterprise” (*Mabeus*, 63 AD3d at 1450), and his “personal observations of defendant’s possession and sale . . . of cocaine” (*People v Peterson*, 269 AD2d 788, 789 [2000], *lv denied* 94 NY2d 951 [2000]). Moreover, unlike the situation in *People v Mercado* (45 AD2d 699, 700 [1974]), the officers’ observations of UP both before and after the second and third sales “had [a] bearing on whether [UP] had actually been in [defendant’s residence] and made the observation[s] he alleged or that he obtained the [cocaine] from this defendant.”

We reject defendant’s contention that nothing in the search warrant established UP’s reliability. While an informant’s reliability is often established by the fact that the informant had

provided reliable information in the past, “there are, of course, other circumstances demonstrating his [or her] probable reliability. For instance, [the Court of Appeals] . . . [has] noted that a magistrate may rely upon the fact that the information was given under oath, *that the statements were against the informant’s penal interest* and that two or more informants tended to confirm the information which each gave” (*People v Wheatman*, 29 NY2d 337, 345 [1971] [emphasis added]). In addressing the use of statements against penal interest as a basis to establish an informant’s reliability, the Court of Appeals wrote that, “[w]hile admissions against penal interest may be sufficient to support a finding of probable cause . . . , [s]uch admissions are not guarantees of truthfulness and they should be accepted only after careful consideration of all the relevant circumstances of the case indicates that there exists a basis for finding reliability’ ” (*People v Chisholm*, 21 NY3d 990, 992-993 [2013]).

After careful consideration of all the relevant circumstances of the case, we conclude that “ ‘*there [was] good reason for believing*’ ” the information supplied by UP to CI-1 (*Parris*, 83 NY2d at 347; *cf. People v Burks*, 134 AD2d 604, 605-606 [1987]). First, UP’s statement that he obtained the drugs from defendant was a “significant declaration[] against penal interest” (*People v Stroman*, 293 AD2d 350, 350 [2002], *lv denied* 98 NY2d 702 [2002]), i.e., the statements admitting to the purchase and possession of cocaine would have subjected him to criminal liability (see *Greene*, 153 AD2d at 444; see generally *People v James*, 93 NY2d 620, 643 [1999]). Moreover, UP knew, at the time of his statement, that the statement was against his penal interest (see *People v Harvey*, 270 AD2d 959, 960 [2000], *lv denied* 95 NY2d 835 [2000], *lv dismissed* 95 NY2d 853 [2000]; see generally *People v Brensic*, 70 NY2d 9, 15 [1987], *remittitur amended* 70 NY2d 722 [1987]; Jerome Prince, Richardson on Evidence § 8-411 [Farrell 11th ed 1995]), and his statement was a specific statement about a just-completed purchase (compare *People v Comforto*, 62 NY2d 725, 727 [1984], with *Burks*, 134 AD2d at 605). In *Burks*, a case relied upon by defendant, the informant’s statement was only that “he had, on some unspecified past occasions, purchased cocaine from the defendant” (134 AD2d at 605). The Second Department in *Burks* deemed that statement “not sufficiently contrary to the informant’s penal interest to establish reliability” (*id.*).

We likewise reject defendant’s contention that UP’s statements to CI-1 cannot satisfy the *Aguilar-Spinelli* test because UP’s statements were made only to CI-1 and thus were not

made with the knowledge that they were against his penal interest, i.e., UP “thought he was speaking in confidence to a confederate and had no idea there was any risk that the statement would be used against him” (*People v Schmotzer*, 87 AD2d 792, 794 [1982]). The First Department dispensed with such a contention, writing that, to reject statements against penal interest on that ground, which is “the most probable situation in which a declaration against penal interest would be truthful,” would “almost make the possibility of inculpatory use of declarations against penal interest a merely academic exercise without any real situation in which it could be applied” (*id.*). Indeed, in a strikingly similar case, the First Department held that a statement to a friend, “trusted by the declarant not to reveal it to the police,” can qualify as a declaration against penal interest (*People v Thomas*, 264 AD2d 691, 692 [1999], *lv denied* 94 NY2d 867 [1999]; *see also James*, 93 NY2d at 643; *People v Ivy*, 217 AD2d 948, 949 [1995], *lv denied* 86 NY2d 843 [1995]).

As further support for our conclusion that “‘*there [was] good reason for believing*’” the information supplied by UP to CI-1 (*Parris*, 83 NY2d at 347), we note that the declaration against penal interest was “amply corroborated by ‘information obtained from a source other than [UP’s] statement’” (*Stroman*, 293 AD2d at 350; *see Ivy*, 217 AD2d at 949). Importantly, the actions of UP and some of his dealings with defendant were personally observed by police officers (*cf. Burks*, 134 AD2d at 605-606). In *Burks*, the Court recognized that “[t]he corroborated details need not be criminal in nature . . . ; however, they must establish ‘good reason to believe’ that the informant was telling the truth” (*id.* at 606, quoting *Rodriguez*, 52 NY2d at 489). Here, the officers actually observed UP interacting with defendant at defendant’s new residence, which corroborated significant details of his statements to CI-1 (*cf. id.* at 605). Significantly, following both the second and third sales and CI-1’s meetings with UP, the officers, who had confirmed that CI-1 had not been in possession of cocaine before meeting with UP, obtained cocaine from CI-1.

We thus conclude that “[t]he court properly found that the drug runner who provided the police confidential informant with information was both reliable and had a basis of knowledge for such information. The drug runner’s basis of knowledge was established by personal observation of criminal activity[,] . . . [and the] drug runner’s reliability was established by the fact that the statements the runner made to the confidential informant were against the runner’s penal interest in that the

runner implicated himself in the crime” (*Thomas*, 264 AD2d at 692).

We again emphasize that the issue here is not whether there was probable cause to believe that defendant himself was selling cocaine. He was never charged with selling cocaine. Rather, the issue is whether the information contained in the search warrant application was “sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place” (*Bigelow*, 66 NY2d at 423). Based on the information provided by CI-1 and UP, as well as the officers’ personal observations, the search warrant application established probable cause to believe that cocaine would be found inside defendant’s new residence.

Defendant further contends that the court erred in refusing to conduct a *Darden* hearing with respect to UP. Inasmuch as defendant does not challenge the existence of UP and indeed was able to identify UP, there was no basis for a *Darden* hearing (see *People v Brown*, 2 AD3d 1423, 1424 [2003], *lv denied* 1 NY3d 625 [2004]).

We thus conclude that the court properly refused to suppress the evidence obtained as a result of the execution of the search warrant. Present—Scudder, P.J., Fahey, Peradotto and DeJoseph, JJ.

38 RICHARD A. WICKS, JR., et al., as Cotrustees of the RICHARD A. WICKS, JR. and MARYANN WICKS TRUST, Appellants, v MICHAEL J. KELLY et al., Respondents. [992 NYS2d 386]—

**Quieting Title—Boundary Dispute—Failure to Establish Title by Deed or Adverse Possession—Existence of Factual Questions
Waters and Watercourses—Diversion of Surface Waters—Diversion by Natural Contour of Property**

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 25, 2013. The order denied the motion of plaintiffs for summary judgment.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting plaintiffs’ motion in part and dismissing the counterclaims and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to resolve an alleged dispute over the ownership of a portion of their driveway, as well as the driveway shoulder to the south of their driveway, which is where plaintiffs’ and defendants’ properties abut each other. In their complaint, plaintiffs allege they have sole title to their driveway and driveway shoulder by deed and/or adverse possession since 1964 and that, beginning in or about October

2011, defendants entered their driveway and driveway shoulder and interfered with their use and enjoyment of the property by placing permanent structures thereon. In their answer, defendants asserted three counterclaims. In the first counterclaim, defendants allege that extensive changes made by plaintiffs to their property in 2010, including the removal of both a shed from their property and a stone barrier between the properties, changed the “contour of the land” and led to water runoff to defendants’ property, resulting in water damage to their side yard and basement. They allege in the second counterclaim that plaintiffs have repeatedly trespassed on their property and are wrongfully denying defendants access to their own property. In the third counterclaim, defendants allege that plaintiffs encroached on their property when plaintiffs’ driveway construction extended 8 to 10 inches beyond the southern boundary of plaintiffs’ property, and defendants seek an order directing plaintiffs to remove the encroachment and to compensate defendants for the resulting damages.

Plaintiffs moved for summary judgment on the complaint and for summary judgment dismissing defendants’ counterclaims. In support of the motion, plaintiffs submitted the affidavit of a former owner of defendants’ property who stated that, from 1966 through 1979, “the [plaintiffs] solely, openly used, occupied, improved, mowed, made plantings, weeded, and maintained the premises at suit as sole owners.” Plaintiffs also submitted the affidavit of an engineer who stated that, in his opinion, plaintiffs’ property has not contributed to any drainage issues on defendants’ property. In opposition to the motion, defendants submitted an affidavit in which they asserted that they “do not dispute that the boundary of our two properties is along the southern edge of [plaintiffs’] driveway” and that defendants’ surveyor “puts our boundary line . . . at the same place as” plaintiffs’ surveyor. They further asserted, however, that the drainage materials they placed next to plaintiffs’ driveway are “clearly within the settled boundary according to the two surveyors and by Plaintiffs’ own admissions,” and that “[d]rainage became an issue on [defendants’] property after the Plaintiffs changed the structures and contour of their property.” Defendants also note that, “[a]lthough . . . [plaintiffs’] driveway encroaches slightly onto our land in some places, we do not claim it.” Supreme Court denied plaintiffs’ motion in its entirety, determining that there are issues of fact “regarding the property line and the parties’ use of all property.”

Contrary to plaintiffs’ contention, the court properly denied that part of their motion for summary judgment on the

complaint. Because plaintiffs are claiming that they obtained title to the disputed property in 1964, plaintiffs' adverse possession contention falls under the prior version of RPAPL 522 (see *Franza v Olin*, 73 AD3d 44, 46 [2010]; see also *West v Hogan*, 88 AD3d 1247, 1248 [2011], *affd* 19 NY3d 1073 [2012]; *Hammond v Baker*, 81 AD3d 1288, 1290 [2011]). We conclude that they failed to meet their initial burden of proof of establishing title by deed or adverse possession, however, because they failed to submit any evidence of the parameters or measurements of the property in dispute. Thus, we conclude that the court's finding of a factual question "regarding the property line," i.e., the actual dimensions of the disputed property, is supported by the record (see generally *Hammond*, 81 AD3d at 1290).

We agree with plaintiffs, however, that the court erred in denying that part of their motion for summary judgment dismissing defendants' counterclaims. We therefore modify the order accordingly. With respect to defendants' first and second counterclaims, it is well established that a party "seeking to recover [from an abutting property owner for the flow of surface water] must establish that . . . improvements on the [abutting property owner's] land caused the surface water to be diverted, that damages resulted and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the [abutting owner's] property" (*Mount Zion Ministries Church, Inc. v Hines Color, Inc.*, 19 AD3d 1060, 1060 [2005], *lv denied* 5 NY3d 711 [2005]; see *Langdon v Town of Webster*, 238 AD2d 888 [1997], *lv denied* 90 NY2d 806 [1997]). Here, plaintiffs met their burden with respect to the first and second counterclaims by establishing that the "natural contour of [their] property, rather than improvements [or alterations] made by [plaintiffs] thereto, caused the diversion of surface water" onto defendants' property (*Mount Zion Ministries Church, Inc.*, 19 AD3d at 1060), and defendants failed to raise an issue of fact in that respect (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The record further establishes that the improvements on plaintiffs' property, including the driveway extension and the removal of a shed, were all made in good faith. Defendants' further contention that its first counterclaim "may reasonably be interpreted as one setting forth a cause of action for private nuisance" is raised for the first time on appeal and therefore is not properly before us (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [1994]).

Finally, with respect to defendants' third counterclaim, we conclude that defendants effectively abandoned that counter-

claim by asserting in opposition to plaintiffs' motion that, "[a]lthough . . . [plaintiffs'] driveway encroaches slightly onto our land in some places, we do not claim it" (*see generally id.* at 984). Present—Scudder, P.J., Fahey, Peradotto, Valentino and DeJoseph, JJ.

39 LONNIE GATES, Respondent, v GENE H. LONGDEN et al., Appellants. [991 NYS2d 229]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Causation—Refusal to Consider Affidavit of Expert Engineer
Insurance—No-Fault Automobile Insurance—Serious Injury—No Permanent Consequential Limitation of Use

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered April 19, 2013. The order, among other things, denied the motion of defendants for summary judgment.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a motor vehicle accident when the vehicle he was driving was rear-ended by a vehicle operated by defendant Gene H. Longden and owned by defendant Sears, Roebuck and Co. According to plaintiff's bill of particulars, plaintiff sustained a serious injury under the significant disfigurement, permanent consequential limitation of use and significant limitation of use categories of serious injury (*see* Insurance Law § 5102 [d]). Defendants moved for summary judgment dismissing the complaint on the grounds that any injury sustained by plaintiff was not causally related to the accident and that, in any event, plaintiff did not sustain a serious injury, and plaintiff cross-moved for partial summary judgment on the issues of "liability, proximate cause and serious injury." Defendants appeal from an order denying their motion and granting that part of plaintiff's cross motion for partial summary judgment on the issue of negligence. We agree with defendants that the court erred in denying that part of their motion with respect to one of the three categories of serious injury allegedly sustained by plaintiff, i.e., the permanent consequential limitation of use category, and we therefore modify the order accordingly.

With respect to causation, defendants contend that the court

abused its discretion in disregarding the opinion of their expert on the issue of injury causation and that, in view of that opinion, they established their entitlement to summary judgment dismissing the complaint because any negligence on their part was not a proximate cause of plaintiff's injuries. Contrary to defendants' contention, the court did not abuse its "'sound discretion'" in refusing to consider the affidavit of defendants' expert (*Baity v General Elec. Co.*, 86 AD3d 948, 952 [2011]; see generally *Werner v Sun Oil Co.*, 65 NY2d 839, 840 [1985]). Defendants' biomechanical expert is an engineer, and is not a medical doctor, and thus the court properly determined that the expert did not possess "the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered [regarding injury causation] is reliable" (*Matott v Ward*, 48 NY2d 455, 459 [1979]; cf. *Cardin v Christie*, 283 AD2d 978, 979 [2001]). Because the court did not consider the opinion of defendants' biomechanical expert on injury causation, we conclude that defendants failed to meet their burden of establishing that they were entitled to summary judgment dismissing the complaint on the ground that there was no injury causation (see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Defendants' further contention that the court should have conducted a *Frye* hearing with respect to the admissibility of their expert's opinion is unpreserved for our review because defendants failed to request one (see *Parker v Mobil Oil Corp.*, 16 AD3d 648, 654 [2005], *affd* 7 NY3d 434 [2006], *rearg denied* 8 NY3d 828 [2007]; see generally *Matter of York v Zullich*, 89 AD3d 1447, 1448 [2011]).

The court properly denied that part of defendants' motion with respect to the significant disfigurement category of serious injury. Specifically, "the issue whether a reasonable person viewing the plaintiff's [lower back and scar] would regard the condition as unattractive, objectionable, or as the subject of pity or scorn presents an issue of fact that cannot be resolved by way of summary judgment" (*Langensiepen v Kruml*, 92 AD3d 1302, 1303 [2012] [internal quotation marks omitted]). We further conclude that the court properly denied that part of defendants' motion with respect to the significant limitation category of serious injury. A significant limitation of use of a body function or member does not require a showing of permanency, and "any assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of the limitation, but of its duration as well" (*Lively v Fernandez*, 85 AD3d 981, 982 [2011] [internal quotation marks omitted]). Here, defendants submitted evidence in support of their motion

indicating that plaintiff missed six weeks of work following his surgery and was confined to his home with medical restrictions, thus raising an issue of fact with respect to that category (*see generally Winegrad*, 64 NY2d at 853).

We conclude, however, that the court erred in denying that part of defendants' motion with respect to the permanent consequential limitation of use category of serious injury. Defendants met their initial burden by submitting evidence that plaintiff worked full-time since the accident, other than during the six weeks in which he was recovering from surgery. They also established that, as of the date of plaintiff's deposition on June 22, 2012, plaintiff had no medical restrictions. Defendants further established that plaintiff has been able to fish, hunt and camp almost every weekend, and they submitted medical records stating that plaintiff had a moderate global loss in range of motion, but with no indication of permanency (*see Carfi v Forget*, 101 AD3d 1616, 1617-1618 [2012]). Plaintiff failed to raise an issue of fact in opposition to defeat that part of the motion (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), inasmuch as he failed to submit evidence of "a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Matte v Hall*, 20 AD3d 898, 899 [2005], quoting *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). In particular, plaintiff failed to submit objective proof of his injury and a "designation of a numeric percentage of [his] loss of range of motion" (*id.*, quoting *Toure*, 98 NY2d at 350). Present—Smith, J.P., Centra, Carni and Whalen, JJ.

40 ROGER PASQUARELLA et al., Respondents, v 1525 WILLIAM STREET, LLC, Appellant. [990 NYS2d 760]—

Vendor and Purchaser—Contract for Sale of Real Property—Specific Performance

Principal and Agent—Apparent Authority—Authority to Enter Contract for Sale of Real Property on Behalf of Limited Liability Corporation

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 23, 2013. The order granted the motion of plaintiffs for summary judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this action arising from a contract for the sale of a parcel of real property, defendant appeals from an order granting plaintiffs' motion for summary judgment on their cause of action for specific performance. Plaintiffs negotiated intermittently over a two-year period to purchase the subject

parcel from defendant, a limited liability corporation (LLC). All of the contractual negotiations were conducted by Zvi Sultan, who indicated to plaintiffs that he was president-principal of defendant, by plaintiff Roger Pasquarella as agent for the business that subsequently became plaintiff 2030 Elmwood Avenue, Inc. (2030 Elmwood), and by the attorneys for the parties. Throughout the negotiations, defendant's attorney acted as if Sultan had authority to negotiate on defendant's behalf. There were several lengthy breaks in the negotiations, but the parties eventually finalized the details of the contract, and, in April 2012, the contract was signed. Sultan, in executing the contract on behalf of defendant, indicated that he was defendant's manager, and defendant's attorney accepted plaintiffs' deposit of \$7,500.00. When plaintiffs' attorney sought the documents that, pursuant to the contract, defendant was obligated to provide prior to closing, defendant declined to provide them and refused to schedule a closing date. Defendant sought to return plaintiffs' deposit after this action was commenced, using the services of a different attorney. Defendant contended that Sultan had no authority to bind defendant because, shortly before the contract was signed, Sultan sold a controlling interest in defendant to his son, and the operating agreement between the two provided that a sale of corporate property must be approved by all members.

We agree with plaintiffs that, in support of their motion for summary judgment, they demonstrated that they "substantially performed [their] contractual obligations and w[ere] willing and able to perform [their] remaining obligations" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 51 [2004], *lv dismissed* 3 NY3d 656 [2004], *lv denied* 3 NY3d 607 [2004]; *see generally Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 530-531 [2012]), and thus demonstrated that they were entitled to summary judgment (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In opposition, defendant failed to raise a triable issue of fact whether Sultan lacked apparent authority to bind defendant contractually. "Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent" (*Hallock v State of*

New York, 64 NY2d 224, 231 [1984] [internal quotation marks omitted]; *cf. N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252 n 3 [2002]). Here, we conclude that plaintiffs reasonably relied on, inter alia, their prior course of dealing with Sultan in his capacity as president, principal and manager of defendant (see *Benderson Dev. Co. v Schwab Bros. Trucking*, 64 AD2d 447, 456 [1978]; see also *Federal Ins. Co. v Diamond Kamvakis & Co.*, 144 AD2d 42, 46-47 [1989], *lv denied* 74 NY2d 604 [1989]). In addition, the record establishes that defendant allowed its attorney to act in a manner consistent with Sultan's continued authority, and that defendant accepted the deposit that plaintiffs provided to that attorney in conjunction with the signing of the contract, thus "giv[ing] rise to the appearance and belief that [Sultan] possesse[d] authority to enter into [the] transaction" (*Hallock*, 64 NY2d at 231). Defendant therefore "allowed [Sultan] to represent that he had the requisite authority[,] and it may not now be denied" (*Benderson Dev. Co.*, 64 AD2d at 456; *cf. 56 E. 87th Units Corp. v Kingsland Group, Inc.*, 30 AD3d 1134, 1134-1135 [2006]).

Finally, we note that Limited Liability Company Law § 412 (a) provides that "[u]nless the articles of organization of a limited liability company provide that management shall be vested in a manager or managers, every member is an agent of the limited liability company for the purpose of its business, and the act of every member, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company, binds the limited liability company, unless (i) the member so acting has in fact no authority to act for the limited liability company in the particular matter and (ii) the person with whom he or she is dealing has knowledge of the fact that the member has no such authority." A nearly identical subsection provides that, where management of an LLC is vested in a manager, the acts of the manager are binding upon the LLC unless the manager at issue has in fact no authority to act for the LLC, and the person with whom he or she is dealing knows that the manager lacks such authority (§ 412 [b] [2] [A], [B]). Thus, regardless whether Sultan was acting as a manager of defendant, as reflected by his signature on the contract, or as a member of defendant, as he and defendant's attorney previously had indicated to plaintiffs, he had apparent authority to act and his acts were binding upon defendant unless, inter alia, plaintiffs had "knowledge of the fact that [Sultan] ha[d] no such authority" (§ 412 [a] [i]; [b] [2] [B]). Here, defendant failed to tender any evidence indicating that plaintiffs had knowledge of the recent limitation of Sultan's authority. Consequently, de-

fendant failed to raise a triable issue of fact whether Sultan lacked authority to enter into the contract and thereby bind defendant to perform it (*see Zuckerman*, 49 NY2d at 562). Present—Smith, J.P., Centra, Carni, Whalen and DeJoseph, JJ.

41 RONALD P. COLANGELO, SR., et al., Respondents, v FREDERICK L. MARRIOTT et al., Appellants, et al., Defendant. [990 NYS2d 763]—

Motor Vehicles—Collision—Negligence of Driver with Right-of-Way
Motor Vehicles—Collision—Emergency Doctrine—Brake Failure

Appeals from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered February 20, 2013. The order, among other things, denied the motion of defendants Frederick L. Marriott and Kristi L. Smith, formerly known as Kristi L. Marriott, for summary judgment and denied the cross motion of defendants Donald A. Sheppard, Sr., Dorcas M. Graham, and Graham's Refuse Service, LLC for summary judgment.

It is hereby ordered that the order so appealed from is unanimously modified on the law by granting the cross motion of defendants Donald A. Sheppard, Sr., Dorcas M. Graham, and Graham's Refuse Service, LLC, and dismissing the amended complaint against them and as modified the order is affirmed without costs.

Memorandum: This personal injury action arises out of a motor vehicle accident involving three vehicles that occurred on Erie Boulevard West, a four-lane road with a middle turning lane, in the town of Rome. Defendant Frederick L. Marriott (Marriott) was driving a pickup truck owned by defendant Kristi L. Smith, formerly known as Kristi L. Marriott (collectively, Marriott defendants) in the left eastbound lane. The vehicle traveling directly in front of Marriott in the eastbound left lane was a garbage truck owned by defendants Dorcas M. Graham and Graham's Refuse Service, LLC, and driven by defendant Donald A. Sheppard, Sr. (collectively, Sheppard defendants). A minivan operated by plaintiff Kevlynn M. Colangelo, in which plaintiff Ronald P. Colangelo, Sr. was a passenger, was in the right eastbound lane. Just prior to the accident, a traffic light directly ahead of these vehicles had turned red, and plaintiffs' minivan had come to a stop in the right lane. The first collision occurred after the brakes on the pickup truck failed. Upon realizing that he had no working brakes, Marriott attempted to avoid rear-ending the garbage truck ahead of him by turning to the right in order to get off the road, whereupon the pickup truck rear-ended plaintiffs' minivan before leaving the road and entering a parking lot. The force of this collision spun plaintiffs'

minivan around so that it partially entered the left eastbound lane. Upon entering the left lane, plaintiffs' minivan either struck or was struck by the garbage truck in the left lane, which either was stopping or had stopped for the red light. As relevant on appeal, the Sheppard defendants cross-moved and the Marriott defendants moved for summary judgment dismissing the amended complaint against them. Supreme Court denied the cross motion and motion, and these appeals ensued.

We agree with the Sheppard defendants that the court erred in denying their cross motion, and we therefore modify the order accordingly. Sheppard was approaching the red light and was either stopped or was braking in order to come to a stop when plaintiffs' minivan, which had been hit by Marriott's pickup truck, unexpectedly entered the left lane and the second collision occurred. We note that, while the Sheppard defendants assert, *inter alia*, that they are entitled to summary judgment based on the emergency doctrine (*see Lifson v City of Syracuse*, 17 NY3d 492, 497 [2011]), the emergency doctrine is not essential to our analysis. When a vehicle turns in front of a vehicle with the right-of-way, the driver with the right-of-way is deemed free of negligence absent proof of speeding or some other act of negligence (*see e.g. Tyson v Nazarian*, 103 AD3d 1254, 1254 [2013]; *Rogers v Edelman*, 79 AD3d 1803, 1804 [2010]; *Guadagno v Norward*, 43 AD3d 1432, 1433 [2007]). Here, viewing the evidence in the light most favorable to the nonmoving party (*see Nichols v Xerox Corp.*, 72 AD3d 1501, 1502 [2010]), we conclude that the garbage truck hit plaintiffs' minivan when it entered the left lane where Sheppard had been driving and was bringing the garbage truck to a stop. There is no evidence that Sheppard's operation of the garbage truck was negligent, and plaintiffs' contention that Sheppard could have avoided the collision by moving into the center turning lane is based on speculation (*see Wallace v Kuhn*, 23 AD3d 1042, 1043 [2005]).

We further conclude, however, that the court properly denied the motion of the Marriott defendants. Those defendants contend that they are entitled to summary judgment based on the emergency doctrine because, *inter alia*, the brakes on their pickup truck failed without warning, thereby creating an emergency situation. We reject that contention. "The common-law emergency doctrine 'recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct,

the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency'” (*Lifson*, 17 NY3d at 497, quoting *Caristo v Sanzone*, 96 NY2d 172, 174 [2001]). It is also clear, however, “that the emergency doctrine does not automatically absolve a person from liability for his or her conduct” (*Sossin v Lewis*, 9 AD3d 849, 851 [2004], *amended on rearg* 11 AD3d 1045 [2004]). “The existence of an emergency and the reasonableness of a driver’s response thereto generally constitute issues of fact” (*Dalton v Lucas*, 96 AD3d 1648, 1649 [2012]; see *Andrews v County of Cayuga*, 96 AD3d 1477, 1479 [2012]). We conclude that there are issues of fact whether the Marriotts’ maintenance of their pickup truck was adequate and thus whether the brake failure was truly unexpected and without any fault on their part. Moreover, it cannot be concluded as a matter of law that swerving to the right in order to avoid rear-ending the garbage truck was a reasonable reaction to the emergency created by the loss of brakes on the pickup truck. Present—Smith, J.P., Fahey, Peradotto, Sconiers and Valentino, JJ.

42 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KACIE MUNSON, Appellant. [990 NYS2d 430]—Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered December 13, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of assault in the first degree (Penal Law § 120.10 [1]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that his plea was not knowing and voluntary (see *People v Jones*, 118 AD3d 1354, 1354 [2014]). Defendant also failed to preserve for our review his contention that County Court improperly delegated to the prosecutor the authority to conduct a portion of the plea allocution (see *People v Swontek* [appeal No. 1], 289 AD2d 989, 989 [2001]). This case does not fall within the narrow exception to the preservation rule (see *People v Lopez*, 71 NY2d 662, 666 [1988]).

Finally, the sentence is not unduly harsh or severe. Present—Scudder, P.J., Fahey, Peradotto, Sconiers and DeJoseph, JJ.

43 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BANGALY D. CHELLEY, Also Known as AFRICA, Appellant. [990 NYS2d 431]—

Crimes—Appeal—Preservation of Issue for Review—Court’s Failure to Advise Defendant of Deportation Consequences of Guilty Plea

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 13, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant, a noncitizen, appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]; *see* § 265.02 [1]). Defendant implicitly contends that the failure of Supreme Court to advise him that he could be subject to deportation if he pleaded guilty renders his plea involuntary (*see People v Peque*, 22 NY3d 168, 197 [2013]). We conclude that defendant’s contention is not preserved for our review (*see* CPL 470.05 [2]), and that, under the circumstances of this case, the narrow exception to the preservation doctrine does not apply (*cf. Peque*, 22 NY3d at 182-183). It is undisputed that the presentence report stated that there was an immigration detainer on file at the Erie County Holding Center and that it was expected that defendant would face deportation proceedings when released from incarceration. Thus, defendant failed to establish that he “did not know about the possibility of deportation during the . . . sentencing proceeding[], [and thus that] he had no opportunity to withdraw his plea based on the court’s failure to apprise him of potential deportation” (*id.* at 183; *see generally* CPL 220.60 [3]; *People v Murray*, 15 NY3d 725, 726-727 [2010]). Although the waiver of the right to appeal does not encompass defendant’s contention that the bargained-for sentence is unduly harsh and severe (*see People v Maracle*, 19 NY3d 925, 928 [2012]), we nevertheless reject that contention. Present—Scudder, P.J., Smith, Peradotto, Sconiers and Whalen, JJ.

44 In the Matter of ANTHONY D. AMAKER, Appellant, v BRIAN FISCHER, Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [990 NYS2d 434]—

Records—Sealing of Records upon Termination of Criminal Action in Favor of Accused—Sealed Records Concerning Arrest and Prosecution of Petitioner’s Mother Not Removed from Petitioner’s Inmate Record

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered March 27, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking review of the determination denying his request to have documents relating to the 2006 arrest and prosecution of his mother removed from his inmate record. As a preliminary matter, we note that, contrary to respondent's contention, petitioner exhausted his administrative remedies with respect to the issues raised herein (*cf. Matter of Wisniewski v Michalski*, 114 AD3d 1188, 1189 [2014]).

Petitioner contends that the documents at issue were ordered sealed pursuant to CPL 160.50, and that Supreme Court therefore acted in an arbitrary and capricious manner in refusing to remove them from his inmate record. We reject that contention. The court properly concluded that the statutes relied upon by petitioner—CPL 160.50 and Executive Law § 296 (16)—do not require respondent to remove any information concerning the 2006 incident from petitioner's inmate record. Those statutes provide protection only to petitioner's mother, not to petitioner. Furthermore, with respect to CPL 160.50, the Unusual Incident (UI) report, which is one of the documents found in petitioner's inmate record relating to the 2006 incident, is not a document that arises from a "criminal action or proceeding" (*id.*). As properly noted by the court, the UI report is an internal document prepared and used by respondent for administrative purposes, and it is "independent of, and unrelated to, the 'arrest or prosecution' of the petitioner's mother" (*see generally Matter of Hearst Corp. v City of Albany*, 88 AD3d 1130, 1131-1132 [2011]).

We reject petitioner's further contention that the Due Process and Equal Protection Clauses of the State and Federal Constitutions mandate that the documents at issue be removed from his inmate record. "[I]n order to successfully assert a constitutional claim, the inmate must establish that the challenged information in his [record] is false" (*Matter of Scarola v Malone*, 226 AD2d 844, 845 [1996]), and petitioner has not done so here. Present—Fahey, J.P., Carni, Lindley, Valentino and DeJoseph, JJ.

45 In the Matter of MARY MEYER OSBORN, an Attorney, Respondent. GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT, Petitioner. [990 NYS2d 433]—

Attorney and Client—Disciplinary Proceedings—Disbarment—Felony Conviction

A certified copy of plea minutes having been filed showing that Mary Mayer Osborn was convicted of grand larceny in the second degree, a class C felony, she is disbarred and her name is stricken from the roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed July 29, 2014.)

46 In the Matter of L. PETER FARKAS, an Attorney, Resignor. [990 NYS2d 433]—

Attorney and Client—Disciplinary Proceedings—Resignation

Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed July 21, 2014.)

47 In the Matter of DAVID B. SPENCE, an Attorney, Resignor. [990 NYS2d 433]—

Attorney and Client—Disciplinary Proceedings—Resignation

Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed July 22, 2014.)

48 In the Matter of JOHN B. CARLE, an Attorney, Resignor. [990 NYS2d 433]—

Attorney and Client—Disciplinary Proceedings—Resignation

Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed July 22, 2014.)

(August 20, 2014)

1 In the Matter of FRANK VESCERA et al., Appellants, v RUSSELL STEWART et al., Commissioners of Oneida County Board of Elections, et al., Respondents. [991 NYS2d 378]—

Elections—Designating Petitions—Signature Requirement—Number of Signatures Required for Municipal Common Council Election

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered August 8, 2014 in a proceeding pursuant to Election Law article 16. The order, insofar as appealed from, invalidated the designating petitions of petitioners.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioners Frank Vescera and James Zecca filed designating petitions purporting to nominate them as Democratic Party candidates for the respective public offices of

president and member at large of the City of Utica Common Council. The Oneida County Board of Elections determined that the designating petitions did not contain a sufficient number of valid signatures, and petitioners commenced this proceeding to validate the designating petitions. Supreme Court concluded after a hearing that the designating petitions were invalid and, in effect, dismissed the petition. We affirm.

Election Law § 6-136 (2) provides that designating petitions for non-statewide public office generally must be signed by five percent of the active enrolled party members in the relevant political unit, but that the number of signatures “need not exceed” enumerated thresholds for specific public offices. At the hearing, the parties stipulated that five percent of the number of active enrolled Democrats in the City of Utica is 708, and that there are 653 valid signatures on the designating petitions. Petitioners contend, however, that only 500 signatures are required pursuant to section 6-136 (2) (f) or, alternatively, pursuant to section 6-136 (2) (i) and (j).

We agree with the court that the citywide positions at issue are “to be filled by all the voters of [a city] . . . containing more than twenty-five thousand and not more than two hundred fifty thousand inhabitants” (Election Law § 6-136 [2] [e]), rather than “all the voters of . . . a councilmanic district” (Election Law § 6-136 [2] [f]). We note that the fact that the population of the City of Utica exceeds 25,000 is “a proper subject of judicial notice” (*Matter of Siwek v Mahoney*, 39 NY2d 159, 163 n 2 [1976]; see *Scoville v Cicoria*, 65 NY2d 972, 974 n [1985]).

Election Law § 6-136 (2) (j) provides that the number of signatures required “[f]or any office to be filled by all the voters of any political subdivision, except as herein otherwise provided, contained within another political subdivision, [need] not . . . exceed the number of signatures required for the larger subdivision.” Petitioners therefore contend that their designating petitions require only 500 signatures because the City of Utica is wholly within a single assembly district (see Election Law § 6-136 [2] [i]). We agree with the court, however, that the phrase “except as herein otherwise provided” modifies “any political subdivision,” such that section 6-136 (2) (j) has no application to public offices in political subdivisions for which a specific provision exists elsewhere in the statute (see generally *Matter of Buffalo Columbus Hosp. v Axelrod*, 165 AD2d 605, 608 [1991]). Because section 6-136 (2) (e) applies to citywide public offices in the City of Utica, section 6-136 (2) (j) does not apply. The applicable signature requirement is therefore the lesser of 1,000 or five percent of the number of enrolled Democrats in the City of

Utica. Here, the five percent figure, i.e., 708, is the lesser number, and the court properly determined that the designating petitions are invalid on the ground that they do not contain at least 708 valid signatures.

Petitioners' contention premised on the New York Constitution is raised for the first time on appeal, and we therefore do not consider it (*see Matter of Scott v City of Buffalo*, 67 AD3d 1393, 1394 [2009], *lv denied* 14 NY3d 710 [2010]; *see also Matter of McGee v Korman*, 70 NY2d 225, 231-232 [1987]; *Matter of Iocovozzi v Herkimer County Bd. of Elections*, 76 AD3d 797, 798 [2010]). Present—Scudder, P.J., Peradotto, Lindley, Valentino and Whalen, JJ.

2 In the Matter of MICHAEL P. QUINN et al., Respondents, v ERIE COUNTY BOARD OF ELECTIONS et al., Appellants, et al., Respondent. [991 NYS2d 380]—

Elections—Designating Petitions—Cover Sheets—Failure of Subscribing Witness to Date Sheet Fatal

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered August 11, 2014 in a proceeding pursuant to Election Law article 16. The order granted the petition to validate a joint designating petition and directed that petitioners be placed on the primary election ballot.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioners commenced this proceeding seeking to validate their joint designating petition for the position of Erie County Democratic Committee Member, Town of Hamburg, District 11. We conclude that Supreme Court erred in granting the petition, and we therefore reverse the order and dismiss the petition. “Election Law § 6-132 (2) requires that each sheet of a designating petition must contain a statement of a subscribing witness which shall be dated and signed by that witness. The date is a matter of prescribed content and therefore strict compliance is required” (*Matter of MacKay v Cochran*, 264 AD2d 699, 699-700 [1999]). Here, it is undisputed that the date of the subscribing witness's authenticating statement on the first sheet of the designating petition is June 7, 2014, i.e., 18 days before the June 25, 2014 date of the signatures collected on that first sheet. It is also undisputed that without the signatures on that first sheet, the designating petition does not contain the requisite number of signatures. Because “all signatures on the petition which [a]re dated *after* the authenticating statement [are] void” (*Matter of Weiss v Mahoney*, 49 AD2d 796, 796

[1975]; see *Matter of Byrnes v Board of Elections of the County of Nassau*, 134 NYS2d 257, 261 [1954], *affd* 284 App Div 847 [1954], *affd* 307 NY 816 [1954]), the signatures on the first sheet of the designating petition are void, and respondent Erie County Board of Elections therefore properly rejected the designating petition. Although petitioners could have filed petitioner Mark W. Kumiega's affidavit attesting to his purported mistake on or before the last day provided by law for filing a designating petition, they failed to do so, and Kumiega's affidavit, which accompanied the petition, was therefore "not properly cognizable" by the court (*Matter of Sortino v Chiavaroli*, 59 AD2d 644, 644 [1977], *affd* 42 NY2d 982 [1977]). Present—Scudder, P.J., Peradotto, Lindley, Valentino and Whalen, JJ.

3 In the Matter of ERIN J. O'BRIEN, Appellant, v FRANCIS J. PORDUM et al., Respondents. [991 NYS2d 381]—

Elections—Designating Petitions—Failure to Serve Attorney General with Order to Show Cause Nonfatal Technical Defect in Proceeding to Invalidate Petition

Appeal from an order of the Supreme Court, Erie County (Matthew J. Murphy, III, A.J.), entered August 14, 2014 in a proceeding pursuant to Election Law article 16. The order, insofar as appealed from, dismissed the petition as jurisdictionally defective on the ground that petitioner failed to serve the Attorney General.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this proceeding by order to show cause and petition pursuant to Election Law article 16 seeking to invalidate the joint designating petition of Francis J. Pordum, Timothy J. Pawarski, Mary I. Julian, Mary Alice Grant, Richard F. Rose, Richard E. Dobson, and Rebecca L. Pordum (candidate respondents). The first six of those candidate respondents sought to be designated judicial delegates of the 147th Assembly District in the September 9, 2014 Democratic Party primary election, and the final candidate respondent sought to be designated an alternate delegate thereof. We agree with petitioner that Supreme Court erred in dismissing the petition as jurisdictionally defective on the ground that she failed to serve the Attorney General with the order to show cause as required by CPLR 2214 (d), and we therefore reverse the order insofar as appealed from, reinstate the petition, and remit the matter to Supreme Court for entry of an order determining the merits.

CPLR 2214 (d) provides, in relevant part, that “[a]n order to show cause against a state body or officers must be served in addition to service upon the defendant or respondent state body or officers upon the attorney general by delivery to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county.” In our view, however, the record on appeal establishes that the “respondent state body” in this case—respondent New York State Board of Elections—was represented by its own counsel, and we therefore conclude that petitioner’s failure to serve the Attorney General was at most a technical defect that may be disregarded (*see* CPLR 2001; *see also* *Duffy v Schenck*, 73 Misc 2d 72, 73 [1973], *affd* 42 AD2d 774 [1973]; *see generally* Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C2214:30 at 151-152; *cf. Matter of Castracan v Colavita*, 173 AD2d 924, 926 n 3 [1991], *appeal dismissed* 78 NY2d 1041 [1991]).

We reject the contention of respondent candidates that the appeal should be dismissed for petitioner’s failure to include the hearing transcript in the record on appeal inasmuch as we conclude that the record on appeal is adequate for us to decide the above jurisdictional issue. Finally, we have examined the additional contentions raised by the candidate respondents and conclude that they are without merit. Present—Scudder, P.J., Peradotto, Lindley and Valentino, JJ.

4 In the Matter of MARK D. ZALOGA, Appellant, v RICKY T. DONOVAN, SR., Putative Candidate for Independence Party for New York State Senate, 63rd District, et al., Respondents. [991 NYS2d 382]—

Elections—Designating Petitions—Cover Sheets—Service of Objections—Rule of County Board of Elections

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered August 4, 2014 in a proceeding pursuant to Election Law article 16. The order dismissed the petition to invalidate a certain designating petition.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this proceeding seeking an order invalidating a designating petition filed on July 10, 2014, pursuant to which respondent Ricky T. Donovan, Sr. (candidate) sought to be placed on the Independence Party primary election ballot as a candidate for New York State Senate,

63rd District. Petitioner contends that Supreme Court erred in determining that he did not effectuate proper service of his objections on the candidate. We reject that contention. With respect to general objections, the Erie County Board of Elections (Board) adopted a rule requiring “[t]he objector [to] serve a copy of the objection either (a) personally or by (b) certified mail, or (c) registered mail, to each candidate named on the petition who is the subject of the objection.” Contrary to petitioner’s contention, the Board had the authority to adopt such a rule (*see* Election Law § 6-154 [2]; *see also* 9 NYCRR 6204.1; *see generally* *Matter of Grancio v Coveney*, 60 NY2d 608, 610 [1983]). There is no dispute that petitioner failed to comply with the above rule. Present—Scudder, P.J., Peradotto, Lindley and Valentino, JJ.

5 In the Matter of PATRICK M. CARNEY, Appellant, v DENNIS WARD et al., as Commissioners of and Constituting Erie County Board of Elections, et al., Respondents, et al., Respondent. [991 NYS2d 383]—

Elections—Designating Petitions—Qualification of Subscribing Witness—Failure to Challenge Voter Registration Status of Subscribing Witness Fatal to Proceeding to Invalidate

Appeal from an order of the Supreme Court, Erie County (Matthew J. Murphy, III, A.J.), entered August 12, 2014 in a proceeding pursuant to Election Law article 16. The order determined a designating petition to be valid.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: On July 10, 2014, a designating petition was filed with respondent Erie County Board of Elections purporting to designate respondent Mara McCabe as a candidate in the Democratic Party’s primary election for the public office of Judge of the Buffalo City Court. A number of the signatures on the designating petition were witnessed by Augustine Olivencia, Jr. According to the designating petition, Olivencia resided at 385 Westgate Road in the Village of Kenmore, Erie County. He has been registered to vote at that address since August 7, 2013.

Petitioner thereafter commenced this proceeding pursuant to Election Law § 16-102 to invalidate the designating petition. Insofar as relevant on appeal, petitioner alleged that Olivencia was not qualified to serve as a subscribing witness because he is not a resident of New York State. According to petitioner, Olivencia is a resident of Puerto Rico. Following an evidentiary hearing, Supreme Court, in effect, dismissed the petition. The court held that petitioner had “adduced insufficient credible

proof to support the conclusion that . . . Olivencia . . . did not reside at the [Kenmore] location set forth in the designating petitions.” We affirm.

Petitioner contends that Olivencia is not a “resident of this state” (Election Law § 5-102 [1]), and thus is not a “duly qualified voter” permitted to act as a subscribing witness to a designating petition (Election Law § 6-132 [2]). We cannot review that contention, however, because the record on appeal does not include a transcript of the evidentiary hearing. “Petitioner, ‘as the appellant, . . . must suffer the consequences’ of submitting an incomplete record” (*Matter of Rodriguez v Ward*, 43 AD3d 640, 641 [2007]; see *Matter of Lopez v Lugo*, 115 AD3d 1237, 1237 [2014]; *Curto v Zittel’s Dairy Farm*, 106 AD3d 1482, 1483-1484 [2013]; *Matter of Carson v Town of Oswego Zoning Bd. of Appeals*, 100 AD3d 1559, 1560 [2012]).

In any event, we agree with McCabe that the merits of petitioner’s contention are irrelevant because Olivencia’s residency status is not open for *de novo* review under these circumstances (see generally *Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; *Matter of Bankoski v Green*, 109 AD3d 690, 692 [2013]). The decision of the Erie County Board of Elections to register Olivencia at the Kenmore address on August 7, 2013 constitutes “presumptive evidence of [his] residence for voting purposes” (Election Law § 5-104 [2]; see *Matter of Hosley v Curry*, 85 NY2d 447, 452 [1995]), and the Board’s decision may not be collaterally attacked in a proceeding to invalidate a designating petition (see *Matter of Engel v Board of Elections of State of N.Y.*, 143 AD2d 291, 292 [1988], *lv denied* 72 NY2d 805 [1988]; *Nesci v Canary*, 112 AD2d 1056, 1056-1057 [1985], *lv denied* 65 NY2d 607 [1985]). Indeed, entertaining the merits of petitioner’s challenge would circumvent the procedure set forth in the Election Law for cancelling a voter’s registration, which “specifically provides that no such cancellation may occur until the voter is notified by the Board of its intention to cancel and given an opportunity to be heard” (*Engel*, 143 AD2d at 292; see *Matter of Rosado v Board of Elections of City of N.Y.*, 218 AD2d 584, 584 [1995], *lv denied* 86 NY2d 704 [1995]; *Nesci*, 112 AD2d at 1057; see generally Election Law § 5-402 [2]). Inasmuch as that “procedure had not been followed at the time the [designating] petition was filed, no cancellation of [Olivencia]’s registration occurred and thus the designating petition was not invalid for that reason,” even if, as petitioner asserts, Olivencia is not a New York State resident (*Engel*, 143 AD2d at 292; see *Nesci*, 112 AD2d at 1057). Present—Scudder, P.J., Peradotto, Lindley, Valentino and Whalen, JJ.

6 In the Matter of SALLIE A. LOCKE et al., Respondents, v JAMES A. WALSH et al., Respondents, DENNIS WARD, Commissioner, Erie County Board of Elections, Respondent, and TRACEY B. EHRLERS, Candidate, et al., Appellants. [991 NYS2d 384]—

Elections—Designating Petitions—Challenge to Residence of Delegate to Judicial Nominating Convention Premature

Appeal from an order of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), entered August 14, 2014 in a proceeding pursuant to the Election Law. The order, insofar as appealed from, granted the petition seeking to invalidate certain designating petitions.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioners commenced this proceeding seeking to invalidate the designating petition of respondents-appellants Tracey B. Ehrlers and Annamae L. Stokes for the positions of delegate and alternate delegate, respectively, to the Independence Party 8th Judicial District Convention for State Supreme Court for the 148th Assembly District, and the designating petition of respondents-appellants Anthony D’Orazio, Jr., and Anthony L. Orsini, Jr., for the positions of delegate and alternate delegate, respectively, to the Independence Party 8th Judicial District Convention for State Supreme Court for the 147th Assembly District, on the ground that Ehrlers and D’Orazio lived outside of the boundaries of the assembly districts from which they sought their positions. We conclude that Supreme Court erred in granting the petition and invalidating the designating petitions, and we therefore reverse the order insofar as appealed from and dismiss the petition.

Even assuming, arguendo, that a candidate for the position of delegate to a judicial district convention must reside within the geographic boundaries of the assembly district that he or she seeks to represent (see Election Law § 6-124; cf. *Matter of Corbin v Goldstein*, 64 AD2d 935, 936 [1978], *lv denied* 45 NY2d 707 [1978]), such requirement would not become operative until “the time of commencement of the term” of the position (Election Law § 6-122 [3]; see *Matter of Weidman v Starkweather*, 80 NY2d 955, 956 [1992]; *Matter of Biamonte v Savinetti*, 87 AD3d 950, 954-955 [2011]; *Matter of Keith v King*, 220 AD2d 471, 471-472 [1995]). In this case, that date is September 9, the date of the primary election. Petitioners’ challenge is therefore premature (see generally *Weidman*, 80 NY2d at 956).

We have examined the remaining contentions of respondents-

appellants and conclude that they are lacking in merit. Present— Scudder, P.J., Peradotto, Lindley and Valentino, JJ.

MEMORANDA

OF

DECISIONS RENDERED DURING THIS PERIOD EMBRACED IN THIS VOLUME

FIRST DEPARTMENT, SEPTEMBER, 2014

(September 4, 2014)

1 TONY MAFES, Respondent, v CITY OF NEW YORK et al., Defendants, and LINCOLN TUGWELL, Appellant. [991 NYS2d 765]—

Appeal—Matters Appealable—Damages Awarded at Inquest after Default

Judgment, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 26, 2013, to the extent appealed from, awarding plaintiff damages as against defendant Lincoln Tugwell, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 26, 2013, after an inquest, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court (Barry Salman, J.), entered October 24, 2013, which denied defendant's motion for reargument and sanctions against plaintiff's counsel, or, in the alternative, an extension of time to demonstrate a meritorious defense to the action, unanimously affirmed, insofar as it denied sanctions or an extension of time, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable paper.

Defendant requests that we exercise our “interest of justice power to correct a fundamental error” that his counsel failed to raise at the inquest, i.e., that damages have been awarded against him for conduct not attributed to him in the complaint (citing *Peguero v 601 Realty Corp.*, 58 AD3d 556, 563 [1st Dept 2009] [an error “so fundamental as to preclude consideration of the central issue upon which the claim of liability is founded” may be reviewed in the interests of justice, even absent objection]). However, since the inquest was held upon his default, defendant's liability was not at issue therein; he is deemed to have admitted it (see *Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 830 [2008]). In the circumstances, our going outside applicable law to entertain arguments not preserved for appeal

would not further the objective of “ensur[ing] that plaintiffs do not secure money judgments based on fraudulent claims” (*id.*).

No appeal lies from the denial of a motion for leave to reargue (*Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579 [1st Dept 2011]).

We have considered defendant’s remaining contentions and find them without merit. Concur—Gonzalez, P.J., Mazzarelli, Sweeny, Manzanet-Daniels and Clark, JJ.

2 JOHNSON DEVADAS et al., Respondents, v KEVIN NIKSARLI, M.D., et al., Appellants. [992 NYS2d 197]—

Limitation of Actions—Medical Malpractice—Continuous Treatment Doctrine—Blurry Vision Following Lasik Surgery—Timely Return Visit Instigated by Patient

Limitation of Actions—Medical Malpractice—Continuous Treatment Doctrine—Inapplicable to Derivative Claim of Wife for Loss of Services

Trial—Verdict—Sufficient Evidence to Support Verdict—Disagreement between Expert Witnesses Does Not Provide Basis for Setting Aside Verdict Damages—Inadequate and Excessive Damages—Serious and Permanent Damage to Vision Provided Sufficient Basis for Award

Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered August 12, 2011, upon a jury verdict in favor of plaintiffs, modified, on the law, to the extent of dismissing the derivative claim of plaintiff Saramma Devadas, and otherwise affirmed, without costs.

In March 2004, plaintiff Johnson Devadas (plaintiff), a 25-year-old pharmacist, accompanied his wife when she went to consult defendant Kevin Niksarli (defendant), an ophthalmologist specializing in Lasik surgery.¹ A Lasik surgeon attempts to improve vision by cutting a flap in the eye with a laser and reshaping the cornea to allow light to fall on the retina, instead of in front of or behind it. Plaintiff had not himself been considering Lasik, but he was nearsighted and found that wearing glasses and having to focus on a computer screen at his pharmacy gave him headaches. He decided to be evaluated by defendant that day, too. Defendant told plaintiff he was a suitable candidate for the procedure, after plaintiff was put through various tests. These included a topography, which plotted the shape of his cornea, and a pachymetry exam, which measured the thickness of his cornea. Defendant also performed an autorefraction and a slit lamp test.

Plaintiff decided to go through with the procedure and scheduled it for April 6, 2004. That day, he was given a Valium

1. Newsight Laser Center, PLLC, the entity that owns the center where Niksarli operates, is also a defendant, and the term defendant herein, although primarily referring to Niksarli, encompasses the entity as well.

tablet because he was nervous, and was then given a written consent form, which he signed. The form listed a variety of possible complications, including evening glare, less-than-corrected 20/20 vision, haloed vision, double vision, progressive corneal thinning (also known as ectasia), and complications that might require further procedures, including a corneal transplant.

Plaintiff returned to defendant's office the day after the procedure, as instructed. He told defendant that his left eye was blurry and tearing, and that he felt like he had grains of sand inside his eye. The doctor told him that this was a normal and temporary condition which would subside. At his next follow-up visit on April 19, 2004, plaintiff again complained of the blurry vision in his left eye, and told defendant that, while the tearing had stopped, he was now experiencing dryness in that eye. According to plaintiff, defendant was dismissive, and recommended rewetting drops. At his six-week postoperative appointment, on May 19, 2004, plaintiff made the same complaints but recalled that defendant was again dismissive, telling plaintiff that he was expecting too much so soon after the surgery, and that he needed to give his eyes time to heal. Defendant told plaintiff to follow up "as needed," and that he could come back any time. According to plaintiff, although "[t]here was no definite time [he] had to come back to him," he considered Dr. Niksarli his "ophthalmologist for life." This was based on plaintiff's recollection that defendant had assured him that the procedure came with a lifetime guarantee.

Plaintiff had no further contact with defendant until February 21, 2007. Although the postsurgical blurriness had never really gone away, plaintiff stated that he learned to adapt to it. By early 2007, however, the blurriness had gotten worse, and plaintiff began experiencing visual distortions and double vision. At the February appointment, defendant performed tests similar to those he had performed preoperatively, and diagnosed plaintiff with a condition called forme fruste keratoconus (FFK). Keratoconus is a bilateral bulging of the cornea and the forme fruste type is an early presentation of the condition. Defendant told plaintiff that it was a genetic condition where the collagen inside the cornea progressively weakens, with no known cure except an experimental procedure being performed by a doctor in California. Defendant told plaintiff that the Lasik surgery had nothing to do with the onset of plaintiff's condition.

Plaintiff commenced this action on May 31, 2007, alleging that defendant committed medical malpractice. His wife interposed a derivative claim. Defendant moved for summary judgment, arguing that plaintiff filed his summons after the

expiration of the 2^{1/2}-year statute of limitations for medical malpractice actions (CPLR 214-a). He argued that the cause of action accrued on April 6, 2004, when he performed the Lasik procedure. Plaintiff, in opposing the motion, invoked the continuous treatment doctrine, contending that defendant had continued treating him for a blurry vision condition, with no interruption, after the surgery was performed, and up to and including his last visit to defendant on February 21, 2007. Plaintiff's expert opined that the blurry vision for which plaintiff visited defendant in February 2007 was related to the Lasik surgery, because the Lasik caused the dormant condition of FFK to manifest into a more active keratoconus, which severely affected plaintiff's vision. Defendant countered by asserting that the last possible date he could be considered to have treated plaintiff was May 19, 2004, at the six-week postoperative checkup, which would render the action time-barred. He argued that plaintiff made no complaints at the time, and had corrected vision of 20/20. He further stated that, although instructed to schedule a routine ophthalmology exam with defendant, three to six months in the future, plaintiff never did so. Finally, defendant argued that the blurriness which prompted plaintiff to visit him in February 2007 was unrelated to the blurriness the Lasik surgery was designed to address.

The court denied the summary judgment motion, finding that issues of fact precluded it from determining the continuous treatment question. The case proceeded to trial. Dr. Paul B. Donzis, plaintiff's expert ophthalmologist, reiterated his opinion, laid out in opposition to the summary judgment motion, that plaintiff had mild dormant FFK before surgery, and that the Lasik surgery weakened plaintiff's cornea such that it triggered the dormant FFK to become active. Thus, he stated, while the surgery was technically performed well, it should have never been performed in the first place. Dr. Donzis testified that dormant FFK can become triggered anywhere from a month or two to five years after Lasik surgery. He further testified that plaintiff's blurry vision immediately after the surgery could not have been from FFK; rather, it was normal temporary Lasik postsurgical blurriness. He stated that plaintiff did not begin experiencing FFK-related blurriness until a few months before the February 2007 visit with defendant.

Defendant's main expert, an ophthalmologist named Dr. Peter Hersh, opined that, upon reviewing the 2004 data, the topography of plaintiff's eyes did not indicate that he had FFK prior to the Lasik procedure. Therefore, he stated, defendant's assessment of plaintiff's condition was appropriate, and Lasik surgery

was not contraindicated. Dr. Hersh further testified that a patient can develop FFK absent a Lasik procedure, and there was no causal connection between plaintiff's Lasik surgery and his subsequent development of FFK.

The jury returned a verdict for plaintiff, specifically finding that the last date of continuous treatment was February 21, 2007. It awarded plaintiff \$100,000 for past pain and suffering, \$3,000,000 for future pain and suffering over 45 years, \$60,000 in lost earnings, and \$740,000 for future lost earnings for a period of 37 years (\$20,000 per year). The jury awarded plaintiff's wife \$20,000 for past loss of services and \$100,000 for future loss of services. Defendant moved for, among other things, judgment notwithstanding the verdict, or, in the alternative, for an order setting aside the verdict and directing a new trial on the grounds that the verdict was against the weight of the evidence and that the court had committed prejudicial errors, or, in the alternative, for an order reducing the damages. The court denied defendant's motion. Regarding defendant's argument that the claim was barred by the statute of limitations, the court stated that the "issue of whether [plaintiff's] February 21, 2007 visit to [defendant] constituted continuous treatment was determined to be a question for the jury, in defendants' previous summary judgment motion" (2010 NY Slip Op 33942[U], *13 [Sup Ct, NY County 2010]).

As a preliminary matter, we note that defendant's statute of limitations defense must be analyzed in light of the fact that the question of the applicability of the continuous treatment doctrine was put before, and decided by, a jury. Accordingly, the jury's verdict on that issue should only be set aside as not supported by sufficient evidence if "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Accordingly, we review the issue with great deference to the jury.

The continuous treatment doctrine is codified at CPLR 214-a, which provides, in pertinent part, that "[a]n action for medical, dental or podiatric malpractice must be commenced within two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure." One of the purposes of the doctrine is to permit a doctor to address a possible act of malpractice without the distraction of a lawsuit commenced by the very person he or she is trying to treat (*Nykorchuck v Henriques*, 78 NY2d 255, 258 [1991]).

Defendant claims that the continuous treatment doctrine did not toll the statute of limitations because plaintiff's treatment with defendant concerning the Lasik surgery came to an end, at the latest, on May 19, 2004, and plaintiff's next visit, nearly three years later, was for an unrelated condition. Specifically, he argues that the reason for the surgery was garden-variety myopia, and the visits after the surgery, up to and including the May 2004 visit, were for routine follow-up exams that every Lasik patient has. Further, defendant asserts that the February 2007 visit arose not out of the myopia condition, but rather out of the keratoconus that plaintiff alleges was brought on by the surgery. Thus, he contends that the conditions were not the "same" for purposes of CPLR 214-a. Defendant further notes that, after the May 2004 visit, plaintiff never scheduled another follow-up appointment and never even communicated with defendant, until he reappeared in 2007. Thus, he concludes, the original treatment had come to an end.

Plaintiff, on the other hand, asserts that the 2007 visit satisfied CPLR 214-a, because it was for the "same" condition as the 2004 visits, which was blurry vision in his left eye. He further argues that whether he and defendant agreed that he would seek further treatment after the May 2004 visit is irrelevant, because defendant "guaranteed" that the Lasik procedure would correct the blurry condition, and stated that he was plaintiff's "doctor for life" for that purpose.

Although the CPLR defines "continuous" treatment as treatment "for the same illness, injury or condition" out of which the malpractice arose (CPLR 214-a [emphasis added]), the controlling case law holds only that the subsequent medical visits must "relate" to the original condition (*Richardson v Orentreich*, 64 NY2d 896, 899 [1985]; *Chestnut v Bobb-McKoy*, 94 AD3d 659, 660 [1st Dept 2012]). Here, plaintiff initially engaged defendant to correct his blurry vision, and the 2007 visit was motivated by continued blurriness in plaintiff's eye, thus making the two visits "related" (*id.*).

Indeed, this view of the evidence has support in the case law. For example, in *Branigan v DeBrouner* (197 AD2d 270 [1st Dept 1994]), the defendant gynecologist failed to diagnose rubella in the plaintiff, his pregnant patient. He argued that the plaintiff's cause of action for malpractice accrued, at the latest, when he read the results of a rubella test that he had ordered and declared her to not have contracted the disease, a date which predated the commencement of the action by more than 2½ years (*id.* at 271-272). This Court disagreed, and held that the continuous treatment doctrine tolled the start of the limitations

period until the plaintiff's final prenatal visit, stating as follows: "Here, it is undisputed that Dr. DeBrovner was plaintiff's gynecologist and had been providing her with prenatal care during her early pregnancy. While Dr. DeBrovner would limit the condition being treated to rubella and the course of treatment to his May 15, 1989 negative diagnosis, it is clear that plaintiff was under his care for all her early pregnancy prenatal medical needs, and not for a series of unrelated and discrete tests and procedures, each giving rise to a separate and unrelated course of treatment. Plaintiff engaged Dr. DeBrovner's services for her pregnancy and not her complaint of rubella. As her gynecologist/obstetrician, he was required to treat the complications of her pregnancy or, if the complication was beyond his area of specialty, to refer her to another competent medical care provider. Continuous treatment for prenatal care should extend to the time of birth and encompass the myriad, diverse procedures and tests appropriate to carrying a child to term and the delivery" (*id.* at 274). In so holding, we cited favorably to a Third Department decision, *Miller v Rivard* (180 AD2d 331 [3d Dept 1992]). That case involved a woman's "wrongful conception" claim arising out of an unsuccessful vasectomy performed on her husband (*id.* at 333-334). The defendant doctor moved for summary judgment based on the statute of limitations (*id.* at 334). Although it was dicta because the court deemed the defendant to have conceded the point, the court stated the following: "[T]he course of related, continuous treatment in the case of a vasectomy performed for the purpose of birth control does not end until completion of the postoperative procedures of fertility testing and notification to the patient that the test results show that the vasectomy was a success" (*id.* at 338).

Here, plaintiff testified, and the jury was entitled to believe, that, prior to the Lasik surgery, defendant guaranteed him a good result, meaning that the procedure would fix plaintiff's nearsightedness. Under these circumstances, we find that, like the plaintiff in *Branigan*, who was considered to be under the continuous care of her doctor until she carried her baby to term, and the plaintiff in *Miller*, whose husband was considered to be under the continuous care of his doctor until it was determined that he was sterile, plaintiff was under the continuous care of defendant for statute of limitations purposes until defendant rectified plaintiff's vision problems, or, as turned out to be the case, determined that any further efforts by him to do so would be futile.

We must also address defendant's argument that because plaintiff pursued no treatment for over 30 months after May

2004, he is not entitled to a tolling based on his single visit in February 2007. This, again, ignores plaintiff's belief that he was under the active treatment of defendant at all times, so long as the Lasik surgery did not result in an appreciable improvement in his vision. In determining whether continuous treatment exists, the focus is on whether the patient believed that further treatment was necessary, and whether he sought such treatment (see *Rizk v Cohen*, 73 NY2d 98, 104 [1989]). Further, this Court has suggested that a key to a finding of continuous treatment is whether there is "an ongoing relationship of trust and confidence between" the patient and physician (*Ramirez v Friedman*, 287 AD2d 376, 377 [1st Dept 2001]). Plaintiff's testimony that he considered defendant to be his "[doctor] for life," and that the efficacy of the Lasik was guaranteed, was a sufficient basis for the jury to conclude that such a relationship existed.

Edmonds v Getchonis (150 AD2d 879 [3d Dept 1989]), a dental malpractice case, illustrates this point. There, the defendant inserted an implant in the plaintiff's mouth in November 1977 to correct a "denture problem" (*id.* at 879-880). After the removable implant was determined to be ineffective, the defendant inserted a fixed one in August 1978 (*id.* at 880). He then told the plaintiff that he no longer needed to see her, unless she had any problems (*id.*). In fact, the plaintiff wrote a letter to the defendant in September 1978 thanking the defendant for his efforts and noting "we have finally come to a parting of our ways" (*id.*). In December 1980, 27 months later, the plaintiff went to see the defendant, complaining of "continued denture-related problems," and continued under his care through August 1982 (*id.*). The defendant moved for summary judgment dismissing part of the action, which was commenced in September 1983, arguing that any claim for malpractice that took place more than three years prior (the statute of limitations was three years at the time) was time-barred (*id.*). The plaintiff contended that her visit in December 1980 related back to the insertion of the original implant, and the court found that there was at least an issue of fact, stating as follows: "Assessed from plaintiff's point of view, the temporal gap between visits was not excessive. In her opposing affidavit, plaintiff averred that she continued to place her trust and confidence in [the defendant's] care, that she did not consult any other dentist, that her September 10, 1978 letter was not intended to terminate her relationship with [the defendant] and that she finally returned for treatment when 'the problem with my implant get [sic] progressively worse.' Given the history of dental treatment in this case, we find, at the very least, that a question of fact exists as to whether plaintiff's December 1980

return was ‘timely’ for purposes of establishing the required continuity” (*id.* at 881).

Plaintiff’s vision problems here are analogous to the plaintiff’s “denture problem” in *Edmonds*, and the jury did not act irrationally in finding that plaintiff continued to place trust and confidence in defendant’s ability to correct his blurry vision. Further, even if we were to accept the proposition advanced by defendant, that the keratoconus was unrelated to the Lasik surgery, plaintiff had no reason to believe that to be the case when he returned to defendant in February 2007. Thus, in reasonably believing that his continued, and worsening, blurry vision was attributable to the Lasik surgery that defendant had guaranteed, plaintiff was genuinely “confronted with the dilemma that led to the judicial adoption of the continuous treatment doctrine” (*Rizk v Cohen*, 73 NY2d at 104).

Cases such as *Clayton v Memorial Hosp. for Cancer & Allied Diseases* (58 AD3d 548 [1st Dept 2009]) are inapplicable here, to the extent they reiterate that “continuous treatment exists ‘when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during that last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past’ ” (58 AD3d at 549, quoting *Richardson v Orentreich*, 64 NY2d at 898-899).

In *Clayton*, the plaintiff asserted that a visit to the defendant in January 2001 was in continuance of treatment last rendered in November 1999 (58 AD3d at 549). This Court found that the continuous treatment doctrine did not apply, because the plaintiff testified that she did not believe anything further could be done to treat her condition after the November 1999 visit, and there was no evidence that plaintiff viewed the two visits as related (*id.*).

Here, of course, plaintiff went back to defendant in February 2007 precisely because he wanted defendant to fulfill his guarantee that the Lasik surgery would work. This was consistent with the notion that “[i]ncluded within the scope of ‘continuous treatment’ is a timely return visit *instigated by the patient* to complain about and seek treatment for a matter related to the initial treatment” (*McDermott v Torre*, 56 NY2d 399, 406 [1982] [emphasis added]). Indeed, “as a practical matter, it is not always possible to know at the conclusion of one visit with a physician whether a further visit with the physician may become indicated for the same condition within a reasonable time thereafter” (*Gomez v Katz*, 61 AD3d 108, 114 [2d

Dept 2009]). We further note that defendant prescribed Timoptoc to plaintiff at the February 21, 2007 appointment, to alleviate the effects of keratoconus. The term “course of treatment” includes the prescription of medications (*see id.* at 112).

It bears emphasizing that the question of the applicability of the continuous treatment doctrine was specifically put before the jury. Our view of the trial record is that sufficient evidence was put before the jury to justify its determination that plaintiff’s visit to defendant in February 2007 tolled the statute of limitations. Accordingly, we defer to the jury and uphold that portion of its verdict.

Notwithstanding that determination, the derivative claim of Saramma Devadas must nevertheless be dismissed. “[T]olling of the statute of limitations pursuant to the continuous treatment doctrine is personal to the recipient of such treatment and does not extend to a derivative claim for loss of services” (*Wojnarowski v Cherry*, 184 AD2d 353, 354-355 [1st Dept 1992]). Accordingly, plaintiff Saramma Devadas’s claim is time-barred.

As for the jury’s substantive determination that defendant committed malpractice, we cannot say that “no valid line of reasoning and permissible inferences . . . could possibly lead rational [people] to th[at] conclusion . . . on the basis of the evidence presented at trial” (*Cohen*, 45 NY2d at 499). Quite simply, plaintiff’s expert ophthalmologist, Dr. Donzis, testified that it was his opinion, within a reasonable degree of medical certainty, that plaintiff had a mild dormant form of FFK contraindicating Lasik surgery, and that defendant should have diagnosed this condition. Further, he testified that the Lasik surgery caused plaintiff’s dormant FFK to become active, resulting in his vision problems. While defendant’s experts may have disagreed, that is not a reason to set aside the verdict (*see Brotman v Biegeleisen*, 192 AD2d 410, 410 [1st Dept 1993], *lv denied* 82 NY2d 654 [1993]).

Defendant mischaracterizes Dr. Donzis’s testimony in an effort to discredit it. For example, he points to passages which suggest that even Dr. Donzis conceded that FFK could not be diagnosed in 2004, when defendant performed the Lasik surgery. However, while the experts agreed that plaintiff’s dormant FFK could not be diagnosed clinically using a slit lamp, they agreed that dormant FFK could be diagnosed via topographic map. Thus, if the jury believed that plaintiff had dormant FFK in 2004, it had a basis for finding that defendant could and should have diagnosed it. Defendant also points to the fact that Dr. Donzis agreed that plaintiff’s age and cornea thickness were within normal limits, and that the Humphrey-Pathfinder analy-

sis stated that plaintiff's eye topography was normal. However, Dr. Donzis also testified that defendant should not have relied solely upon the Humphrey-Pathfinder analysis, given that plaintiff's corneal thickness and topography were borderline normal, and plaintiff was young, an additional risk factor. According to Dr. Donzis, defendant should have performed an independent analysis of plaintiff's I-S value,² which would have indicated that plaintiff's I-S was 3.08, a level at which Lasik was contraindicated. Further, defendant's protestations regarding Dr. Donzis's use of the 2006 version of Pathfinder is a red herring. Dr. Donzis testified that the 2006 version presented the topography of plaintiff's eye in a different manner than the 2004 version of the software. Critically, however, he added the caveat that the "absolute numbers" used to determine whether there is an abnormality are the same, regardless of the software used. Thus, the jury had reason to disregard the fact that Dr. Donzis used a version of the software that was unavailable to defendant during his initial examination of plaintiff.

Defendant also mischaracterizes the record by arguing that Dr. Donzis "manipulat[ed] numerical descriptions" in determining that plaintiff's I-S was 3.08. Defendant's expert, Dr. Hersh, testified that Dr. Donzis's numbers were incorrect, not because he "manipulated" data, but because he incorrectly used all corneal measurements within a 3 mm radius of the eye's center. By doing so, Dr. Hersh opined, Dr. Donzis relied on data that was inaccurate due to interference caused by plaintiff's long lashes. Instead, according to Dr. Hersh, the I-S should be calculated by using only the data within a 2 mm radius, or 4 mm zone. On cross-examination, however, plaintiff's counsel read Dr. Hersh's testimony from a prior trial of an unrelated case, in which he stated that it was really the data from the central 6 mm of the cornea that should be used. This contradicted his direct testimony. Dr. Hersh could not explain the discrepancy between his testimony in this trial and the other, nor could he point to any support for his use of a 4 mm methodology at the trial of this matter. Under such circumstances, it would have been reasonable for the jury to discredit Dr. Hersh, and believe Dr. Donzis.

Defendant also points to the testimony of Dr. Chu, who conducted a medical examination for him in which he found plaintiff's vision to be 20/30 uncorrected, and 20/20 when corrected. However, Dr. Chu admitted that he did not conduct any

2. I-S value is short for Inferior-Superior value, a measurement that represents a comparison between the shape of the top half of the cornea and the lower half. A higher number indicates a more irregularly shaped eye.

qualitative testing to address plaintiff's claims of coming, haloing, and other adverse effects of the Lasik surgery. Further, while Dr. Chu explained that plaintiff's near 20/20 vision belied any such claims, making further objective testing unnecessary, the jury was not obliged to believe this explanation.

We reject defendant's argument that the jury's verdict was tainted by the introduction of a topography of plaintiff's eye created with software not available until two years after the surgery in question. Again, the critical aspect of Dr. Donzis's testimony was that plaintiff's I-S was 3.08, and this was obtained without use of the 2006 topography. Nor was defendant prejudiced by plaintiff's failure to produce the topography during discovery. Plaintiff's expert disclosure provided that his expert would testify as to all records, including "post-operative topographies." Since defendant had the 2006 Pathfinder software, and the 2004 data, he could have easily created the topography himself.

We further find that the jury award did not deviate materially from what would be reasonable compensation (CPLR 5501 [c]). Plaintiff sustained serious and permanent damage to his vision, testifying that he continues to suffer from double vision, starbursts, and halos. His eyes are constantly dry, and even though he has an unrestricted drivers license, he testified that he can only wear corrective lenses for about six hours a day. Even surveillance tape shown at trial by defendant establishes that plaintiff must depend on his wife and father for rides to work and other places. Case law supports significant awards for blindness in one eye (see *e.g. Sanchez v Project Adventure, Inc.*, 12 AD3d 208 [1st Dept 2004]; *Crawford v Williams*, 198 AD2d 48 [1st Dept 1993], *lv denied* 83 NY2d 751 [1994]), and because plaintiff's condition affects both eyes, the jury had sufficient basis to award plaintiff the amount it did.

Finally, the judgment complies with CPLR 5031. Concur—Mazzarelli, J.P., Renwick, DeGrasse and Gische, JJ.

Friedman, J., dissents in part in a memorandum as follows: The majority affirms the judgment for plaintiff Johnson Devadas in this medical malpractice action based on its holding that a factual question was presented at trial as to whether the "continuous treatment" doctrine tolled the running of the statute of limitations from May 19, 2004, the date of plaintiff's last immediate postoperative consultation with defendant Kevin Niksarli, M.D., until February 21, 2007, the date of plaintiff's last consultation with defendant before he commenced this ac-

tion.¹ The majority reaches this result even though it is undisputed that, following defendant's performance of the allegedly contraindicated LASIK eye surgery in April 2004, there was no contact of any kind between plaintiff and defendant during the 33 months that passed between the May 2004 visit and the February 2007 visit—an interval three months longer than the 30-month limitation period (CPLR 214-a). The majority's sustaining of a finding that a course of "continuous treatment" persisted over a period longer than the limitation period, in which no physician-patient contact whatsoever occurred, appears to be without precedent in this state (*see* Edward J. Guardaro, Jr. & Norman Bard, *New York Medical Malpractice* § 9:100 [2014]).

The majority purports to justify its apparently unprecedented holding by pointing to the "guarantee" that plaintiff claims to have received from defendant. According to plaintiff's own testimony, however, this alleged "guarantee" was nothing more than a promise that plaintiff would not be charged for additional treatment or follow-up procedures relating to the LASIK surgery.² By plaintiff's own account, although he believed that he could see defendant "at any time" for issues relating to the surgery, on an "as-needed basis," he had no specific intention of returning to consult with defendant at any "definite time," or within any particular time frame, after the May 2004 office visit. Notwithstanding the blurred vision that persisted after the operation, plaintiff testified that he did not return to defendant's office for nearly three years after the May 2004 appointment because he "had adapted to [the] blurry vision" and had found defendant to be "dismissive" of his complaints at his postoperative visits in 2004. It was only when the blurred vision "got[] worse" in early 2007 that plaintiff returned to see defendant.

Even assuming in plaintiff's favor that his May 2004 and February 2007 consultations with defendant were "for the same illness, injury or condition" (CPLR 214-a), I cannot see how plaintiff's knowledge of the alleged "guarantee," by itself, can be deemed to support a finding that "continuous treatment"

1. I concur with the majority's dismissal of the derivative claim of plaintiff Saramma Devadas. In the remainder of this writing, the term "plaintiff" refers to plaintiff Johnson Devadas. References to "defendant" include Dr. Niksarli's professional limited liability company, which is also named as a defendant in this action.

2. According to defendant, he had told plaintiff that he could receive any follow-up treatment free of charge for the first year after the surgery and, thereafter, he would be billed for further treatment relating to LASIK surgery at a reduced rate.

persisted over a 33-month period in which there was neither any actual physician-patient contact nor any definite plans or expectation for such contact to resume. That plaintiff believed he could return to defendant's office at any point in the future to seek treatment relating to his LASIK surgery, on an "as-needed basis," does not distinguish this case from any situation in which a course of treatment concludes without either a definite breach in the physician-patient relationship or the patient's switching to a different doctor. Plaintiff's belief that defendant would not charge him for any future LASIK-related treatment is irrelevant to the question of whether a course of treatment continued over nearly three years during which the parties had no actual contact, whether in person or otherwise. Thus, plaintiff's own testimony establishes, as a matter of law, that defendant's continuous treatment of plaintiff relating to the allegedly negligent April 2004 LASIK surgery came to an end in May 2004. Plaintiff's brief resumption of treatment with defendant in February 2007 (for only one visit), while perhaps for the same condition, was not part of the earlier course of treatment that had ended in May 2004 and could not revive claims arising from that course of treatment, for which the statute of limitations had expired in November 2006. A renewal or resumption of treatment after a lengthy break is not continuous with an earlier course of treatment that had reached its end (*see Rizk v Cohen*, 73 NY2d 98, 105 [1989] [the continuous treatment doctrine did not apply where the later contact between the parties "was a renewal, rather than a continuation, of the physician-patient relationship"]; *Aulita v Chang*, 44 AD3d 1206, 1210 [3d Dept 2007] [the patient's "later treatment . . . could only be considered a resumption of treatment as opposed to a continuation of his prior care" (internal quotation marks omitted)]; *Van Inwegen v Lucia*, 222 AD2d 576, 577 [2d Dept 1995] ["the plaintiff's return to Dr. Lucia in August of 1982 for treatment of two teeth which he had not worked on since 1977 was a resumption of treatment rather than continuous treatment"]).

The purpose of the continuous treatment toll, now codified by CPLR 214-a, is "to enforce the view that a patient should not be required to interrupt corrective medical treatment by a physician and undermine the continuing trust in the physician-patient relationship in order to ensure the timeliness of a medical malpractice action" (*Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296 [1998]). Here, during the 33-month interval between plaintiff's May 2004 and February 2007 consultations with defendant, plaintiff was not undergoing any treatment of any kind by defendant; hence, commencing an action within that period would not have interrupted any ongoing

treatment. While it is possible for a course of continuous treatment to be extended beyond the patient's last visit with the physician "when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future" (*Richardson v Orentreich*, 64 NY2d 896, 898-899 [1985] [continuous treatment ended on the date of the patient's last scheduled appointment, for which she failed to appear]), in this case—by plaintiff's own admission—the parties did not "explicitly anticipate[]" further treatment at any particular time or within any defined time frame. As plaintiff testified at trial: "There was no definite time I had to come back to him. It was an as-needed basis. He was my ophthalmologist for life. According to his guarantee I could come back any time." Again, apart from plaintiff's alleged understanding that any future LASIK-related treatment would be free of charge, this is no different from the conclusion of any course of treatment in which neither the physician nor the patient affirmatively breaks off the relationship. Moreover, plaintiff admits that, in the time between his May 2004 and February 2007 consultations with defendant, he was not aware of any need for further treatment. "Given plaintiff's lack of awareness of a condition warranting further treatment, the purpose of the continuous treatment doctrine would not be served by its application here" (*Young*, 91 NY2d at 297; *see also id.* at 296 ["a patient who is not aware of the need for further treatment of a condition is not faced with the dilemma that the doctrine is designed to prevent"]; *Rizk v Cohen*, 73 NY2d at 104 [there was "no sound basis for applying the continuous treatment doctrine" where the plaintiff was "unaware of the need for further treatment"]).

Further, by extending the course of treatment in which the alleged malpractice occurred from May 2004, when the last regular postoperative examination occurred, to a single visit in February 2007, covering a period of 33 months in which the parties had no contact at all, the majority in effect applies an accrual-upon-discovery rule to a malpractice claim that is not based on the presence of a foreign object in the patient's body.³ In so doing, the majority contravenes both the Legislature's determination to limit the discovery rule to foreign-object claims (*see* CPLR 214-a) and the Court of Appeals' admonition against

3. In the February 2007 examination, defendant diagnosed plaintiff as having a congenital eye condition that, had it been diagnosed in 2004, would have contraindicated LASIK surgery. The majority's ruling effectively tolls the running of the statute of limitations on plaintiff's claim until his discovery, in 2007, of defendant's failure to diagnose the condition in 2004.

judicial extension of the discovery rule beyond the scope the Legislature prescribed for it in the statute (see *Rizk v Cohen*, 73 NY2d at 104 n 3).

The Court of Appeals' statement, quoted by the majority, that a course of continuous treatment includes "a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment" (*McDermott v Torre*, 56 NY2d 399, 406 [1982]), does not support the majority's result. As the Court of Appeals noted in *Curcio v Ippolito* (63 NY2d 967 [1984]), a unanimous decision rendered only two years later, the key word in the quoted passage from *McDermott* is "timely." In *Curcio*, the Court of Appeals affirmed summary judgment dismissing as time-barred a malpractice claim against a surgeon who had operated on the plaintiff's nose. The *Curcio* plaintiff, who had been discharged from the defendant surgeon's care in January 1976, went back to see the defendant on February 24, 1979, presenting with complaints about her breathing and nasal indentation, "without having seen defendant or any other physician in the meantime with respect to her nose" (*id.* at 968). In affirming the dismissal of the claim, the Court of Appeals explained: "[I]t is enough to bar plaintiff's claim that no contact between plaintiff and defendant after her discharge and before the February 24, 1979 visit has been shown. Under such circumstances the required continuity has not been established through 'a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment' (*McDermott v Torre*, 56 NY2d 399, 406 [emphasis supplied]), or otherwise" (63 NY2d at 969). Since, by the majority's reckoning, a return visit may serve to extend the toll of the statute of limitations even where further treatment is not specifically contemplated, a return visit occurring any length of time after the initial course of treatment—perhaps for the rest of the patient's life or for the rest of the physician's career—could be deemed "timely" under the majority's holding. I do not believe that this approach is consistent with the continuous treatment doctrine as formulated by the Court of Appeals and enacted by the Legislature.

The instant plaintiff, like the plaintiff in *Curcio*, had no contact with the defendant physician after the alleged malpractice for a period of time longer than the limitation period applicable to his claim. During that hiatus, moreover, neither party anticipated that contact would be resumed within any particular time frame. Accordingly, the claim here, like the claim in *Curcio*, should be dismissed as time-barred (see also *Spear v Rish*, 161 AD2d 197, 198 [1st Dept 1990] [the plaintiff, who

completed the course of allegedly negligent treatment in 1967 and did not see the defendant physician again until 1975, failed to establish “a ‘timely’ return visit so as to be able to invoke the continuous treatment doctrine,” where, “(d)uring the long periods between treatments, (she) was not under any form of medical care, nor was there any existing ongoing physician-patient relationship”)).

I note that the result reached by the majority is anomalous and will create perverse incentives for physicians. Had plaintiff instituted this suit in February 2007, without visiting defendant’s office again for the first time in nearly three years, the action plainly would have been dismissed pursuant to the statute of limitations upon defendant’s motion. By deeming plaintiff’s one-time office visit in February 2007 to extend a course of treatment that otherwise plainly ended in May 2004, the majority sends physicians the unfortunate message that they should think twice before seeing patients with whom they have not had contact for longer than 2½ years—especially in the cases of patients with whom the physicians have had difficulties. Under the majority’s holding, by seeing such a patient, the physician may be reviving an otherwise time-barred claim. Thus, as applied by the majority, a doctrine that was instituted for the purpose of avoiding the “interrupt[ion] [of] corrective medical treatment” (*Young*, 91 NY2d at 296) could have the effect of deterring physicians from resuming treatment of former patients.

For the reasons discussed above, I believe that the record does not support the jury’s finding that February 21, 2007 was the last date of a “continuous course of treatment” that included defendant’s alleged malpractice in April 2004, and that defendant’s posttrial motion for judgment notwithstanding the verdict should have been granted and the complaint dismissed. I therefore respectfully dissent to the extent the majority’s affirms the judgment for plaintiff. Given my view that the statute of limitations issue is dispositive of this appeal, I need not reach the remaining issues defendant raises.

3 TANNER ROSS BHONLAY et al., Appellants, v RAQUETTE LAKE CAMPS, INC., et al., Respondents. [991 NYS2d 765]—

Trial—Place of Trial—Demand for Change of Venue—Enforceability of Venue-Selection Clause—Agreement Not Disregarded for Inconvenience

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 16, 2013, which granted defendants’ motion to change the venue of this action from New York County to Hamilton County, and denied plaintiffs’ cross motion to retain

venue in New York County, unanimously affirmed, without costs.

We are constrained by this Court's holdings in *Medina v Gold Crest Care Ctr., Inc.* (117 AD3d 633 [1st Dept 2014]) and *Hendrickson v Birchwood Nursing Home Partnership* (26 AD3d 187 [1st Dept 2006]). In any event, whether the motion to change venue was analyzed as one based on "improper" venue or not, the agreement would control. In other words, even if we deemed a demand necessary, we would still exercise our discretion to enforce the agreement (see *Pittman v Maher*, 202 AD2d 172, 175 [1st Dept 1994] [existence of venue agreement is one of the "limited situations" in which the court may disregard strict compliance with the statute]; *Callanan Indus. v Sovereign Constr. Co.*, 44 AD2d 292, 294-295 [3d Dept 1974]).

There is no basis for disregarding the venue agreement. Plaintiff has not demonstrated that enforcement of the venue clause would be unjust or would contravene public policy, or that the clause was rendered invalid by fraud or overreaching (see *Molino v Sagamore*, 105 AD3d 922 [2d Dept 2013] [enforcing against Queens resident venue clause in rental agreement requiring litigation of disputes in Warren County]). This case has been transferred to Fulton County, because there are no Supreme Court sessions held in the parties' selected venue of Hamilton County. While there is evidence that it would be inconvenient for plaintiff and his witnesses to travel to Fulton County for trial, it cannot be said that "the selected forum would be so gravely difficult that [plaintiff] would, for all practical purposes, be deprived of [his] day in court" (*LSPA Enter., Inc. v Jani-King of N.Y., Inc.*, 31 AD3d 394, 395 [2d Dept 2006]; see also *Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836 [2d Dept 2009], *lv denied* 13 NY3d 706 [2009]). Concur—Mazzarelli, J.P., Renwick, Feinman, Gische and Kapnick, JJ.

4 LINDA DAURIA et al., Appellants, v CASTLEPOINT INSURANCE COMPANY et al., Defendants, and FRANK CAMPO, Respondent. [992 NYS2d 210]—

Motions and Orders—Reargument or Renewal—Leave to Renew Following Grant of Dismissal to Codefendant at Appellate Level—Law of Case Does Not Provide Basis for Renewal Motion Where Codefendants Not Similarly Situated

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered October 8, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to renew defendant Frank Campo's motion to dismiss the complaint, affirmed, without costs.

In 2008, defendant Castlepoint Insurance Company issued a

homeowner's policy to plaintiffs Linda Dauria and Thomas Dauria based on an application prepared and submitted on their behalf by defendant broker Frank Campo. After a fire in 2010, Castlepoint rescinded the policy based on its determination that the premises contained a basement apartment, which rendered it a "three family" dwelling as opposed to the "two family" designation listed on the insurance application.

In 2011, plaintiffs commenced this action against Castlepoint for breach of contract, and against Campo for his alleged negligence and breach of contract in failing to procure the proper insurance policy and to properly process plaintiffs' application for insurance. Campo moved to dismiss for failure to state a cause of action and based on documentary evidence, claiming that he was never advised or had reason to believe that the premises was a three-family dwelling. In opposition, Mr. Dauria stated that in a conversation with Campo after the fire, Campo admitted that he had "messed up," and that in 2002 an investigator for Allstate, the prior insurer of the premises, had advised Campo that the house was a three-family home. Plaintiffs also cross-moved for summary judgment against Castlepoint and Castlepoint cross-moved for summary judgment against plaintiffs dismissing the complaint.

The motion court granted Campo's and plaintiffs' motions for summary judgment, and denied Castlepoint's motion on the ground that Campo fulfilled his duties to plaintiffs, and Castlepoint failed to meet its prima facie burden of showing its entitlement to rescission as a matter of law. In so ruling, the court found that Castlepoint did not establish that plaintiffs had made a material misrepresentation in the insurance application because three-family dwellings were not listed as an "unacceptable exposure" in Castlepoint's underwriting guidelines, and the policy did not exclude three-family dwellings from coverage.

Castlepoint appealed. This Court reversed and granted Castlepoint summary judgment (104 AD3d 406 [1st Dept 2013]), holding that the motion court erred in finding that Castlepoint failed to establish the materiality of the misrepresentation that the premises was a two-family dwelling, as opposed to a three family dwelling that did not fit within the policy definition of a "residence premises."

Plaintiffs did not appeal from the grant of summary judgment as to Campo. However, after our decision in the Castlepoint appeal was issued, plaintiffs moved below to renew Campo's motion to dismiss. Finding that plaintiffs' failed to present any new and additional facts not available at time of Campo's origi-

nal motion to dismiss the complaint, the motion court deemed the motion to be an untimely motion to reargue based on our decision in the Castlepoint appeal, which did not address the unappealed dismissal of the complaint against Campo. The court further stated that even assuming *arguendo* that it could consider the motion, plaintiffs' arguments were without merit.

Although the grant of a dismissal to a codefendant at the appellate level may form the basis of a renewal motion (in the court below) by a nonappealing defendant on the ground of "law of the case" (*Spierer v Bloomingdale's*, 59 AD3d 267 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]; *Koscinski v St. Joseph's Med. Ctr.*, 47 AD3d 685 [2d Dept 2008]), this is not a case where two codefendants are so similarly situated that this Court's order with respect to one defendant directly impacts the other defendant. The issue of Campo's liability is not identical to the issue of Castlepoint's liability, and plaintiffs have not shown that the factual or legal basis for the order dismissing the claims against Campo has been overturned (*compare Ramos v City of New York*, 61 AD3d 51 [1st Dept 2009]).

An insurance broker can be held liable in negligence if he or she does not exercise due care in an insurance brokerage transaction (*see Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865 [1st Dept 2009]). In the order dismissing the claims against Campo, the motion court found that Campo had shown that "no significant dispute exists regarding his lack of duty to [p]laintiffs under the circumstances of this matter." (2012 NY Slip Op 33670[U], *3 [2012] [internal quotation marks omitted].) The court reasoned that Campo procured the requested insurance for plaintiffs, within a reasonable time, and had no continuing duty to advise plaintiffs to procure additional insurance once this was achieved. Although the dissent states that "[t]he entire premise of [the motion court's] dismissal of the complaint against Campo was that Campo obtained the requested coverage and thus fulfilled his duty," in denying renewal the motion court stated that "the issue of the materiality of the misrepresentation regarding the number of families the home was designed to accommodate was not discussed with reference to Campo, and was immaterial to the decision to dismiss the complaint as against [him]" (41 Misc 3d 960, 962 [Sup Ct, Bronx County 2013]).

Significantly, in our decision in the Castlepoint appeal this Court did not find that Campo was in fact responsible for a material misrepresentation in the insurance policy application, and plaintiffs have not shown that the motion court's exoneration of Campo was based on its now-overturned holding that there was

no misrepresentation (*see e.g. Estate of Brown v Pullman Group*, 60 AD3d 481, 482 [1st Dept 2009], *lv dismissed in part, denied in part* 13 NY3d 789 [2009]). If, as the dissent finds, material issues of fact exist as to whether Campo failed to fulfill his duty to obtain the requested coverage and whether he made a material misrepresentation in the application, under the circumstances of this case plaintiffs' remedy was to appeal from the original order granting Campo summary judgment.

We have considered plaintiffs' other contentions and find them unavailing. Concur—Tom, J.P., Andrias and DeGrasse, JJ.

Acosta and Richter, JJ., dissent in a memorandum by Richter, J., as follows: Plaintiffs Linda Dauria and Thomas Dauria are the owners of a house in the Bronx where they live with their in-laws. In 2002, defendant Frank Campo, an insurance broker, procured a homeowners insurance policy for the premises from Allstate. The Allstate policy listed the house as a two-family residence. In 2008, Allstate did not renew the policy, and Campo obtained a policy from defendant Castlepoint Insurance Company. The application for that policy also identified the premises as a two-family residence. In November 2010, the premises was damaged by fire resulting in an alleged loss of \$330,000. Castlepoint disclaimed coverage based on a material misrepresentation in the policy application. According to Castlepoint, its investigation showed that the premises was a three-family dwelling, and not a two-family dwelling as listed on the application.

In March 2011, plaintiffs commenced this action against Castlepoint and Campo alleging, inter alia, that Castlepoint breached the insurance contract by denying coverage, and that Campo was negligent and breached his contract with plaintiffs by failing to obtain the requested coverage. Campo moved to dismiss the complaint, and both Castlepoint and plaintiffs moved for summary judgment. In opposing Campo's motion, plaintiff Thomas Dauria submitted an affidavit stating that in a conversation after the fire, Campo admitted that he "messed up," and that in 2002 an Allstate investigator had sent Campo a letter stating that the house was a three-family home. Dauria further alleged that he had neither seen nor signed the Castlepoint application, and that Campo had submitted it unbeknownst to him.

By decision and order entered February 7, 2012, the motion court granted plaintiffs' motion for summary judgment against Castlepoint, finding that Castlepoint was required to indemnify plaintiffs under the policy. In light of this conclusion, the court dismissed the complaint against Campo, finding that he fulfilled

his duty to plaintiffs by obtaining the requested insurance coverage within a reasonable time. Castlepoint appealed, and on March 5, 2013, this Court reversed and dismissed the complaint against Castlepoint, finding that plaintiffs' designation of the premises as a two-family residence was a material misrepresentation (104 AD3d 406 [1st Dept 2013]). In light of this Court's decision, which resulted in the loss of insurance coverage, on June 7, 2013, plaintiffs promptly moved to renew Campo's motion to dismiss the complaint. The motion court denied the motion and this appeal ensued.

A motion for leave to renew a prior motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]; *Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. [USA] LLC*, 114 AD3d 432 [1st Dept 2014]). Unlike a motion for reargument, "a motion for leave to renew is not subject to any particular time constraints" (*Ramos v City of New York*, 61 AD3d 51, 54 [1st Dept 2009]; see CPLR 2221 [e]).

Applying these principles, the motion court should have granted plaintiffs' motion to renew. The motion court's initial decision found that Castlepoint was required to cover the loss. The entire premise of its dismissal of the complaint against Campo was that Campo obtained the requested coverage and thus fulfilled his duty. In light of this Court's decision that there was no insurance coverage, however, the original factual premise of the motion court's decision was no longer true. Thus, there was a sufficient basis to grant renewal, deny Campo's motion to dismiss, and allow plaintiffs to litigate the issue of his liability (see *Ramos*, 61 AD3d at 51 [subsequent reversal of the plaintiff's criminal conviction constituted a new fact warranting renewal of the motion court's earlier decision dismissing the plaintiff's complaint alleging false arrest and malicious prosecution]).

It is well settled that insurance brokers have a common-law duty to obtain insurance coverage requested by their clients within a reasonable time after the request is made or to inform the client of an inability to do so (see *Hoffend & Sons, Inc. v Rose & Kiernan, Inc.*, 7 NY3d 152, 157 [2006]; *Murphy v Kuhn*, 90 NY2d 266, 270 [1997]; *Cosmos, Queens Ltd. v Matthias Saechang Im Agency*, 74 AD3d 682 [1st Dept 2010]). Thus, a client who has engaged a broker to procure adequate insurance can "recover damages from the broker if the policy obtained

does not cover a loss for which the broker contracted to provide insurance, and the insurance company refuses to cover the loss” (*Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc.*, 65 AD3d 865, 866 [1st Dept 2009] [internal quotation marks omitted]).

Triable issues of fact exist as to whether Campo failed to fulfill his duty to obtain the requested coverage and whether Campo made a material misrepresentation in the application. Plaintiffs allege that although Campo had previously been informed by an insurance investigator that the home was a three-family residence, he nevertheless submitted the application to Castlepoint describing it as a two-family residence. Plaintiffs further allege that Campo submitted the application without plaintiffs’ knowledge and without giving them the opportunity to review it. Campo does not dispute that he submitted the application which identified the premises as a two-family residence. In light of these allegations, dismissal of the complaint against Campo at this stage is unwarranted.

There is no merit to Campo’s contention that plaintiffs are precluded from seeking renewal because they did not appeal from the motion court’s dismissal of the complaint against him. In *Koscinski v St. Joseph’s Med. Ctr.* (47 AD3d 685 [2d Dept 2008]), the Second Department rejected a similar argument. In that case, the lower court denied the motions of two defendants to dismiss the complaint. Only one of the defendants appealed, and on appeal, the Second Department reversed and dismissed the complaint against that defendant. Based on that appellate decision, the nonappealing defendant moved in the lower court for leave to renew its motion to dismiss. The motion court granted the motion to renew, and upon renewal, dismissed the complaint against the nonappealing defendant. The Second Department affirmed, concluding that “the [nonappealing defendant] was not precluded from seeking renewal of its . . . motion to dismiss the complaint insofar as asserted against it because it did not appeal from the prior order which denied that . . . motion” (47 AD3d at 685-686). A similar result is warranted here (*see also Irizarry v New York City Health & Hosps. Corp.*, 268 AD2d 321, 322 [1st Dept 2000] [where the basis of a prior order has subsequently been overturned, reargument based on a change in the law is proper even if the period within which to appeal the prior order has expired]).

The majority misapprehends the motion court’s reasons for initially dismissing the complaint against Campo. The motion court stated: “CAMPO fulfilled his duty to Plaintiffs; CASTLEPOINT is not entitled to rescind the insurance policy” and

“CAMPO procured insurance for the Plaintiffs, within a reasonable time.” (2012 NY Slip Op 33670[U], *2-3 [2012].) The only logical inference from these statements is that Campo was dismissed from the action because he obtained the requested coverage. In light of this Court’s dismissing the action against Castlepoint, however, the motion court’s factual conclusion was incorrect and renewal was appropriate. The majority, and the motion court, fail to explain how Campo could have fulfilled his duty as a matter of law if, in fact, he did not obtain the requested coverage.

The majority virtually ignores this Court’s decision in *Ramos*. In attempting to distinguish *Koscinski*, the majority asserts that this Court’s order with respect to Castlepoint did not “directly impact[]” Campo. That is simply not true. The issue of Campo’s liability is dependent upon whether or not plaintiffs are covered by the Castlepoint policy and whether Campo, as the broker, obtained coverage for them. If the Castlepoint policy covered the loss, then Campo unquestionably fulfilled his duty. If, on the other hand, as is the case here, the loss is not covered, issues of fact exist as to Campo’s negligence. Thus, this Court’s finding of no coverage and its dismissal against Castlepoint “directly impact[ed]” the case against Campo. **[Prior Case History: 41 Misc 3d 960.]**

5 BETA HOLDINGS, INC., et al., Appellants, v ROBERT J. GOLD-SMITH et al., Respondents. CORINTHIAN-BETA INVESTMENTS, LLC, et al., Proposed Additional Counterclaim Defendants-Appellants. [992 NYS2d 25]—

Fraud—What Constitutes—Misrepresentations in Connection with Promissory Notes—Fraud Claim Duplicative of Breach of Contract Claim

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 21, 2013, which, insofar as appealed from, denied plaintiffs-counterclaim defendants and proposed additional counterclaim defendants’ (collectively counterclaim defendants) cross motion to dismiss the fraud counterclaims asserted against them pursuant to CPLR 3211 (a) (7), unanimously reversed on the law, with costs, and the cross motion granted.

The fraud counterclaims, insofar as based on the alleged misrepresentations by counterclaim defendants that they would honor the terms of the promissory notes, are duplicative of the breach of contract counterclaims; the allegations are essentially that they did not intend to honor the terms of the notes at the time they executed them (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]; *Non-Linear Trading Co. v*

Braddis Assoc., 243 AD2d 107, 118-119 [1st Dept 1998]). The allegations are insufficient to satisfactorily plead that counterclaim defendants, at the time the agreement was entered into, never intended to carry out the terms of the agreement (see *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]). Neither do they allege a duty separate from the terms of the agreement that was breached by counterclaim defendants so as to support a claim of fraud (see *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287 [1st Dept 1999]), or that the damages sought to be recovered are based on lost opportunities arising from counterclaim plaintiffs having been induced to sell their company (see *Mañas v VMS Assoc., LLC*, 53 AD3d 451, 454 [1st Dept 2008]). Here, plaintiffs claim that counterclaim defendants orally promised to “grow the company” using methods such as geographic expansion, acquisition opportunities and better marketing, and that these promises are specific and not subject to the agreement’s merger provision. However, this overlooks the September 8, 2008 letter of intent, which includes a promise that the buyers “want to continue to grow the Company,” and briefly summaries how this would be done. The terms of the letter of intent are subject to the merger provision. In any event, the alleged promises are of a general nature and insufficiently specific to establish fraudulent inducement, even were they not barred by the agreement’s merger provision.

The pleadings of the counterclaims also fail to show that the individual counterclaim defendants, officers of the counterclaim defendant companies, allegedly acted outside of their corporate capacities or for personal gain. There is no showing of a duty separate from counterclaim defendants’ alleged failure to abide by the terms of the agreement (see *Allerand, LLC v 233 E. 18th St. Co., L.L.C.*, 19 AD3d 275, 277-278 [1st Dept 2005]). Concur—Renwick, J.P., Richter, Manzanet-Daniels, Feinman and Gische, JJ.

6 ROSEMOND BARNEY-YEBOAH, Appellant, v METRO-NORTH COMMUTER RAILROAD, Respondent. [992 NYS2d 215]—

Negligence—Res Ipsa Loquitur—Summary Judgment—Train Ceiling Utility Panel Swung Open and Struck Passenger—Exclusive Control

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 10, 2013, which denied plaintiff’s motion for partial summary judgment on the issue of liability, reversed, on the law and the facts, without costs, and the motion granted.

Plaintiff, a passenger on defendant’s train, was allegedly injured when a ceiling panel in the train car swung open and

struck her in the head. Plaintiff testified that she was seated on the train when she heard a loud sound, and the next thing she knew, she was on her knees with people around her yelling. After the commotion, she looked up and saw a hanging panel—a cabinet utility door that had hit her in the head.

The motion court improperly denied plaintiff's motion on the issue of liability based on the doctrine of *res ipsa loquitur*. While summary judgment is rarely granted in *res ipsa loquitur* cases, it is appropriate in "exceptional case[s]," such as this one, where "the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209-212 [2006]).

To demonstrate a claim under the doctrine, a plaintiff must establish three elements: (1) the accident is of a kind that ordinarily does not occur in the absence of defendant's negligence; (2) the instrumentality causing the accident was within defendant's exclusive control; and (3) the accident was not due to any voluntary action or contribution by plaintiff (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]).

Plaintiff met all three elements with her submission of witness testimony and the testimony of defendant's foreman. The foreman testified that the train's HVAC and ventilation system was accessible through the ceiling panel that hit plaintiff. He also testified that to his knowledge, no one but defendant's personnel accessed the ceiling panels and that he had no explanation for how the accident occurred. The foreman described the panel as being fastened to the ceiling with four screws outside and two safety latches and a safety chain inside.

Defendant concedes the first and third elements but argues that it did not have exclusive control over the ceiling panels. However, defendant offers no evidence to support its argument. Rather, defendant simply offers its attorney's affirmation, in which counsel opines that "the only logical conclusion," considering the foreman's testimony, was that the accident occurred because of tampering by unauthorized individuals. This statement, which amounts to no more than counsel's speculation about what might have happened, is insufficient to defeat plaintiff's motion (*see Dillenberger v 74 Fifth Ave. Owners Corp.*, 155 AD2d 327 [1st Dept 1989]). This conclusion holds especially true here, where defendant's own foreman testified that to his knowledge, no one but defendant's personnel accessed the ceiling panels. Indeed, that the panel somehow became dislodged after Metro-North employees worked on the HVAC or ventila-

tion system is a far more “logical conclusion” than the one counsel offers—namely, that “someone other than a Metro-North employee” must have tampered with the ceiling panel while on the train.

Pavon v Rudin (254 AD2d 143 [1st Dept 1998]) and *Nesbit v New York City Tr. Auth.* (170 AD2d 92 [1st Dept 1991]) are both directly on point. In *Nesbit*, the plaintiff’s decedent was walking on the sidewalk when he was struck on the head by a bar and safety chain that fell from the defendant’s elevated subway train (170 AD2d at 94). The safety chain and bar had been attached to the train between two of its cars (*id.*). The trial court submitted the case to the jury on a *res ipsa* theory.

We held that the court erroneously set aside the plaintiff’s jury verdict and directed judgment for the defendant. In so doing, we noted that “[n]o evidence of tampering or tools were found between the cars with the missing chains, and no witnesses ever testified to seeing some unidentified vandal tampering with the chain” between the cars (*id.* at 98). Under these circumstances, we found, “Certainly, one can infer it was ‘probably’ defendant’s negligence which caused the occurrence, and the evidence shows it was *not* ‘equally probable’ that the negligence was that of another without any requirement that other possibilities be excluded altogether” (*id.* at 99). Thus, we found that the jury had clearly considered but rejected the defendant’s “theory of the ‘phantom vandal’” where there was no evidence that an unknown passenger or vandal had tampered with the train’s safety chain (*id.* at 96, 98).

Defendant’s opposition to the motion for summary judgment here suffers from precisely the same deficiency. Indeed, as in *Nesbit*, the utility door in this case had multiple safety mechanisms—screws, safety latches, and a safety chain—all of which apparently failed. Neither defendant nor the dissent offers any reason to accept the unlikely hypothesis that a train passenger “had the tools or inclination to stand . . . in view of the other passengers” and tamper with the utility door (*see Nesbit*, 170 AD2d at 96).

In *Pavon*, the plaintiff, while working at the defendants’ premises, was injured when she was allegedly struck on the head by a heavy seven-foot-high door that had apparently dislodged from its top pivot hinge (254 AD2d at 143). We reversed the motion court’s grant of summary judgment to defendants, finding that the plaintiff had established a triable issue based on a *res ipsa* theory. In so doing, we noted that the motion court, in determining the issue of defendants’ exclusive control, improperly focused on the door that fell on the plaintiff,

rather than the more appropriate inquiry of whether the door's hinge itself "was generally handled by the public" (*id.* at 146). Similarly, here, defendant offered no evidence suggesting that Metro-North passengers generally handled the overhead panel.

On the issue of exclusive control, the dissent relies on *Dermatossian v New York City Tr. Auth.* (67 NY2d 219 [1986]), for the proposition that where there is "extensive public contact with an instrumentality," we must not assume a defendant's exclusive control. In *Dermatossian*, the plaintiff was injured when he struck his head on a defective grab handle as he stood to leave a city bus (*id.* at 221). However, unlike *Dermatossian*, where the grab handle was "continuously available for use by defendant's passengers," here, the panel that allegedly struck plaintiff was fixed to the ceiling of the train car (*id.* at 228). Indeed, defendant's train passengers were not similarly "invited to use" the ceiling panel as they were the grab handle in the city bus and there is nothing more than defense counsel's speculation to suggest that someone other than defendant's employees touched or accessed the panel. Concur—Mazzarelli, J.P., Moskowitz, Manzanet-Daniels and Kapnick, JJ.

DeGrasse, J., dissents in a memorandum as follows: Contrary to what the majority has determined, the motion court properly denied plaintiff's motion for summary judgment on the issue of liability. Plaintiff, a passenger on a crowded commuter train, was injured when a ceiling panel swung open and struck her head. Plaintiff invoked the doctrine of *res ipsa loquitur* as the only ground for summary judgment. *Res ipsa loquitur* is an evidentiary doctrine that permits an inference of negligence "solely from the happening of the accident upon the theory that 'certain occurrences contain within themselves a sufficient basis for an inference of negligence' " (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986] [citation omitted]). The majority correctly recites the three elements that must be established to warrant the submission of a case to a jury on the theory of *res ipsa loquitur* (*see id.*). I dissent because there is a triable issue of fact as to whether, under the second element, the accident was caused "by an agency or instrumentality within the exclusive control of the defendant" (*id.* [citation omitted]).

As noted above, this case involves an event that occurred within a commuter train car. It cannot be assumed that a common carrier, such as defendant, has exclusive control over its facilities that are accessible to the riding public. *Dermatossian* is on point. The plaintiff in *Dermatossian* was struck in the head by a defective grab handle on a city bus. The case against the Transit Authority was submitted to the jury under the theory of

res ipsa loquitur. In reversing the judgment entered on the plaintiff's verdict and ordering the dismissal of the complaint, the Court found that "[t]he proof did not adequately exclude the *chance* that the handle had been damaged by one or more of defendant's passengers who were invited to use it" (*Dermatossian*, 67 NY2d at 228 [emphasis added]). Where there is extensive public contact with an instrumentality, the standard articulated by *Dermatossian* is one of "sufficient exclusivity to fairly rule out the *chance* that [a defect] was caused by some agency other than defendant's negligence" (*id.* [emphasis added]; see also *Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]).

A foreman, who was deposed on behalf of defendant, testified that the ceiling panel could have been loosened by use of a standard flathead screwdriver. Given the exposure of the panel to daily public contact, the majority misplaces its reliance on the foreman's testimony that "to his knowledge," no one other than defendant's employees accessed the ceiling panels. Contrary to the majority's view, this testimony is insufficient to establish defendant's exclusive control of the publicly accessible ceiling panel as a matter of law. Like the proof considered by the Court in *Dermatossian*, the foreman's testimony does not adequately exclude the chance that the panel had been loosened by one or more of defendant's passengers (67 NY2d at 228; see also *Bazne v Port Auth. of N.Y. & N.J.*, 61 AD3d 583 [1st Dept 2009]). By application of *Dermatossian*, it was plaintiff's burden to establish the absence of a triable issue of fact as to whether there was any chance that the panel had been loosened by another passenger. This is because plaintiff made the underlying motion for summary judgment. This distinction seems to have eluded the majority as evidenced by its belief that *Pavon v Rudin* (254 AD2d 143 [1st Dept 1998]) is "directly on point."* In *Pavon*, we reversed an order that granted the defendants' motion for summary judgment, finding the record sufficient to warrant submission of the case to a jury on the theory of res ipsa loquitur. In so doing, we noted that in order to raise an issue of fact under the doctrine it was "not necessary for plaintiff to rule out all other possible causes [other than defendants' negligence], only to show that they are less likely" (*id.* at 145 [citation omitted]). Here, by contrast, the majority's grant of summary judgment in favor of plaintiff amounts to a finding

* *Nesbit v New York City Tr. Auth.* (170 AD2d 92 [1st Dept 1991]), another case the majority relies upon, is even more distinguishable because it involves a post-trial motion to set aside a jury's verdict, implicating standards that have no application to a motion for summary judgment.

that defendant's negligence is the only possible cause of the accident. In my view, such a finding is not supported by the record. In addition, the instant motion for summary judgment does not call for a determination of which party has proffered the more "logical conclusion," as the majority seems to suggest. The question is whether there exists a triable issue of fact.

Moreover, given the fact that the ceiling panel was within the reach of any passenger on the commuter train, the majority misplaces its reliance on the absence of evidence that passengers "generally handled the overhead panel." *Bazne*, for example, involved a bus terminal escalator that shook suddenly and stopped, causing the plaintiff to fall (61 AD3d at 583). In affirming an order granting the defendant's motion for summary judgment, we found *res ipsa loquitur* inapplicable in light of the extensive daily public contact with the escalator (*id.* at 583-584). The result reached in this case cannot be reconciled with our decision in *Bazne* in which there is no indication that the component parts of the malfunctioning escalator were handled by members of the public (*see also Parris v Port of N.Y. Auth.*, 47 AD3d 460 [1st Dept 2008]). Accordingly, this case should not have given us occasion to depart from the general rule that "only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). **[Prior Case History: 2013 NY Slip Op 30021(U).]**

7 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v AUGUSTINE VERGES, Appellant. [991 NYS2d 766]—

Crimes—Unlawful Search and Seizure—Search Incident to Arrest—Arrest Supported by Probable Cause

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 13, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of two to four years, unanimously affirmed.

The court properly denied defendant's motion to suppress a knife and statements he made to the police. Police officers patrolling a New York City Housing Authority building saw defendant try to enter the building as the man in front of him, whom he did not appear to know, opened the door after being buzzed into the building. Defendant did not have a key out, and he was not seen using the buzzer system himself. Although defendant suggests that the officers approached him as he merely stood behind the other man, they actually observed him attempting to enter, in a manner inconsistent with that of a resident or invitee, and apparently without authorization.

Defendant's inability to provide the name or apartment number of the person he was purportedly visiting, or any other innocent explanation, provided probable cause to arrest him for attempted criminal trespass (*see e.g. People v Wighfall*, 55 AD3d 347 [1st Dept 2008], *lv denied* 11 NY3d 931 [2009]; *People v Hendricks*, 43 AD3d 361, 363-364 [1st Dept 2007]). Thus, the search of defendant's pocket was permitted as a search incident to a lawful arrest. The fact that the search occurred first is of no moment (*see People v Evans*, 43 NY2d 160, 166 [1977] ["It may be said that the search and arrest must constitute a single *res gestae*. The fact that the search precedes the formal arrest is irrelevant as long as the search and arrest are nearly simultaneous so as to constitute one event" (emphasis omitted)]). Concur—Acosta, J.P., DeGrasse, Richter, Manzanet-Daniels and Feinman, JJ.

8 In the Matter of NANCY MOYNIHAN, Respondent, v NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, Appellant, et al., Respondent. [993 NYS2d 260]—

Municipal Corporations—Notice of Claim—Late Notice—Denial—No Viable Cause of Action

Limitation of Actions—What Statute Governs—Whistleblower Law Limitations Period Takes Precedence over Notice of Claim Limitations Period

Labor—Whistleblower Law—Healthcare Whistleblower Law—Covered Employee

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 5, 2010, which granted a petition for leave to file a late notice of claim against respondent-appellant New York City Health and Hospitals Corporation (HHC) pursuant to General Municipal Law § 50-e, reversed, on the law, without costs, the petition denied, the proceeding brought pursuant to CPLR article 4 dismissed, and the proposed complaint dismissed, with prejudice. The Clerk is directed to enter judgment accordingly.

The crux of petitioner's claim against her former employer, respondent HHC, is that, on April 6, 2009, HHC fired her from her position with HHC's Office of Clinical and Health Services Research (OCHSR), not because of budget constraints (as petitioner was told), but in retaliation for her objection to the failure of the documentation of many human-subject research programs submitted to her office (which it was her job to review) to comply with applicable regulatory requirements. The verified complaint for petitioner's proposed action against HHC summarizes the conduct for which HHC allegedly retaliated against petitioner as follows:

"24. From the beginning of her employment by HHC,

[petitioner] had reason to believe that a number of HHC hospitals . . . were out of compliance with HHC operating procedures, for reasons including but not limited to: (1) failure to comply with HIPPA, IRB and protocol requirements; (2) failure to provide informed consents in compliance with regulatory requirements; and (3) failure to submit information relating to adverse events occurring in the course of human subject research.

“25. [Petitioner] brought such noncompliance to the attention of affiliates, officials at HHC hospitals and HHC administration, and attempted to enforce applicable federal, state and city laws and regulations.”

Based on her own allegations in the proposed verified complaint and other sworn statements submitted with her application for leave to file a late notice of claim, petitioner reviewed the documentation of human-subject research projects conducted at HHC facilities for regulatory compliance. She neither provided treatment nor care to patients, nor did she supervise or direct those who did; nor did she have responsibility for the provision of resources needed for treatment or care. She does not allege that she had interaction with patients or any decision-making authority concerning the care administered to any particular patient.

Petitioner seeks to assert causes of action against HHC for retaliatory termination based on Labor Law § 740, which applies to all employees of health care organizations, and Labor Law § 741, which applies more narrowly to employees of health care organizations who actually “perform[] health care services” (§ 741 [1] [a]), as well as a few other claims to be discussed later. She failed to serve a notice of claim on HHC within 90 days of her termination on April 6, 2009, as required by General Municipal Law § 50-e and the New York City Health and Hospitals Corporation Act (HHC Act) § 20 (2) (McKinney’s Uncons Laws of NY § 7401 [2]), although she did serve a notice of claim within the 90-day period upon the Office of the Comptroller of New York City, which does not have the authority to receive notices of claim on behalf of HHC. On July 2, 2010, petitioner made the instant application for leave to serve a late notice of claim and file the annexed verified complaint. Supreme Court granted the application.

Upon HHC’s appeal, we reverse the granting of the motion for leave to file a late notice of claim against HHC, and accordingly dismiss the proposed complaint, on the ground that, as a matter of law, petitioner cannot prevail on any of the claims that she seeks to assert. Because petitioner does not assert any

legally viable causes of action, we need not consider whether Supreme Court's granting of leave to file a late notice of claim would otherwise have been a proper exercise of discretion.

We turn first to the claim under Labor Law § 740. That cause of action is time-barred under the terms of the statute itself because, as previously stated, HHC terminated petitioner's employment on April 6, 2009, and petitioner filed her petition for leave to file a late notice of claim on July 2, 2010, after the expiration of the one-year statute of limitations incorporated into the statute (*see* Labor Law § 740 [4] [a]). General Municipal Law § 50-e (5), made applicable to HHC by HHC Act § 20 (2), permits a court to entertain a motion for leave to serve a late notice of claim only within the applicable limitations period, not, as here, after the limitations period has expired. Contrary to Supreme Court's view, the one-year statute of limitations that is part of section 740 takes precedence over the one-year and 90-day limitations period set forth in the HHC Act (*see Romano v Romano*, 19 NY2d 444, 447 [1967]).

Although not time-barred, the claim under Labor Law § 741 is also without merit as a matter of law. Section 741 affords to a health care "employee," as defined in the statute, a cause of action against the employer for "retaliatory action" (§ 741 [2]) taken

"because the employee does any of the following:

"(a) discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care; or

"(b) objects to, or refuses to participate in any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care."

Section 741 defines the term "employee," as used in that statute, as "any person *who performs health care services* for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration" (§ 741 [1] [a] [emphasis added]). The Court of Appeals, describing this definition as "exactly specific" (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 90 [2008]), has held that "the 'natural signification' of section 741 (1) (a) is quite definite: to be subject to the special protections of section 741, an employee of a health care provider must 'perform[] health care services,' which means to actually supply health care services, not merely to coordinate with those who do" (*id.* at 91). Section 741, the Court of Appeals concluded, "is meant

to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, *and whose jobs require them to make these judgments*” (*id.* at 93 [emphasis added]). Accordingly, the *Reddington* Court held that section 741 does not apply to “an individual who does not render medical treatment” (*id.* at 87 [internal quotation marks omitted] [answering the second certified question in the negative]).

Based on the Court of Appeals’ holding in *Reddington*, the Second Circuit (which had certified the question to the Court of Appeals in that case) affirmed the dismissal of a claim under section 741 asserted by a hospital employee who “allege[d] that she coordinated and developed certain services for the Hospital’s patients, took charge of patient satisfaction questionnaires, and managed and trained personnel who provided translation assistance, but . . . [did] not allege that she supplied any treatment” (*Reddington v Staten Is. Univ. Hosp.*, 543 F3d 91, 93 [2d Cir 2008]). Similarly, this Court dismissed a claim under section 741 asserted by “a licensed clinical social worker . . . [who] alleges that she ‘secure[d] prescribed medications,’ ‘evaluate[d] the need for and arrange[d] for individual patients’ appropriate staffing and treatment,’ and was ‘personally involved in ensuring that patients received protective and healthful grooming and other health-related treatment.’ These allegations establish that plaintiff ‘merely . . . coordinate[d] with those who [performed health care services]’ ” (*Webb-Weber v Community Action for Human Servs., Inc.*, 98 AD3d 923, 924 [1st Dept 2012], *revd on other grounds* 23 NY3d 448 [2014], quoting *Reddington*, 11 NY3d at 91).¹

In this case, petitioner, by her own account, reviewed the supporting paperwork for research projects involving human subjects for compliance with applicable regulatory requirements. She had no responsibility, direct or indirect, for providing treatment or care to any patient, for any patient outcome, or even for facilitating the provision of care or treatment to patients through the allocation of HHC resources. She was charged

1. In its *Webb-Weber* decision, which reinstated a claim under Labor Law § 740, the Court of Appeals did not address the issue of whether the plaintiff was an “employee” within the scope of Labor Law § 741 because, as stated in Judge Pigott’s opinion, the plaintiff “ha[d] abandoned th[e] claim [under section 741] on this appeal and ask[ed] for reinstatement of only the section 740 claim” (23 NY3d at 451 n 2). Unlike section 741, section 740 does not restrict its coverage to employees who perform health care services (*see* Labor Law § 740 [1] [a] [defining the term “employee” as used in section 740 to mean “an individual who performs services for and under the control and direction of an employer for wages or other remuneration”]).

simply with making sure that HHC did not run afoul of applicable legal requirements in the documentation of human-subject research projects conducted at its hospitals. She was even further removed from the actual provision of care or treatment to patients than were the plaintiffs in *Reddington* and *Webb-Weber*. As HHC aptly points out in its reply brief, petitioner “did not see, treat or otherwise interact with patients, nor did she have any decision making authority regarding direct patient health care.”

The dissent stresses petitioner’s “experience” as a registered nurse licensed to practice in New York—which, while undisputed, is irrelevant to her standing under section 741, given the absence of any basis in the record for the dissent’s characterization of petitioner’s position as one that actually required her “to make . . . judgments [concerning] the quality of patient care” (*Reddington*, 11 NY3d at 93). Again, in her job at OCHSR, petitioner participated in the process of approving research projects at inception, and in monitoring ongoing projects, based on whether the researchers had complied with applicable legal requirements and HHC procedures. Nowhere does petitioner allege that she rendered any independent “judgment” about the quality of any patient’s health care. While we appreciate the importance to the integrity of the scientific enterprise of the work petitioner did at OCHSR, we do not believe that she was “perform[ing] health care services” (§ 741 [1] [a]) in this position.

The dissent attempts to distinguish *Reddington* and *Webb-Weber* on the ground that the plaintiffs in those cases (a coordinator of volunteer services and translator in *Reddington*, a clinical social worker in *Webb-Weber*), unlike petitioner herein, were not trained medical professionals. We disagree. Although petitioner was a licensed registered nurse qualified to “perform[] health care services” (§ 741 [1] [a]), during her employment at OCHSR, she neither performed health care services nor was she required to make “judgments as to the quality of patient care” (*Reddington*, 11 NY3d at 93) based on her training and experience as a nurse. Indeed, the plaintiffs in *Reddington* and *Webb-Weber*, notwithstanding their lack of health care credentials, performed tasks closer to providing health care services than petitioner did at OCHSR, since they actively coordinated with providers of health care services and, in one case, even secured prescribed medications. Petitioner, by contrast, merely reviewed the documentation generated by medical researchers for compliance with regulatory requirements. If the tasks performed by the *Reddington* and *Webb-Weber* plaintiffs did not give them

standing under section 741, still less should petitioner's review functions qualify her for such standing.

The dissent also stresses petitioner's allegation that the actions she took that allegedly led to her termination were motivated by her concern for the quality of the care that the subjects of the research programs she monitored would ultimately receive. This motivation, laudable though it was, does not confer standing on petitioner to sue under section 741. The statute provides that it covers only persons who actually "perform[] health care services" (§ 741 [1] [a]). Health care institutions employ many people who do not perform health care services. While such an employee might, out of concern for patients, disclose perceived improprieties in the quality of patient care, that motivation, however commendable, would not bring within the purview of the statute an accountant, a social worker, or, as here, a person who reviews research documentation for compliance with legal requirements.

Notwithstanding that, as a registered nurse, petitioner was qualified to provide health care services, HHC plainly did not employ her to do so. To reiterate, she did not provide care; she did not supervise those who provided care; and she did not facilitate the provision of care through resource allocation. She reviewed paperwork for compliance with legal requirements, which, under *Reddington*, does not qualify petitioner as a member of the class of those "who perform[] health care services" (§ 741 [1] [a]), for whose sole benefit the statute was enacted. Accordingly, *Reddington* mandates dismissal of petitioner's claim under section 741.

Petitioner's remaining claims against HHC are also without merit as a matter of law. The claims for violation of Administrative Code of the City of New York § 12-113 and for violation of her constitutional right of free speech are barred because her assertion of claims under Labor Law §§ 740 and 741 waived her right to assert whistleblower claims under other provisions of law (see *Reddington*, 11 NY3d at 87, 89). Finally, petitioner's cause of action for tortious interference with prospective business relations fails as a matter of law because she does not identify any third party with whom she lost the prospect of doing business as a result of HHC's actions (see *Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]). Concur—Friedman, J.P., Freedman and Richter, JJ.

Moskowitz, J., dissents in part in a memorandum as follows: For the reasons that the majority states, I agree that we should dismiss petitioner's Labor Law § 740 claim on the basis that it is time-barred. I also agree that we should dismiss petitioner's

claims for tortious interference with prospective business relations, violation of Administrative Code of the City of New York § 12-113 and violation of the constitutional right of free speech. However, in my view, the motion court properly granted petitioner's motion for leave to file a late notice of claim. Similarly, I believe that at this stage of the litigation, petitioner has adequately pleaded a cause of action for violation of Labor Law § 741. Therefore, I respectfully dissent.

Petitioner is a former employee of New York City Health and Hospitals Corporation (HHC) in its Office of Clinical and Health Services Research (OCHSR). In this action, she sues for retaliatory termination, alleging that OCHSR fired her after she reported HHC's noncompliance with regulations designed to protect human subjects in research studies. Likewise, petitioner alleges that OCHSR fired her for trying to remedy HHC's noncompliance.

In January 2008, HHC hired petitioner, a licensed registered nurse with over 20 years of experience in the clinical research field, as a director of OCHSR, with the title of Human Research Protection Program QC/QA/QI Regulatory Specialist. Petitioner reported to Nonie Pegoraro, Senior Director, who herself reported to HHC officials.

According to federal regulations, researchers at HHC facilities had to obtain approval from OCHSR before beginning research studies involving human subjects. In September 2008, petitioner assumed the responsibility of reviewing research proposals to ensure that HHC's affiliated hospitals had complied with these regulations. In the course of her review, petitioner identified a number of HHC hospitals, including Bellevue and Harlem Hospitals, that were missing necessary documents, including informed consent forms and Institutional Review Board (IRB) approvals.

Petitioner reported to Pegoraro her concerns about the missing documents. In addition, she tried to remedy the alleged noncompliance by sending out notices to the hospitals involved. For example, in late 2008, petitioner contacted Ernest Marrero, research chair of Bellevue, to inform him of his facility's noncompliance and to explain the reason OCHSR had not approved the facility's research proposals. From late 2008 to early March 2009, petitioner alleges, Marrero objected to her questioning of Bellevue protocols and resisted her efforts to effect compliance. During this time, petitioner repeatedly discussed her concerns with Pegoraro, who in turn discussed petitioner's concerns with her superiors, HHC officials.

Eventually, OCHSR determined that Harlem Hospital's

noncompliance warranted suspension. In early February 2009, at petitioner's recommendation, OCHSR notified Harlem Hospital of OCHSR's intent to audit a number of studies. Petitioner alleged that HHC officials objected to the proposed suspension and took actions to resist it.

In March 2009, with the goal of overcoming HHC's resistance to the proposed suspension, petitioner and Pegoraro prepared audits documenting outstanding issues in five Harlem Hospital research proposals. According to petitioner, HHC's special counsel confirmed the audits' findings. On March 24, 2009, petitioner and Pegoraro attended a meeting at Harlem Hospital to address the facility's noncompliance. Petitioner believed the purpose of the meeting was to move toward resolution of the noncompliance issues. Instead, meeting attendees discounted petitioner's concerns, characterizing them as "irritating."

After the meeting, petitioner and Pegoraro continued to urge that HHC comply with regulations. For example, OCHSR requested that Harlem Hospital forward documentation relating to informed consent and IRB approvals. In addition, Pegoraro unsuccessfully sought approval from HHC officials to schedule follow-up meetings so that she and petitioner could review the records of outstanding research proposals, including the medical records of research participants.

Petitioner alleges that on April 6, 2009, without any previous warning or notice, HHC's security chief appeared at her desk and escorted her out of the building to HHC's Human Resources office. There, she received a letter stating that HHC was terminating her, effective immediately, because of budgetary constraints. Petitioner knew that layoffs were due to occur by June 30, 2009 but asserts that fiscal problems were merely a pretext for her termination. HHC later named Marrero as Corporate Compliance Officer, with supervisory authority over Pegoraro and OCHSR. In May 2009, HHC terminated Pegoraro summarily and without warning.

On June 29, 2009, within 90 days of her termination, petitioner served a notice of claim on the New York City Comptroller rather than directly on HHC. In the notice, petitioner identified HHC as the "city agency involved" and provided the factual basis for her claim. Specifically, petitioner recounted the events surrounding her termination and asserted that HHC had wrongfully retaliated against her for her reports of regulatory noncompliance at HHC affiliates. The Comptroller's office accepted petitioner's notice of claim, acknowledged receipt of the claim in writing, and assigned petitioner a claim number.

Meanwhile, on June 5, 2009, also within 90 days of petitioner's termination, Pegoraro served her own notice of claim on HHC, specifying her claim of retaliatory termination. On January 5, 2010, she commenced a federal court action for retaliatory termination, alleging that her termination violated New York and federal law. In the course of investigating Pegoraro's claims, HHC's Inspector General met twice with Pegoraro and, in March 2010, once with petitioner.

On July 2, 2010, petitioner filed the summons and verified complaint in this action. She asserted five causes of action: (1) retaliatory termination in violation of Labor Law § 740; (2) retaliatory termination in violation of Labor Law § 741; (3) violation of petitioner's free speech rights under the New York Constitution, article I, § 8; (4) violation of Administrative Code § 12-113 by terminating petitioner for making a report of information she believed to present a risk of harm to the health and safety of a child; and (5) common-law tortious interference with prospective business relations for allegedly interfering with petitioner's later efforts to obtain employment.

On the same day, petitioner filed a verified petition and moved by order to show cause for an order deeming her notice of claim timely served on HHC, *nunc pro tunc*. In the alternative, she sought leave to file a late notice of claim.

The motion court granted petitioner leave to serve a late notice of claim. Noting that HHC was a City-affiliated organization, the court found that petitioner had shown a reasonable excuse for erroneously filing her notice of claim with the City Comptroller. The court also found that "HHC officials were well aware of" petitioner's noncompliance concerns and her termination, thereby acquiring actual knowledge of the essential facts underlying petitioner's claim (2010 NY Slip Op 32753[U], *6 [Sup Ct, NY County 2010]). Further, the court held, the lateness of petitioner's claim would not prejudice HHC because, among other things, HHC had timely notice of Pegoraro's claim, which was based in part on the same underlying events as petitioner's claim. Therefore, the court concluded, HHC had presumably taken steps to preserve evidence relating to those claims.

Finally, the court rejected HHC's argument that Labor Law § 740 barred petitioner's claims as untimely. Rather, the court held, the one-year and 90-day limitations period set forth in the New York City Health and Hospitals Corporation Act (the HHC Act) (McKinney's Uncons Laws of NY §§ 7381-7406) took precedence over other limitations periods, including the one-year limitations period in Labor Law § 740.

General Municipal Law § 50-e (1) requires that a petitioner in a tort action against a public corporation serve a notice of claim on that entity within 90 days after the claim arises. The statute's intent "is to protect the municipality from unfounded claims" and to ensure that it has an adequate opportunity to explore the claim's merits while information is still readily available (*Matter of Porcaro v City of New York*, 20 AD3d 357, 357 [1st Dept 2005]). However, courts should liberally construe the statute because it is remedial in nature (*Camacho v City of New York*, 187 AD2d 262, 263 [1st Dept 1992]) and should not operate to frustrate the rights of those with legitimate claims (see *Porcaro*, 20 AD3d at 358).

Under General Municipal Law § 50-e (5), a court has discretion to grant leave to serve a late notice of claim after considering, "in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within [90 days of the claim's accrual] or within a reasonable time thereafter." The court must also consider all other relevant factors, including whether "the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted . . . and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits" (General Municipal Law § 50-e [5]; see also *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 539 [2006]; *Ifejika-Obukwelu v New York City Dept. of Educ.*, 47 AD3d 447, 447 [1st Dept 2008]). The party seeking leave to serve a late notice of claim bears the burden of establishing these criteria (see *Matter of Kelley v New York City Health & Hosps. Corp.*, 76 AD3d 824, 826 [1st Dept 2010]; *Matter of Lauray v City of New York*, 62 AD3d 467 [1st Dept 2009]).

Here, HHC had timely notice of the essential facts underlying petitioner's claim. The record demonstrates that HHC officials were actively involved in petitioner's termination and were well aware of her concerns about HHC's alleged regulatory noncompliance. Indeed, petitioner alleges that before her termination, HHC's special counsel confirmed the findings in petitioner and Pegoraro's audits, which addressed that very noncompliance.

Further, as noted above, Pegoraro timely commenced a separate action for retaliatory termination, and HHC's Inspector General investigated that action. Because the facts of Pegoraro's action paralleled those in petitioner's action—to be sure, Pegoraro's action was based on the same events—HHC was on notice within the statutory time frame of the facts underlying petitioner's action.

That petitioner served the notice of claim on the City Comptroller, rather than on HHC, constituted a reasonable and excusable error (see *Harris v City of New York*, 297 AD2d 473, 474-475 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002] [distinguishing the case then at bar from a situation in which the claimant's error "rested on an excusable confusion as to the proper governmental entity to be served with the notice of claim"]). Petitioner served her notice of claim within 90 days of her termination and identified HHC as the agency involved. The Comptroller, in fact, actively endorsed her error by formally acknowledging her claim and assigning her a claim number. This kind of error warrants late filing relief (see *Matter of Gherardi v City of New York*, 294 AD2d 101 [1st Dept 2002]; *Tadros v New York City Health & Hosps. Corp.*, 112 AD2d 85, 86 [1st Dept 1985] ["(M)istaken belief that HHC was a city agency (is) a sufficient excuse warranting late filing relief"]).

One point does run in HHC's favor: generally, a petitioner seeking late filing relief must also set forth some "excuse for [a] lengthy delay in seeking leave to serve a late notice of claim" (*Matter of Reed v County of Westchester*, 222 AD2d 679, 679 [2d Dept 1995]; see *Matter of Nairne v New York City Health & Hosps. Corp.*, 303 AD2d 409, 410 [2d Dept 2003]). Here, although petitioner has sufficiently explained her initial mistaken filing, she has failed to offer any explanation for the subsequent long delay in seeking late filing relief (*Matter of Matarrese v New York City Health & Hosps. Corp.*, 215 AD2d 7, 9 [2d Dept 1995], *lv denied* 87 NY2d 810 [1996]). This fact does militate against her argument that the motion court properly permitted her late filing.

On balance, however, petitioner's delay is excusable. In cases where courts have found inexcusable delay in seeking late filing relief, the petitions suffered from two deficiencies: first, they failed to set forth any excuse for the delay; and second, they failed to demonstrate a lack of prejudice to the opposing party arising from the delay (see *Matter of Reed*, 222 AD2d at 679; *Matter of Nairne*, 303 AD2d at 410; *Matter of Matarrese*, 215 AD2d at 9-11). By contrast, as noted above, petitioner has shown that any delay did not prejudice HHC, because that entity was timely aware of the facts surrounding petitioner's claim and, in fact, one of the defendants in the underlying action gave a deposition in August 2010. Likewise, as also noted above, petitioner has shown a reasonable excuse for her delay—namely, that she served the City Comptroller rather than HHC.

In addition, *Reed*, *Nairne* and *Matarrese* present markedly different factual situations from the one presented here. In

Reed, the court found the papers supporting the proceeding to be “patently insufficient,” as they failed to allege the manner in which the respondents were negligent or committed malpractice (222 AD2d at 679). In this case, on the other hand, there is no allegation that the papers do not adequately set forth petitioner’s causes of action. And in *Nairne* and *Matarrese*, there were seven-year and eight-year delays, respectively, in making the applications (*Matter of Nairne*, 303 AD2d at 409-410; *Matter of Matarrese*, 215 AD2d at 9). In this case, the delay was around 15 months.

Thus, considering all the relevant factors, I believe that the motion court correctly granted petitioner’s motion for leave to serve a late notice of claim.

With regard to Labor Law § 741, HHC argues, and the majority agrees, that petitioner’s proposed cause of action is patently meritless because she is not an “employee” for purposes of that statute. Labor Law § 741 prohibits a health-care employer from taking any retaliatory action against an employee who “discloses or threatens to disclose to a supervisor, or to a public body an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care” (Labor Law § 741 [2] [a]).

Unlike Labor Law § 740, which broadly defines an “employee” to include any individual who “performs services” for any employer, section 741 defines an “employee” much more restrictively, as “any person who performs health care services for and under the control and direction of any public or private employer which provides health care services for wages or other remuneration” (Labor Law § 741 [1] [a]). Thus, to determine whether petitioner falls under the aegis of Labor Law § 741, we must decide whether she “performs health care services.”

The Court of Appeals has addressed this issue, holding that, while not necessarily excluding persons other than doctors and nurses, section 741’s “specialized protections . . . were meant to protect professional judgments regarding the quality of patient care” (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 92 [2008]). Hence, the Court held, “an employee of a health care provider must ‘perform[] health care services,’ ” meaning that the employee must “actually supply health care services, [and] not merely . . . coordinate with those who do” to receive “the special protections of section 741” (*id.* at 91, quoting Labor Law § 741 [1] [a]). The Court further stated that section 741 “safeguard[s] only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments” (*id.* at 93).

On that basis, the *Reddington* Court held that Labor Law § 741's definition of "employee" did not encompass the plaintiff because she did not care for patients, nor did she have any responsibility for ensuring proper patient care (*id.* at 83-84 [describing the plaintiff's duties as involving, among other things, coordinating patient travel and providing patients with translation services]). Further, the Court held, section 741 contemplates a "registered professional nurse" "speaking out about [her] perception of inadequate staffing levels," in violation of Department of Health regulations governing nurse staffing (*id.* at 92).

Here, I believe that for pleading purposes, petitioner falls within the definition of an employee under Labor Law § 741 because she has, in fact, alleged that she is a "licensed registered nurse" responsible for "ensur[ing] that all human subject research regulatory requirements were met for new and continuing research conducted at HHC hospitals." Under the standards of the *Reddington* Court, this allegation is more than sufficient to sustain petitioner's claim on a motion to dismiss (*see also Webb-Weber v Community Action for Human Servs., Inc.*, 23 NY3d 448, 453-454 [2014], *rev'd on other grounds* 98 AD3d 923 [1st Dept 2012]).

In arguing that petitioner is not an "employee" within the meaning of section 741, the majority refers to our decision in *Webb-Weber* (98 AD3d 923). As the majority notes, the Court of Appeals in *Webb-Weber* recently reversed this decision insofar as we dismissed the claim under section 740; however, the Court did not address the viability of the section 741 claim because the plaintiff abandoned that claim on her appeal to the Court of Appeals and asked only for reinstatement of the Labor Law § 740 claim (23 NY3d at 451 n 2).

Nonetheless, *Webb-Weber* still does not foreclose petitioner's action in this case. The *Webb-Weber* plaintiff, who was the chief operating officer of the defendant health care provider, did not allege that she used her training to provide mental health services or other services that might qualify as health care (98 AD3d at 924). Indeed, reference to the complaint in *Webb-Weber* reveals that there was no connection between the plaintiff's professional training and the allegedly harmful conditions that she complained about.² Instead, the plaintiff, who was trained as a clinical social worker, complained about matters including lack of podiatric care for patients, lack of safe egress from facil-

2. This Court may take judicial notice of undisputed court records and files (*Pramer S.C.A. v Abapulus Intl. Corp.*, 76 AD3d 89, 102 [1st Dept 2010]; *Matter of Khatibi v Weill*, 8 AD3d 485, 485 [2d Dept 2004]).

ity premises, improperly working doors that caused injury to a patient, faulty plumbing, nonworking fire alarms, financial improprieties and sloppy construction work. Her complaints about these matters, the plaintiff alleged, resulted in her unlawful dismissal. But none of these various complaints required any application, even tangentially, of the plaintiff's health care training; her experience in health care was entirely unrelated to the allegations of her complaint. The *Webb-Weber* plaintiff, therefore, fell outside the "specialized protections of Labor Law § 741[,] [which] were meant to protect professional judgments regarding the quality of patient care" (*Reddington*, 11 NY3d at 92).

Similarly, *Reddington*, upon which the majority also places much reliance, does not serve to foreclose petitioner's action. In *Reddington*, the plaintiff had begun her tenure at the defendant hospital by working in volunteer services (*id.* at 82). She later began working as a translator for a group of Italian patients and their families, eventually attaining the title of "Director-International Patient Program" (*id.* at 83).

However, nothing in the *Reddington* decision suggests that the plaintiff was a medical professional, or that she used any medical or paraprofessional training to perform the tasks within her job description. The job description itself, which is set forth in *Reddington*, listed no duties requiring medical training. Instead, the description made clear that at most, one of the plaintiff's duties involved interaction with medical personnel to determine what services the defendant hospital would provide to international patients (*id.* at 83-84). The rest of the plaintiff's listed duties comprised tasks such as coordinating transportation, developing a calendar of activities for international patients, and coordinating marketing efforts for the international patients' program (*id.*). In light of the facts set forth in *Reddington*, it is difficult to discern how the majority can fairly characterize the *Reddington* plaintiff's tasks as "closer to providing health care services" than the ones petitioner undertook at OCHSR.

In this case, petitioner pleaded that she was a licensed and registered nurse with over 20 years of experience in clinical research. What is more, her allegations of wrongdoing related directly to her health care and research experience. Indeed, petitioner alleged that she was ultimately impelled to act because of the potential harm that might be inflicted on patients as a direct result of HHC's regulatory noncompliance. Further, petitioner alleged, she had grown concerned with the possibility that "patients enrolled in ongoing studies would be deprived of the opportunity to continue treatment if the studies lacked the requisite approvals."

These allegations encompass precisely the type of “professional judgment[] regarding the quality of patient care” that the Court of Appeals contemplated in *Reddington* (*see id.* at 92). That the patient care in this case depended on compliance with research protocols rather than on implementing specific medical procedures does not serve to render petitioner’s claim patently meritless at this stage of the litigation. This conclusion holds especially true in light of the fact that petitioner’s professional experience was not only in nursing, but in clinical research.

The majority, in further support of its argument that petitioner was not an “employee” within the meaning of section 741, adopts HHC’s position that petitioner “did not see, treat or otherwise interact with patients, nor did she have any decision making authority regarding direct patient health care.” This assertion misses the point. Neither section 741 nor the Court of Appeals mandates that an “employee” must directly treat or interact with patients to receive section 741 protection. Rather, as the *Reddington* Court stated, section 741 safeguards “those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments” (*id.* at 92-93). The complaint adequately pleads that petitioner fell under this rubric during her employment with OCHSR.

As a result, affording the complaint a liberal construction and giving petitioner the benefit of every possible favorable inference, as we must at this stage of the litigation, petitioner’s proposed claim under section 741 is not so “patently meritless” as to warrant denial of her application for late filing relief. This was the very standard that the Court of Appeals advanced in reversing our decision with respect to section 740 in *Webb-Weber* (23 NY3d at 453-454). [**Prior Case History: 2010 NY Slip Op 32753(U).**]

(September 11, 2014)

1 MARTA ALVAREZ, Appellant, v NYLL MANAGEMENT LTD. et al., Respondents. [993 NYS2d 1]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Causation—Degenerative Conditions and History of Arthritis

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 17, 2012, which granted defendants’ motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102 (d), affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain permanent or significant serious injuries to her right shoulder, right knee, and neck as a result of the accident by submitting the expert reports of an orthopedic surgeon and radiologist, and by relying on plaintiff's own medical records (*see Paduani v Rodriguez*, 101 AD3d 470, 470 [1st Dept 2012]). Defendants' orthopedist found full range of motion in each body part, and their orthopedist and radiologist both concluded that plaintiff's conditions were degenerative in nature. The MRI reports prepared by plaintiff's radiologists found, among other things, that the shoulder MRI showed a bone spur (or growth) causing impingement on the shoulder tendon, that the right knee MRI was "normal," and that the cervical spine MRI showed a degenerative condition. Plaintiff's medical records also included a physician's examination finding full range of motion of the right knee, and the same range of motion in both shoulders shortly after the accident. Further, plaintiff's emergency room records included her acknowledgment of a history of arthritis.

In opposition, plaintiff failed to raise a triable issue of fact with respect to these alleged injuries. Her orthopedic surgeon's conclusory opinion that plaintiff's shoulder, knee and spine conditions were caused by the accident, and not degeneration, was insufficient to raise an issue of fact as to causation. Indeed, the surgeon failed to address or contest the detailed findings of preexisting degenerative conditions by defendants' experts, which were acknowledged in the reports of plaintiff's own radiologists (*Paduani*, 101 AD3d at 471). Moreover, the surgeon's failure to address plaintiff's history of arthritis, or the earlier, conflicting findings by plaintiff's other physician of normal knee range of motion and the same range of motion in both shoulders, warrants summary judgment dismissing those serious injury claims (*see Santos v Perez*, 107 AD3d 572, 574 [1st Dept 2013]; *Jno-Baptiste v Buckley*, 82 AD3d 578, 578-579 [1st Dept 2011]).*

The court properly dismissed plaintiff's 90/180-day claim, as she failed to allege in her bill of particulars that she was incapacitated for at least 90 of the first 180 days following the accident (*Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]; *Batista v Porro*, 110 AD3d 609, 609-610 [1st Dept 2013]). Concur—Gonzalez, P.J., Sweeny and Freedman, JJ.

Moskowitz and Kapnick, JJ., dissent in part in a memoran-

* This is evident by the analysis of the motion court and a reading of the doctor's report; an analysis not belied by the dissent's argument to make the report authoritative where it is not.

dum by Moskowitz, J., as follows: I agree with the majority that plaintiff has not raised an issue of fact on her 90/180-day claim. However, I believe that plaintiff raised a triable issue of fact as to whether she suffered a serious injury under the permanent, consequential and significant limitation categories of Insurance Law § 5102 (d). Therefore, I respectfully dissent.

As the majority notes, defendants made a prima facie showing that plaintiff did not sustain permanent or significant serious injuries to her right shoulder, right knee and neck as a result of the accident by submitting the expert reports of an orthopedic surgeon and radiologist, and by relying on plaintiff's medical records (*see Paduani v Rodriguez*, 101 AD3d 470, 470 [1st Dept 2012]). Defendants' orthopedist found full range of motion in each body part, and their orthopedist and radiologist both concluded that plaintiff's conditions were degenerative in nature. The MRI reports prepared by plaintiff's radiologists found, among other things, that the shoulder MRI showed a bone spur (or growth) causing impingement on the shoulder tendon, that the right knee MRI was "normal," and that the cervical spine MRI showed a degenerative condition. Plaintiff's medical records also included a physician's examination finding full range of motion of the right knee, and the same range of motion in both shoulders shortly after the accident. Further, plaintiff's emergency room records included her acknowledgment of a history of arthritis.

However, in opposition, plaintiff raised a triable issue of fact through her orthopedic surgeon's opinion that plaintiff's shoulder, knee and spine conditions were caused by the accident, and not by degeneration (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]).

Plaintiff's treating surgeon evaluated plaintiff approximately two weeks after the accident; he performed arthroscopic surgery on plaintiff's right shoulder in June 2009, finding, among other things, a partial tear. The surgeon also performed surgery on plaintiff's right knee in August 2009. Based on plaintiff's report that she had never sustained injury to her right shoulder and right knee or other parts of her body before the accident, in which she was driving a car that was rear ended, and based upon his exam finding significant limitations of motion, the surgeon opined that defendant had sustained a partial tear to her right shoulder and injuries to her right knee from the accident. Further, the surgeon read an MRI of plaintiff's cervical spine and determined that it showed impingement from the accident.

Plaintiff's treating surgeon also noted her continued difficulty

in performing daily activities after the accident, and concluded that her disabilities and restrictions were not degenerative. His physical examination two years later, in July 2011, confirmed continued restriction in plaintiff's cervical spine, right shoulder and right knee (*see Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]). The surgeon concluded that continued treatment after December 2009 would have been futile, as plaintiff was not improving and was receiving only temporary relief from acupuncture, chiropractic and physical therapy. Further, he noted, her no-fault benefits had been discontinued (*Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 906-907 [2013]).

Moreover, the physician who examined plaintiff 10 days after the accident observed in his notes that plaintiff had decreased range of motion in her cervical spine and right shoulder. This observation is also sufficient to raise a triable issue of fact (*see Tsamos v Diaz*, 81 AD3d 546 [1st Dept 2011]).

In light of the evidence presenting issues of fact inappropriate for summary adjudication, I would deny defendants' motion for summary judgment.

2 WILLIAM DePAUL, JR., et al., Respondents-Appellants, v NY BRUSH LLC et al., Appellants-Respondents, and RUTTURA & SONS CONSTRUCTION CO., INC., Respondent/Third-Party Defendant-Respondent. NY BRUSH LLC et al., Third-Party Plaintiffs-Appellants, et al., Third-Party Defendant. [994 NYS2d 59]—

Labor—Safe Place to Work—Fall through Hazardous Wooden Planks—Notice of Dangerous Condition

Labor—Safe Place to Work—Industrial Code Violation—Loose Wooden Planks Did Not Qualify as “Structure”

Indemnity—Contractual Indemnification—Worker Injured on Hazardous Wooden Planks at Construction Site—Subcontractor's Contractual Duty to Keep Area Clear of Debris

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 2, 2013, which, insofar as appealed from, denied the part of defendants/third-party plaintiffs Holt Construction Corp., Pepsi Cola Bottling Company of New York, Inc., and NY Brush LLC's (collectively, defendants) motion for summary judgment that sought to dismiss the Labor Law § 200 and common-law negligence claims as against them, granted the part of their motion that sought to dismiss the Labor Law § 241 (6) claim as against them, denied the part of their motion that sought summary judgment on their contractual indemnification claim against defendant/third-party defendant Ruttura & Sons Construction Co., Inc., and granted the part of Ruttura's motion for summary judgment that sought to dismiss the aforemen-

tioned contractual indemnification claim, unanimously modified, on the law, to deny the part of Ruttura's motion that sought to dismiss the contractual indemnification claim against it, and otherwise affirmed, without costs.

Defendants, who do not dispute that plaintiff's injuries arose from a dangerous condition, failed to demonstrate that they did not have constructive notice of that dangerous condition, a wooden plank that plaintiff testified broke underneath him while he was walking across it; thus they are not entitled to summary judgment dismissing the Labor Law § 200 and common-law negligence claims. Plaintiffs' photographs of the site, taken immediately after the injured plaintiff fell, show three wooden planks lined up end-to-end but unconnected. The job superintendent and the site safety manager of defendant Holt, the general contractor, admitted that these photos showed planks that were wet and rotten, posing a hazard to any workers walking across them. These Holt employees denied that Holt placed the planks there and testified that they did not see any dangerous condition on the site before the accident. However, they both conducted regular inspections of the whole site, and the site safety manager would have inspected the subject area about an hour before plaintiff fell. Moreover, plaintiff testified that he had seen planks there for three weeks preceding his accident, and the defects observed in the planks would tend to be longstanding. This evidence raises triable issues of fact concerning Holt's constructive notice (*see Picasso v 345 E. 73 Owners Corp.*, 101 AD3d 511 [1st Dept 2012]; *Burton v CW Equities, LLC*, 97 AD3d 462, 462 [1st Dept 2012]). Defendants Brush and Pepsi also failed to demonstrate that they neither created nor had actual or constructive notice of the dangerous condition that caused plaintiff's injuries, since they do not point to any probative evidence on these questions.

Insofar as the Labor Law § 241 (6) claim is based on a violation of Industrial Code (12 NYCRR) § 23-1.7 (e) (1), it should be dismissed. The accident occurred in an open working area, notwithstanding evidence that workers traversed the plank to get from the street to the job site (*see Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]).

Industrial Code (12 NYCRR) § 23-1.11 (a) states: "The lumber used in the construction of equipment or temporary structures required by this Part (rule) shall be sound and shall not contain any defects . . . which may impair the strength of such lumber for the purpose for which it is to be used." While the plank on which DePaul slipped qualifies as dimensional lumber under the regulation, it fails to meet the other specified criteria: it was not

used in the *construction* of equipment or a temporary structure, and no equipment or temporary structure *required* by part 23 has been identified by plaintiffs. A plank fails to meet even the liberal definition of “structure” contained in *Joblon v Solow* (91 NY2d 457, 464 [1998]): “any production or piece of work artificially built up or composed of parts *joined together* in some definite manner” (internal quotation marks omitted and emphasis added). Plaintiffs concede that the lumber was not joined together, and photographs of the location show only loose planks. Simply put, nothing had been constructed from the planks so as to come within the ambit of the regulation. Furthermore, the regulation applies only to a device required to be constructed by another provision of part 23, as evident from subdivisions (b) and (c), which discuss, respectively, “[t]he lumber dimensions specified in this Part (rule)” and the nails required “to provide the required strength at all joints.” Thus, as in *Purcell v Metlife Inc.* (108 AD3d 431, 432-433 [1st Dept 2013]), plaintiffs have failed to demonstrate that section 23-1.11 (a) is applicable, and this claim was properly dismissed (*see Morgan v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 50 AD3d 866, 867 [2d Dept 2008]).

Neither defendants nor defendant Ruttura is entitled to summary judgment on defendants’ contractual indemnification claim against Ruttura. The subcontract between Holt and Ruttura broadly requires the latter to indemnify defendants for, inter alia, any claims arising from or in connection with Ruttura’s performance of the work. The subcontract requires Ruttura to keep its work areas free of debris and unsafe conditions. The accident occurred in an area of the exterior parking lot where Ruttura, the concrete subcontractor, had graded the ground and reinforced it with rebar in preparation for pouring concrete. Thus, plaintiff’s accident may be connected with Ruttura’s performance of its work insofar as Ruttura may have failed to satisfy its contractual obligation to keep this area clear of debris, such as the concededly hazardous planks. However, as indicated, issues of fact exist as to the extent of defendants’ liability for plaintiff’s injuries (*see Callan v Structure Tone, Inc.*, 52 AD3d 334, 335 [1st Dept 2008]). Concur—Tom, J.P., Friedman, Saxe, Richter and Clark, JJ.

The decision and order of this Court entered herein on February 27, 2014 (114 AD3d 609 [2014]) is hereby recalled and vacated (*see* 2014 NY Slip Op 83144[U] [2014] [decided simultaneously herewith]). **[Prior Case History: 2013 NY Slip Op 30000(U).]**

3 4 USS LLC, as Successor in Interest to 40 EAST 14 REALTY ASSOCIATES LLC, Appellant, v DSW MS LLC, as Successor in Interest to RETAIL VENTURES, INC., Respondent. [992 NYS2d 515]—

Suretyship and Guarantee—Scope of Guarantee—Guarantee of Tenant's Obligations—Modification of Lease Did Not Bar Summary Judgment as Guarantor's Liability was Triggered before Modification

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 25, 2013, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on the breach of contract cause of action, unanimously reversed, on the law, with costs, the motion granted with respect to the breach of contract cause of action, and the matter remanded for an immediate trial before a referee on the amount of recoverable damages.

On January 27, 2004, nonparties 40 East 14 Realty Associates LLC (40 East), the landlord, and Filene's Basement, Inc. (Filene's), the tenant, entered into a 20-year lease of premises located at 4 Union Square South. Retail Ventures, Inc. (RVI), Filene's then-parent and defendant's predecessor, executed an "absolute and unconditional guaranty of payment (and not of collection) and of performance" under the lease by a writing dated January 13, 2004. 40 East assigned the lease to plaintiff in April 2009 when it became plaintiff's general member.

Section 16.1 of the lease defined the tenant's failure to pay rent when due as well as the tenant's filing of a voluntary bankruptcy proceeding as "events of default" that would cause the termination of the lease. Section 17.2 (A) (1) and (2) of the lease provided, in pertinent part, that upon such termination, the tenant would be required to pay the landlord "all Fixed Rent, Tax Payments, Operating Payments, Percentage Rent and other items of Rental payable under th[e] Lease by Tenant to Landlord . . . [plus] any deficiency . . . between the Rental for the period which otherwise would have constituted the unexpired portion of the Term and the net amount, if any, of rents collected under any reletting effected" pursuant to the lease.

On May 4, 2009, Filene's, along with its affiliates, filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code (11 USC § 1101 *et seq.*) in the United States Bankruptcy Court for the District of Delaware. On June 17, 2009, the bankruptcy court issued an asset purchase order authorizing Filene's to assume the lease and assign it to SYL LLC, which succeeded Filene's as the tenant. The following day, plaintiff and SYL entered into a lease modification, to be discussed below, which constitutes the basis for defendant's opposition to the instant motion for summary judgment. In

November 2011, SYL defaulted under the lease by failing to make payments due and by filing its own voluntary petition in bankruptcy. The lease was surrendered by SYL and rejected by the bankruptcy court. On December 1, 2011, plaintiff invoked the guaranty and demanded that RVI pay all sums then due and to become due under the lease. Plaintiff's letter cited SYL's defaults under the lease. By response dated December 7, 2011, defendant, RVI's successor, denied liability on the guaranty, asserting that the modification effectively destroyed "the value of the Lease, rendering it uneconomic and unmarketable, to the detriment of both Tenant, a chapter 11 debtor, and Guarantor." Defendant further asserted that "[s]uch a material and unexpected departure from the original terms of the Lease has the effect, as a matter of law and equity, of abrogating the Guarantee." In a subsequent letter to defendant dated January 23, 2012, plaintiff stated that the amounts it demanded under the guaranty "do not include any additional obligations of Tenant under any modification to the Lease" Defendant did not respond to that letter and plaintiff brought suit on February 10, 2012. The first cause of action is based on a contract theory; the second is for a judgment declaring defendant's liability on the guaranty. Plaintiff explicitly states in the complaint: "Through this action, Landlord is not seeking from the Guarantor any additional obligations of Tenant under the Modification, but only the payment of those obligations due and owing under the Lease."

This dispute centers on the application of the third and seventeenth paragraphs of the guaranty. The third paragraph provides: "This Guaranty shall be a continuing guaranty, and the liability of the Guarantor hereunder shall in no way be affected, modified or diminished by reason of (a) any assignment, renewal, modification, amendment, or extension of the Lease, or (b) any modification or waiver of or change in any of the terms, covenants and conditions of the Lease by Landlord and Tenant . . . or (f) any bankruptcy, insolvency, reorganization, liquidation, arrangement, assignment for the benefit of creditors, receivership, trusteeship or similar proceeding affecting Tenant, whether or not notice thereof is given to Guarantor." The seventeenth paragraph of the guaranty provides: "Notwithstanding anything to the contrary contained herein . . . Guarantor acknowledges, agrees and covenants that Guarantor shall continue to be liable pursuant to this Guaranty notwithstanding the occurrence of any of the events set forth in subdivisions (a) and (b) of the third paragraph of the Guaranty, provided only that the extent of Guarantor's liability pursuant to this Guaranty shall not be increased by reason of the occurrence of such event(s), except if at the time any such event(s) occur, the

Tenant pursuant to the Lease is an Affiliate of Guarantor or if Guarantor has notice of and consents to the occurrence of such event(s), such liability of Guarantor shall be increased accordingly.” SYL was not an affiliate of defendant, the guarantor. Nor did defendant have notice of and consent to the June 18, 2009 modification of the lease. Therefore, by operation of the third and seventeenth paragraphs, defendant’s exposure on the guaranty was neither diminished nor increased by the modification.

On the basis of Filene’s 2009 defaults, plaintiff made a prima facie showing of its entitlement to summary judgment on the contract cause of action. “On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty” (*City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). Defendant opposed summary judgment on the following grounds: (1) the modification “voided the Guaranty as a matter of law, because it materially increased the risk that there would be a call upon the Guaranty and was not the type of commercially-reasonable modification that [defendant] could have anticipated”; (2) “[plaintiff] breached the Guaranty’s implied covenant of good faith and fair dealing by engineering the First Modification because [plaintiff] was prohibited from taking any actions that would result in a call upon the Guaranty”; and (3) “under the plain terms of the Guaranty, [defendant] has no liability—the ‘extent of’ [defendant’s] liability could not be increased by reason of a lease modification, and absent the First Modification, [defendant] would have had no liability because the original Lease would have been assumed by a new tenant without a call upon the Guaranty.”

Defendant’s arguments miss the mark because they are entirely focused on the modification. The record discloses that the modification was entered into after Filene’s defaulted under the lease and after the guarantor’s liability had already been triggered. As stated above, the complaint makes it clear that plaintiff is not seeking a recovery for any of the tenant’s obligations under the modification. As plaintiff’s counsel argued before the motion court, “the guarantor’s liability is capped at the amount of the original lease” Defendant has therefore failed to raise a triable issue of fact with respect to its liability under the contract cause of action.*

404 Park Partners, L.P. v Lerner (75 AD3d 481 [1st Dept

* We note parenthetically that it would not have availed defendant to argue that it was given late notice or even no notice of Filene’s default. The second

(n. cont’d)

2010]), which the motion court cited, is distinguishable because it involved an issue as to whether a guarantor consented to the terms of a renewed lease, where the guarantor did not sign a new guaranty for the renewed lease. Here, plaintiff is not seeking to recover under a new lease; rather, as noted, it is seeking to recover under the terms of the lease, prior to its modification. The amount of plaintiff's damages should be determined by a referee in light of the jury waiver set forth in the guaranty. Concur—Saxe, J.P., Moskowitz, DeGrasse, Feinman and Clark, JJ.

4 RETIREMENT PLAN FOR GENERAL EMPLOYEES OF THE CITY OF NORTH MIAMI BEACH et al., Appellants, v THE MCGRAW-HILL COMPANIES, INC., Respondent. [992 NYS2d 220]—

Corporations—Inspection of Books and Records—Investigation of Alleged Mismanagement and Breaches of Fiduciary Duty were Proper Bases for Shareholder Inspection

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 21, 2013, which denied the petition to inspect respondent's books and records pertaining to the alleged wrongful conduct of its wholly-owned subsidiary, unanimously reversed, on the law, without costs, the petition granted, and the matter remanded for further proceedings consistent herewith concerning the proper scope of inspection.

Petitioners, Retirement Plan for General Employees of the City of North Miami Beach (North Miami Beach) and Robin Stein, are shareholders of respondent the McGraw-Hill Companies, Inc. (McGraw-Hill). Nonparty Standard & Poor's Financial Services LLC (S&P) is a major credit rating agency wholly owned by McGraw-Hill. S&P issues ratings on securities and other investment products related to those products' default risk; the ratings play a critical role in the economy by driving investment decisions, as many institutional investors have rules that restrict them to investing only in products with high ratings from S&P.

Petitioners allege that under the direction of respondent's chairman and chief executive, S&P undertook a strategy of fraudulently issuing positive ratings on complex financial products such as residential mortgage-backed securities (RMBS), collateralized debt obligations (CDOs), and other similarly packaged mortgage-related products. According to petitioners, this strategy redounded to McGraw-Hill and S&P's

and third paragraphs of the guaranty provide that the guaranty is effective with respect to the relevant defaults whether or not notice thereof is given to the guarantor.

benefit because in many instances, debt issuers whose securities S&P rated were also clients of S&P's services. Therefore, petitioners allege, as the complex mortgage-backed securities industry grew, McGraw-Hill's management directed S&P to further provide optimistic credit ratings in an effort to attract more business from the issuers and gain more revenue from those issuers' complex securities. According to petitioners, the mortgage-related securities at the heart of the meltdown would not have been marketed and sold without S&P's high ratings, none of which accurately reflected the securities' actual risk. Petitioners assert that the rosy credit ratings, which S&P knew to be false, encouraged investment in toxic securities, thus helping to trigger the financial crisis of 2008.

Petitioners note that between August 2007 and November 2007, S&P, along with other major credit rating agencies, came under investigation by several state Attorney Generals' offices and by the United States Securities and Exchange Commission (SEC). These state and federal authorities set out to examine the rating agencies' activities in rating subprime RMBSs and CDOs. Among the main inquiries of the SEC investigation were whether the credit rating agencies complied with their own policies and procedures for initial ratings, the effectiveness of the agencies' conflict-of-interest procedures, and whether conflicts of interest influenced the agencies' ratings—specifically, whether agencies were influenced by receiving compensation from the very issuers and underwriters whose securities they rated.

After conducting its investigation, the SEC issued its conclusions in a July 2008 report. In that report, the SEC found, without attributing conduct to any particular credit rating agency, that the various agencies did not always disclose relevant ratings criteria and that none of them had specific written procedures for rating RMBSs and CDOs. The SEC report also noted, among other things, that although the agencies were required to maintain and enforce policies and procedures designed to manage conflicts of interest, significant conflicts persisted—for example, the “issuer pays” model for RMBS and CDO offerings.

Similarly, in April 2011, the United States Senate Subcommittee on Investigations issued a report emphasizing credit rating agencies' complicity in the 2008 financial crisis—a crisis partially driven by investments in the subprime mortgage securities market. The Senate subcommittee report concluded that the rating agencies' senior management knew of increasing risks in the mortgage markets, such as lax lending standards,

poor quality loans and mortgage fraud. However, the subcommittee stated, instead of using this information to temper their ratings, the agencies continued to issue numerous investment-grade ratings for mortgage-backed securities.

By letter dated November 18, 2011, petitioner North Miami Beach, citing Business Corporation Law § 624 and the New York common law, made a written demand upon respondent to inspect certain books and records of respondent's board of directors.* The demand listed 15 categories of books and records generally relating to the board of directors' oversight and management of S&P, and also relating to the board's independence. For example, the demand requested records concerning: (1) the board's independence; (2) respondent's policies and procedures regarding the board's oversight of S&P; (3) names of senior employees reporting directly to the board; (4) policies and procedures for issuing credit ratings for RMBSs and CDOs; (5) policies and procedures for addressing and managing conflicts of interest, particularly those arising out of the "issuer pays" model for issuing credit ratings; and (6) the names of respondent's personnel in charge of enforcing a code of business ethics and any other conflict-of-interest policy. North Miami Beach specified the time frame for the production as "January 1, 2002 to the present."

Further, North Miami Beach enumerated the purposes for its demand—among others, to investigate potential wrongdoing and mismanagement by the board of directors; to assess the board's ability to consider impartially a demand for action; to assess policies that the board had implemented to address potential conflicts of interest in S&P's RMBS and CDO business; and to assess policies the board had considered or implemented to address S&P's procedures for issuing RMBS and CDO credit ratings.

Before petitioners commenced this action, the parties engaged in a series of discussions to determine whether they could compromise on the scope of petitioners' demand without any court intervention. Respondent offered for production all documents required by Business Corporation Law § 624—that is, a record of shareholders, shareholder meeting minutes, and profit and loss statements. However, petitioners asserted a demand for additional documents under New York common law, including anything that the board had received or disseminated with respect to credit ratings for RMBSs and CDOs. Petitioners further demanded, also under New York common law, documents

* Petitioner Robin Stein did not join North Miami Beach in making the demand until June 22, 2012.

pertaining to respondent's policies and oversight of S&P, among other things. Nevertheless, respondent refused to produce any documents that were not required under Business Corporation Law § 624, asserting that the request for documents under the New York common law was too broad.

Petitioners alleged that, in later discussions, they made clear that they sought only documents that the board had actually received, prepared, reviewed or distributed, and, of those documents, only the ones concerning the board's knowledge about and oversight of S&P. Thus, petitioners stated, respondent was not obliged to conduct an exhaustive firmwide search for documents, as the requested documents were easily identified and easily obtainable. However, respondent still took the position that petitioners were entitled only to documents required under Business Corporation Law § 624.

When discussions failed to produce any agreement on further documents to be produced, petitioners filed the petition underlying this appeal. Further, petitioners attached to their memorandum of law a "Schedule A" containing only nine categories of documents and making clear that petitioners sought documents only from board members. Petitioners noted that Schedule A constituted an attempt to narrow their prior demands after the series of discussions with respondent.

Supreme Court denied the petition, finding that petitioners should have first made a demand upon respondent and then, once respondent rejected the demand, should have commenced a shareholders' derivative action rather than filing a petition under Business Corporation Law § 624. We disagree.

Under New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose (*see Matter of Dwyer v Di Nardo & Metschl, P.C.*, 41 AD3d 1177, 1178 [4th Dept 2007], quoting *Matter of Peterborough Corp. v Karl Ehmer, Inc.*, 215 AD2d 663, 664 [2d Dept 1995]). The statutory right supplemented, but did not replace, the common-law right (*see Matter of Crane Co. v Anaconda Co.*, 39 NY2d 14, 19-20 [1976]; *Matter of Steinway*, 159 NY 250, 263-265 [1899]).

Here, petitioners sufficiently showed that they were acting in good faith and for a proper purpose in seeking to enforce their common-law right to inspect respondent's books and records. Specifically, the petition alleges that petitioners seek to investigate alleged mismanagement and breaches of fiduciary duty by respondent's board of directors in failing to oversee purported wrongdoing by S&P; this alleged wrongdoing,

petitioners assert, exposed respondent to substantial potential liability in multiple civil actions and investigations. These allegations form a proper basis for petitioners' request (*see Matter of Crane Co.*, 39 NY2d at 20-21).

Contrary to respondent's contentions, investigating alleged misconduct by management and obtaining information that may aid legitimate litigation are, in fact, proper purposes for a Business Corporation Law § 624 request, even if the inspection ultimately establishes that the board had engaged in no wrongdoing (*see Matter of Tatko v Tatko Bros. Slate Co.*, 173 AD2d 917, 918 [3d Dept 1991]). Indeed, petitioners identified several reasons for making their demand, including assessment of policies that the board had implemented when issuing credit ratings and investigation of possible wrongdoing by the respondent's board of directors. Each of these purposes adequately justifies petitioners' access to certain board documents. Moreover, because the common-law right of inspection is broader than the statutory right, petitioners are entitled to inspect books and records beyond the specific materials delineated in Business Corporation Law § 624 (b) and (e) (*see Matter of Ochs v Washington Hgts. Fed. Sav. & Loan Assn.*, 17 NY2d 82, 86-87 [1966]; *see also Rockwell v SCM Corp.*, 496 F Supp 1123, 1126 [SD NY 1980]).

Finally, although petitioners substantially limited the scope of their initial requests by submitting their Schedule A, respondent maintains that the items requested in that schedule are still too broad. On this record, we cannot determine which records are relevant and necessary for petitioners' purposes. A hearing is therefore necessary to determine the proper scope of inspection (*see Matter of Liaros v Ted's Jumbo Red Hots, Inc.*, 96 AD3d 1464, 1465 [4th Dept 2012]; *Tatko*, 173 AD2d at 919). Accordingly, we remand the matter to Supreme Court for that hearing. Concur—Saxe, J.P., Moskowitz, Freedman, Gische and Kapnick, JJ.

5 KIMBERLY ANDRON, Appellant, v HOWARD LIBBY, Respondent. [1993 NYS2d 272]—

Husband and Wife and Other Domestic Relationships—Separation Agreement—Enforcement of Guarantee Provision—Entitlement to Attorneys' Fees Judgments—Summary Judgment—Hearsay Statement Did Not Create Question of Fact Where Belied by Documentary Evidence

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 15, 2012, which denied plaintiff's motion for summary judgment and for dismissal of the counterclaim, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for a hearing to determine

reasonable attorney's fees. Appeal from order, same court and Justice, entered April 26, 2013, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Plaintiff brought this action against defendant, her former father-in-law, to enforce his guaranty of a settlement agreement reached in a matrimonial proceeding. Defendant counterclaimed, seeking damages in the form of costs associated with this litigation. The settlement agreement provided in relevant part that plaintiff, the former wife, who remained an obligor on a mortgage and a line of credit agreement along with her nonparty former husband (hereinafter, the husband), had the right to notify the husband or defendant when there was an "uncured default" in the monthly payments and demand that the default be cured. It also provided that defendant's failure to give notice of the cure within five business days of plaintiff's initial demand, would trigger her right to seek immediate enforcement of the settlement agreement, including, as pertinent here, defendant's payment of her reasonable attorney's fees incurred in the enforcement of the guaranty.

Plaintiff's primary claim is that as of July 2010 the husband's repeated late payments on the mortgage and the line of credit had damaged her credit and resulted in receipt of a bank notice indicating that the former marital residence was at risk of foreclosure. Defendant failed to provide proof of cure of the defaulted payments by July 19, 2010, five business days after her demand. On July 22, 2010, defendant was notified by email that because he had not given timely notice to plaintiff that the defaults had been cured, plaintiff was asserting her right to have the entire equitable distribution payment come due immediately. When no payments were made, plaintiff commenced this litigation. Since commencement of this action, defendant has paid the accelerated debt and default interest, and the first cause of action is no longer at issue.

The crux of the defense is that while plaintiff admittedly did not receive notice of cure within five days, the accounts were allegedly already up to date or were brought up to date within that five-day period, and that this is sufficient to deny summary judgment. He also argues that there are questions of fact including whether there was an actual default, and the nature of plaintiff's motives in bringing the litigation.

"A party opposing summary judgment may proffer hearsay evidence, but such proof may not be the sole factual basis for denying summary judgment" (*Sunfirst Fed. Credit Union v Empire Ins. Co./All City Ins. Co.*, 239 AD2d 894, 894 [4th Dept

1997] [citations omitted]; *see also Wilbur v Wilbur*, 266 AD2d 535, 536 [2d Dept 1999] [finding that the defendant's deposition testimony as to what her mother told her was "unsubstantiated hearsay" and contradicted by documentary evidence, and therefore insufficient to defeat summary judgment]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Here, pertaining to the line of credit account, defendant avers, and the husband states in a letter emailed on July 23, 2010, that the bank representative informed them that as of July 16, 2010 the line of credit payments were current, with the next payment due on July 25, 2010. Defendant contends that the statement by the bank representative was the best and only information he could obtain, as he was not a signatory on the accounts at issue and not allowed to obtain copies of the statements. Nonetheless, defendant's affidavit relies only on hearsay evidence that a bank representative had indicated that the line of credit was in good standing. The documentary evidence is to the contrary.

It is not the function of the court to remake an agreement agreed to by the parties, but to enforce it as it exists (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]). The proper aim of the court is to arrive at a construction that gives meaning to all the language employed by the parties (*see Tantleff v Truscelli*, 110 AD2d 240, 244 [2d Dept 1985], *affd* 69 NY2d 769 [1987]). The parties agreed in the settlement agreement that defendant's failure to cure a default or to give notice that the default had been cured within five business days of plaintiff's demand would trigger plaintiff's right to certain remedies. We cannot ignore the parties' written agreement.

The motion court erred in finding a question of fact as to whether the mortgage was actually in default when plaintiff made her demand. The fact that defendant was told on July 16 that payment of \$5,683.50 would bring the accounts up to date, and that his bank statement shows that this payment was made on July 19, establishes that the mortgage payments had in fact been in arrears, and plaintiff was entitled to make her demand. It was, under the circumstances, also error to rely on the hearsay statement of the bank representative to find issues of fact and credibility as to whether the home equity line of credit was in default, as plaintiff claims, or was current. The representative's alleged statement is belied by the bank statements showing that no payment was made on the line of credit as of June 30, 2010, and the payment on July 2, 2010 represents the payment due in June, not the payment due in July as claimed by the husband. The bank statements show that the arrears carried forward even after July. Giving defendant, the nonmov-

ing party, the benefit of every favorable inference, even if he were under the mistaken belief that payment on the line of credit was current, the fact that he paid funds to correct the balance of the outstanding mortgage is sufficient evidence of a default and that plaintiff did not abuse the terms of the settlement agreement when she sought a cure *and proof of the cure*. Accordingly, she is entitled to the enforcement of the guaranty's provision for her reasonable attorney fees to be paid in this litigation.

As for defendant's counterclaim for costs based on his argument that he timely cured any default, as well as paid the full amount of the equitable distribution sum that plaintiff sought rendering her first cause of action moot, we find that his claim lacks merit. The documentary evidence shows that the husband had a pattern of making late payments on both accounts. This pattern harmed plaintiff's credit history, and it was only by seeking legal assistance that she was able to have the payments made current and to restore her credit rating. Notably, after her attorney intervened, defendant not only brought the mortgage up to date, but paid the accelerated equitable distribution claim. Given this history, we do not find plaintiff's suit to be frivolous nor do we find that it constitutes harassment. Accordingly, the counterclaim should be dismissed (*see* 22 NYCRR 130-1.1 [a], [c] [2], [3]). Concur—Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels and Feinman, JJ.

6 LILIA ORTIZ, Respondent, v NEW YORK CITY HOUSING AUTHORITY, Appellant. [991 NYS2d 884]—

Negligence—Snow and Ice—Trip and Fall on Icy Sidewalk—Liability of Abutting Landowner

Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 14, 2013, denying defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action for personal injuries allegedly suffered by plaintiff when she tripped and fell on the sidewalk adjacent to defendant's residential building, the trial court properly denied defendant's motion. The climatological records establish that it snowed two days prior to plaintiff's accident, the temperature fluctuated within a few degrees above and below the freezing point during the interim period, and there was sixteen inches of accumulated snow and ice on the ground from prior recent storms. Defendant's grounds supervisor attested that the sidewalk had been plowed on the day of the last storm, and that he had last noted icy conditions at 8:00 a.m. the day before the

accident. Plaintiff testified, however, that the sidewalk was not cleared of snow and ice, rather, only a relatively narrow path had been partially cleared and large mounds of snow abutted the path on either side. She further testified that the path was dirty and wet due to runoff from the mounds of snow and that while walking in the pathway, she slipped on a hard, gray, dirty patch of ice that had accumulated in a defect in the sidewalk.

Accepting plaintiff's account for the purposes of this motion (see *Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]), the evidence raises issues of fact as to whether defendant's procedures either created or exacerbated the icy condition that allegedly caused the accident and whether the condition was present for a sufficient period of time within which it could have been discovered and remedied (see *Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013]; *Sanchez v City of New York*, 48 AD3d 275, 276 [1st Dept 2008]). Concur—Friedman, J.P., Acosta, Saxe, Feinman and Gische, JJ.

7 STANLEY COHEN, Respondent-Appellant, v PAULINE COHEN, Appellant-Respondent. [993 NYS2d 4]—

Husband and Wife and Other Domestic Relationships—Stipulations—Open Court Stipulation Too Incomplete and Indefinite to be Enforceable—Consent to Divorce in Exchange for Financial Payments against Public Policy

Parent, Child and Family—Custody—Sound and Substantial Basis for Award of Sole Custody to Father—Mother Pressured and Manipulated Child

Trial—Adjournment—Matrimonial Action—Denial of Further Adjournment Warranted Where Three-Week Adjournment Previously Given and Claim of Medical Injury Unavailing

Husband and Wife and Other Domestic Relationships—Support—Maintenance—Excessive Award

Parent, Child and Family—Custody—Negative Inference against Parent Who Failed to Return to Court to Finish Cross-Examination

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered May 9, 2013, to the extent appealed from, dissolving the parties' marriage, granting plaintiff physical and legal custody of the parties' child, directing plaintiff to pay defendant non-durational maintenance of \$26,000 per month, and directing plaintiff to continue to maintain defendant's two \$300,000 life insurance policies and to purchase and maintain a \$2.5 million life insurance policy naming defendant as sole beneficiary, unanimously modified, on the law and the facts, to reduce the amount of non-durational maintenance to \$22,500 per month and to reduce the amount of life insurance that plaintiff is required to purchase to \$1 million, and otherwise affirmed, without costs. Appeals from orders, same court and Justice, entered on or about April 16, 2012, May 7, 2012, June 14, 2012, August 14, 2012 and February 5, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Order, same court (Matthew F. Cooper, J.), entered on or about May 30, 2013, which awarded defendant attorneys' fees in the sum of \$175,000, unanimously affirmed, without costs.

Plaintiff husband, now 79, is a United States citizen. In or around 1990, he established, for his security and investment transactions, Scone Investments, a limited partnership in which he is a general partner. In the mid-1990s, he created the Scone Foundation, which provides financial awards and prizes to artists and archivists.

In 1996, while living in France, plaintiff met defendant wife, now 54, and they moved in together. Defendant, a documentary film maker and assistant director, was a citizen of Belgium and France. In 1998, defendant became pregnant and stopped working. On April 30, 1999, plaintiff created the Second Stanley Cohen Irrevocable 1999 Family Trust (1999 Trust), primarily for the benefit of defendant and their issue, although his daughter from a previous marriage is also a beneficiary.

On June 7, 1999, the parties executed a prenuptial agreement in France, which provided that upon marriage, each party's premarital property would remain his or her separate property, that property titled in individual names acquired during the marriage would be the property of the person in whose name it was titled, and that jointly titled property acquired during the marriage would be jointly owned marital property. The parties married on June 14, 1999, and on July 10, 1999, their son was born.

In 2001, Scone Investments purchased two apartments in the Galleria, an apartment building in Manhattan. A third apartment in the building was later purchased. In 2002, the 1999 Trust purchased a 4,000-square-foot apartment in Paris.

During the marriage, the parties moved to the United States. They separated in 2006, but plaintiff continued to provide defendant with financial support. Plaintiff commenced this divorce action in March 2009. In a prior appeal (93 AD3d 506 [1st Dept 2012]), this Court affirmed the order of the trial court that held that the French prenuptial agreement was valid.

After a 2011 on-the-record "agreement" was vacated, the parties proceeded to trial in 2012. The trial was bifurcated, with specific days reserved for testimony regarding custody and other days for testimony about finances. Although defendant was cross-examined during the financial phase of the trial, on May 18, 2011, in the midst of her cross-examination on custody issues, she left New York and returned to Paris. The attorney for the child requested that defendant's testimony on custody be stricken because she was not cross-examined. Plaintiff's at-

torney requested that all of defendant's testimony, including testimony on finances, be stricken. Defendant's counsel asked for time to permit defendant to appear again. The court provided defendant's counsel with an opportunity to explain her absence, and adjourned the trial to June 6, 2012.

Despite the three-week adjournment, defendant did not return to court, claiming that she was under doctor's orders not to travel. The court refused defendant's request for a further adjournment or to allow her to appear via Skype, and ended the trial on June 7, 2013. The court drew an adverse inference against defendant with respect to custody issues based on her failure to complete her cross-examination, but refused to default her or to strike her testimony in its entirety.

On the record before us, the court properly vacated the parties' 2011 on-the-record agreement. To be enforceable, an open court stipulation must contain all of the material terms and evince a clear mutual accord between the parties (*see* CPLR 2104; *Bonnette v Long Is. Coll. Hosp.*, 3 NY3d 281, 286 [2004]; *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 103-104 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). The 2011 on-the-record agreement was too incomplete and indefinite to be enforceable, and was merely a non-binding agreement to agree (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]; *Bernstein v Felske*, 143 AD2d 863, 865 [2d Dept 1988]). The parties disagreed whether the proposal included a waiver of maintenance and they did not finalize the details of the transfer of the 1999 Trust. Other material terms were never agreed upon, and the agreement was subject to the consummation of future conditions and additional agreements.

The agreement also lacked consideration (*see Whitmore v Whitmore*, 8 AD3d 371 [2d Dept 2004]). Accepting defendant's consent to the divorce in exchange for the financial payments would have been against public policy (*see Charap v Willett*, 84 AD3d 1003 [2d Dept 2011]). In any event, the parties unambiguously agreed that "whether we hammer out the agreement or not, the divorce will go forward uncontested." There is no merit to defendant's claim that her decision to avoid a public trial on fault grounds constituted consideration because it would have brought up embarrassing and difficult questions for plaintiff concerning his financial dealings.

The court correctly precluded defendant from introducing evidence of French law on equitable distribution at trial. There is no need for extrinsic evidence because the parties' prenuptial agreement unambiguously precludes equitable distribution (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 579 [2008]). Contrary to

defendant's apparent contention, while the trial court previously held that the parties' prenuptial agreement was enforceable in New York because it was validly executed under French law, it did not rule that French law would apply to the ancillary divorce issues to be tried in this New York action; nor did this Court so rule in affirming the trial court's order.

The court properly considered all the circumstances and the best interests of the child in awarding plaintiff sole legal custody (see *Eschbach v Eschbach*, 56 NY2d 167 [1982]). While the child reported initially that he wanted to move to Paris and live with defendant, and the forensic expert expressed some concern about plaintiff's parenting, the expert also testified as to some serious concerns about defendant, including her suicide attempts and her rigidity. Most significantly, it came to light in May 2012 that defendant had been pressuring and manipulating the child, who was then nearly 13 years old; her contact with him was temporarily suspended, and plaintiff was granted temporary custody. During a second *Lincoln* hearing (see *Matter of Lincoln v Lincoln*, 24 NY2d 270 [1969]), the child revealed to the court his deep-seated issues with defendant, and the court continued plaintiff's temporary custody. Instead of addressing these serious issues, defendant called two witnesses to attack the child's general veracity. Defendant then elected to return to France before her cross-examination was completed, and the court reasonably drew a strong negative inference as to her credibility and fitness as a parent. Thus, there is a sound and substantial basis in the record for the court's custody determination (see *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

The denial of defendant's request for a further adjournment of the trial after she returned to France was not a clear abuse of the court's discretion, and should not be disturbed (see *Pezhman v Department of Educ. of the City of N.Y.*, 113 AD3d 417 [1st Dept 2014], *lv denied* 22 NY3d 863 [2014], *cert denied* 572 US —, 134 S Ct 2303 [2014]). The record fully supports the court's finding that defendant's failure to return to court, despite a three-week adjournment, was of her own making (see *Matter of Steven B.*, 24 AD3d 384 [1st Dept 2005], *affd* 6 NY3d 888 [2006]; see also *Matter of Samida v Samida*, 116 AD3d 779 [2d Dept 2014]). Defendant failed to submit an affidavit explaining her absence on the May 18th date or on the June 6th date. To the extent she relies on her claim of medical injury, the claim is unavailing, since the unsworn medical note provided to the court was brief and vague (*Gramma v Gramma*, 161 AD2d 899 [3d Dept 1990]). While she now claims that she needed only a

two-week adjournment, defendant gave no indication to the court that she would be able to return on a certain date, and her counsel had no knowledge of when she could actually do so.

Defendant also contends that she could not adequately respond to the allegations against her without the *Lincoln* hearing transcripts. However, the record demonstrates that she was well aware of the substance of the child's allegations and that she had every opportunity to address and respond to them, and she has not established that the court abused its discretion in refusing to release the transcripts (*see Matter of Anderson v Harris*, 73 AD3d 456, 458 [1st Dept 2010]). In any event, the two in camera meetings were only one factor in the court's custody determination.

Defendant's net worth statement, excluding housing costs, listed monthly expenses of more than \$62,000. She asks that this court restore plaintiff's obligation to pay her non-durational maintenance of \$26,000 per month.* Plaintiff asks that the award of maintenance be stricken in its entirety or that the amount and duration of the maintenance be drastically reduced. For the reasons that follow, we find that the award of \$26,000 per month in non-durational maintenance is excessive, and should be reduced to \$22,500 per month.

Generally, the determination of maintenance is within the sound discretion of the trial court upon consideration of the relevant factors enumerated in Domestic Relations Law § 236 (B) (6) (a) and the parties' pre-divorce standard of living (*see Hartog v Hartog*, 85 NY2d 36, 50-51 [1995]; *Morrow v Morrow*, 19 AD3d 253 [1st Dept 2005]). However, "the authority of this Court in determining issues of maintenance is as broad as that of the trial court" (*Reed v Reed*, 55 AD3d 1249, 1251 [4th Dept 2008]; *see also DiNozzi v DiNozzi*, 74 AD3d 866 [2d Dept 2010]).

The factors to be considered in awarding maintenance include "the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become self-supporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance" (*Alleva v Alleva*, 112 AD3d 567, 568 [2d Dept 2013] [internal quotation marks omitted]).

These factors must be evaluated along with the fact that

* By order entered October 31, 2013, this Court granted plaintiff's motion for a stay of the judgment on condition that he pay defendant maintenance of \$10,000 per month and maintain the life insurance benefiting defendant in the amount of \$600,000.

“[t]he overriding purpose of a maintenance award is to give the spouse economic independence” (see *Bains v Bains*, 308 AD2d 557, 559 [2d Dept 2003]).

Here, defendant had the primary homemaking and child-raising responsibilities during the marriage. The parties enjoyed a lavish lifestyle, both before and, significantly, after their separation, and plaintiff assumed the role of financial provider, acquiescing in defendant’s financial dependency. Defendant is not going to receive a distributive award, her own assets are limited, and the record does not contain evidence of the amount of income that she will receive from the 1999 Trust. Defendant also suffers from a mild cognitive impairment that compromises her ability to work, both within and outside of the film industry, and she is incapable of supporting herself at a standard of living approximating the marital standard. While plaintiff asserts that his assets decreased during the recent financial crisis in the United States, they have presumably rebounded with the recovery of the financial markets. In any event, they are still substantial and, along with plaintiff’s annual income, are more than sufficient to provide for defendant’s reasonable needs.

On the other hand, defendant made little or no financial contribution to the marriage, and her efforts as a mother were diminished by her manipulation of the child. The costs listed in defendant’s statement of net worth were based on her life in New York, including expenses for the child. Defendant failed to provide a specific account of the money she alone required, and the court improvidently made certain assumptions in that regard. Thus, taking into consideration the statutory factors, including the parties’ extravagant lifestyle (see *Summer v Summer*, 85 NY2d 1014 [1995]; *Costa v Costa*, 46 AD3d 495, 497 [1st Dept 2007]), defendant’s dependence on plaintiff, the absence of a distributive award, and defendant’s cognitive impairment insofar as it detrimentally affects her ability to become self-supporting (see *Miceli v Miceli*, 78 AD3d 1023, 1025 [2d Dept 2010]), an award of non-durational maintenance of \$22,500 per month is appropriate.

Plaintiff contends that defendant should not be awarded maintenance because of her refusal to submit to a complete cross-examination, which prevented the court from ascertaining her standard of living at the time of the divorce action, in contrast to the time earlier in the marriage when the parties co-resided. When a party, through no fault of its own, “is deprived of the benefit of the cross-examination of a witness,” a court may strike that witness’s direct testimony in whole or in part (*Gallagher v Gallagher*, 92 App Div 138, 140 [1904] [internal

quotation marks omitted]; *Diocese of Buffalo v McCarthy*, 91 AD2d 213, 220 [4th Dept 1983], *lv denied* 59 NY2d 605 [1983]). Although we do not condone defendant's failure to return to court to complete her cross-examination during the custody phase of the trial, and firmly believe that this conduct must be sanctioned, we find, under the particular circumstances before us, that the court providently exercised its discretion when it drew a negative inference against defendant with respect to custody issues but declined to strike her testimony in its entirety. Among other things, the court was familiar with the parties' lavish standard of living during the marriage and defendant testified and was cross-examined for a number of days during the financial phase of the trial. During this testimony, defendant acknowledged that her food and unreimbursed medical expenses had decreased, that many of the amounts in her net worth statement reflected the way the parties lived before separating, and that she had reduced her spending on many of these items. Accordingly, plaintiff's claims of prejudice are overstated, and a negative inference with respect to custody was an adequate sanction for defendant's misconduct.

The court properly required plaintiff to maintain a policy of life insurance naming defendant as the sole beneficiary (*see* § 236 [B] [8] [a]; *Hartog*, 85 NY2d at 50). However, in view of our reduction of the maintenance award, and the high premium costs due to plaintiff's advanced age, the amount of additional insurance that defendant is required to purchase should be reduced from \$2.5 million to \$1 million.

The court properly awarded defendant \$175,000 in counsel fees after considering the financial positions of the parties and the circumstances of the case, including the unnecessary litigation caused by defendant (*see* Domestic Relations Law § 237; *Johnson v Chapin*, 12 NY3d 461, 467 [2009]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]; *O'Shea v O'Shea*, 93 NY2d 187, 193 [1999]). Concur—Sweeny, J.P., Renwick, Andrias, Richter and Kapnick, JJ.

(September 18, 2014)

1 NORTH STAR CONTRACTING CORP., Appellant, v MTA CAPITAL CONSTRUCTION COMPANY, Respondent. [993 NYS2d 11]—

Negligence—Negligent Misrepresentation—Privity—Subcontractor's Reliance on Representations Made by Construction Manager Caused Relationship to be Functional Equivalent of Privity

Order, Supreme Court, New York County (Anil C. Singh, J.),

entered April 24, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the first cause of action for negligent misrepresentation and the second cause of action for tortious interference with contract, unanimously modified, on the law, to deny the portion of the motion seeking to dismiss the first cause of action, and otherwise affirmed, without costs.

Defendant MTA Capital Construction Company (MTA-CC) was the construction manager of a project taking place along the 7th Avenue/Broadway subway line in Manhattan; the MTA-New York City Transit Authority (NYCT), to which MTA-CC is a sister entity, was the project's owner. In connection with the project, MTA-CC entered into a contract with nonparty Judlau Contracting, Inc. under which Judlau became the project's general contractor. Judlau then entered into a contract with plaintiff North Star Contracting Corp., under which North Star became the subcontractor to perform the necessary track work for the project.

As NYCT designed them, the tracks to be installed were to use a vibration dampening system that required the tracks' rails to fasten onto specially designed Low Vibration Track blocks (LVT blocks). According to the complaint, the subcontract between North Star and Judlau required North Star to adhere to NYCT's plans and specifications for the project. NYCT's plans and specifications, in turn, required the use of LVT blocks manufactured by nonparty Permanent Way Corporation (PWC), the exclusive manufacturer and patent holder of these LVT blocks. Thus, on October 24, 2006, North Star entered into a purchase order agreement with PWC to buy all the LVT blocks for the project.

North Star was to use three different types of LVT blocks: Type A, Type GR and Type DXO. The blocks were manufactured with concrete inserts cast into them; fasteners would then be placed into the concrete inserts to attach the rails to the LVT blocks. Until NYCT designated the LVT blocks for this project, no entity in the United States had ever used them for a track crossover switch—a fact North Star avers it did not know until well after it placed its bid on the project.

North Star alleges that in October 2007, when it began installing Type A LVT blocks, it discovered that the blocks had been defectively made—specifically, that PWC had allegedly incorrectly positioned the concrete inserts during manufacturing. According to the allegations in the complaint, MTA-CC directed North Star to remove and replace some of the Type A blocks, thus delaying the project, creating additional work and imposing unanticipated costs.

North Star further averred that after installation of the defective Type A blocks, MTA-CC represented that it had conducted an investigation of PWC's manufacturing process, and, after that investigation, specifically represented to North Star that PWC had modified its quality control measures so that the Type A LVT blocks would be free from defects. Likewise, as with the Type A blocks, MTA-CC allegedly "specifically represented to North Star that it had reviewed PWC's manufacturing and design processes for the . . . DXO blocks to ensure that they would be satisfactory" for use in the project.

North Star then received a second batch of LVT blocks, this time Type DXO blocks. North Star received those Type DXO blocks around January 23, 2008 and installed them on the tracks until around May 8, 2008. At that time, however, North Star alleges that, as with the Type A blocks, the Type DXO blocks were defective despite MTA-CC's representations that they would be suitable for the project. Specifically, according to North Star, cracks allegedly began to develop in the Type DXO blocks when bolts were tightened into them using the torque that PWC had specified. On July 16, 2008 as a result of the defects, MTA-CC directed North Star to remove and replace the installed DXO blocks. After a further delay of around five months, North Star alleged, it received yet another set of replacement blocks—again, Type DXO—and installed that set of replacement blocks in the fall of 2008.

North Star commenced this action in August 2011, asserting causes of action for negligent misrepresentation, tortious interference with contract and unjust enrichment.¹ The complaint alleged, among other things, that "during the course of the [p]roject," PWC and MTA-CC represented "on numerous occasions" that PWC's LVT blocks were suitable for their intended purpose and of the highest quality, even though the blocks had never, in fact, been tested. Additionally, the complaint alleges that, unbeknownst to North Star, MTA-CC and PWC had a covert agreement in which MTA-CC "was to direct [North Star] to perform the [subcontract] work free of charge to either MTA-CC or PWC." Thus, North Star concludes, MTA-CC and PWC were, in essence, surreptitiously using North Star as a means to conduct research and development on the LVT blocks.

According to the allegations in the complaint, MTA-CC "was aware that its statements would be used by North Star . . . to

1. In September 2009, North Star commenced a separate action against Judlau, asserting claims for breach of contract, unjust enrichment and account stated. North Star cross-moved to consolidate the Judlau action with this one, but the IAS court denied the cross motion as moot.

induce North Star to install the improperly designed and defective blocks at the [p]roject.” North Star further alleged that as a result of MTA-CC’s negligent misrepresentations, it incurred more than \$800,000 in extra costs and more than \$900,000 in delay damages.

The IAS court granted MTA-CC’s pre-answer motion to dismiss, finding that the complaint did not support North Star’s contention that there was a special relationship of trust and confidence between it and MTA-CC. Rather, the court found, the complaint alleged merely the existence of an ordinary business relationship between North Star and MTA-CC; therefore, North Star had not pleaded sufficient facts to support a claim for negligent misrepresentation.² Similarly, the IAS court dismissed the tortious interference claim, finding that North Star failed adequately to show that MTA-CC had induced an actual breach of the purchase order between North Star and PWC.

As North Star concedes, there is no contractual privity between it and MTA-CC; rather, North Star asserts, the relationship between it and MTA-CC was close enough to be the functional equivalent of privity.

To properly assert a claim on a theory of negligent misrepresentation, a plaintiff must plead: “(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]).

As to the first element, a court will find a special relationship if the record supports “a relationship so close as to approach that of privity” (*Sykes v RFD Third Ave. 1 Assoc., LLC*, 67 AD3d 162, 164 [1st Dept 2009], *affd* 15 NY3d 370 [2010] [internal quotation marks omitted]) or, stated another way, the “functional equivalent of contractual privity” (*Ossining Union Free Sch. Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419 [1989]). Under this standard, before liability for negligent misrepresentation may attach in favor of a third party, there must be: (1) an awareness by the maker of the statement that the statement is to be used for a particular purpose; (2) reliance

2. North Star has abandoned its third cause of action for unjust enrichment. Thus, the only questions before this Court are whether North Star should be permitted to proceed on its first cause of action for negligent misrepresentation and its second cause of action for tortious interference with contract.

by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance (*Ossining Union Free Sch. Dist.*, 73 NY2d at 425, citing *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551 [1985]).

We find that the complaint adequately alleges, based on representations made during the course of the contract, that the relationship between MTA-CC and North Star approached privity. Notably, MTA-CC was in contractual privity with Judlau and Judlau was in contractual privity with North Star; the purpose of the subcontract between Judlau and North Star was to further the prime contract between MTA-CC and Judlau. The complaint states that “MTA-CC was aware that its statements would be used by North Star, Judlau’s subcontractor, to induce North Star to install the improperly designed and defective blocks at the [p]roject.” Likewise, the complaint links MTA-CC to North Star. Indeed, MTA-CC, as the project’s construction manager, was the very entity that required North Star’s work to be performed with LVT blocks, and those blocks were available only from PWC, the distributor and sole manufacturer. Moreover, the complaint alleges that MTA-CC conducted an investigation of the manufacturing and design process for the blocks, but that North Star was not permitted to conduct an investigation for itself.

In an affidavit submitted in opposition to the motion to dismiss,³ Joseph Lovece, North Star’s president, states that had it not been for MTA-CC’s misrepresentations regarding its investigation of the defects in the LVT blocks, North Star would not have installed the second set of blocks without a written change order guaranteeing its payment, but instead would have chosen to breach the contract. However, North Star states, because of MTA-CC’s representation that PWC was remedying the problems, it chose to work with the defective blocks. At the pleading stage, drawing all inferences in favor of the pleading party (*Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]), these allegations are sufficient to allow the negligent misrepresentation claim to proceed with respect to the allegations about the second set of LVT blocks.

Crucially, North Star alleges that MTA-CC did, in fact, have “unique or specialized expertise” with respect to the suitability

3. Certain of the allegations are not contained in the complaint, but only in Lovece’s affidavit. Under CPLR 3211 (c), a trial court may use affidavits in its consideration of a pleading motion to dismiss (see *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

of the DXO blocks, as it had conducted an investigation of the manufacturing process and, after that investigation, had assured North Star that the blocks would work as planned. Indeed, North Star also represented at oral argument that MTA-CC had performed an on-site investigation of the blocks' manufacturing process, but that North Star was not permitted to attend that on-site investigation because of "proprietary intellectual property issues."

With respect to any misrepresentations allegedly made before North Star entered into its contract with Judlau, the complaint fails to allege reliance. First, nowhere in the complaint does North Star specify when MTA-CC purportedly made any misrepresentations before the contract commenced; at most, North Star alleges that MTA-CC represented "on numerous occasions" that PWC's LVT blocks were suitable for their intended purpose. Even though the approximate date of any misrepresentation would, of course, be a fact within North Star's knowledge, never does North Star specifically allege that MTA-CC actually misrepresented any facts before North Star entered into the contract with Judlau.

Although Lovece avers that had North Star known the true facts about the LVT blocks—that is, had North Star known that it was actually bidding on a research and development project—it would have put in a higher bid or would have refrained from entering into the project entirely. But these averments, even taken as true, do not salvage the negligent misrepresentation claim with respect to any purported misrepresentations before the Judlau contract. On the contrary, North Star—a contractor highly and singularly experienced in the track work that Judlau hired it to perform—still could not have reasonably relied, at that juncture on MTA-CC's representations about the LVT blocks' suitability for the project. Further, given its experience and qualifications, North Star does not, and cannot, plead that MTA-CC had superior knowledge (*see e.g. Greentech Research LLC v Wissman*, 104 AD3d 540 [1st Dept 2013]).

The complaint fails to state a claim for tortious interference with contract. As noted above, North Star alleges that defendant entered into a "clandestine agreement" with PWC, thereby inducing it to breach its contract with plaintiff. However, because defendant's alleged inducement occurred after PWC's alleged breaches, it could not have been the "but for" cause of PWC's purported breaches (*see Parrott v Logos Capital Mgt., LLC*, 91 AD3d 488, 489 [1st Dept 2012]; *Wells Fargo Bank, N.A. v ADF Operating Corp.*, 50 AD3d 280, 281 [1st Dept 2008]).

We have considered the parties' remaining contentions and

find them unavailing. Concur—Gonzalez, P.J., Friedman, Sweeny, Moskowitz and Clark, JJ. [**Prior Case History: 2013 NY Slip Op 33582(U).**]

2 MSCI INC. et al., Appellants, v PHILIP JACOB et al., Respondents, et al., Defendants. [992 NYS2d 224]—

Disclosure—Scope of Disclosure—Trade Secrets—Source Code Underlying Technologies Discoverable in Misappropriation Action

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 15, 2013, which, to the extent appealed from, denied plaintiffs’ motion to compel defendant Axioma, Inc. to produce source code created after April 3, 2012, reversed, on the facts, without costs, and the motion granted.

Plaintiffs, MSCI Inc., Financial Engineering Associates, Inc., RiskMetrics Group, Inc., and RiskMetrics Solutions, Inc. (collectively, MSCI), serve as a provider of investment decision support tools, including indices, risk analytics, and corporate governance products. MSCI provides a multi-asset class (MAC) risk analytics software product called “RiskManager,” which contains several component technologies, including “RiskServer,” “Plug and Price,” and “StructureTool.” MSCI asserts that each one of these technologies constitutes a confidential and proprietary trade secret. MSCI further asserts that because RiskManager leads the market in the risk analytics software field, the source code underlying these technologies is a trade secret that provides MSCI with a competitive advantage in the marketplace.

MSCI commenced this action in 2011, alleging that in January and February 2011, defendants Philip Jacob and John Does I through X, former senior-level employees at MSCI who had been intimately involved in the development of RiskManager, left MSCI to work for defendant Axioma, Inc., a direct competitor. According to MSCI, the individual defendants went to work for Axioma specifically for the purpose of creating a MAC product that would compete with MSCI’s RiskManager. Further, MSCI alleges, before the individual defendants resigned, they misappropriated the entire source code underlying RiskServer, Plug and Price, and StructureTool.

Because the trade secrets of both MSCI and Axioma, in the form of the source codes for their MAC software products, were the essential evidence in the case, the parties negotiated a confidentiality stipulation, and Supreme Court so-ordered the stipulation in September 2011. The confidentiality stipulation and order (CSO) provided that MSCI and Axioma would jointly retain a third-party neutral with whom they would deposit their

respective source codes and that only the parties' experts and attorneys would receive or see the material. The CSO specified that the parties would not be allowed to view their adversaries' source codes.

The CSO required the parties to "deliver to [the third-party neutral] two (2) full copies of the source code for each programs/products/components at issue in this action" It further provided, "The copies of each source code shall include all versions of such source code created from inception in buildable, runnable, native text format and in a file organization that retains the original directory structure of the code and any source code repository; and source code documentation."¹

During the litigation, defendants contended that MSCI had not sufficiently identified its alleged trade secrets and that the failure to do so rendered useless any attempt to analyze and compare the parties' source codes for any evidence of misappropriation. Hence, defendants moved to compel MSCI to identify its trade secrets with sufficient particularity and for a protective order staying their obligation to deposit their source code until MSCI did so. In a compliance conference order entered March 30, 2012, the court ordered the parties to brief the issue whether MSCI had to affirmatively identify its trade secrets, and also ordered Axioma to deposit its source code with the third-party neutral. Accordingly, on April 4, 2012, Axioma deposited all versions of its source code created from February 24, 2011 through April 3, 2012—a 14-month period that included four months preceding the action's commencement and 10 months afterward. The deposited material contained 5,552 "unique source code revisions and even substantially more individual source code file versions." After receiving briefing on the matter, by order entered April 23, 2012, the court ordered MSCI to identify the trade-secret components of its source code by June 8, 2012, and precluded it from seeking further discovery until it had done so.

By order entered on or about November 21, 2012, the court adopted the report of a court-appointed expert stating that MSCI had sufficiently identified the trade-secret components of its source code. As a result, MSCI was permitted to review Axioma's source code.

1. "A source code repository is a place where large amounts of source code are kept, either publicly or privately. [It is] often used by multi-developer projects to handle various versions and handle conflicts arising from developers submitting conflicting modifications" (*see* Wikipedia, Codebase, <http://en.wikipedia.org/wiki/Codebase>). When the code is in repository format, one can review the code and see its revision history.

Upon reviewing the code with MSCI's expert, MSCI's counsel learned that Axioma had not deposited any versions of source code created or modified after April 3, 2012; as a result, counsel sought the versions of the source code created or modified after that date. Defendants state that they denied that request on the ground that nothing in the CSO or any other order mandated that Axioma continually update its source code information. Discovery then proceeded for the next several months, and on or about March 12, 2013, MSCI's counsel again requested that Axioma deposit updated versions of its source code. Axioma, however, declined to provide any updated code.

MSCI moved for an order compelling Axioma to produce to the third-party neutral all versions of its relevant source codes and the underlying source code files and for a protective order staying discovery until Axioma had complied. On the motion, MSCI submitted an affidavit by an expert who stated that it was not possible to evaluate MSCI's misappropriation claims without the updated code, since it was possible that Axioma's later versions of the code underlying its MAC product had been altered to hide or eliminate improper use. Thus, the expert concluded, the post-April 3, 2012 versions were necessary to determine, among other things, whether Axioma's MAC product was created using MSCI's trade secrets. Relying on its expert's opinion, MSCI asserted that it would not be able to prove a claim of misappropriation if it were not permitted to see the updated version of Axioma's code.² Hence, it concluded, defendants had an ongoing obligation to disclose and update the source code as the software was developed.

In opposition, defendants relied on the opinion of an expert who stated that he had seen no evidence to support the theory that Axioma could have used MSCI's source code as a starting point and then altered the code to disguise any misuse. The expert opined that it would not be practical for defendants to disguise any alteration so that it was not detectable. Further, the expert stated, his initial analysis of the source code that Axioma had deposited indicated that it was a complete and usable source code repository created in the normal course of the actual software development at Axioma.

At oral argument, the motion court noted that it had not ordered production of the ongoing version of Axioma's source code. On the contrary, the court stated, MSCI was entitled simply to learn whether defendants had misappropriated its

2. Defendants cross-moved, among other things, to compel MSCI to produce all versions of its source code; MSCI does not appeal from the court's determination on the cross motion.

code, and it was able to make that determination with the 14 months of code that defendants had already deposited with the third-party neutral. The motion court therefore held that defendants had satisfied their obligation by disclosing 5,552 versions of its source code for the 14-month period. We disagree.

New York strongly encourages open and full disclosure as a matter of policy (see *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]). To that end, CPLR 3101 (a) provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.”

A trial court is vested with broad discretion in its supervision of disclosure (*148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 [1st Dept 2009]; *Matter of American Home Prods. Corp. v Shainswit*, 215 AD2d 317 [1st Dept 1995]). Indeed, “deference is afforded to the trial court’s discretionary determinations regarding disclosure” (*Don Buchwald & Assoc. v Marber-Rich*, 305 AD2d 338, 338 [1st Dept 2003] [internal quotation marks omitted]). However, “[t]his Court is vested with the power to substitute its own discretion for that of the motion court, even in the absence of abuse” (*Estate of Ungar v Palestinian Auth.*, 44 AD3d 176, 179 [1st Dept 2007]). We have observed that we “rarely and reluctantly invoke” our power to substitute our own discretion for that of the motion court (*id.*). We find that this case presents one of those rare instances in which we are compelled to substitute our discretion for that of the motion court.

To begin, the CSO does not provide for merely a single production of source code to the third-party neutral. Rather, it provides that the parties will deposit “all versions” of the relevant source code “created from inception in buildable, runnable” format. Nothing in this language suggests that defendants’ obligation will be discharged by a single delivery of source code. Indeed, neither party disputes that counsel for both sides spent several months negotiating the CSO and that the document went through numerous drafts and revisions. Surely, had defendants wished to specify that they would make a single delivery of source code, they could have insisted upon a single delivery date. They did not do so; rather, they agreed to deliver “full copies” and “all versions” of the relevant source code.

In addition, MSCI’s expert stated that without versions of the code made after April 3, 2012, he could not provide a meaningful comparison of the parties’ respective source codes so as to determine misappropriation, because Axioma’s code as of April 3, 2012 was in a nascent state. The expert asserted that as a result he was limited as to the information he could glean

regarding the overall architecture and functionality of Axioma's code. Thus, he stated, later versions of the code were crucial to his analysis, because they reflected a more complete and closer-to-final version of Axioma's MAC product. Indeed, the dissent inaccurately characterizes the affidavits by MCSI's expert. Far from suggesting that he is on a "fishing expedition," the expert makes clear that post-April 3, 2012 versions of defendants' source code are necessary for an accurate analysis of whether defendants misappropriated MSCI's trade secrets. Similarly, the expert's opinion is not based on mere speculation. Rather, he states that the versions of the source code already deposited "strongly suggest[] that the majority of development of Axioma's MAC [p]roduct actually occurred in the versions of source code created or modified after April 3, 2012."

The record provides no basis for summarily rejecting the expert's assertions in that regard. Indeed, defendants' expert affidavit merely stated in a conclusory fashion that MSCI's expert could adequately analyze the misappropriation issue without the updated source code. Our conclusion that Axioma must produce post-April 3, 2012 code holds particularly true in light of the policies underlying discovery—namely, to give parties a reasonable opportunity to uncover any available evidence to support their claims (*see Member Servs., Inc. v Security Mut. Life Ins.*, 2007 WL 2907520, *5, 2007 US Dist LEXIS 74047, *13-14 [ND NY, Oct. 3, 2007, Civ Action No. 3:06-CV-1164 (TJM/DEP)]).

Nonetheless, because we have the discretion to set reasonable parameters on discovery, there shall be disclosure of all versions of the source code created, modified, or maintained between April 3, 2012, and the date that Axioma's MAC product is released to the market. Further, disclosure of the post-April 3, 2012 code shall be subject to the protections set forth in the CSO stating that the deposited source code materials are for attorneys' and experts' eyes only. Concur—Moskowitz, Richter and Manzanet-Daniels, JJ.

Acosta, J.P., and Andrias, J., dissent in a memorandum by Andrias, J., as follows: I respectfully disagree with the majority's conclusion "that this case presents one of those rare instances in which we are compelled to substitute our discretion for that of the motion court." Rather, the motion court providently exercised its discretion when it denied, as an unwarranted fishing expedition, plaintiffs' motion to compel the production of additional source code created by defendants more than a year after the alleged misappropriation of plaintiffs' source code took place, where there was only hope and speculation as to what the additional discovery would uncover. Accordingly, I dissent.

In May 2011, plaintiffs commenced this action in which they allege that the individual defendants, while in plaintiffs' employ, misappropriated trade secrets, to wit, the source code underlying several component technologies of their flagship multi-asset class (MAC) risk-analytics software product, and used those secrets to develop a competing MAC software product for defendant Axioma. Among other things, plaintiffs allege that from June to November 2010 the individual defendants developed a plan to take certain intellectual property that they developed while working for plaintiffs to launch a competing business, and that in January and February 2011 they took plaintiffs' source code and algorithms with them to Axioma. Plaintiffs also allege that the individual defendants contemplated a nine-month time frame for building a valuation platform and that such a short time frame "would be impossible absent the misuse and misappropriation of [plaintiffs'] confidential and propriety information, including algorithms and source code."

In September 2011, the parties negotiated and executed a confidentiality stipulation, so-ordered by the court (the CSO), which provided: "35. MSCI, Axioma and Jacob . . . shall deliver to [a neutral] two (2) full copies of the source code for each programs/products/components at issue in this action . . . [and] in development . . . [which] shall include all versions of such source code created from inception in buildable, runnable, native text format and in a file organization that retains the original directory structure of the code and any source code repository; and source code documentation."

The CSO also provided that only the parties' experts would receive or see the material deposited with the neutral.

Defendants subsequently moved to compel plaintiffs to affirmatively identify their trade secrets with sufficient particularity, as demanded in defendants' interrogatories, and for a protective order relieving defendants of their obligation to produce Axioma's source code until plaintiffs complied. A compliance conference order entered March 30, 2012, directed the parties to submit briefs on the trade secrets issue and directed Axioma to "deposit source code with [the neutral] as soon as reasonably possible." On April 4, 2012, Axioma deposited with the neutral 5,552 unique historical versions of its source code that had been created or modified during the 14-month period between February 24, 2011 and April 3, 2012.

By orders entered April 23, 2012 and on or about July 9, 2012, the court directed plaintiffs to identify their trade secrets with reasonable particularity. By order entered on or about November 21, 2012, the court adopted the report of a court-appointed

expert stating that plaintiffs' second supplemental interrogatory response, served on August 27, 2012, identified certain of their trade secrets with reasonable particularity, and was insufficient in other respects. Meanwhile, by so-ordered stipulation entered on or about September 27, 2012, the parties agreed that the neutral should release each side's source code to the other's expert, which was done on or about October 4, 2012.

In a compliance conference order entered March 21, 2013, the court directed plaintiffs, among other things, to deposit their source code in buildable and runnable form, as required by the CSO; identify those lines of the source code that they claimed Axioma had misappropriated; and respond to defendants' outstanding document demands. Rather than comply, plaintiffs moved for a protective order and to compel Axioma to produce "all versions" of its source code. Defendants cross-moved to compel plaintiffs to fulfill their outstanding discovery obligations.

At oral argument, the court rejected plaintiffs' contention that it was entitled to a continuous updating of Axioma's source code for the life of the case as contrary to paragraph 35 of the CSO and as nothing more than a "fishing expedition." Thus, the court found that defendants complied with their discovery obligations when Axioma deposited over 5,000 versions of its source code for a 14-month period—including the four-month period preceding the commencement of this lawsuit and the 10-month period thereafter.

The court then issued the order on appeal, entered August 15, 2013, in which it denied plaintiffs' motion "in regard to directing Axioma to continue to turn over new code beyond the 14 months already turned over"; denied plaintiffs' request for a stay of its discovery obligations; and granted defendants' cross motion by requiring plaintiffs to deposit its source code in buildable, runnable format and to respond to defendants' interrogatories and discovery requests, as required in the March 21, 2013 order. The court also issued a separate compliance conference order, requiring, among other things, that plaintiffs respond to the interrogatories and discovery requests by September 13, 2013, and turn over the buildable, runnable source code by September 30, 2013; that all depositions be completed by January 31, 2014; and that the note of issue be filed by April 4, 2014.

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." In determining when disclosure is appropriate, "[t]he test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "Although

the scope of discovery under CPLR 3101 is to be construed liberally, where discovery of trade secrets is sought, the party seeking disclosure must show that the information demanded appears to be indispensable to the ascertainment of truth and cannot be acquired in any other way” (*Carecore Natl., LLC v New York State Assn. of Med. Imaging Providers, Inc.*, 24 AD3d 488, 489 [2d Dept 2005] [internal quotation marks omitted]). When viewed in light of these principles, I find that the motion court properly denied plaintiffs’ motion to compel the perpetual production of highly sensitive trade secret source code created by Axioma from April 4, 2012 through the life of this action, a time period beyond that alleged in the complaint, which identified the period of misappropriation as from June 2010 through March 2011.

Contrary to the majority’s view, the motion court reasonably concluded that paragraph 35 of the CSO required a single production of source code to the neutral, which was to include all of the code’s previous versions, and that it did not create a continuing obligation to produce every future iteration of the code. This interpretation is consistent with the court’s March 30, 2012 compliance order, which required Axioma to deposit source code with the neutral “as soon as reasonably possible.” Defendants complied with this obligation, producing 5,552 versions of its source code, as well as 24,391 “offline” source code documents.

Nor do I agree with the majority’s finding that defendants’ expert affidavit established the need for production of all versions of defendants’ source code made until the date that Axioma’s MAC product is released to the market. In seeking additional discovery of source code, plaintiffs’ expert only speculated that “in the event Defendants altered Axioma’s source code in an effort to disguise its use of MSCI’s trade secrets,” those changes would appear in later versions of the code. Indeed, with respect to common code in the parties’ respective products, the expert acknowledged that his review to date revealed only that “some of these files were third-party created, ‘off the shelf,’ source code files.” The expert could only speculate that “there may also be source code files created and developed by Axioma’s employees outside of Axioma’s Subversion system, and then added into the system in final form,” and plaintiffs presented no evidence to suggest that this scenario had in fact occurred.

The majority finds that plaintiffs’ expert’s opinion is not speculative because “he states that the versions of the source code already deposited ‘strongly suggest[] that the majority of

development of Axioma's MAC [p]roduct actually occurred in the versions of source code created or modified after April 3, 2012.' " However, the expert's conclusion was based on the fact that "the first 140 'versions' Defendants deposited include less than 200 source code files out of the total 2,167 unique source code files Axioma deposited [and] [t]he first 1700 versions contain less than half of all the source code files deposited." Defendants produced 5,552 versions, and the expert did not address what the latter 3,852 versions contained.

Further, although the majority cites plaintiff's expert's statement that the code produced by defendants was in its "nascent state," defendants' expert stated that his "initial analysis of Axioma's Deposited Source Code indicates that it is a complete and usable source code repository that was created in the normal course of the actual software development at Axioma." While defendants' expert acknowledged that there were occasions where larger than average amounts of new source code were added to the Axioma project in a relatively short period of time, which could indicate that the source code originated in other places, he explained that "[u]pon further inspection, each of these periods of interest related to the introduction and use of third-party, off-the-shelf source code libraries."

In sum, the motion court, which was intimately familiar with the discovery issues in the case, providently balanced plaintiffs' need for production of additional source code against the need to protect defendants from a fishing expedition that would allow plaintiffs to monitor the development of Axioma's new product, after it became apparent that discovery to date did not support plaintiffs' misappropriation claims as alleged in the complaint. As the court stated at oral argument, plaintiffs' theory that updated source code may provide evidence that Axioma somehow successfully concealed its misappropriation in the 5,552 versions of source code already deposited is "a great leap," based upon mere speculation, without a factual predicate for the requested additional discovery (*see Viacom Intl. Inc. v Youtube Inc.*, 253 FRD 256, 260 [SD NY 2008] ["YouTube and Google should not be made to place this vital asset in hazard merely to allay speculation. A plausible showing that YouTube and Google's denials are false . . . should be required before disclosure of so valuable and vulnerable an asset is compelled"]).

The fact that the CSO calls for production to a neutral and review by plaintiffs does not justify continuous production of Axioma's post-April 3, 2012 source code. Careful and extensive confidentiality provisions are "not as safe as nondisclosure [and] [t]here is no occasion to rely on them, without a preliminary

proper showing justifying production of the search code” (*Viacom*, 253 FRD at 260).

Accordingly, I would affirm the denial of plaintiffs’ motion to compel.

3 LISA BEST, Respondent, v TISHMAN CONSTRUCTION CORPORATION OF NEW YORK et al., Respondents-Appellants. TISHMAN CONSTRUCTION CORPORATION OF NEW YORK et al., Third-Party Plaintiffs-Respondents-Appellants, v SOLAR ELECTRIC SYSTEMS, INC., Third-Party Defendant-Appellant-Respondent, et al., Third-Party Defendant. [993 NYS2d 16]—

Labor—Safe Place to Work—Industrial Code Violations—Trip over Electrical Cord in Passageway

Indemnity—Contractual Indemnification—Summary Judgment

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 25, 2012, which, to the extent appealed from as limited by the briefs, granted defendants’ motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims, denied summary judgment as to the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code (12 NYCRR) § 23-1.7 (e) (1) and (2), denied defendants’ motion for summary judgment on their third-party claim for contractual indemnification against third-party defendant Solar Electric Systems, Inc. (Solar), and denied Solar’s cross motion for summary judgment dismissing the third-party complaint as against it, unanimously modified, on the law, to grant defendants conditional summary judgment on their third-party claim for contractual indemnification against Solar, and otherwise affirmed, without costs.

Supreme Court properly denied the motions for summary judgment dismissing plaintiff’s cause of action under Labor Law § 241 (6). Defendants failed to demonstrate, with respect to the Labor Law § 241 (6) claim, that 12 NYCRR 23-1.7 (e) (1) is inapplicable to this case, given plaintiff’s testimony that she tripped over the electrical cord in the passageway (*see Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]). Contrary to defendants’ contention that the accident occurred in an open working area rather than a passageway, plaintiff and a Solar supervisor described the area as a small hallway or corridor. Defendants also failed to show that the cord did not constitute scattered materials for purposes of 12 NYCRR 23-1.7 (e) (2). Contrary to defendants’ argument, the evidence does not show that the cord was not left there by another trade that had departed before the accident occurred (*see Kutza v Bovis Lend Lease LMB, Inc.*, 95 AD3d 590 [1st Dept 2012]).

Supreme Court also properly granted summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action to the direct defendants (the project's owner and construction manager), which did not exercise supervisory control over the work.

Third-party defendant Solar is obligated by its contract to indemnify defendants, among others, for suits or costs arising from its work, except to the extent the damage in question was attributable to defendants' fault. While Supreme Court properly denied Solar's cross motion for summary judgment dismissing the third-party complaint, it erred to the extent it denied defendants conditional summary judgment on their third-party claim for contractual indemnity for any judgment plaintiff may recover. In view of the dismissal of the common-law negligence and Labor Law § 200 causes of action, any liability that may be imposed on defendants in this action will be vicarious pursuant to Labor Law § 241 (6), and there will be no bar to their recovery of complete indemnification pursuant to Solar's contract. Contrary to Solar's argument, Supreme Court's March 5, 2010 order in the action brought by defendants for, inter alia, a declaration that Solar had a duty to indemnify and defend them (*see National Union Fire Ins. Co. of Pittsburgh, Pa. v Great Am. E&S Ins. Co.*, 86 AD3d 425 [1st Dept 2011]) is not res judicata as to defendants' third-party claims against Solar, since the prior order did not address those claims on the merits (*see Langhorst v Guzzardo*, 156 AD2d 272 [1st Dept 1989]). Concur—Mazzarelli, J.P., Friedman, DeGrasse, Richter and Manzanet-Daniels, JJ.

4 WALLY G., an Infant, by His Mother and Natural Guardian, YOSELIN T., Appellant, v NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (METROPOLITAN HOSPITAL), Respondent. [992 NYS2d 232]—

Municipal Corporations—Notice of Claim—Late Notice—Medical Records Did Not Put Hospital on Notice of Alleged Medical Malpractice—Infant's Condition Consistent with Premature Birth Rather than Malpractice

Order, Supreme Court, New York County (Douglas E. McKeon, J.), entered on or about November 21, 2012, which granted plaintiff's motion to reargue, and upon reargument, adhered to its prior order, entered on or about January 26, 2012, denying plaintiff's motion for leave to serve a late notice of claim, and granting defendant's cross motion to dismiss the complaint, affirmed, without costs. Appeal from the January 26, 2012 order, dismissed, without costs.

In this action for medical malpractice, in which the infant

plaintiff seeks to recover for injuries he suffered after being born at 27 weeks' gestation, the motion court considered the pertinent statutory factors and properly exercised its discretion in denying plaintiff's motion (General Municipal Law § 50-e [5]). The infant plaintiff's mother's excuses that she was unfamiliar with the requirement that she file a notice of claim, and that she was unaware that her son's injuries were caused by defendant Health and Hospital Corporation's (HHC) malpractice, are not reasonable. Nor is her attorney's assertion that he waited to make the motion until approximately three years and ten months after filing the untimely notice of claim because he needed to receive the medical records from HHC (*see Basualdo v Guzman*, 110 AD3d 610, 610 [1st Dept 2013]).

Further, the medical records demonstrate that the infant plaintiff's condition and prognosis are consistent with his premature birth and do not suggest any injury attributable to the hospital staff's malpractice (*see Torres v New York City Health & Hosps. Corp. [Lincoln Hosp.]*, 101 AD3d 463, 463 [1st Dept 2012], *lv denied* 21 NY3d 860 [2013]). Moreover, plaintiff failed to demonstrate that the medical records put HHC on notice that the alleged malpractice would subsequently give rise to brain damage as a result of birth trauma and hypoxia or that he would subsequently develop other deficits, delays, and disorders (*see Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538, 538-539 [1st Dept 2010], *lv denied* 17 NY3d 718 [2011]).

Significantly, plaintiff's experts do not claim that the extreme prematurity of his delivery (during the seventh month of gestation) was attributable to any fault on HHC's part. In fact, plaintiff's experts opine that the cesarean section delivery should have been performed even earlier than it was. In view of the fact that plaintiff's injuries are typical of children born as prematurely as he was, as well as HHC's undisputed lack of fault for the necessity of a preterm delivery, we, like the motion court, are not persuaded by plaintiff's argument, accepted by the dissent, that the medical records put HHC on notice that plaintiff's injuries may have been caused by the alleged deviations from the standard of care that plaintiff's experts perceive to be documented in the record, rather than by the unavoidable necessity of delivering the child only 27 weeks into the pregnancy. Plaintiff's experts, although claiming to identify deviations from the standard of care in the record, fail to articulate any basis for determining the extent to which plaintiff's deficits were caused by the alleged deviations, as opposed to the unavoidable preterm delivery. Given that the medical records,

even as interpreted by plaintiff's experts, do not yield a nonspeculative basis for determining whether the deficits of this prematurely born child would have been less severe absent the alleged deviations, it cannot be said that the medical records put HHC on notice of the claim. As the motion court correctly stated: "There is insufficient evidence to support the finding that the infant's condition upon delivery and the subsequent issues that developed during his admission to the [neonatal intensive care unit] were caused by any malpractice as opposed to the infant's extremely premature birth, which could not have been avoided."

Finally, plaintiff's infancy carries little weight since there is no connection between the infancy and the delay (*see Rodriguez*, 78 AD3d at 539). Concur—Tom, J.P., Friedman and Andrias, JJ.

Acosta and Richter, JJ., dissent in a memorandum by Acosta, J., as follows: This appeal involves the propriety of denying a motion for leave to file a late notice of claim, made pursuant to General Municipal Law § 50-e (5) in a medical malpractice action against defendant New York City Health and Hospitals Corporation (HHC or Metropolitan Hospital), in which it is alleged that the medical staff failed to properly render both prenatal and postnatal care to the infant plaintiff and to properly manage his mother's labor and delivery at 27 weeks' gestation. Plaintiff argued that HHC acquired actual knowledge of the essential facts constituting the claim within 90 days of the alleged malpractice, or a reasonable time thereafter, because the facts constituting the alleged departures from good and accepted standards of care were explicitly documented in the medical records. In particular, plaintiff asserted that the mother had a labor and delivery complicated by placental abruption,¹ chorioamnionitis,² and fetal tachycardia,³ and that after the infant suffered a grade III intraventricular hemorrhage, he "was referred directly to the developmental clinic and early intervention," explicitly demonstrating that the hospital staff was on notice of the injury. I agree with plaintiff and would therefore reverse.

Background

The infant plaintiff was born on June 15, 2005. Pursuant to General Municipal Law § 50-e (1), plaintiff was required to serve

1. Placental abruption is the premature separation of the placenta from the uterine wall prior to delivery, which compromises the ability of the placenta to supply the fetus with oxygenated blood.

2. Chorioamnionitis is an infection of the placental membranes which compromises the ability of the placenta to supply oxygen to the fetus.

3. Tachycardia is defined as an excessively rapid heartbeat.

a notice of claim on HHC by November 8, 2005 (90 days after the child's discharge from the hospital). Plaintiff served an untimely notice of claim by letter dated January 16, 2007. This action was commenced when plaintiff filed the summons and complaint on August 4, 2008, which was within the statute of limitations, as tolled by CPLR 208. On December 9, 2010, plaintiff sought an order deeming his previously served notice of claim timely nunc pro tunc, or for leave to file a late notice of claim. The motion court denied plaintiff's request and granted defendant's cross motion to dismiss.

The infant plaintiff suffers from cerebral palsy, seizures, hemiparesis, and speech and cognitive defects. His mother avers that his current condition is the result of defendant's failure to both timely deliver the infant in the face of evidence of placental abruption, infection, and fetal distress, and to properly monitor and treat respiratory distress in the newborn.

Specifically, the infant's mother stated that, prior to her son's birth, she had been bleeding vaginally for weeks and was "passing large clots of blood." Although her doctors had mentioned that it might be due to an abruption, they decided that it was not and told her to return if the bleeding became worse.

Dr. Stuart Edelberg averred, to a reasonable degree of medical certainty, that after reviewing the infant plaintiff's medical records it was his opinion that departures from good and accepted medical practice by HHC's hospital staff were a proximate cause of the infant plaintiff sustaining hypoxic-ischemic brain injury by placental abruption and chorioamnionitis. He also opined that the child's "[p]rolonged exposure to cytokines in utero further contributed to [his] fetal brain injury."

Dr. Edelberg averred that the medical records demonstrated that the mother's prenatal care "was complicated by the fact that she was a type 1 diabetic with a history of prior preterm birth in March of 2002 at 29 weeks and a miscarriage at 5 weeks in October of 2003." He also stated that the hospital staff was on notice that the mother "was at risk for complication by excessive bleeding," because her "prior preterm delivery was associated with 'bleeding complications.'"

Hospital records indicate that on May 24, 2005, the mother went to HHC, and according to a triage note, "bleeding ha[d] been ongoing for two days and [wa]s significant for bright red blood with small pink clumps of tissue." The staff discharged the mother after determining that the "vaginal spotting" was "most likely [secondary] to [a] low-lying placenta" and that she should "return to [the] hospital if [there was] increased bleeding." The mother returned to the hospital seven hours later, af-

ter experiencing “pelvic pain and a gush of red blood at home.” A “sterile speculum examination” was performed, which revealed that “the cervical os appeared closed and [that there was] a small 5 cc clot . . . in the vault” with “a subsequent rush of clear fluid which was interpreted as [a] rupture of [the] membranes.” The admission assessment was “vaginal bleeding, rule out placental abruption, preterm premature rupture of membranes,” and the plan included “antibiotics and dexamethasone to facilitate fetal lung maturity.”

A subsequent attending note taken that same day, however, set forth a differential diagnosis of a partial abruption. According to Dr. Edelberg, since placenta previa was effectively ruled out by sonogram on May 24, 2005, the cause of the bleeding and passage of clots was a placental abruption, which was confirmed on the day the infant plaintiff was born, as noted, June 15, 2005. Although the consulting physician’s opinion was that there was no abruption, the consult does not set forth the reasoning for that opinion other than by reference to a sonogram, which, according to Dr. Edelburg, is insufficient to rule out an abruption and “ignored the clear clinical evidence of abruption in the form of chronic bleeding and passage of clots” and the fact that the mother complained of back and abdominal pain. Based “on the symptoms,” Dr. Edelburg opined that the mother had been exhibiting “an ongoing worsening chronic abruption” since May 24, 2005.

Dr. Edelberg averred that on May 25, 2005, blood clots were observed and the mother reported pelvic and back pain, which are symptoms of placental abruption. A sterile speculum exam revealed that the cervix was not dilating. The neonatologist discussed the risks of premature birth with the mother.

On May 26, 2005, the mother “reported a loss of fluid and [a] foul smelling discharge, indicative of infection, while she continued to complain of back pain.” On May 29, 2005, the mother was stable enough that hospital staff contemplated transferring her to the labor and delivery unit. However, the mother “left the hospital against medical advice” and staff “advised [her] to return in 48 hours for evaluation.”

On May 31, 2005, the mother returned to the hospital and reported that she had been vaginally bleeding since the previous afternoon. A speculum examination revealed blood in the vaginal vault; the cervical os appeared closed and long. A sonogram revealed that placenta previa was not the cause of the mother’s bleeding, and the fetus appeared to be doing well. A perinatal consult opined “that there was no evidence of abruption” and the mother “was discharged on ampicillin for [a] pos-

sible urinary tract infection, with instructions to return to the clinic in 2 weeks, or if symptoms recur.”

According to Dr. Edelberg, given the mother’s history and clinical signs of abruption, hospital staff departed from good and accepted standards of care, by discharging her on May 31, 2005, and that instead she should have been admitted to the hospital for close monitoring and observation. Moreover, “[v]aginal infection can and in this instance did lead to premature labor and the development of chorioamnionitis.”

On June 4, 2005, the mother appeared at the hospital and told staff that she had been bleeding vaginally for one week. There was decreased fetal movement, and positive maternal weakness and dizziness. Although a vaginal exam did not reveal any active bleeding, clots were found in the mother’s vagina. Although “[t]he diagnosis of the hospital staff was intrauterine pregnancy at 25 weeks with possible chronic placental abruption,” Dr. Edelburg opined that the hospital departed from good and accepted practice by sending the mother home and telling her to follow up with the clinic, because her “presenting symptoms indicated placental abruption and maternal infection, both of which required close monitoring, particularly at 25 weeks gestation.” Moreover, the doctor asserted that at “some point[,] chronic placental abruption will result in a reduced flow of oxygenated blood” from the mother to the fetus, “causing a hypoxic ischemic event,” which “the labor and delivery record reveals . . . was the case.”

On June 14, 2005, the mother returned to the hospital and “presented with a history of vaginal bleeding and clots in the vagina and a history of chronic bleeding.” However, she was sent home with an instruction to return if the bleeding increased.

On June 15, 2005, the day the infant plaintiff was born, the mother was admitted to the hospital at 1:00 p.m., and “presented with a history of abdominal pain with vaginal bleeding with passage of clots for one day.” The mother was noted as being “a class D diabetic since age 6 being treated with glyburide.” “A speculum exam was conducted and large clots were noted; a pelvic exam revealed [that the mother] was 4 cm dilated, 50% effaced and at -3 station.” The mother’s temperature was “elevated” at 100.7 degrees, and the fetal heart rate was at 150 to 160 beats per minute, both of which are “symptomatic of chor[i]oamnionitis.”

Dr. Edelberg averred that fetal tachycardia was evidence of fetal distress and that it was documented in the records on June 15, 2005, because the heart rate was “at the level of 180

beats per minute.” There was also evidence of fetal distress in the form of decelerations of the fetal heart rate and “[a]ll of these findings are caused by an ongoing and worsening hypoxic ischemic insult to the fetal brain as a result of the placental abruption and chorioamnionit[is].”

After the infant plaintiff was born, he was assigned Apgar scores of 5 at one minute and 7 at five minutes, but no breakdown of those scores was provided. Testing indicated “a chronic hypoxic ischemic process requiring the exhaustion of the body’s reserves to counteract acidosis” and “a depressed neonate . . . as a result of chorioamnionitis and placental abruption, both of which affect the ability of the placenta to oxygenate the fetus, superimposed on prematurity (the infant being approximately 27 weeks gestation).”

Dr. Edelberg opined that the mother should have been prepared for emergency cesarean section and her infant delivered no later than 1:30 p.m., given her obstetrical history, the tentative diagnosis arrived at on June 4, 2005, and her presentation on June 15, 2005 with increased symptoms such as passing large blood clots. Although “the decision to deliver by cesarean section due to placental abruption and probable chorioamnionitis was made at 3:45 p.m., . . . delivery was not accomplished until 4:38 p.m.,” which “[p]rolonged exposure to cytokines in utero [and] further contributed to [the child’s] fetal brain injury.”

Dr. Rosario R. Trifiletti averred that on June 23, 2005, the infant plaintiff was diagnosed with an intraventricular hemorrhage (IVH), which was “consistent with a significant hypoxic ischemic insult.” “The clinical and radiological observations, particularly the intraventricular hemorrhage observed in the first days of life, established conclusively the existence of a neonatal neurological syndrome as a result of hypoxia/ischemia and hypocarbia.” Moreover, according to Dr. Trifiletti, the child’s lack of spontaneous respiratory effort indicated that the Apgar scores were inaccurate and overly optimistic, because the clinical picture indicated a severely depressed neonate with no ability to breathe on his own, which is also consistent with in utero hypoxic ischemic insult. At roughly seven months of age, the child was diagnosed with seizures at HHC.

Dr. Trifiletti opined that to a reasonable degree of medical certainty, the infant plaintiff “suffers from neurological and cognitive deficits,” which “were the result of hypoxia/ischemia, or oxygen deprivation, in utero and exposure to cytokines” and that he had “a form of cerebral palsy known as hemiparesis.” According to Dr. Trifiletti, since the “causal relationship be-

tween chorioamnionitis and brain injury is well established,” “the Metropolitan Hospital staff, who made an explicit diagnosis of chorioamnionitis, were absolutely on notice that the infant had a significantly increased likelihood of having suffered brain injury.” He also opined that “[i]n view of the severe intraventricular hemorrhage, there is no doubt that the Metropolitan staff was on notice that this infant had suffered a significant neurological injury,” and that “the issue of subsequent neurological sequelae was explicitly discussed with the parents after the diagnosis of the grade III IVH.” He additionally opined that the child’s seizures were “caused by the hypoxic ischemic insults to the brain.”

Dr. Trifiletti opined that the infant plaintiff’s cytokine exposure and in utero hypoxia ischemia were the result of HHC’s staff’s negligent failure to timely deliver the infant by cesarean section, despite the presence of chorioamnionitis and placental abruption. The further hypoxic ischemic insult, which occurred during the newborn period, was the result of the staff’s negligent failure to provide immediate adequate respiratory support by ventilation through intubation. Thereafter, the child was overventilated, causing him to develop hypocarbia and associated decreased cerebral blood flow, and the medical records document facts that put the hospital staff on notice that he had suffered an injury to the brain during the perinatal and neonatal period and that his injuries would lead him to suffer from motor and cognitive deficits.

Dr. Stuart Danoff opined, to a reasonable degree of medical certainty, that there were departures from good and accepted medical practice by HHC’s staff that were a proximate cause of infant plaintiff sustaining a brain injury.

Dr. Danoff averred that the infant plaintiff’s “Apgar scores are variously described as 5 at one minute and 7 at five minutes in the obstetrical record . . . and 6 at one minute and 8 at five minutes in the newborn record,” which are “contradictory on its face.” Moreover, “no breakdown is provided as to what scores were assigned for individual categories in either the obstetrical or newborn record,” which was “a departure from good and accepted standards of care [and] contributed to the inadequate resuscitative measures undertaken.”

According to Dr. Danoff, when the infant plaintiff was born, given his “prematurity and fetal distress, it was extremely likely that [he] would require a significant degree of resuscitative intervention,” and “he should have been intubated within one minute and placed on mechanical ventilation as quickly as practicable.” However, when the baby was born with “a

complete absence of respiration,” hospital staff improperly oxygenated him, and he was not placed on a mechanical ventilator until 22 minutes after his birth (i.e., 5:00 p.m.), after they twice attempted and failed to resuscitate him with efforts they should have known would fail.

Dr. Danoff averred that the failure of HHC’s staff to timely intubate the infant plaintiff caused him “to suffer [from] a . . . lack of oxygen,” and that at birth, the child “was suffering from a metabolic acidosis as a result of an in utero hypoxic event.” He opined that “minutes of hypoxia can and did cause brain damage” to the child.

According to Dr. Danoff, after HHC’s staff “fail[ed] to adequately oxygenate and resuscitate” the infant plaintiff following his delivery, they further departed “from good and accepted standards of care by overventilating” him, “causing him to suffer hypocarbia and diffuse brain injury.” The medical records demonstrate that by June 23, 2005, HHC was “plainly aware that the infant had likely suffered a brain injury,” because “a repeat sonogram show[ed] a bilateral ventricular hemorrhage with post hemorrhagic ventriculomegaly,” which “was characterized as a grade III intraventricular hemorrhage.” Moreover, the June 27, 2005 attending note stated that the “[c]ondition of the baby [was] discussed with both parents about the IVH which the baby has and the possible outcome and [possible] neurological sequelae.”

In its cross motion to dismiss, HHC argued, among other things, that plaintiff’s expert affidavits should be disregarded, because they failed to address whether the infant plaintiff’s medical records provided HHC with actual notice of negligent conduct, but rather simply claimed that HHC’s records showed that it inflicted injury upon the child. HHC additionally argued that the child’s medical records documented that his premature delivery could not have been avoided and that his condition upon delivery and the subsequent issues that developed during his admission to the NICU were caused by his extremely premature birth.

In support of its motion, HHC annexed the expert affidavits of Dr. Adiel Fleischer and Dr. Walter Molofsky. Dr. Fleischer opined that the infant plaintiff’s medical records demonstrated to a reasonable degree of medical certainty that Metropolitan Hospital’s staff rendered care and treatment that was at all times within accepted standards of medical care and that no acts or omissions caused any of the child’s alleged injuries. He also opined that the medical records do not provide HHC with notice that its staff was negligent in providing the child with

medical treatment. He additionally opined that it was not a departure from good and accepted medical practice to discharge the mother in light of her episodes of vaginal bleeding and that everything had been done to rule out a possible placental abruption prior to her delivery.

According to Dr. Fleischer, even assuming there was an abruption, admitting the mother to the hospital would not have stopped it from occurring. There was no specific treatment mandated prior to delivery and even if the mother was admitted, she would have undergone the same course. At all times the infant plaintiff's "condition was being monitored and at no time was there any indication of fetal distress." Moreover, "[t]he tracings do not demonstrate any ominous signs and they [we]re overall reassuring."

According to Dr. Fleischer, "[s]ince there was absolutely no signs of fetal distress, a cesarean section did not need to be performed on a 'STAT' basis." Once there was a suspicion of chorioamnionitis and once tachycardia was evident, the staff appropriately scheduled and performed a timely cesarean section and the infant plaintiff "delivered with Apgars of 6 and 8 (or 5 and 7 as also noted), weighing 990 grams," which is "not abnormal for a fetus born at approximately 26 weeks."

Dr. Fleischer opined that the hospital records do not indicate that the infant suffered injury due to "placental abruption, fetal distress or a delay in delivery" and that there are no indications of any negligent act or omission by HHC's staff.

Dr. Molofsky opined that there were no departures from good and accepted medical practice in the management of the mother's labor, delivery care, and treatment, and that there was no documentation in the hospital chart that provided HHC with notice that its staff had negligently provided treatment to the child.

Dr. Molofsky averred that although the child "was born small, he was appropriate for his gestational age." The child's Apgar scores "were also acceptable as most premature babies will not be vigorous or pink." Moreover, "[a]lmost every premature baby has apnea, regardless of the propriety of care rendered, because the last system to fully develop in a fetus is the control of breathing," and apnea "is expected in premature infants."

Dr. Molofsky averred that the infant plaintiff was diagnosed with a grade III intraventricular hemorrhage and that "almost every premature baby of this size develops some degree of bleeding and it is not indicative of fetal distress," and it "cannot be prevented" and "usually develops within 96 hours of life" (emphasis omitted). When the child was diagnosed with autism

on July 8, 2008 by one of his physicians, the diagnosis was “not secondary to a brain injury” and his “functional level is not related to his diagnosis of autism” (emphasis omitted).

Dr. Molofsky opined that “the infant experienced complications due to his premature birth and that this does not serve to alert [HHC] that he would develop any conditions now alleged to be the result of negligence in his perinatal care and treatment.” The child’s “developmental delays and resultant deficits were related to him being born at approximately 26+ weeks and . . . there was no evidence that the infant sustained hypoxic ischemic encephalopathy,” nor was there evidence that any of the infant’s respiratory issues or development of an IVH were related to placental abruption.

In reply, Dr. Edelberg opined, among other things, that the chronic bleeding the mother experienced between May 31, 2005 and June 15, 2005 “was caused by and evidence of a chronic placental abruption.” Although the abruption itself may not have been treatable or preventable, the injury to the fetus caused in part by the abruption was preventable by timely delivery.

Dr. Trifiletti averred that Apgar scores of 6 and 8 are not normal findings for a newborn, even a premature newborn, and indicated neonatal depression as a result of fetal distress, as did the cord blood gas analysis, which indicated acidosis as a result of in utero hypoxia/ischemia. Further, the doctor asserted, the child’s prematurity made it predictable that resuscitation by “PEEP and PPV” would be ineffective, and such efforts caused the staff to delay intubation until 4:55 p.m. According to Dr. Trifiletti, Dr. Molofsky’s opinion that intubation was timely ignores the facts preserved in the medical record.

Dr. Trifiletti averred that his experience did not support the assertion that almost every infant of the infant plaintiff’s size experiences some degree of bleeding, nor did the medical literature, which states that the vast majority of infants born prior to 35 to 36 weeks do not experience bleeding in the brain and that appropriate intervention after delivery could have prevented or reduced the injury to the child’s brain.

Analysis

“In determining whether to grant [an] extension [to file a late notice of claim], the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one of [General Municipal Law § 50-e] or within a reasonable time thereafter” (General Municipal Law § 50-e [5]; *see also*

Perez v New York City Health & Hosps. Corp., 81 AD3d 448 [2011]). In addition to actual knowledge of essential facts, the court should also consider “whether the claimant is an infant, whether there exists a reasonable excuse for the failure to serve the notice timely and whether the delay in serving the notice would substantially prejudice the municipality in its defense” (*Perez*, 81 AD3d at 448, citing *Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 535 [2006], and *Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [2003]; see also General Municipal Law § 50-e [5]). “[T]he presence or absence of any one factor is not determinative” (*Dubowy*, 305 AD2d at 321), and since the notice statute is remedial in nature, it should be “liberally construed” (*id.*).

Here, contrary to the majority’s opinion, the hospital chart demonstrates that HHC had actual notice of the essential facts constituting the claim within 90 days of accrual or a reasonable time thereafter, as required by General Municipal Law § 50-e (5). Notably, the medical records need not conclusively document that malpractice caused the injury. Rather, they merely need to *suggest* injury attributable to malpractice (*Williams*, 6 NY3d at 537). The medical records in the present case document that the infant plaintiff’s mother suffered a placental abruption and chorioamnionitis, and that the infant plaintiff suffered a grade III intraventricular hemorrhage. After reviewing the medical records, plaintiff’s experts averred that the hospital staff deviated from the standard of care. There was, according to plaintiff’s experts, an obvious urgency to deliver by emergency cesarean section.

The defendant’s delay in performing an emergency cesarean section and in providing immediate ventilation through intubation, and its discussion of subsequent neurological sequelae with the parents after the diagnosis of the grade III IVH, while not dispositive, suggest injury attributable to medical malpractice (see *Castaneda v Nassau Health Care Corp.*, 89 AD3d 782, 783 [2011] [holding that the defendants had actual knowledge of the essential facts constituting the claim because the medical records provided knowledge of the facts and suggested injury attributable to malpractice]). Thus, contrary to the majority’s opinion, plaintiff’s experts showed that plaintiff’s injuries resulted from medical malpractice notwithstanding the premature birth.

The fact that defendant’s experts have provided a different interpretation of the medical records does not show that the hospital lacked actual knowledge of the records. Instead, it shows that there is an issue as to the merits of the claim. Indeed,

the motion court acknowledged that the conflicting expert testimony would have precluded a motion for summary judgment.

In addition, defendant was not substantially prejudiced by the delay. Indeed, unlike the defendant in *Williams*, who was prejudiced by a 10-year delay (6 NY3d at 539), defendant in the present case was not substantially prejudiced by a 14-month delay. Once a municipal body receives a notice of claim, it has actual notice that a lawsuit is likely to follow and it should begin its investigation and preserve evidence, even if the notice of claim is served late and without leave of court (see *Pearson v New York City Health & Hosps. Corp. [Harlem Hosp. Ctr.]*, 43 AD3d 92, 94 [1st Dept 2007], *affd* 10 NY3d 852 [2008]; cf. *Alvarez v New York City Health & Hosps. Corp. [North Cent. Bronx Hosp.]*, 101 AD3d 464, 464 [1st Dept 2012] [no prejudice where “hospital records, which evidence an investigation in the cause of the infant’s condition, provide an extensive paper trail and preserve all of the essential facts relating to this claim” (internal quotation marks omitted)]). The statute “should not operate as a device to defeat the rights of persons with legitimate claims” (*Matter of Annis v New York City Tr. Auth.*, 108 AD2d 643, 644 [1st Dept 1985]).

Defendant asserts that it has been prejudiced by the untimely notice of claim because if it had received timely notice, it would have been able to interview the staff involved while the treatment was “still fresh in their minds.” This claim of prejudice is speculative at best, since the hospital has not illustrated specifically how it has been prejudiced. This court has repeatedly held that assertions of prejudice based solely on the delay in serving the notice of claim are insufficient (*Matter of Lopez v City of New York*, 103 AD3d 567, 568 [1st Dept 2013]; see also *Young v New York City Health & Hosps. Corp.*, 90 AD3d 517, 518 [1st Dept 2011] [holding that the “(d)efendant’s claim that the memories of its employees are no longer at their ‘most fresh’ does not evidence substantial prejudice attributable to the delay”]).

Plaintiff’s infancy also militates in his favor. Although a court is not precluded from examining whether infancy caused the delay in serving the notice, the Court in *Williams* noted that the “Legislature deleted the causation language” in General Municipal Law § 50-e (5) and added the simple fact of infancy as one of the considerations that should be considered (6 NY3d at 538; see also *Bayo v Burnside Mews Assoc.*, 45 AD3d 495, 495 [1st Dept 2007] [where the record demonstrates that the defendant’s possession of the medical records provided actual notice of the facts constituting a claim of medical malpractice, the

infant plaintiff should not be deprived of a remedy]). Thus, although a “delay of service caused by infancy would make a more compelling argument to justify an extension,” the lack of a “causative nexus” is not fatally deficient (*Williams*, 6 NY3d at 538; see also *De La Cruz v New York City Health & Hosps. Corp.*, 13 AD3d 130, 130 [1st Dept 2004] [infant plaintiff should not be penalized for mother’s delay, “where defendant has been in possession of plaintiff’s medical records since the time of the alleged acts of malpractice, and does not show how it has been prejudiced by these delays”])).

Lastly, this Court has repeatedly ruled that lack of a reasonable excuse is not determinative in considering a motion for leave to serve a late notice of claim (see *Alvarez*, 101 AD3d at 465). This is particularly so where the defendant had actual notice of the essential facts and was not prejudiced by the delay (*Matter of Lopez*, 103 AD3d at 568; *Renelique v New York City Hous. Auth.*, 72 AD3d 595, 596 [1st Dept 2010]; see also *Perez*, 81 AD3d at 449 [“The absence of a reasonable excuse for the delay is not, standing alone, fatal to the application, particularly in light of the lack of prejudice to (the) defendant” (citation omitted)])).

Accordingly, I would reverse and remand for further proceedings.

5 DAVID LICHTENSTEIN et al., Appellants, v WILLKIE FARR & GALLAGHER LLP, Respondent, et al., Defendants. [992 NYS2d 242]—

Attorney and Client—Malpractice—Advice Concerning Directors’ Liability to Creditors of Insolvent Corporation was Appropriate at Time of Representation

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about April 25, 2013, which, to the extent appealed from as limited by the briefs, granted the motion by defendant Willkie Farr & Gallagher LLP to dismiss the legal malpractice cause of action pursuant to CPLR 3211 (a) (7), unanimously affirmed, with costs.

Plaintiff David Lichtenstein owns and manages real estate through his entities, plaintiffs The Lightstone Group, LLC and Lightstone Holdings, LLC. In 2007, Lichtenstein and a consortium of investors purchased Extended Stay, Inc. (ESI), which owns and manages hotels. Most of the purchase price was financed through a combination of \$4.1 billion in mortgage loans to ESI and \$3.3 billion in 10 mezzanine loan tranches to its subsidiaries. As part of the loan transaction, Lichtenstein and Lightstone Holdings executed 11 guarantees that subjected them to \$100 million in personal liability in the event of particular “bad boy” acts which included the voluntary filing of a

bankruptcy petition by ESI. Lichtenstein managed ESI and became its president, CEO and chairperson. The majority of ESI's board of directors was comprised of Lichtenstein and representatives of entities he controlled.

The following year, ESI was faced with a liquidity crisis as its financial situation declined. ESI retained nonparty Weil, Gotshal & Manges as its restructuring counsel. As stated in the complaint, Weil Gotshal could not represent both ESI and Lichtenstein. As further alleged in the complaint, Lichtenstein retained Willkie Farr in December 2008, "to advise and represent [him] in his role as an officer and director of ESI, particularly as to the liability of him and his entities in any restructuring, as well as to advise and represent affiliates of the Lightstone Group regarding their interests in ESI." Acting as ESI's counsel, Weil Gotshal recommended that ESI file for bankruptcy and advised that its board members, including Lichtenstein, were obligated as fiduciaries to achieve that result. Plaintiffs allege that their counsel, Willkie Farr, embraced Weil Gotshal's position although it was allegedly erroneous and would have exposed plaintiffs to \$100 million in liability on the guarantees.

According to the complaint, ESI's financial condition continued to deteriorate, leaving Lichtenstein with a choice to either (a) have the company file for bankruptcy, exposing Lichtenstein to liability on the guarantees, or (b) "seek an alternative, including to refuse, or at least delay, and force the Lenders' hand to file a petition for involuntary bankruptcy or foreclose on the collateral (in which case Lichtenstein would risk a lawsuit under a breach of fiduciary claim [sic])." The complaint further alleges that Willkie Farr insisted that Lichtenstein had a fiduciary obligation to put ESI into bankruptcy for the benefit of the lenders. Willkie Farr warned that Lichtenstein otherwise faced the prospect of unequivocal and uncapped personal liability in any subsequent action by the lenders absent a bankruptcy filing by ESI. Before having ESI file for bankruptcy, Lichtenstein offered to surrender the collateral to the lenders as a group. Some of the lenders, however, balked and went to court to block any such surrender in what plaintiffs describe as a likely effort to force ESI into voluntary bankruptcy and trigger the "bad boy" guarantee. On Willkie Farr's advice, Lichtenstein caused ESI to file its bankruptcy petition on June 15, 2009. The lenders brought actions on the guarantees and a judgment was subsequently entered against Lichtenstein and Lightstone Holdings in the sum of \$100 million.

This action was filed in June 2012. In making the instant mo-

tion to dismiss, Willkie Farr argued that its advice was reasonable and consistent with controlling Delaware law which imposed upon Lichtenstein, a director of an insolvent corporation, a fiduciary duty to maximize the company's long-term value for the benefit of its creditors and other constituencies such as equity holders and employees. Willkie Farr further asserted that the complaint is deficient because it does not allege that absent ESI's bankruptcy filing, Lichtenstein's liability would not have been triggered. The motion court granted Willkie Farr's motion, finding that the complaint contains no allegation of a failure "to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession which results in actual damages to . . . plaintiff" (see *AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). We affirm.

On this appeal, plaintiffs argue that Willkie Farr's advice did not meet the requisite standard of professional skill because a derivative suit by the lenders against Lichtenstein for breach of fiduciary duty would not have been successful. In making the argument, plaintiffs recognize that under Delaware law, the exposure Lichtenstein faced by reason of ESI's insolvency differed from the exposure that would be faced by the officers and directors of a traditional stock-issuing corporation. For example, when a corporation is solvent its directors' fiduciary duties may be enforced by its shareholders, who have standing to bring derivative actions on behalf of the corporation because they are the ultimate beneficiaries of the corporation's growth and increased value (*North Am. Catholic Educ. Programming Found., Inc. v Gheewalla*, 930 A2d 92, 101 [Del 2007]). On the other hand, when a corporation is insolvent, "its creditors take the place of the shareholders as the residual beneficiaries of any increase in value" (*id.*). "Consequently, the creditors of an *insolvent* corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties" (*id.*).

Citing *CML V, LLC v Bax* (28 A3d 1037 [Del 2011]), plaintiffs argue that the landscape is different with respect to Lichtenstein's fiduciary duty because the constituent entities that made up ESI were Delaware limited liability companies (LLCs) as opposed to corporations. In *CML*, the Supreme Court of Delaware held that under the Delaware Limited Liability Company Act (Del Code Ann, tit 6, ch 18) § 18-1002, derivative standing is limited to "member[s]" or "assignee[s]" and unavailable to creditors of LLCs (*id.* at 1046). Plaintiffs' argument is not persuasive because the Supreme Court of Delaware's opinion in

CML as well as the Delaware Chancery Court's opinion, which it affirmed (6 A3d 238 [Del Ch 2010]), were decided after Willkie Farr gave the advice described in the complaint. In fact, the Chancery Court observed that "virtually no one has construed the derivative standing provisions [of section 18-1002] as barring creditors of an insolvent LLC from filing suit" (*id.* at 242). The Chancery Court further noted that "[m]any commentators . . . have assumed that creditors of an insolvent LLC can sue derivatively" (*id.* at 243).

In a legal malpractice action, what constitutes ordinary and reasonable skill and knowledge should be measured at the time of representation (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 313 [2000]). In this case, the time of Willkie Farr's representation preceded the Chancery Court's decision in *CML* by approximately two years. Accordingly, the complaint fails to allege that Willkie Farr's advice was wanting by reason of its failure to advise Lichtenstein that the creditors of the ESI constituent entities lacked standing to bring derivative actions.

Plaintiffs also argue that Lichtenstein would have been insulated from liability by the business judgment rule had he declined to have ESI file for bankruptcy protection. In support of the argument, plaintiffs cite *Mukamal v Bakes* (378 Fed Appx 890 [11th Cir 2010], *cert denied* 563 US —, 131 S Ct 1785 [2011]), for the proposition that under Delaware law, "officers and directors do not breach the duty of loyalty by exercising their business judgment and continuing to operate an insolvent corporation rather than entering bankruptcy and preserving assets to pay creditors" (*id.* at 900-901). The business judgment rule, however, protects only directors who are disinterested, meaning they do not, for example, stand to gain any personal financial benefit in the sense of self-dealing "as opposed to a benefit which devolves upon the corporation or all stockholders generally" (*Aronson v Lewis*, 473 A2d 805, 812 [Del 1984], *overruled on other grounds Brehm v Eisner*, 746 A2d 244 [Del 2000]). The complaint in this case makes it plain that Lichtenstein was not disinterested, because his stewardship of ESI was affected by a conflict between his fiduciary duties as a director of the company and his personal exposure to \$100 million in liability on the guarantees in the event of ESI's voluntary bankruptcy. As disclosed by the complaint, Lichtenstein's conflict was the reason why Weil Gotshal, ESI's restructuring counsel, advised him to retain separate counsel. Had Lichtenstein failed to authorize or delayed ESI's bankruptcy filing, he would have been faced with uncapped personal liability on the basis of a breach of his duty to act in good faith. Such a breach occurs

“when a director ‘intentionally acts with a purpose other than that of advancing the best interests of the corporation’ ” (*In re USA Detergents, Inc.*, 418 BR 533, 545 [D Del 2009] [citation omitted]).

There is no merit to plaintiffs’ argument that Willkie Farr overlooked the availability of an equitable defense under the doctrine of in pari delicto. By operation of the doctrine, the position of a party defending against a claim is better than that of the party asserting the claim in a case of equal or mutual fault (see *In re Oakwood Homes Corp.*, 389 BR 357, 365 [D Del 2008], *affd* 356 Fed Appx 622 [3d Cir 2009]). Here, plaintiffs argue that the lenders could have been faulted for structuring the loan transactions in a way that prevented ESI from declaring bankruptcy. Plaintiffs’ argument is flawed because they allege no wrongdoing that the lenders have committed in negotiating the guarantees in the course of an arms length transaction. We have considered plaintiffs’ remaining arguments and find them unavailing. Concur—Mazzarelli, J.P., Friedman, DeGrasse, Freedman and Kapnick, JJ. [**Prior Case History: 2013 NY Slip Op 32852(U).**]

6 WOJCIECH RZYMSKI, Respondent, v METROPOLITAN TOWER LIFE INSURANCE COMPANY et al., Appellants. (And a Third-Party Action.) [993 NYS2d 522]—An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about June 10, 2013, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated July 29, 2014, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Kapnick, JJ.

7 NANCY WALDBAUM NIMKOFF, Respondent, v RONALD A. NIMKOFF, Appellant. [992 NYS2d 400]—

Husband and Wife and Other Domestic Relationships—Divorce—Vacatur of Default Judgment

Husband and Wife and Other Domestic Relationships—Divorce—Division of Income Tax Refund

Order, Supreme Court, New York County (Laura E. Drager, J.), entered October 9, 2012, which, to the extent appealed from as limited by the briefs, confirmed the Special Referee’s recommendations as to the allocation of the parties’ 2001 federal and state tax refunds and the distribution of their JP Morgan bank

account and their wedding gifts, and denied defendant's motion to reject the Referee's denial of his motion to vacate his default, and order, same court and Justice, entered October 8, 2013, to the extent it rejected the Special Referee's recommendation as to defendant's obligations for basic child support and statutory add-on expenses and determined those obligations anew, unanimously affirmed, without costs. Appeal from so much of the October 8, 2013 order as denied defendant's request for reconsideration of his motion to vacate his default, deemed a motion to reargue, unanimously dismissed, without costs, as nonappealable. Order, same court and Justice, entered December 4, 2012, to the extent it sanctioned defendant, unanimously reversed, on the law, without costs, and the order vacated.

Assuming, without determining, that defendant had a reasonable excuse for his default in appearing at the hearing on equitable distribution and child support, vacatur of the default is nonetheless unwarranted because defendant failed to adduce sufficient evidence to demonstrate a meritorious claim (*see Atwater v Mace*, 39 AD3d 573, 574 [2d Dept 2007]).

The court also correctly determined that the filing of the parties' 2001 joint federal and state tax returns should not be regarded as creating a joint tenancy with a right of survivorship in the resulting refunds (*see Angelo v Angelo*, 74 AD2d 327, 330-334 [2d Dept 1980]). Under the terms of the parties' prenuptial agreement, since the tax refunds are not specifically identified as marital property, they must be regarded as separate property of which each party is entitled to a pro rata share.

However, the court improperly imposed on defendant, "as sanctions," plaintiff's costs in responding to his motion for sanctions against her, since it set forth no finding that defendant's conduct was frivolous (*see* 22 NYCRR 130-1.2). Nor, assuming it intended to award costs, rather than sanctions, did the court provide the requisite explanation why the amount awarded was appropriate (*see id.*).

We have considered defendant's remaining contentions and find them unavailing. Concur—Mazzarelli, J.P., Friedman, Saxe and Feinman, JJ.

8 WILFRED GRIFFITHS, Appellant, v FC-CANAL, LLC, et al., Respondents. [992 NYS2d 518]—

Labor—Safe Place to Work—No Recovery for Injury Caused by Very Condition Worker Undertook to Remedy

Labor—Safe Place to Work—Supervision and Control of Subcontractor's Work

Order, Supreme Court, Bronx County (John A. Barone, J.), entered May 9, 2013, which, insofar as appealed from as limited

by the briefs, granted defendants' motion for summary judgment dismissing the Labor Law §§ 200 and 241 (6) causes of action, and denied plaintiff's cross motion for partial summary judgment on the issue of liability on those claims, unanimously affirmed, without costs.

Plaintiff was injured when he slipped and fell on ice that he was removing from the top floor of a hotel under construction. Defendant FC-Canal, LLC owned the property, and defendant Tritel Construction Group, LLC (Tritel) was the general contractor on the project. Plaintiff was an employee of nonparty IBK Construction Group (IBK), with which Tritel had entered into a subcontract for concrete superstructure work.

The motion court properly dismissed plaintiff's Labor Law § 200 claim. The record shows that plaintiff slipped on ice that his supervisor had instructed him to remove. The ice was a dangerous condition that plaintiff was directed to remedy. As such, he cannot recover under Labor Law § 200 since the condition for which he would hold defendants accountable was the exact condition he had undertaken to remedy (*see Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 60 [1st Dept 2004]; *Appelbaum v 100 Church*, 6 AD3d 310, 311 [1st Dept 2004]).

Upon our review of the record, we find that plaintiff's deposition testimony and affidavit, and the contract between FC-Canal and Tritel, do not raise a triable issue of fact as to whether Tritel supervised and controlled plaintiff's work. Although plaintiff alleges that "some guy from another company" directed his supervisor to remove the ice in order to put down cement, he testified that the only person who gave him any instruction over his work was his supervisor. To the extent that someone directed plaintiff's supervisor, this only establishes that the general contractor coordinated the work of the subcontractor. In fact, the contract between FC-Canal and Tritel provides for Tritel to have general supervisory authority over subcontractors. This general supervisory authority does not "rise to the level of supervision or control necessary to hold the general contractor liable for plaintiff's injuries under Labor Law § 200" (*Bisram v Long Is. Jewish Hosp.*, 116 AD3d 475, 476 [1st Dept 2014]).

As to plaintiff's argument that it was the general contractor's obligation, not the job of the subcontractor, to remove the ice, section 2.02 of the contract between FC-Canal and Tritel states that the "General Contractor shall perform and furnish, or cause to be performed and furnished all labor, supervision . . . and all other requirements of governmental agencies including . . . winter and inclement weather protections." The contract's

provisions regarding weather does not impose a strict duty on Tritel itself to perform the ice removal. Thus, if Tritel directed the subcontractor to perform the ice removal before pouring concrete, it remains consistent with the contract's provisions for "winter and inclement weather protections."

We find that the court properly dismissed the Labor Law § 241 (6) claim insofar as it was predicated on 12 NYCRR 23-1.7 (d), since plaintiff slipped on "the very condition he was charged with removing" (*Gaisor v Gregory Madison Ave., LLC*, 13 AD3d 58, 60 [1st Dept 2004]). The court also properly dismissed the claim insofar as it was predicated on 12 NYCRR 23-1.8 (c) (2), since plaintiff does not allege a violation of this provision in his complaint or bill of particulars (*see Reilly v Newireen Assoc.*, 303 AD2d 214, 218 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]), and, in any event, it is inapplicable to the circumstances presented. Concur—Mazzarelli, J.P., Acosta, Freedman, Richter and Clark, JJ.

(September 23, 2014)

1 In the Matter of TRANSPARENT VALUE, LLC, Appellant, v WADE EMORY JOHNSON, Respondent. [993 NYS2d 522]—An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Ira Gammerman, J.H.O.), entered on or about December 2, 2013, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated August 15, 2014, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Gonzalez, P.J., Acosta, DeGrasse, Freedman and Richter, JJ.

2 ORLY GENDER, Respondent, v DALIA GENDER et al., Appellants. [993 NYS2d 297]—

**Contempt—Civil Contempt—Violation of Injunction—Counsel Fees
Pleading—Amendment—Denial of Motion to Amend Answer to Assert Defense
of Release—Voidable Release**

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 31, 2013, which, insofar as appealed from, denied the motions of defendants TPR Investment Associates, Inc. (TPR) and D & K GP LLC (D&K GP) to amend their answers and for summary judgment dismissing the claims against them, granted plaintiff's cross motion for sanctions against TPR, D&K

GP, defendant Dalia Genger (Dalia), and defendant Sagi Genger (Sagi), sanctioned defendant Leah Fang (Fang), and denied Fang's motion for summary judgment dismissing the claims against her, unanimously modified, on the law and the facts, to delete the sanctions against Dalia, Sagi, and Fang, and to grant Fang's motion for summary judgment dismissing the claims against her, and otherwise affirmed, without costs.

Contrary to the motion court's statement, plaintiff did not cross-move for sanctions against Fang. Furthermore, Fang did not disobey the 2010 and 2011 injunctions—she resigned as trustee of indirect plaintiff the Orly Genger 1993 Trust (Orly Trust) in January 2008 and had nothing to do with the 2011 and 2012 settlements challenged by plaintiff. Hence, there was no basis for sanctioning Fang.

Plaintiff's *cross* motion for sanctions was improper as against Dalia and Sagi, who were not movants (*see e.g. Kershaw v Hospital for Special Surgery*, 114 AD3d 75 [1st Dept 2013]).

TPR and D&K GP contend that they should not have been sanctioned because they did not violate the 2010 and 2011 injunctions. This argument is unavailing. Assuming, arguendo, that the 2010 order merely enjoined transfers, sales, pledges, assignments, or other dispositions of TPR shares (as opposed to transfers, etc., of the Orly Trust's interest in double-derivative plaintiff D&K LP), Orly Trust disclaimed any interest in any shares of TPR via the settlement agreements.

It is true that the October 2011 settlement predated the December 2011 injunction; however, the parties to the settlement amended and restated their agreement in March 2012, i.e., after the injunction. The 2011 order enjoined Sagi, TPR, and Dalia “from making demands upon and using or spending the proceeds derived from the purported sale by TPR . . . to [nonparty] Trump Group . . . of . . . the Orly Trust[s] [shares of nonparty Trans-Resources, Inc. (TRI)] . . . , pending the determination by a court of competent jurisdiction [of] the beneficial ownership of such shares.” The promissory note which is a part of both settlement agreements—and which replaced a note that D&K LP had given in 1993 (the 1993 Note)—provides that the principal and accrued interest shall be due “[i]mmEDIATELY upon [Orly Trust]’s receipt of the proceeds from the sale of [its] TRI shares.”

In sum, the motion court properly found that TPR and D&K GP had disobeyed “a lawful mandate of the court” (Judiciary Law § 753 [A] [3]) and properly ordered them to pay plaintiff's attorneys' fees (*see Davey v Kelly*, 57 AD3d 230 [1st Dept 2008]).

For the reasons discussed in the following paragraph, it was a

provident exercise of the IAS court's discretion to deny TPR's and D&K GP's motions to amend their answers to add the defense of release, based on the release contained in the October 2011 and March 2012 settlement agreements, because the proposed amendment lacked merit and would be futile (see *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]). For the same reasons, the court correctly denied the motions by TPR and D&K GP for summary judgment dismissing the claims against them based on the same release.

When a fiduciary has a conflict of interest in entering a transaction and does not disclose that conflict to his/her principal, the transaction is "voidable at the option of" the principal (*Wendt v Fischer*, 243 NY 439, 443 [1926]). Moreover, "an agent cannot bind his principal . . . where he is known to be acting for himself, or to have an adverse interest" (*Manhattan Life Ins. Co. v Forty-Second St. & Grand St. Ferry R.R. Co.*, 139 NY 146, 151 [1893]). In entering into the aforementioned October 2011 and March 2012 settlement agreements with TPR and D&K LP on behalf of Orly Trust, of which she was sole trustee, Dalia had a conflict of interest. The new promissory notes executed by Dalia on behalf of Orly Trust pursuant to the settlement agreements contained provisions that were plainly intended to entrench her as sole trustee of Orly Trust, notwithstanding the ongoing disputes and litigation between herself and plaintiff, the trust's beneficiary. Specifically, the replacement notes provided that Dalia's resignation or removal as trustee of Orly Trust, or the appointment of any additional trustee, would constitute an event of default rendering the notes immediately due and payable by Orly Trust. Further, the purported settlement of the derivative claims that plaintiff asserts on behalf of Orly Trust in this action—which was already pending at the time the settlement agreements were executed—required the court's approval, which was never sought. Moreover, as previously discussed, the settlements were entered into in violation of the aforementioned 2010 and 2011 injunctions. For these reasons, the settlements are voidable and, given the expressed intention of plaintiff (the beneficiary of Orly Trust) to void them, the purported releases they contain are not enforceable.

Fang moved for summary judgment based on additional releases given to her by Dalia (as trustee of Orly Trust) in December 2007 and January 2008. As no infirmity has been demonstrated in the December 2007 and January 2008 releases, the IAS court should have granted Fang summary judgment

based on these instruments. This determination renders moot the portion of Fang's motion that sought summary judgment based on the infirm releases in the 2011 and 2012 settlement agreements. Concur—Tom, J.P., Friedman, Acosta, Andrias and Richter, JJ.

The decision and order of this Court entered herein on March 4, 2014 (115 AD3d 421 [2014]) is hereby recalled and vacated (see 2014 NY Slip Op 84294[U] [2014] [decided simultaneously herewith]).

3 In the Matter of BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK et al., Appellants, v STEVEN OSTRIN, Respondent. [992 NYS2d 401]—

Administrative Law—Judicial Review—Teacher Disciplinary Proceedings

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 16, 2012, denying the petition, which sought to modify the penalty imposed in an arbitration award, dated December 27, 2010, granting respondent's cross motion to dismiss the petition and confirm the award, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

The Hearing Officer's determination to suspend respondent teacher for one half year without pay, rather than terminate him, was rational and supported by the evidence (see *City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445, 452-453 [1st Dept 2010], *aff'd* 17 NY3d 917 [2011]). There is no basis to disturb the Hearing Officer's findings that respondent did not commit sexual misconduct on the date in question, and that he did not engage in a pattern of misconduct warranting the penalty of dismissal. The Hearing Officer made clear that the case turned entirely on the credibility of the witnesses, and such determinations "are largely unreviewable" (*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 568 [1st Dept 2008]; see also *McGraham*, 75 AD3d at 452). Further, the imposed penalty does not violate public policy (see *McGraham*, 75 AD3d at 450).

We have considered petitioners' remaining arguments and find them unavailing. Concur—Mazzarelli, J.P., Friedman, Saxe, Manzanet-Daniels and Feinman, JJ. [**Prior Case History: 2012 NY Slip Op 30281(U).**]

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v QUADAUN JAMES, Appellant. [992 NYS2d 401]—

Crimes—Sentence—Resentencing for Youthful Offender Determination

Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered March 12, 2012, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 10 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

As the People concede, defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful offender determination. Defendant did not make a valid waiver of the right to appeal, and, in any event, the right of an eligible defendant to such a determination is not waivable (*id.* at 499). Since we are ordering a new sentencing proceeding, we find it unnecessary to address defendant's other arguments. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

5 In the Matter of DEXTER A., Appellant, v GEORGIA G., Respondent. [992 NYS2d 402]—

Parent, Child and Family—Custody—Relocation of Custodial Parent

Order, Family Court, Bronx County (Jennifer S. Burt, Ref.), entered on or about August 31, 2013, which, to the extent appealed from as limited by the briefs, denied, after a hearing, petitioner father's application to relocate to Virginia with the parties' minor child, unanimously reversed, on the law, and the facts, without costs, the application granted, and the matter is remanded to the trial court to set an access schedule for the mother.

The record does not support the referee's determination that the child's best interests would be served by denying the father's relocation application (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]).

While not determinative, the child has indicated a preference to relocate to Virginia with the father. There is sufficient evidence to support the father's claim that there will be economic and educational benefits to the child, and the child's contact with his mother will not be substantially impacted because the father has offered liberal access to the mother. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

6 MAZEL 315 WEST 35TH LLC, Respondent, v 315 W. 35TH ASSOCIATES LLC et al., Defendants, and JON LEFKOWITZ, Appellant. [992 NYS2d 402]—

Attorney and Client—Misconduct by Attorney—Issue of Fact as to Intentional Deceit

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered April 24, 2013, which, insofar as appealed from as limited by the briefs, denied defendant Lefkowitz's motion for summary judgment dismissing the cause of action for violation of Judiciary Law § 487 as against him, unanimously affirmed, with costs.

Defendant failed to demonstrate that the Judiciary Law § 487 cause of action has no merit. Plaintiff's evidence showing that defendant presented false assignment documents for recordation in the City Register and sent a letter to the justice stating falsely that his client was the true owner of the notes and mortgages establishes an egregious act of intentional deceit of the court sufficient to support the cause of action (*see Kurman v Schnapp*, 73 AD3d 435, 435 [1st Dept 2010]). Defendant denies that he was involved in the recordation of the false documents and asserts that he did not intend to deceive the court. These assertions are insufficient to warrant judgment as a matter of law in defendant's favor; they merely raise issues of fact. Moreover, the parties dispute many of the underlying facts of this matter, and no discovery has been conducted. Since defendant has not established that he had no intent to deceive, his contention that he is immune from liability because he was merely engaged in zealous advocacy is unavailing (*see Lazich v Vittoria & Parker*, 189 AD2d 753 [2d Dept 1993], *appeal dismissed* 81 NY2d 1006 [1993]; *Alliance Network, LLC v Sidley Austin LLP*, 43 Misc 3d 848, 859-860 [Sup Ct, NY County 2014]).

Defendant's remaining arguments are unpreserved for our review and in any event without merit. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

7 In the Matter of LA CASA DI ARTURO INC., Doing Business as ARTURO'S RESTAURANT & PIZZERIA, Petitioner, v NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS, Respondent. [992 NYS2d 421]—

Administrative Law—Failure to Conform to Agency Precedent—Failure to Provide Sufficient Reason for Reaching Different Result on Identical Facts

Determination of respondent, Department of Consumer Affairs (DCA), dated March 2, 2012, which, after a hearing, found that petitioner violated the Administrative Code of the City of New York § 20-224 (a), and imposed a civil fine of \$1,000, unanimously annulled, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Manuel J. Mendez, J.], entered March 12, 2013), granted.

Petitioner, the owner of a restaurant located in New York

County, challenges DCA's determination that it engaged in unlicensed sidewalk café activity on September 21, 2011 because its café seating was located on the public sidewalk (*see* Administrative Code of City of NY §§ 20-223 [a]; 19-101 [d]; *see also* Vehicle and Traffic Law § 144). On three prior occasions spanning more than two decades, DCA's administrative tribunals dismissed notices of violation against petitioner based on essentially identical factual allegations, finding that respondent failed to prove that the outdoor café was sited on public property. In the most recent of those decisions, issued less than four years before the inspection at issue, the tribunal specifically afforded DCA an opportunity to obtain evidence from the Department of Buildings regarding the location of the property line and DCA failed to present any such evidence. Similarly, at the October 18, 2011 hearing concerning the violation at issue, DCA's inspector admitted that he did not know where the property line is located and DCA did not offer any evidence establishing that the tables and chairs petitioner set up on the sidewalk extended past the property line onto the public sidewalk. Respondent's failure to adhere to its own prior precedent, without providing a sufficient reason for reaching a different result on identical facts, is arbitrary and capricious, requiring reversal (*see Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 519-520 [1985]; *Matter of Klein v Levin*, 305 AD2d 316, 317-318 [1st Dept 2003], *lv denied* 100 NY2d 514 [2003]). Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

8 ORIX VENTURE FINANCE LLC, Respondent, v EAGLE LTD. et al., Appellants. [992 NYS2d 403]—

Contracts—Construction—Acceleration Language in Loan Purchase Agreement

Order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered April 18, 2013, granting plaintiff's motion for summary judgment, and awarding plaintiff \$3 million in general damages on its first and second causes of action as against defendants, prejudgment interest totaling \$303,287.67 from March 4, 2012 through the judgment entry date, postjudgment interest at 9% until satisfaction of the judgment, and attorney's fees in an amount to be determined by a special referee following a hearing, unanimously affirmed, with costs. Appeal from underlying order, same court and Justice, entered November 26, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the order and judgment.

Defendants' interpretation of the language in the parties' loan purchase agreement—that the acceleration term therein

only applied to purchase loan installments that had already become due and remained unpaid—disregards general contract principles that the contracting parties' intent be gleaned from their written agreement as a whole, with an understanding that the interpretation is to give effect to the writing's general purpose, and that the plain meaning of terms utilized is to apply, unless they are otherwise defined (*see generally Williams Press v State of New York*, 37 NY2d 434, 440 [1975]; *Triax Capital Advisors, LLC v Rutter*, 83 AD3d 490 [1st Dept 2011], *appeal dismissed* 17 NY3d 804 [2011]; *Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100 [1st Dept 2012]). Application of these principles supports the motion court's finding, as a matter of law, that the contested acceleration language authorized plaintiff lender to resort to any remedy at law or in equity, including acceleration of defendants' full obligations under the agreement. The corporate defendant did not dispute its failure to cure its default on an obligation to tender a minimum one million dollar payment owing to plaintiff by a date specified in the agreement, and the acceleration provision obligated the corporate defendant to make full payment of all obligations due under the agreement. Defendants' interpretation of the acceleration language is rejected, as it fails to give meaning to all the terms in the remedies provision, and it effectively renders part of the contract meaningless (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]).

Defendants' argument that summary judgment was improperly awarded to plaintiff because plaintiff failed to establish *prima facie* that the defendants caused the plaintiff injury, and failed to establish the amount of damages, was refuted by the record, which includes contract documents that clearly define the parties' respective obligations and the amounts due thereunder (*see generally General Acceptance Corp. v Masmo, Inc.*, 33 AD2d 57 [1st Dept 1969]). The plain terms of the contract documents refute defendants' defenses (*see id.*), and establish the individual defendant's obligation as an unconditional guarantor of the corporate defendant's performance under the agreement.

We have considered defendants' remaining arguments and find them unavailing. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

9 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RAMON LALONDRIZ-CASTILLO, Appellant. [993 NYS2d 522]—

Crimes—Sentence—No Basis for Reducing 15-Year Sentence for Attempted Murder in Second Degree

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered February 3, 2014, convicting defendant, upon his plea of guilty, of attempted murder in the second degree, and sentencing him to a term of 15 years, unanimously affirmed.

Assuming that defendant's right to challenge his sentence survives his waiver of his right to appeal, we perceive no basis for reducing the sentence. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

10 In the Matter of ADAM CHRISTOPHER S. and Others, Children Alleged to be Neglected. DEBORAH D., Appellant; ADMINISTRATION FOR CHILDREN'S SERVICES, Respondent. [992 NYS2d 404]—

Parent, Child and Family—Abused or Neglected Child—Excessive Corporal Punishment

Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about October 2, 2013, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about October 2, 2013, which found that respondent neglected the child Adam Christopher S. and derivatively neglected the other children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence, which demonstrates that respondent inflicted excessive corporal punishment on her son Adam, then eight years old. On one occasion she slapped Adam in the face, leaving red marks, and nine days later she beat him over the course of 10 hours, using a belt on his legs and attempting to pry his mouth open while trying to force him to eat (*see* Family Ct Act § 1046 [b]; *Matter of Joshua R.*, 47 AD3d 465 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]). That the physical injuries sustained by her son did not warrant medical attention does not preclude a finding of neglect against respondent based on excessive corporal punishment (*see Matter of Joseph C. [Anthony C.]*, 88 AD3d 478 [1st Dept 2011]). Further, the court found that respondent showed no remorse or insight into the impact of her conduct on her children.

By establishing that respondent neglected her son by using excessive corporal punishment on him, petitioner demonstrated respondent's derivative neglect of the other three children (Family Ct Act § 1046 [a] [i]; *Matter of Jason G. [Pamela G.]*, 3 AD3d 340 [1st Dept 2004], *lv denied* 2 NY3d 702 [2004]). Respondent's behavior demonstrated a level of parental judgment so impaired

as to create a substantial risk of harm to any child in her care (see *Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]). Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

11 SSA HOLDINGS LLC, Appellant, v HOWARD KAPLAN et al., Respondents. [992 NYS2d 405]—

**Fraud—Fraudulent Concealment—No Duty to Disclose in Absence of Fiduciary Duty and Superior Knowledge of Essential Facts
Actions—Stay—Related Litigation Pending**

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 15, 2013, which granted defendants’ motion to dismiss the fraudulent concealment cause of action and to stay the declaratory judgment cause of action pending resolution of another action (the AKR action), unanimously affirmed, with costs.

The complaint failed to state a cause of action for fraudulent concealment, as defendants had no duty to disclose the alleged material information (see *e.g. Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011]). Defendants—nonmanaging minority members of plaintiff, a Delaware limited liability company—owed no fiduciary duties to plaintiff or its manager, Stanley S. Arkin, a nonparty to this action (see *Coventry Real Estate Advisors, L.L.C. v Developers Diversified Realty Corp.*, 84 AD3d 583, 584 [1st Dept 2011]). Nor did the duty to disclose arise under the special facts doctrine, as the complaint does not allege that defendants had superior knowledge of essential facts (see *Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005]). Indeed, defendants allegedly failed to disclose that they “considered themselves to have stopped practicing law with [Mr. Arkin] on a full-time basis as his partners as of January 6, 2012” (emphasis added). “While there may have been concealment of opinions, there was no concealment of the facts upon which those opinions were based” and defendants “were not bound to volunteer their opinions” (*Amherst Coll. v Ritch*, 151 NY 282, 322 [1897]). Moreover, there was no allegation of superior knowledge, as defendants’ belief that AKR had been dissolved as of January 6, 2012 was based on Mr. Arkin’s own email of that date.

The motion court providently exercised its discretion by staying the declaratory judgment cause of action (see *e.g. Uptown Healthcare Mgt., Inc. v Rivkin Radler LLP*, 116 AD3d 631 [1st Dept 2014]). A stay is proper, since the determination of the AKR action may dispose of or limit issues involved in this action (see *Belopolsky v Renew Data Corp.*, 41 AD3d 322, 323 [1st Dept 2007]). Indeed, plaintiff requested, among other things, a decla-

ration that defendants were not entitled to any distributions from plaintiff after the date of dissolution of Arkin Kaplan Rice LLP—a nonparty to this action. The dissolution date will be determined in the AKR action. If, after that determination, the parties in this case disagree whether the dissolution date was the date as of which defendants were no longer entitled to distributions from plaintiff, this issue may be raised when the stay in this action is lifted. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

12 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRANDY PRETTO, Appellant. [992 NYS2d 406]—Judgments, Supreme Court, New York County (Michael Sonberg, J.), rendered on or about March 13, 2012, unanimously affirmed.

Application by appellant’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 appellant’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 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. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

13 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSHUA NOWRANG, Appellant. [992 NYS2d 407]—

Crimes—Murder—Sufficiency and Weight of Evidence—Overwhelming Evidence of Guilt

Crimes—Right to Counsel—Effective Representation—Trial Strategy

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered January 10, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence was overwhelming. The circumstantial proof led to the inevit-

able conclusion that it was defendant, and not some unknown perpetrator, who killed defendant's wife, dismembered her body, and disposed of the body parts.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]), concerning defense counsel's strategic decisions. This is not one of the rare cases where the trial record itself permits review of an ineffective assistance of counsel claim challenging counsel's strategy. Among other things, counsel may have reasonably concluded that lengthy cross-examinations and futile objections would have been counterproductive. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of his ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]).

Defendant's hearsay claims are rejected. The evidence at issue was not admitted for its truth, but for legitimate nonhearsay purposes (*see People v Bierenbaum*, 301 AD2d 119, 145-146 [1st Dept 2002], *lv denied* 99 NY2d 626 [2003], *cert denied* 540 US 821 [2003]), and the court provided thorough limiting instructions. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

14 In the Matter of JAQUAN F., a Child Alleged to be Neglected, Respondent. ALEXIS F., Appellant; ADMINISTRATION FOR CHILDREN'S SERVICES, Respondent. [993 NYS2d 18]—

Parent, Child and Family—Abused or Neglected Child—Neglect of Child's Special Needs—Inadequate Supervision, Educational Neglect and Failure to Attend Numerous Medical Appointments

Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about May 6, 2013, which, upon a fact-finding determination that respondent mother neglected the subject child, placed the child with petitioner agency until the next permanency hearing, and directed respondent to comply with certain conditions, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that respondent neglected the special needs child by failing to properly supervise him and failing to attend numerous medical appointments. The court was within its discretion in crediting the testimony of petitioner's medical expert (*see Matter of Cerda*, 114 AD2d 795, 795-796 [1st Dept 1985]).

A preponderance of the evidence also supports the court's finding of neglect based on the child's excessive absences from school. The record shows that between September 11, 2011 and February 7, 2012, the child missed 52 days of school. The court rejected respondent's explanation that she missed numerous medical appointments for the child because of inclement weather and lateness, resulting in the child being unable to obtain a prescription for a new protective helmet that was required for him to attend school and causing his absence from school for more than two months until the new helmet was obtained, and there is no basis for disturbing the court's credibility determination (*see Matter of Aliyah B. [Denise J.]*, 87 AD3d 943 [1st Dept 2011]). Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

15 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v NIGEL DAVIS, Appellant. [993 NYS2d 522]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 4, 2011, 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. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

16 ERIKA KLAUER, Respondent, v ASA ABELIOVICH, Appellant. [992 NYS2d 408]—

Parent, Child and Family—Custody—Stipulation of Settlement—Pressure by Attorneys Insufficient to Establish Mistake or Duress
Parent, Child and Family—Custody—Modification—Entitlement to Hearing

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered October 15, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion to vacate the July 1, 2013 on-the-record custody agreement, unanimously affirmed, without costs. Appeal from so-ordered transcript of the custody agreement, same court and Justice, entered on or about September 24, 2013, unanimously dismissed, without costs.

Supreme Court properly denied defendant's motion to set

aside the open-court custody agreement, as there was no showing of fraud, overreaching, mistake, or duress (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]). The parties were represented by able and experienced counsel, had been negotiating custody for some time, and spent an entire day resolving the agreement. Defendant was actively involved in the negotiations and many of his requested additions and modifications were incorporated into the agreement. Further, Supreme Court conducted a proper allocution of defendant and properly determined that he voluntarily and knowingly accepted the terms of the stipulation (*see Matter of Strang v Rathbone*, 108 AD3d 565, 566 [2d Dept 2013]). Defendant's contentions that he felt "forced into settling" and pressured by his attorneys are insufficient to establish mistake or duress so as to warrant setting aside the stipulation (*id.*).

Defendant did not demonstrate any change in circumstances since the time of the stipulation that would warrant the modification he seeks (*see Matter of Iris R. v Jose R.*, 74 AD3d 457 [1st Dept 2010]). Nor is there any basis for finding that the agreement is against the child's best interests (*see generally Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]). The agreement ensures regular parental access, equal vacation and holiday time, requires plaintiff to consult defendant on all major decisions, and gives defendant a say in medical decisions and in some extracurricular activities. The forensic report was not in evidence and, in any event, is not binding on the court (*see Matter of John A. v Bridget M.*, 16 AD3d 324, 332 [1st Dept 2005], *lv denied* 5 NY3d 710 [2005]). Accordingly, defendant was not entitled to a hearing on custody (*see Matter of Patricia C. v Bruce L.*, 46 AD3d 399 [1st Dept 2007]). Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

17 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SEAN FINCHER, Appellant. [993 NYS2d 522]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered on or about July 3, 2012, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

18 In the Matter of YESENNIA B., a Child Alleged to be Abused. ANGEL N., Appellant; ADMINISTRATION FOR CHILDREN'S SERVICES, Respondent. [992 NYS2d 409]—

Parent, Child and Family—Abused or Neglected Child—Sexual Abuse

Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about December 11, 2013, which, upon a fact-finding determination that respondent sexually abused the subject child, released the child to the custody of her mother, and directed respondent to comply with the terms and conditions specified in the final one-year order of protection, to attend a sex-offender program, and to remain under the supervision of the Administration for Children's Services for one year, unanimously affirmed, without costs. Appeals from orders, same court and Judge, entered on or about November 27, 2013 and on or about December 10, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Application by respondent's assigned counsel to be relieved as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed the record and agree with counsel that there are no nonfrivolous issues that could be raised on this appeal. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

19 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KENNETH QUANTANO, Appellant. [992 NYS2d 409]—

Crimes—Criminal Contempt—Violation of Order of Protection
Crimes—Evidence—Admission of Nontestifying Witness's Statements to Police to Explain Police Actions

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 27, 2011, convicting defendant, after a jury trial, of criminal contempt in the first degree, sentencing him, as a second felony offender, to a term of 1½ to 3 years, and imposing a final order of protection that remains in effect through October 26, 2022, unanimously affirmed.

The evidence was legally sufficient to prove defendant's guilt of first-degree criminal contempt. The evidence supports the inference (*see generally People v Getch*, 50 NY2d 456, 465 [1980]) that defendant intentionally violated a part of an order of protection that required him to "stay away from the person . . . on whose behalf the order was issued" (Penal Law § 215.51 [c]). A duly served order of protection directed defendant to stay away from his grandmother's person, home, school, business and place of employment. At the time of the incident that resulted in the present conviction, the police observed defendant in his grandmother's bedroom, and his grandmother was in a nearby room. Even if the grandmother was not home at the time defendant entered, defendant knew this was his grand-

mother's apartment, and the evidence supports the conclusion that he expected her to be home.

The nontestifying grandmother's statements to the police were properly admitted, not for their truth, but for the legitimate nonhearsay purpose of explaining police actions that would otherwise have made little sense to the jury (*see e.g. People v Rivera*, 96 NY2d 749 [2001]). Moreover, the court provided appropriate limiting instructions. Accordingly, there was no violation of the hearsay rule or the Confrontation Clause. In any event, any error in admitting this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's challenges to the order of protection issued by the sentencing court in the present case are without merit. Contrary to defendant's argument, the order properly specified an expiration date. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

20 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TOMAS ACOSTA, Appellant. [992 NYS2d 410]—Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered on or about December 6, 2012, unanimously affirmed.

Application by appellant'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 appellant's assigned counsel that there are no nonfrivolous 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 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. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

21 In the Matter of ALLSTATE INSURANCE COMPANY, Appellant, v FELICIA ROLON et al., Respondents. GEICO GENERAL INSURANCE COMPANY, Proposed Additional Respondent-Respondent, et al., Proposed Additional Respondents. [992 NYS2d 411]—

Arbitration—Stay of Arbitration—Uninsured Motorist Arbitration Permanently Stayed—Permissive Operation of Vehicle

Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 15, 2013, which denied the petition for a stay of arbitration or, in the alternative, for a framed-issue hearing and to join proposed additional respondents and proposed additional respondent-respondent as parties, unanimously reversed, on the law, with costs, proposed additional respondents GEICO, Cecere and LaFontaine joined as parties, the petition granted, and the arbitration permanently stayed.

Petitioner seeks a stay of arbitration of respondents Rolon and Peralta's claim for uninsured motorist insurance coverage in connection with an accident involving a vehicle owned and operated by Rolon and carrying Peralta as a passenger and, inter alia, a vehicle owned by additional proposed respondent Cecere and operated by additional proposed respondent LaFontaine, or a framed-issue hearing and joinder of the proposed additional respondents. Petitioner established prima facie that Cecere's vehicle was insured by additional proposed respondent GEICO by submitting the police accident report, which shows the vehicles' insurance code designations, and GEICO does not dispute that it insured Cecere's vehicle. GEICO's opposition to the petition, based on its denial of coverage to LaFontaine on the ground that he had been operating the vehicle without Cecere's permission (*see* Vehicle and Traffic Law § 388 [1]), was insufficient because GEICO failed to come forward with any admissible supporting evidence, such as an affidavit by Cecere (GEICO's insured) or a police report of the vehicle's theft. Accordingly, since GEICO failed to raise any issue of fact as to whether LaFontaine's operation of the vehicle was permissive, and thus covered by Cecere's GEICO policy, the petition should have been granted. Since this determination affects the rights of GEICO, Cecere and LaFontaine, we join them as respondents to this proceeding. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

22 In the Matter of DANIEL SILVERA, Petitioner, v SHERRY KLEIN HEITLER et al., Respondents. [993 NYS2d 523]—The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules, now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon, it is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements. Concur—Friedman, J.P., Acosta, Saxe, Gische and Kapnick, JJ.

23 In the Matter of ANA A., Respondent, v JOSEPH C., Appellant. [992 NYS2d 412]—

Parent, Child and Family—Support—Child Support Based on Child's Needs Rather than Father's Income—Insufficient Evidence of Income

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about December 21, 2012, which denied respondent father's objections to the order of the Support Magistrate, dated August 15, 2012, directing him to pay child support in the amount of \$2,271.00 per month, unanimously affirmed, without costs.

The Support Magistrate properly precluded the father from providing additional financial documentation at the child support proceeding (*see* Family Ct Act § 424-a [b]). The father failed to provide an updated sworn net worth statement in compliance with Family Court Act § 424-a (a), never produced proof of his pension and other income, despite numerous directions from the Support Magistrate, and has not explained his noncompliance. The father also gave varying accounts of his income in the course of the proceedings. Given the father's noncompliance and the insufficient evidence regarding his gross income, the Support Magistrate correctly ordered child support based on the child's needs (*see* Family Ct Act § 413 [1] [k]; *Matter of Darren F. v Marie-Amina T.*, 58 AD3d 493, 494 [1st Dept 2009], *lv dismissed and denied* 12 NY3d 879 [2009]).

We find the father was accorded due process. Further, the proceedings were adjourned numerous times to permit the father to obtain new counsel and for new counsel to familiarize themselves with the matter.

The court was not bound by the agreement entered into between the parties in connection with the divorce proceedings that were later dismissed (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]; *Linda R. v Ari Z.*, 71 AD3d 465, 466 [1st Dept 2010]).

We have considered the father's remaining arguments and find them unavailing. Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

24 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ROBERT RUSSELL, Appellant. [992 NYS2d 412]—Judgment, Supreme Court, New York County (Laura Ward, J.), rendered on or about July 30, 2012, unanimously affirmed.

Application by appellant'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 appellant's assigned counsel that there are no nonfrivolous 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 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. Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

25 NATACHA L. QUEZADA, Appellant, v TOPSIDE SYSTEMS INC. et al., Respondents. [992 NYS2d 413]—

Judgments—Summary Judgment—Premature Motion

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 16, 2013, which denied plaintiff's motion for summary judgment on the issue of liability, without prejudice to renewal following discovery, unanimously affirmed, without costs.

No discovery has been conducted, and the parties' affidavits are inconsistent as to how the accident occurred (*see generally Licurgo-Cruz v Ahmed*, 118 AD3d 420 [1st Dept 2014]; CPLR 3212 [c], [f]). Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

26 In the Matter of YICK WING CHAN et al., Petitioners, v NEW YORK INDUSTRIAL BOARD OF APPEALS et al., Respondents. [992 NYS2d 413]—

Administrative Law—Judicial Review—Determination of Liability for Unpaid Wages Supported by Substantial Evidence

Labor—Hours and Wages—Transfer of Ownership of Business—Definition of Employer

Determination of respondent New York Industrial Board of Appeals (IBA), dated October 17, 2012, after a hearing, affirming, as amended, respondent New York State Commissioner of Labor's Order to Comply, dated October 9, 2008, which directed petitioners to pay unpaid wages due eight claimants for the period April 1, 2002 to March 31, 2006, plus interest and penalties, 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 [Peter H. Moulton, J.], entered June 20, 2013), dismissed, without costs.

The determination is supported by substantial evidence in the record (*see generally 300 Gramatan Ave. Assoc. v State Div. of*

Human Rights, 45 NY2d 176, 179-181 [1978]). Petitioners, who had the burden of proof at the hearing (*see* State Administrative Procedure Act § 306 [1]; 12 NYCRR 65.30), provided testimony about the transfer of ownership of the restaurant that was too general to satisfy petitioners' burden of establishing that the corporate petitioner could not be held liable for its predecessor's acts. Thus, the burden never shifted to the Commissioner of Labor to establish successor liability. Petitioners' submissions to this Court of material that was never presented to the IBA will not be considered.

The determination that petitioner Chan was an "employer" as defined by Labor Law § 190 (3) is supported by substantial evidence, including Chan's own testimony that he "took over" the operation of the business in 2002, that he created a system by which to track employees' work hours and instructed his staff as to using the system, and that he had to "keep an eye" on an "unreliable manager," as well as the employees' testimony that Chan was the "boss," that he transferred workers from another location to the restaurant, and that he gave one of the claimants a raise, set his hours of work, and directed his work (*see Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]; *Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]). Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

27 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v ELIAS McFARLAND, Respondent. [992 NYS2d 414]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure Not Warranted

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about June 21, 2012, which granted defendant's Correction Law § 168-o (2) petition and modified his sex offender classification from a level three sexually violent offender to level two, unanimously reversed, on the law, without costs, the petition denied, and defendant's original classification reinstated.

While we recognize that a court has discretion to grant a modification of a sex offender classification, the court improvidently exercised such discretion in this case. Defendant failed to meet his burden under Correction Law § 168-o (2) of presenting clear and convincing evidence that a downward modification of his risk level is warranted.

Defendant's apparent sobriety while incarcerated and during the first 17 months after his release to parole supervision was not a reliable predictor of his risk for reoffense, or of the threat

he poses to public safety, in light of his extensive history of alcohol abuse and prior parole violations for alcohol-related offenses (*see People v Watson*, 112 AD3d 501, 502-503 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]; *People v Gonzalez*, 48 AD3d 284, 285 [1st Dept 2008], *lv denied* 10 NY3d 711 [2008]). Defendant's age (76 years) at the time of his release was not a reliable factor in determining his risk of reoffending, notwithstanding actuarial evidence, since defendant committed his most recent sex offense (a violent attack on an 86-year-old woman) at the age of 68 (*see People v Harrison*, 74 AD3d 688 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]). Furthermore, defendant's relationship with his wife was not sufficiently shown to be a mitigating factor since he was married to, and living with, his wife in 2002 when he committed his most recent sex offense. The impact that defendant's level three designation had on his ability to reside with his wife at the senior citizen housing facility they shared before his most recent conviction had no bearing on defendant's risk of a repeat offense or the threat he posed to the public safety (*see* Correction Law § 168-*l* [5]).

The remaining factors considered by the court involved matters already adequately taken into consideration by the guidelines, and thus did not warrant a departure from the presumptive risk level. Moreover, defendant expressly stated in his petition that he was not challenging the point assessment and presumptive risk level determination made by the court at his original classification hearing. Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ. [**Prior Case History: 35 Misc 3d 1243(A), 2012 NY Slip Op 51137(U).**]

28 In the Matter of GODWIN R., a Person Alleged to be a Juvenile Delinquent, Appellant. [992 NYS2d 415]—

Infants—Juvenile Delinquents—Weight of Evidence—Fingerprint Expert

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 25, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of burglary in the third degree, criminal trespass in the third degree, petit larceny, and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the court's evaluation of expert testimony. The pre-

sentment agency's fingerprint expert testified about the basis for his conclusion that appellant's known fingerprint matched a latent print recovered from a school-owned laptop computer after it and 13 other computers were found discarded outdoors in the same location where the police saw three youths dropping garbage bags and a metal bin while fleeing. Appellant's contention that the expert's testimony carried little weight due to his inexperience is unavailing, given that the expert had received extensive training, and had analyzed more than 1,000 fingerprints over the course of about two years. Appellant's theory that he could have innocently possessed the computer was refuted by the testimony that the computer was assigned only to students at a school which appellant did not attend, and that the students' computers were not permitted to be removed from the school (*see e.g. People v Teixeira*, 32 AD3d 756 [1st Dept 2006], *lv denied* 7 NY3d 904 [2006]).

Appellant's remaining argument is unpreserved, and we decline to review it in the interest of justice. Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

29 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MARC PAYEN, Appellant. [992 NYS2d 416]—

Crimes—Scheme to Defraud—Fraudulent Immigration Services and Forgery

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered July 18, 2011, as amended August 2, 2011, convicting defendant, after a jury trial, of scheme to defraud in the first degree, grand larceny in the third degree, grand larceny in the fourth degree (two counts), forgery in the second degree (two counts), and criminal possession of a forged instrument in the second degree (three counts), and sentencing him, as a second felony offender, to an aggregate term of 5 to 10 years, with restitution in the amount of \$17,179.05, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence amply demonstrated that defendant obtained money in exchange for fraudulent immigration services, and that he forged documents. Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

30 MIA HENDERSON-JONES et al., Appellants, v CITY OF NEW YORK et al., Respondents, et al., Defendants. [993 NYS2d 19]—

Appeal—Matters Appealable—Order Affecting Substantial Right—Order Requiring Full Trial Concerning Liability of Individual Defendants

Motions and Orders—Motion Papers—Relief Not Requested against All Defendants**Judgments—Default Judgment—Inquest to Assess Damages**

Order, Supreme Court, New York County (Lucy Billings, J.), entered on or about July 16, 2013, which, to the extent appealable, determined that a prior order of this Court striking the answers of defendants City of New York and Raymond W. Kelly did not preclude individual defendants Detective Michael Sierra and Sergeant Wendie Gomez-Smith from contesting their liability at trial, unanimously affirmed, without costs.

The order on appeal, which requires a full trial concerning the liability of individual defendants Sierra and Gomez-Smith, affects a substantial right and is therefore appealable (*see Matter of Eisenberg*, 93 AD3d 413 [1st Dept 2012], *lv dismissed* 19 NY3d 1011 [2012]). On a prior appeal, we affirmed an order striking the answer of defendants City of New York and Raymond Kelly (*see Henderson-Jones v City of New York*, 87 AD3d 498 [1st Dept 2011]). Since plaintiffs' motion did not seek relief against defendants Sierra and Gomez-Smith, such relief was not afforded by this Court and those individual defendants cannot be precluded from defending the merits of the claims against them at trial (CPLR 2214; *Phoenix Enters. Ltd. Partnership v Insurance Co. of N. Am.*, 130 AD2d 406, 407 [1st Dept 1987]). The default judgment entered against the City and Kelly does not bind Sierra or Gomez-Smith, or otherwise affect their substantive rights (*State Farm Ins. Co. v Frias*, 66 AD3d 997, 999 [2d Dept 2009]).

However, while Sierra and Gomez-Smith will be permitted to contest their liability at a trial, the same is not true for the City and Kelly, who are limited to an inquest on damages. The striking of their answer effectively resolved all of plaintiffs' claims against them, including any claims of vicarious liability and negligent hiring and training, even if Sierra and Gomez-Smith are found to have no liability (*see Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 3, 6 [1st Dept 2011] ["the striking of an answer . . . effectively resolves a claim against the nondisclosing defendant"]). The City and Kelly, having had default judgments entered against them, cannot rely on any defenses raised by the individual defendants to escape liability themselves, but are limited to an inquest at which they can contest the extent of plaintiffs' damages (*see Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730-731 [1984]).

The portion of the order declining to resolve plaintiffs' in limine motion seeking to preclude testimony by defendants' expert witness is not appealable, as the issue remains pending and

undecided (*see Scalise v Adler*, 267 AD2d 295, 296 [2d Dept 1999]). Concur—Mazzarelli, J.P., Renwick, Andrias and Richter, JJ.

31 In the Matter of JASMINE A. and Others, Children Alleged to be Neglected. ALBERT G., Appellant; ADMINISTRATION FOR CHILDREN'S SERVICES, Respondent, et al., Respondent. [992 NYS2d 417]—

Parent, Child and Family—Abused or Neglected Child—Violation of Order of Protection

Parent, Child and Family—Abused or Neglected Child—Corroboration of Child's Out-of-Court Statement

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 12, 2013, which, after a fact-finding hearing, found that respondent father neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1012 [f] [i] [B]). The record shows that respondent repeatedly allowed the mother to return to the family home despite his awareness of the mother's history of drug use and the history of domestic violence. Additionally, respondent permitted the mother to return to the home in violation of an existing order of protection (*see Matter of Diamond Tyneshia B. [Aisha K.]*, 109 AD3d 740 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]).

The children's out-of-court statements regarding the mother's history of violence against respondent, were cross-corroborated by each others' statements, by their statements to petitioner agency's caseworkers, and by respondent's own statements (*see Matter of Alex R. [Maria R.]*, 81 AD3d 463 [1st Dept 2011]; Family Ct Act § 1046 [a] [vi]). Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

32 In the Matter of ADALIZA H., a Person Alleged to be a Juvenile Delinquent, Appellant. [992 NYS2d 417]—

Infants—Juvenile Delinquents—12-Month Conditional Discharge was Least Restrictive Dispositional Alternative

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about July 3, 2013, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute attempted assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appel-

lant's request for an adjournment in contemplation of dismissal (ACD), and instead adjudicating her a juvenile delinquent and imposing a conditional discharge. In light of the seriousness of the underlying incident, appellant's history of disciplinary problems at school and home, and the short duration of any supervision that an ACD might have provided, the court adopted the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

33 BENJAMIN MORALES, Appellant, v JORGE GARZON et al., Respondents. [992 NYS2d 418]—

Motor Vehicles—Collision—Summary Judgment—Rear-End Collision

Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 20, 2013, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 10, 2013, which granted defendants' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants established under any version of the facts that plaintiff was negligent, by demonstrating that, while under a darkened overpass, their tractor-trailer was struck in the rear by plaintiff's box truck. Plaintiff failed to provide a nonnegligent explanation for the collision (*see Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]). Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

34 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RAYMOND LOPEZ, Appellant. [992 NYS2d 418]—

Crimes—Sentence—Resentence—Postrelease Supervision—Double Jeopardy

Judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered February 22, 2012, resentencing defendant to a term of 14 years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

We perceive no basis for reducing the term of postrelease supervision. Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

35 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v PEDRO TORRES, Appellant. [992 NYS2d 419]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure Not Warranted

Order, Supreme Court, New York County (Daniel McCullough, J.), entered on or about April 18, 2013, which denied defendant's Correction Law § 168-o (2) petition to modify his sex offender classification from level three to level one, unanimously affirmed, without costs.

Defendant failed to meet his burden under Correction Law § 168-o of presenting clear and convincing evidence that a downward modification of his risk level is warranted. Defendant made a showing of positive factors, including the fact that he did not commit any additional sex crimes in the 12 years since his release from prison. Nevertheless, in light of the seriousness of the underlying conviction, and his prior felony conviction for a sex crime, the court providently exercised its discretion in denying the downward modification (*see People v Cabrera*, 91 AD3d 479 [1st Dept 2012], *lv denied* 19 NY3d 801 [2012]). We also note that defendant did not disclose or explain three convictions that occurred after his release, including one for failure to report a change in address as required by SORA. Defendant's procedural objection to the court's disposition of the petition is unpreserved, and is in any event without merit. Concur—Mazzearelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

36 LORNA MAY FRANCIS, Appellant, v NEW YORK YANKEES PARTNERSHIP, Respondent. [992 NYS2d 419]—

Negligence—Maintenance of Premises—Reasonably Foreseeable Tripping Hazard

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered April 16, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff allegedly sustained personal injuries when, to avoid a golf cart coming toward her in the basement concourse of defendant's baseball stadium, she stepped to the left and tripped over a handlebar protruding from the bottom of one of defendant's batting screens. She contends, among other things, that the handlebar constituted a hidden trap, as it was not readily visible.

Defendant failed to make a prima facie showing that it neither created nor had actual notice of the alleged hazardous condition—namely, the placement of the batting screens in the basement concourse (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 75 [1st Dept 2004]). Although defendant argues that the batting screens were not inherently dangerous,

that is not a relevant inquiry. The salient issue is whether the handlebars at the bottom of the screens were readily visible and protruded into the concourse so as to constitute a reasonably foreseeable tripping hazard (*see id.* at 75-76; *Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [1st Dept 2004]; *compare Figueroa v New York City Bd. of Educ.*, 104 AD3d 544 [1st Dept 2013]). Plaintiff has raised a triable issue of fact as to whether that was the case. Whether the golf cart coming toward plaintiff constitutes an intervening act that breaks the causal nexus should await jury resolution (*see Derdarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

37 METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY et al., Appellants, v JOHN R. BRAUN, Ph.D., et al., Respondents. [992 NYS2d 420]—

Pleading—Answer—Extension of Time to Answer—Law Office Failure—Showing of Meritorious Defense Not Required

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about May 8, 2013, which denied plaintiffs' motion for a default judgment and granted defendants' cross motion for an extension of time to interpose an answer, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting defendants' cross motion for an extension of time to interpose an answer. Under the circumstances, although defendants' assertion of law office failure "is not particularly compelling, it constitutes good cause for the delay" (*Lamar v City of New York*, 68 AD3d 449, 449 [1st Dept 2009] [internal quotation marks omitted]). There is no evidence that plaintiffs have been prejudiced, and the record shows that plaintiffs had previously agreed to an extension of time for defendants to answer. Contrary to plaintiffs' contentions, a meritorious defense was not required for defendants to be granted an extension of time to answer (*see Interboro Ins. Co. v Perez*, 112 AD3d 483 [1st Dept 2013]; *Cirillo v Macy's, Inc.*, 61 AD3d 538, 540 [1st Dept 2009]). Concur—Mazzarelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

38 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JEFFREY DEJESUS, Appellant. [992 NYS2d 421]—Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered on or about November 10, 2011, unanimously affirmed.

Application by appellant'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 appellant's assigned counsel that there are no nonfrivolous 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 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. Concur—Mazzearelli, J.P., Renwick, Andrias, Richter and Feinman, JJ.

39 In the Matter of ORCHARD HOTEL, LLC, Petitioner, v CHARLES E. RAMOS et al., Respondents. [993 NYS2d 633]—The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules, now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon, it is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements. Concur—Renwick, J.P., Andrias, Richter and Feinman, JJ.

(September 25, 2014)

1 LEXINGTON BUILDING CO. LLC et al., Respondents, v PRECISION GLASS & METAL WORKS CO., INC., et al., Defendants, and THE PHOENIX INSURANCE COMPANY, Appellant. [993 NYS2d 522]—An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Milton A. Tingling, J.), entered on or about April 15, 2013, and said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated August 22, 2014, it is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation. Concur—Tom, J.P., Friedman, Renwick, Gische and Clark, JJ.

2 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOHNNY SUAREZ, Appellant. [993 NYS2d 522]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard

Carruthers, J.), rendered on or about July 5, 2011, 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. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

3 In the Matter of SHAYOLANDA M., a Person Alleged to be a Juvenile Delinquent, Appellant. [992 NYS2d 422]—

Infants—Juvenile Delinquents—Least Restrictive Dispositional Alternative—Placement

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about February 25, 2014, which adjudicated appellant a juvenile delinquent upon her admission that she committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed her with the Administration for Children's Services' Close to Home Program for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing her with the Close to Home Program rather than ordering an adjournment in contemplation of dismissal (ACD). This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Appellant had already received an ACD and a juvenile delinquency adjudication as the result of prior arrests. Furthermore, among other things, appellant has a history of violent and aggressive behavior, she demonstrated a pattern of truancy and absconding from placement facilities, her home life was unstable and lacking proper adult supervision, and she was not compliant with regard to taking psychiatric medications. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RONALD SCRIMA, Appellant. [993 NYS2d 522]—Appeals having been taken to this Court by the above-named appellant from judgments of resentence of the Supreme Court, Bronx County (William I. Mogulescu, J.), rendered on or about January 9, 2013, said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentences not excessive, it is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

5 In the Matter of MARQUISE B., a Person Alleged to be a Juvenile Delinquent, Appellant. [992 NYS2d 423]—

Infants—Juvenile Delinquents—Violation of Probation—Fair Notice of Conditions of Probation

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about July 10, 2013, which denied appellant's motion to dismiss the petition; and order, same court and Judge, entered on or about September 4, 2013, which found, after a hearing, that appellant had violated the terms and conditions of his probation, vacated an order of disposition entered on or about September 6, 2012 that had placed him on probation for 18 months upon a prior violation of probation, and placed him with the Administration for Children's Services Close to Home program for a period of 12 months, unanimously affirmed, without costs.

The petition sufficiently alleged a prima facie case that appellant violated the terms and conditions of his probation (*see generally Matter of Jahron S.*, 79 NY2d 632, 639 [1992]; *see also* Family Ct Act § 360.2 [2]; *Matter of Rayshawn P.*, 103 AD3d 31, 40 [1st Dept 2012]). The petition alleged that appellant failed to appear at six weekly meetings with his probation officer, and appellant received fair notice that such meetings were a condition of his probation. Attached to the petition was an order placing appellant under probation supervision and an order of conditions, which contained a written acknowledgment from appellant that he received it, and which expressly required appellant to report to his probation officer as directed as a condition of his probation. Accordingly, appellant received fair notice of this condition.

Contrary to appellant's contentions, the order of conditions merely supplemented, rather than contradicted, the order of disposition, which did not expressly list such meetings as a condition of his probation, but, consistently with the language in the order of conditions, ordered appellant to be placed under probation supervision. Thus, there is no conflict that could have deprived appellant of fair notice of the conditions of his probation. Appellant merely speculates that the court signed the order of disposition after it signed the order of conditions. Thus, there is no merit to appellant's argument that the court intended to nullify the order of conditions. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

6 MAILA HERMINA et al., Appellants, v 2050 VALENTINE AVENUE LLC et al., Respondents. [992 NYS2d 424]—

Negligence—Maintenance of Premises—Constructive Notice of Dangerous

Condition—Defective Windows—Obligation to Inspect

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered July 1, 2013, which, in this action for personal injuries sustained when the window in plaintiff Malia Hermina's apartment suddenly fell while her hands were on the window sill, granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Triable issues of fact exist as to whether defendants, the owners and managers of the building, had constructive notice of the defective condition of the window. Defendants were aware of problems with the building's windows staying in an upright position, based on the replacement of balances on a number of plaintiff's own windows, including the subject window, and on many of those elsewhere in the building prior to the accident (*see Radnay v 1036 Park Corp.*, 17 AD3d 106, 107-108 [1st Dept 2005]; *see also Lisbey v Pel Park Realty*, 99 AD3d 637 [1st Dept 2012]).

Defendants' argument that there was no requirement to periodically inspect the window balances in the apartment, is unconvincing. Once defendants knew that an appreciable number of the windows in the building required attention, they had an obligation to inspect all of them (*see Candela v New York City Sch. Constr. Auth.*, 97 AD3d 507, 511 [1st Dept 2012]). Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

7 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v DEMETRIUS LATHON, Respondent. [992 NYS2d 424]—

Crimes—Right to Speedy Trial—Excludable Time—Material and Necessary DNA Analysis

Order, Supreme Court, Bronx County (Darcel D. Clark, J.), entered on or about October 9, 2012, which granted defendant's CPL 30.30 motion to dismiss the indictment, unanimously reversed, on the law, the motion denied, the indictment reinstated and the matter remanded for further proceedings.

Defendant's speedy trial motion turns on the preindictment period from April 15, 2011 through August 15, 2011, during which the People were awaiting the results of DNA testing of samples taken from defendant and his codefendant pursuant to a court order. Under the circumstances of this case, this period was excludable as a "delay occasioned by exceptional circumstances" resulting from the "unavailability of evidence material to the people's case" (CPL 30.30 [4] [g] [i]; *see People v Robinson*, 47 AD3d 847, 848 [2d Dept 2008], *lv denied* 10 NY3d 869

[2008]). The fact that the automobile presumption (Penal Law § 265.15 [3]) was available to the People to establish defendant's possession of the pistol did not mean that the DNA analysis was not "material" to the People's case, since defendant had expressed his intention to testify before the grand jury for the purpose of disclaiming any connection with the pistol and rebutting the presumption (*see People v Verez*, 83 NY2d 921, 924 [1994]). Moreover, the materiality and necessity of the DNA analysis had already been determined in the court order compelling defendant and his codefendant to provide saliva samples, and defendant does not contend that the People failed to act diligently to obtain the DNA analysis. Concur—Sweeny, J.P., Moskowitz, DeGrasse and Manzanet-Daniels, JJ.

8 In the Matter of MANDJU S.K., an Infant. ALIYAH B.D., Appellant; GOOD SHEPHERD SERVICES, Respondent. [992 NYS2d 425]—

Parent, Child and Family—Termination of Parental Rights—Permanent Neglect—Failure to Plan for Child's Return Despite Agency Efforts—Failure to Complete Required Treatment and Remain Drug-Free

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Monica Drinane, J.), entered on or about April 15, 2013, which, to the extent appealed from as limited by the briefs, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b [7]). The evidence shows that the agency made diligent efforts to strengthen the parental relationship by, among other things, providing the mother with referrals to drug treatment programs, repeatedly attempting to contact her, holding meetings with her to discuss how she could complete her service plan, encouraging her to complete the necessary services, and scheduling regular visitation between her and the child (*see Matter of Darryl Clayton T. [Adele L.]*, 95 AD3d 562, 562-563 [1st Dept 2012]; *Matter of Jordane John C.*, 14 AD3d 407, 407-408 [1st Dept 2005]). The evidence also shows that, during the statutorily relevant time period, the mother failed to plan for the child's return, as she never completed a drug treatment program or an anger management class, even though she was aware of those requirements, and she failed to remain drug-free (*see Matter of Destiny S. [Hilda S.]*, 79 AD3d 666, 666 [1st Dept 2010], *lv denied* 16 NY3d 709 [2011]). Moreover, the mother never produced proof to support her contention that she had received the required mental health examination.

A preponderance of the evidence supports the determination that termination of the mother's parental rights is in the best interests of the child (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has been in a kinship foster home for over three years, since he was seven years old, and has developed a stable and positive bond with the foster mother, who has provided excellent care and wishes to adopt him (*see Matter of Harold Ali D.-E. [Rubin Louis E.]*, 94 AD3d 449, 450 [1st Dept 2012]). A suspended judgment is unwarranted, given the mother's significant delay in addressing the problems that remained unresolved at the time of disposition, including completion of a drug treatment program (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698, 699 [1st Dept 2012]). Given the record before it, the Family Court properly treated the child's expressed preference to return to the mother's care as nondispositive. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

9 MARISOL SANTIAGO, Respondent, v NEW YORK CITY HOUSING AUTHORITY, Appellant. [992 NYS2d 426]—

Negligence—Maintenance of Premises—Slip and Fall on Stairwell Landing—Summary Judgment

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 3, 2013, which, to the extent appealed from as limited by the briefs, denied defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff, a tenant in a building owned by NYCHA, allegedly sustained injuries when she slipped and fell on the fourth floor landing of a stairwell in the 14-story building. NYCHA established prima facie entitlement to summary judgment through the testimony of the building's caretaker who stated that he inspected the stairwell, including the fourth floor landing, within two hours prior to plaintiff's accident and did not see any urine on the floor (*see Vilomar v 490 E. 181st St. Hous. Dev. Fund Corp Corp.*, 50 AD3d 469 [1st Dept 2008]).

In opposition, plaintiff raised a triable issue of fact by submitting an affidavit from her neighbor stating that she observed urine on the fourth floor landing the day before plaintiff's accident and again the following morning before the accident occurred. The motion court properly considered the affidavit and plaintiff's supplemental bill of particulars. Although both were served after plaintiff filed the note of issue, the court subsequently vacated the note of issue at NYCHA's request. We reject NYCHA's contention that it is entitled to the benefit of vacating

the note of issue to conduct further discovery while precluding plaintiff from engaging in further discovery. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

10 FIDELITY NATIONAL TITLE INSURANCE COMPANY, Plaintiff, v ALTSHULER SHAHAM PROVIDENT FUNDS LTD, Formerly Known as PERFECT PROVIDENT FUND LTD, Defendant/Third-Party Plaintiff-Respondent. JAECKLE FLEISCHMANN & MUGEL LLP, Third-Party Defendant-Appellant. PERFECT PROVIDENT FUND LTD, Respondent, v JAECKLE FLEISCHMANN & MUGEL LLP, Appellant. [992 NYS2d 427]—

Parties—Third-Party Practice

Actions—Consolidation and Severance—No Common Questions of Law or Fact

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 21, 2013, which granted Altshuler Shaham Provident Funds Ltd.'s motion to transfer the Erie County action to New York County, granted Altshuler's motion to consolidate the actions to the extent of consolidating the actions for discovery and other pretrial proceedings and deferring a determination as to whether to consolidate the actions for trial until after the completion of discovery and the determination of any dispositive motions, and denied Jaeckle Fleischmann & Mugel LLP's motion to dismiss the amended third-party complaint in the New York County action, unanimously reversed, on the law and the facts, with costs, Altshuler's motion to transfer and consolidate denied, and Jaeckle's motion to dismiss granted without prejudice to the continued prosecution of the Erie County action. The Clerk is directed to enter judgment dismissing the amended third-party complaint in the New York County action.

This action stems from a failed loan relating to commercial real estate in Syracuse, New York (*see generally Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 21 NY3d 352 [2013]). Fidelity National Title Insurance Company issued a policy to Altshuler. In the New York County action, plaintiff Fidelity seeks a declaration that it properly denied coverage to defendant Altshuler. In the amended third-party complaint against Jaeckle, Altshuler asserts that Jaeckle committed legal malpractice by failing to, among other things, obtain adequate title insurance. The amended third-party complaint should have been dismissed for failure to state a cause of action (CPLR 3211 [a] [7]), because Fidelity did not make a claim against Altshuler for which Jaeckle "is or may be liable" (CPLR 1007; *see Merchants Mut. Ins. Co. v Valilis*, 11 AD2d 324, 326 [1st Dept 1960]; *Ainspan v City of Albany*, 132 AD2d 911, 913 [3d Dept

1987]). Based on the foregoing determination, it is unnecessary to reach Jaeckle's other arguments in support of dismissal of the amended third-party complaint.

The motion court should have denied Altshuler's motion to consolidate the New York County and Erie County actions (*see County of Westchester v White Plains Ave., LLC*, 105 AD3d 690, 691 [2d Dept 2013]). As we are dismissing the amended third-party complaint in the New York County action, the two actions no longer present common questions of law or fact (*see* CPLR 602 [a]). The issue in the New York County action is whether Fidelity properly disclaimed coverage; this will turn on the wording of the policy, not whether Jaeckle committed malpractice by obtaining the wrong type of policy. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

11 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v LUIS RAMIREZ, Appellant. [992 NYS2d 428]—

Crimes—Sentence—Drug Law Reform Act

Order, Supreme Court, New York County (Patricia Nunez, J.), entered on or about April 4, 2013, which denied defendant's motion for resentencing under the Drug Law Reform Act of 2005 (L 2005, ch 643, § 1), unanimously affirmed.

The court properly determined that defendant is ineligible for resentencing because he had already been released to parole supervision for his class A-II drug felony conviction at the time he made the instant application (*see People v Mills*, 11 NY3d 527, 537 [2008]). Accordingly, this Court has no lawful basis upon which to reduce defendant's sentence of six years to life on that conviction to a term of six years. We have considered and reject defendant's remaining arguments. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

12 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ENRIQUE ADORNO, Appellant. [992 NYS2d 429]—Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about December 11, 2012, unanimously affirmed.

Application by appellant'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 appellant's assigned counsel that there are no nonfrivolous 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 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. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

13 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v VICTOR LEE, Appellant. [992 NYS2d 429]—

Crimes—Right of Confrontation—Admission of Codefendant’s Guilty Plea Allocution—New Trial Ordered

Crimes—Right to Counsel—Evidence Improperly Admitted Based on Defendant’s Request over Counsel’s Opposition

Crimes—Appeal—Preservation of Issue for Review—Admission of Testimonial Hearsay in Violation of Confrontation Clause—Decision to Object to Evidence Belongs to Attorney

Crimes—Evidence—New Evidence Admitted during Jury Deliberation—Reversal in Interest of Justice

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 26, 2012, as amended February 24, 2012, 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 whose prior felony conviction was a violent felony, to a term of six years, unanimously reversed, on the law, and as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

Defendant’s constitutional right of confrontation was violated when the court read the transcript of the codefendant’s guilty plea allocution to the jury. The codefendant’s statements by which she inculpated defendant, were testimonial hearsay by a nontestifying declarant, whom defendant did not have a prior opportunity to cross-examine (see *Crawford v Washington*, 541 US 36 [2004]).

The People’s argument that the Confrontation Clause was inapplicable because defendant himself introduced the evidence is unavailing. Although defendant personally requested the introduction of the evidence, he was not appearing pro se. Defendant was represented by counsel throughout the case, and there was no form of hybrid representation. The decision to introduce evidence was not a fundamental decision reserved to defendant, but a strategic or tactical decision for his attorney (see *People v Jones*, 41 AD3d 242, 243 [1st Dept 2007], *lv denied* 9 NY3d 923 [2007]). Thus, defendant was deprived of his right to counsel when the court admitted the evidence solely based on his own request, over his attorney’s vigorous and consistent op-

position (*see People v Colville*, 20 NY3d 20, 32 [2012]). Likewise, since the decision to object to evidence is relegated to the attorney, the admission of testimonial hearsay in violation of the Confrontation Clause constitutes a preserved error here. On appeal, defendant also challenges the same evidence on the grounds that he was deprived of due process because the defense lacked an opportunity to comment on the evidence before the jury, and that the court improvidently exercised its discretion by untimely admitting the evidence after the jury had begun deliberating. Although these additional arguments are unpreserved, reversal is further warranted based on those claims, in the interest of justice. New evidence may be admitted during jury deliberation only with “the utmost caution” (*People v Olsen*, 34 NY2d 349, 353 [1974]). That standard was not met under the circumstances of this case, given the risk that the evidence would receive “undue emphasis” as a result of “the drama of discovery” at the proverbial last minute (*id.* at 353-354).

The errors in admitting the evidence were not harmless, because the codefendant’s admission to working with defendant to sell cocaine to an undercover police officer bore on the central issue at trial, namely whether he acted as the agent of the buyer (*see People v Crimmins*, 36 NY2d 230 [1975]).

Since we are ordering a new trial, we find it unnecessary to discuss defendant’s other arguments, except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

14 In the Matter of ALFREDO J.T., Respondent, v JODI D., Appellant. [992 NYS2d 431]—

Parent, Child and Family—Custody—Award of Sole Custody to Father—Father More Stable and Better Suited to Meet Child’s Medical and Educational Needs
Parent, Child and Family—Custody—Attorney for Child Properly Advocated against Child’s Expressed Preference

Order, Family Court, Bronx County (David B. Cohen, J.), entered on or about August 30, 2013, which, inter alia, awarded petitioner father Alfredo J.T. sole legal and physical custody of the subject child, with visitation to respondent mother, unanimously affirmed, without costs.

The court’s determination was based upon a thoughtful assessment of the parties’ testimony and credibility, and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]; *Bubbins v Bubbins*, 136 AD2d 672 [2d Dept 1988]). The court properly considered the appropriate factors in making its determination, and gave appropriate

weight to the testimony and recommendations of the court-appointed forensic expert, which is but one factor to consider and is not a substitute for the court's own review of the relevant record evidence (*see State of New York ex rel. H.K. v M.S.*, 187 AD2d 50, 53 [1st Dept 1993], *appeal dismissed* 81 NY2d 1006 [1993]).

The court properly considered the evidence that, among other things, the mother deliberately and continuously disparaged the father in the child's presence, which caused the child to develop anxiety which was further fostered by the mother's conduct (*see Dodson v Dodson*, 77 AD3d 564 [1st Dept 2010]), and impeded the father's visitation with the child, conduct clearly inconsistent with the child's best interests (*see Matter of Xiomara M. v Robert M.*, 102 AD3d 581, 582 [1st Dept 2013]; *Matter of Howell v Lovell*, 103 AD3d 1229, 1232 [4th Dept 2013]; *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

In addition, the father was shown to be more stable and better suited to meet the child's medical and educational needs (*see Matter of Worowski v Worowski*, 95 AD2d 687 [1st Dept 1983]; *Matter of Sellen v Wright*, 229 AD2d 680, 681 [3d Dept 1996]). In the mother's care, the child developed advanced bottle rot requiring extensive dental treatment, and was still wearing diapers at the age of five. The mother changed the child's preschool repeatedly, sometimes without consulting the father, and moved to several different residences. The court properly considered the evidence supporting the mother's allegations of domestic violence, and concluded that the allegations were not credible.

The child, who now resides in the father's home with her father, stepmother, stepsister and an infant half-brother, would benefit from continued stability in the father's home, and will still be able to maintain contact with her older half-sister through visitation and modern communication technology (*see Matter of Brown v Marr*, 23 AD3d 1029, 1030 [4th Dept 2005]).

The attorney for the child acted properly in apprising the court of the then five-year-old child's expressed preference to reside with the mother, but in advocating otherwise based upon her determination that the child lacked "capacity for knowing, voluntary and considered judgment" (22 NYCRR 7.2 [d] [3]; *see Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1728 [4th Dept 2010]).

We have considered appellant's remaining arguments, and find them unavailing. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

15 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRUCE NOVELLO, Appellant. [992 NYS2d 432]—Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered on or about April 24, 2013, unanimously affirmed.

Application by appellant’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 appellant’s assigned counsel that there are no nonfrivolous 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 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. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

16 NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Appellant, v 221-223 WEST 82 OWNERS CORP. et al., Defendants, and JRP CONTRACTING, INC., Respondent. [992 NYS2d 432]—

Workers’ Compensation—Third-Party Action—No Duty to Indemnify Employer in Absence of Grave Injury—Summary Judgment

Order, Supreme Court, Bronx County (John A. Barone, J.), entered December 13, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff National Union’s motion for summary judgment against defendant JRP Contracting, Inc., with leave to renew, unanimously reversed, on the law, with costs, the motion granted, and it is declared that National Union has no duty to defend or indemnify defendant JRP Contracting, Inc. in the underlying personal injury action.

National Union was entitled to rely on the underlying plaintiff’s bill of particulars to make a prima facie showing that the ligament and meniscal tears he allegedly sustained do not qualify as “grave injur[ies]” within the meaning of Workers’ Compensation Law § 11 (*see Marshall v Arias*, 12 AD3d 423, 424 [2d Dept 2004]). Indeed, the underlying plaintiff failed to allege that he had lost the use of his knee, let alone the use of his leg (*see Fleischman v Peacock Water Co., Inc.*, 51 AD3d 1203, 1205 [3d Dept 2008]). JRP produced no evidence indicating that

further discovery will yield material and relevant evidence (*see id.*). Accordingly, National Union has no obligation to defend or indemnify JRP for the underlying common-law indemnification and contribution claims (*cf. Liberty Mut. Ins. Co. v Insurance Co. of State of Pa.*, 43 AD3d 666, 667-668 [1st Dept 2007]). Further, National Union is not obligated to defend or indemnify JRP for the underlying contractual indemnification claim, since its policy clearly excludes coverage for “liability assumed under a contract.”

JRP’s argument that it will be prejudiced if National Union withdraws from its defense is unavailing, as National Union expressly reserved its rights to disclaim coverage, and JRP failed to demonstrate prejudice (*see General Acc. Ins. Co. v 35 Jackson Ave. Corp.*, 258 AD2d 616, 618 [2d Dept 1999]). Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

17 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JONATHAN HERNANDEZ, Appellant. [992 NYS2d 433]—

Crimes—Verdict—Sufficiency and Weight of Evidence

Crimes—Consolidation and Severance—Evidence Relating to Codefendants Admissible and Necessary to Prove Conspiracy—Absence of Antagonistic Defenses

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 29, 2011, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts), attempted assault in the first degree and conspiracy in the third and fourth degrees, and sentencing him to three concurrent terms of 15 years to run consecutively to concurrent terms of 2¹/₃ to 7 years and 1¹/₃ to 4 years, unanimously modified, on the law, to the extent of vacating the fourth-degree conspiracy conviction and dismissing that count of the indictment, and otherwise affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury’s credibility determinations. The weapon and attempted assault convictions were supported by police observations, which were corroborated by the recovery of cartridge cases at the scene. There was ample evidence to support the conspiracy convictions, including recorded telephone conversations.

The court properly exercised its discretion in denying defendant’s motion to sever his trial from that of his codefendants. There were no antagonistic defenses, and the evidence relating to the acts of the codefendants was admissible against defend-

ant and necessary to prove conspiracy (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]; *People v Council*, 98 AD3d 917, 918 [1st Dept 2012], *lv denied* 20 NY3d 1060 [2013]).

As the People concede, the fourth-degree conspiracy count should have been dismissed as an inclusory concurrent count.

We perceive no basis for reducing the sentence. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

18 YANIVETH R., an Infant, by Her Mother and Natural Guardian, RAMONA S., et al., Appellants, v LTD REALTY CO. et al., Respondents, et al., Defendants. (And a Third-Party Action.) [992 NYS2d 434]—

Negligence—Violation of Statutory Duty—Landlord’s Duty to Remove Lead Paint—Infant Did Not Reside in Apartment

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered May 28, 2013, which, to the extent appealed from as limited by the briefs, granted defendant LTD Realty Co.’s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant established prima facie that the infant plaintiff was cared for at the apartment, during the day, but resided elsewhere, with her parents (*see* Administrative Code of City of NY former § 27-2013 [h] [1], now §§ 27-2056.3, 27-2056.5, 27-2056.6, 27-2056.18; *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628 [1996]; *Hanlan v Parkchester N. Condominium, Inc.*, 32 AD3d 799 [1st Dept 2006]; *Michaud v Lefferts 750, LLC*, 87 AD3d 990 [2d Dept 2011]). In opposition, plaintiffs failed to raise an issue of fact as to the infant’s residence at the premises.

We have considered plaintiffs’ remaining arguments and find them unavailing. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

19 NORTH SHORE COMMUNITY SERVICES, INC., Appellant, v COMMUNITY DRIVE LLC, Respondent. [992 NYS2d 435]—

Landlord and Tenant—Lease—Acceptance of Rent Following Termination of Lease

Order, Supreme Court, New York County (Cynthia Kern, J.), entered December 23, 2013, as amended February 19, 2014, which granted defendant’s motion for summary judgment on its counterclaims for use and occupancy and attorney’s fees, unanimously affirmed, with costs.

Plaintiff’s argument that defendant’s acceptance of its tender of rent for the month following the expiration of the lease agreement created a new month-to-month tenancy under Real Property Law § 232-c is refuted by the unambiguous terms of the

lease (see *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543 [1995]; *101123 LLC v Solis Realty LLC*, 23 AD3d 107 [1st Dept 2005]). Real Property Law § 232-c provides that if the landlord accepts rent for any period subsequent to the expiration of the lease term, the tenancy thereby created will be from month to month, “unless an agreement either express or implied is made providing otherwise.” Article 61 of the parties’ lease is such an agreement. It provides that, upon plaintiff’s default of its obligation to surrender the premises at the end of the lease term, plaintiff’s continued occupation of the premises, with or without defendant’s consent or acquiescence, will be treated as a tenancy at will and “in no event” a tenancy from month to month. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

20 In the Matter of LOUISE NEATHWAY, Petitioner, v DANIEL CONVISER et al., Respondents. [993 NYS2d 523]—The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules, now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon, it is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements. Concur—Sweeny, J.P., Moskowitz, DeGrasse, Manzanet-Daniels and Clark, JJ.

21 2350 FIFTH AVENUE LLC, Respondent, v 2350 FIFTH AVENUE CORPORATION, Appellant. [993 NYS2d 522]—An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Edward Lehner, J.), entered on or about February 13, 2009, and said appeal having been stayed at the call of the calendar, and correspondence from counsel having been filed on September 8, 2014, it is unanimously ordered that said appeal be and the same is hereby withdrawn. Concur—Mazzarelli, J.P., Friedman, Renwick and Richter, JJ.

(September 30, 2014)

1 CRUSH BOONE, Appellant, v ELIZABETH TAXI, INC., et al., Respondents. [993 NYS2d 302]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Cervical Spine and Wrist—Permanent Consequential Limitations in Use and 90/180-Day Claims Properly Dismissed

Order, Supreme Court, New York County (Arlene P. Bluth, J.),

entered March 7, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleged in his bill of particulars that, as a result of an accident in which he was thrown from his bicycle after being hit by defendants' taxi, he suffered cervical spine injury, and that he complained of neck and bilateral wrist pain after the accident, but that X rays taken at the time "apparently were negative." Plaintiff alleged, *inter alia*, injury under the permanent consequential limitations in use and 90/180-day categories of Insurance Law § 5102 (d).

Defendants met their *prima facie* burden of demonstrating the absence of permanent consequential limitations in use injuries by submitting, *inter alia*, affirmed expert medical reports finding full range of motion in the cervical spine and wrists, negative test results and no objective evidence of permanent injury in plaintiff's cervical spine or wrists (*see Kone v Rodriguez*, 107 AD3d 537 [1st Dept 2013]). Defendants also submitted a report by their radiologist opining that plaintiff's claimed cervical spine injuries were chronic and degenerative, and not causally related to the subject accident (*see Nova v Fontanez*, 112 AD3d 435 [1st Dept 2013]).

In opposition, plaintiff failed to offer evidence of permanent consequential limitations in use of his cervical spine or wrists caused by the accident (*see Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]). Instead, plaintiff raised for the first time a new serious injury claim under Insurance Law § 5102 (d), namely, that he sustained a fracture in his left wrist. In support, he offered the affirmation of a radiologist, which, contrary to the motion court's determination, was in sufficient compliance with the requirements of CPLR 2106 (*see e.g. Dennis v New York City Tr. Auth.*, 84 AD3d 579 [1st Dept 2011]). The radiologist had recently reviewed the post-accident left-wrist MRI and averred that it showed a nondisplaced fracture of the scaphoid. However, it was error for the court to consider this new serious injury claim, since plaintiff did not plead a fracture injury in the bill of particulars (*see Christopher V. v James A. Leasing, Inc.*, 115 AD3d 462 [1st Dept 2014]; *Marte v New York City Tr. Auth.*, 59 AD3d 398 [2d Dept 2009]).

Defendants also met their *prima facie* burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony in which he claimed that he was only confined to his bed and home for a month after the subject accident (*see Komina v Gil*, 107 AD3d 596, 597 [1st Dept 2013]). In opposition, plaintiff failed to submit competent medical evidence

contradicting this testimony and, furthermore, his submissions failed to address defendants' showing that his cervical spine injuries were degenerative and preexisting (*see Nova*, 112 AD3d at 436; *Bravo v Martinez*, 105 AD3d 458, 459 [1st Dept 2013]). Concur—Sweeny, J.P., Renwick, Saxe, Freedman and Richter, JJ.

The decision and order of this Court entered herein on May 13, 2014 (117 AD3d 515 [2014]) is hereby recalled and vacated (*see* 2014 NY Slip Op 84904[U] [2014] [decided simultaneously herewith]).

2 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOSEPH SMALLS, Appellant. [992 NYS2d 880]—Order, Supreme Court, New York County (Cassandra M. Mullen, J.), entered on or about April 2, 2012, which adjudicated defendant a level three sexually violent offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, and properly exercised its discretion in denying a downward departure. The underlying offense is defendant's third felony sex crime conviction. Defendant committed the underlying crime after having already been adjudicated a level three sex offender (*see People v Carter*, 114 AD3d 592 [1st Dept 2014]). The mitigating factors cited by defendant were outweighed by his criminal record, which demonstrates a dangerous propensity to commit sex crimes (*see e.g. People v Jamison*, 107 AD3d 531 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]; *People v Poole*, 105 AD3d 654 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]), and also by his failure to advance to the second level of the sex offender treatment program. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

3 In the Matter of REGGIE T., a Person Alleged to be a Juvenile Delinquent, Respondent. [993 NYS2d 27]—

Crimes—Unlawful Search and Seizure—Flight from Police—No Justification for Police Pursuit Absent Other Indicia of Criminality

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 12, 2013, which granted respondent's motion to suppress physical evidence, unanimously affirmed, without costs.

The court properly granted respondent's motion to suppress a weapon recovered from his person. The officer's credited

testimony failed to establish that he had the requisite suspicion to justify pursuing respondent, ordering him to stop and handcuffing him. The police received an anonymous tip that lacked a detailed description of the alleged criminal activity or its participants (*see generally People v De Bour*, 40 NY2d 210 [1976]). Respondent and his companions did not even match the limited descriptions of four alleged participants in a fight, and there was nothing to support an inference that they were likely to have been the same four persons described in the radio message, particularly since the events occurred on a busy street in the afternoon. Initially, there was nothing suspicious about the behavior of the four youths as the police arrived. Under all the circumstances, respondent's ensuing flight was insufficient to elevate the minimal level of preexisting suspicion to a level warranting pursuit (*see People v Holmes*, 81 NY2d 1056 [1993]). The manner in which respondent held his arms while fleeing was also equivocal. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

4 In the Matter of JOHN J. LYNCH, Appellant, v CITY OF NEW YORK et al., Respondents. [993 NYS2d 28]—

Limitation of Actions—Four-Month Statute of Limitations—Timeliness of Petition—Date of Reviewable Final and Binding Determination

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered January 18, 2013, granting respondents' cross motion to dismiss the petition to annul the determination that petitioner is not entitled to payment of \$18,758 for unused annual leave at retirement, denying the petition, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed on the law, without costs, the cross motion denied, the petition reinstated, and the matter remanded for further proceedings.

The motion court erred in finding that the petition was not filed within the four month statute of limitations applicable to article 78 proceedings (*see* CPLR 217 [1]). There were two components to the "actual, concrete injury" (*see Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]) giving rise to petitioner's claim that respondents improperly determined that his unused annual leave had been miscalculated resulting in an overstatement of the amount he was to be paid upon his retirement in 2010. While the first determination, that petitioner was credited with approximately forty more days of annual leave than he was entitled to between 1992 and 1999, was definitively communicated to petitioner in June 2011, the second, that the "six-

year rule,” which would have limited recoupment to a period of six years preceding discovery of the error, did not apply to managers, such as petitioner, was not decided by respondents until March 2012.

Notably, in June 2011, the City’s Human Resources Administration took the position that petitioner was covered by the six-year rule, and the issue remained unsettled for more than ten months thereafter. Accordingly, the petition, filed on July 26, 2012, was timely, having been filed within four months of the March 27, 2012 determination that the six-year rule did not apply to petitioner. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

5 In the Matter of JEREMY A., Appellant, v VIANCA G., Respondent. [993 NYS2d 29]—

Parent, Child and Family—Visitation—Uniform Child Custody Jurisdiction and Enforcement Act—Inconvenient Forum—Failure to Consider All Relevant Factors before Making Determination

Order, Family Court, Bronx County (Jennifer S. Burt, Ref.), entered on or about September 25, 2013, which granted respondent mother’s motion to dismiss petitioner father’s visitation petition on forum non conveniens grounds to the extent of staying the father’s petition until he either files a new petition for visitation in Florida or files a cross petition in the proceedings filed by the mother that are currently pending in Florida, unanimously reversed, on the law, without costs, the stay lifted, and the matter remanded for further proceedings consistent with this decision. Leave to appeal from the aforementioned order is granted nunc pro tunc.

The order staying the father’s petition is not appealable as of right (*see* Family Ct Act § 1112 [a]; *Matter of Holtzman v Holtzman*, 47 AD2d 620, 620-621 [1st Dept 1975]). However, we exercise our discretion and treat the father’s appeal as an application for leave to appeal, and grant the application nunc pro tunc (*see Matter of Brett M.D. v Elizabeth A.D.*, 110 AD3d 424 [1st Dept 2013]).

The court improvidently exercised its discretion, as the record indicates that the court failed to consider all relevant factors before making its determination (*see* Domestic Relations Law § 76-f [2]). In particular, there is no indication that the court considered the distance between New York and Florida, the relative financial conditions of the mother and father, any agreement between the parties on jurisdiction, or the nature and location of any evidence required to resolve the “pending litigation” concerning the father’s visitation rights (§ 76-f [2]).

[c], [d], [e], [f]). Accordingly, the matter is remanded so that the parties may present evidence and the court can consider all factors in determining whether New York is an inconvenient forum and whether Florida is a more appropriate forum (*see* Domestic Relations Law § 76-f [1], [2]; *Matter of Wilson v Linn*, 79 AD3d 1767 [4th Dept 2010]; *Matter of Blerim M. v Racquel M.*, 41 AD3d 306, 310-311 [1st Dept 2007]). Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

6 CPN MECHANICAL, INC., et al., Appellants, v MADISON PARK OWNER, LLC, Respondent, et al., Defendants. (And Other Actions.) [992 NYS2d 880]—

Liens—Mechanic's Lien—Foreclosure—Foreclosure Precluded by Wrongdoing

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered June 5, 2013, which granted defendant Madison Park Owner, LLC's (defendant) motion to dismiss the complaint as against it, unanimously affirmed, with costs.

Plaintiffs argue that since plaintiff CPN Mechanical, Inc.'s admitted theft of \$100,000 from defendant by over-billing for the HVAC work on defendant's renovation project only amounted to 1.25% of its total subcontract price, the theft is not central to the claims brought in this lien foreclosure action (*see McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 471 [1960]). This argument is unpreserved and, in any event, without merit. CPN pleaded guilty to grand larceny in the second degree, and agreed to make restitution to defendant in an amount not to exceed \$348,000 (later reduced to \$100,000). Documents in the record show that CPN's principal admitted that CPN over-billed defendant "at the behest of" defendant's contract manager, whose own lien foreclosure action was dismissed because of its participation in "a complex kickback scheme involving the over-billing of project subcontractors" (*see G Bldrs. IV LLC v Madison Park Owner, LLC*, 101 AD3d 413, 414 [1st Dept 2012]). Moreover, CPN engaged in this over-billing practice during the two years in which it worked on the renovation project. CPN's illegality in the performance of its contract was not, as plaintiffs argue, a "minor wrongdoing" but was "central to or a dominant part of [its] whole course of conduct in performance of the contract" (*McConnell*, 7 NY2d at 471).

We have considered plaintiffs' remaining arguments and find them unavailing. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

7 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ERVIN BOWENS, Appellant. [992 NYS2d 881]—

Crimes—Accessory**Crimes—Sentence—Second Violent Felony Offender**

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered December 11, 2012, convicting defendant, after a jury trial, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of seven 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, 349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. Defendant's accessory liability could be reasonably inferred from the entire course of conduct of defendant and his codefendant before, during and after the crime, along with defendant's damaging admissions (*see generally Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]).

The sentencing court properly adjudicated defendant a second violent felony offender. Not only was defendant's predicate felony (Penal Law §§ 110.00, 265.02 [4]) classified as a violent felony at the time of that conviction in 2003 (*see People v Walker*, 81 NY2d 661, 664-666 [1993]), the same crime remained a violent felony at the time of defendant's second violent felony offender adjudication, albeit as the result of a recodification (*see* Penal Law § 265.03 [3]; William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 265.00 at 413). Defendant's ex post facto argument is without merit. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

8 ROBERT V.C., Appellant, v Polly V.H., Respondent. [992 NYS2d 882]—Order, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about April 29, 2013, which, to the extent appealed from as limited by the briefs, denied petitioner father's objections to the Support Magistrate's approval of a Qualified Domestic Relations Order (QDRO), unanimously affirmed, without costs.

Petitioner father has been litigating this matter for 19 years. Pursuant to Family Court Act § 439 (e), he made a specific objection regarding service of the QDRO (*see Matter of Renee XX. v John ZZ.*, 51 AD3d 1090, 1092 [3d Dept 2008]). However, his objection is unavailing. The Support Magistrate did not err in mailing the father's copy of the QDRO to the attorney who represented him on the support violation matter. The record indicates that the two matters were consolidated and that the same attorney represented the father on both matters.

There is no basis for reassigning this case to a different judge or court (*cf. Matter of Tequan R.*, 43 AD3d 673, 679 [1st Dept 2007]). Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

9 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ERNEST GAY, Appellant. [992 NYS2d 882]—Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about November 29, 2012, as amended December 4, 2012, unanimously affirmed.

Application by appellant'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 appellant's assigned counsel that there are no nonfrivolous 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 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. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

10 MIDWEST GOLDBUYERS, INC., Appellant, v BRINK'S GLOBAL SERVICES USA, INC., a Delaware Corporation, Respondent. [992 NYS2d 883]—Order, Supreme Court, New York County (Anil C. Singh, J.), entered June 6, 2013, which, granted defendant's motion to dismiss the first two breach of contract claims, and the negligence claim, unanimously affirmed, without costs.

Plaintiff's claims arising from transactions that occurred more than one year before the filing of the instant suit in New York are time-barred under the one-year contractual limitations period. The IAS court correctly held that plaintiff's prior action in Illinois was not a "prior action" for purposes of the six-month toll in CPLR 205 (a) (*Lehman Bros. v Hughes Hubbard & Reed*, 245 AD2d 203, 203 [1st Dept 1997], *affd* 92 NY2d 1014 [1998]). Further, the IAS court properly dismissed the claim for negligence as to all transactions, as plaintiff failed to allege any breach of duty independent of the parties' contracts (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 [1992]). Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

11 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v Emiliano Carreon, Appellant. [992 NYS2d 883]—Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about November 21, 2012, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not demonstrate by a preponderance of the evidence any mitigating factors not already taken into account in the risk assessment instrument that would warrant a downward departure (*see People v Gillotti*, 23 NY3d 841, 860-861 [2014]). While working as a home health care attendant for a disabled person, he committed sex offenses against that person's mentally-impaired teenaged sister. We do not find that this defendant's age requires a downward departure to level one, when viewed in light of all the circumstances (*see e.g. People v Harrison*, 74 AD3d 688 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]).

We have considered and reject defendant's remaining arguments. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

12 ASSOS CONSTRUCTION CORP., Respondent-Appellant, v 1141 REALTY LLC, Appellant-Respondent. [993 NYS2d 23]—

Contracts—Construction Contracts—Validity—Mistake in Name of Corporate Entity

Contracts—Construction Contracts—Change Work Orders

Interest—Prejudgment Interest—Date from Which Prejudgment Interest Computed

Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 7, 2013, after a nonjury trial, awarding plaintiff \$258,000 plus prejudgment interest from August 23, 2013, and costs and disbursements, unanimously modified, on the law, to reduce the award to \$248,000, plus prejudgment interest calculated from March 28, 2011, and otherwise affirmed, without costs. Appeal from the order, same court and Justice, entered August 23, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Contrary to defendant project owner's contention, the documents detailing the scope of steel work to be performed by plaintiff subcontractor and setting a price for the work, are valid contracts that are binding on defendant. The documents were signed by defendant's manager, and a mere misnomer in the name of the corporate entity will not free it from liability

under the contract (see *Humble Oil & Ref. Co. v Jaybert Esso Serv. Sta.*, 30 AD2d 952 [1st Dept 1968]; cf. *Skyline Enters. of N.Y. Corp. v Amuram Realty Co.*, 288 AD2d 292 [2d Dept 2001] [misidentification of corporate plaintiff in contract does not preclude plaintiff from enforcing contract]). The contracts are sufficiently definite and evince an obligation on the part of defendant to pay the price stated for the work. This is not inconsistent with the contract between defendant and the general contractor which specifically permitted defendant to contract directly with other contractors.

Defendant's argument that it should be credited for payments it made to plaintiff with moneys from the general contractor's account is unavailing. The trial court's determination that defendant was not authorized by the general contractor to make such payments from the account is not incompatible with the evidence and should not be disturbed (*Horsford v Bacott*, 32 AD3d 310, 312 [1st Dept 2006], *affd* 8 NY3d 874 [2007]). However, plaintiff acknowledges that a \$10,000 credit is owed to defendant for work that was not performed.

Plaintiff's argument on its cross appeal, that it is entitled to payment from defendant for change work orders signed by the former president of the general contractor, is unavailing. The trial court's rejection of the explanation offered by plaintiff's principal and the general contractor's former president, that the general contractor's former principal only signed the change work orders to signify that the work had been completed, is not incompatible with the evidence and should not be disturbed (*id.*). Plaintiff is entitled to prejudgment interest from the "earliest ascertainable date the cause of action existed" (CPLR 5001 [b]), which, in this case, is the date the complaint was served, March 28, 2011. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

13 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MORGAN SOTO, Appellant. [992 NYS2d 884]—Judgment, Supreme Court, New York County (Michael Sonberg, J., at plea and sentencing), rendered on or about April 2, 2012, unanimously affirmed.

Application by appellant'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 appellant's assigned counsel that there are no nonfrivolous 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 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. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

14 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v FRANCISCO RODRIGUEZ, Appellant. [993 NYS2d 522]—An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered on or about March 21, 2012, said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive, it is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

15 SEA TRADE MARITIME CORPORATION, Appellant, v MARSH USA, INC., Respondent. [993 NYS2d 30]—

Insurance—Agents and Brokers—Negligent Failure to Procure Requested Coverage—Findings of Arbitration Panel Sufficient to Rebut Claim

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 21, 2013, which granted defendant's motion to dismiss the complaint with prejudice, unanimously affirmed, with costs.

While in a port in Sri Lanka in May 1997, plaintiff's ship suffered damage as a result of an alleged terrorist bombing. Plaintiff's insurer paid millions of dollars less than the amount of plaintiff's loss, because plaintiff failed to give the insurer notice that its ship was entering an additional premium area (APA).

In this action, plaintiff claims that the terms of the insurance policy that defendant broker had procured for plaintiff were not those which plaintiff had requested and which defendant had led plaintiff to believe had been obtained. This action—initially commenced against plaintiff's insurer, its former broker, and defendant—was stayed to permit plaintiff and the insurer to pursue contractually-mandated arbitration (*see Sea Trade Mar. Corp. v Hellenic Mut. War Risks Assn. [Bermuda]*, 7 AD3d 289,

290 [1st Dept 2004], *lv dismissed* 3 NY3d 766 [2004]). The arbitration panel ultimately found that plaintiff, through its agent, Trans-Ocean, was familiar with the insurer's rules, knew or should have known that it was required to declare voyages to APAs in advance or risk losing coverage, and had actual notice that Sri Lanka was an APA. The motion court recognized and enforced the award, and this Court affirmed the motion court's judgment (*see Sea Trade Mar. Corp. v Hellenic Mut. War Risks Assn. [Bermuda] Ltd.*, 79 AD3d 601 [1st Dept 2010], *lv dismissed and denied* 17 NY3d 783 [2011]).

The findings of the arbitration panel, supported by the written statement of Trans-Ocean's employee, were sufficient to rebut plaintiff's claims against defendant (*see Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78-80 [1st Dept 2003], *lv denied* 100 NY2d 512 [2003]; *see also Acevedo v Holton*, 239 AD2d 194, 195 [1st Dept 1997]). Indeed, plaintiff's claim that defendant negligently failed to procure the requested coverage fails because the evidence established that plaintiff was aware of the policy's rules, that it "renewed the policy annually on five successive occasions" despite such knowledge (7 AD3d at 290), and that the loss was actually due to Trans-Ocean's inadvertent error in failing to give notice. Further, the motion court properly dismissed plaintiff's negligent misrepresentation cause of action, as the 1996 and 1997 Confirmations of Insurance, provided by defendant to Trans-Ocean, accurately described the insurance policy by expressly stating that notice "shall" be given prior to entering an APA (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]).

Plaintiff has offered no evidentiary showing that would support a third amendment to the complaint (*see Lerner v Prince*, 119 AD3d 122, 126 n 1 [1st Dept 2014]). Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ. **[Prior Case History: 41 Misc 3d 1215(A), 2013 NY Slip Op 51704(U).]**

16 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MARCELLUS JOHNSON, Appellant. [992 NYS2d 884]—

Crimes—Robbery—Sufficiency of Evidence—Larcenous Intent—Discarding Stolen Items

Crimes—Evidence—Tape Recordings—Telephone Calls Made by Defendant from Correction Facility

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered March 22, 2012, as amended March 29, 2012, convicting defendant, after a jury trial, of robbery in the third degree (two counts), grand larceny in the fourth degree (three

counts) and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

We reject defendant's argument that his convictions on counts relating to his taking of the victim's wallet and phone were against the weight of the evidence with respect to the element of larcenous intent. The evidence supports the conclusion that, at the time of the taking, defendant intended to permanently deprive the victim of those items, even though defendant then discarded those items, apparently to divert the victim as defendant escaped with the victim's debit card (*see e.g. People v Jacobs*, 52 AD3d 432 [1st Dept 2008], *lv denied* 11 NY3d 833 [2008]).

The court properly admitted portions of telephone calls made by defendant from Rikers Island that were routinely recorded by the Department of Correction. These calls were clearly admissible, notwithstanding that defendant's right to counsel had attached (*see Kuhlmann v Wilson*, 477 US 436, 459 [1986]; *Maine v Moulton*, 474 US 159, 176 [1985]; *see also People v Campney*, 94 NY2d 307 [1999]; *People v Harris*, 57 NY2d 335, 342 [1982], *cert denied* 460 US 1047 [1983]). We have considered and rejected defendant's remaining claims regarding the recorded calls. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

17 TERRENCE MULLIGAN, Appellant, v CITY OF NEW YORK et al., Respondents. [993 NYS2d 24]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Knee—No Evidence of Limitations in Use

Insurance—No-Fault Automobile Insurance—Serious Injury—Cervical and Lumbar Spine—Permanent Consequential and Significant Limitations of Use

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 23, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint based on plaintiff's failure to establish a "permanent consequential" or "significant" limitation of use of his cervical and lumbar spine and right knee within the meaning of Insurance Law § 5102 (d), unanimously modified, on the law, the motion denied to the extent plaintiff alleges permanent consequential and significant limitations of use of his cervical and lumbar spine, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain permanent consequential or significant limitations in the subject body parts by submitting the affirmed report of their medical expert, who found no limitations in range of mo-

tion upon examination (*see Thomas v City of New York*, 99 AD3d 580, 581 [1st Dept 2012], *lv denied* 22 NY3d 857 [2013]). Plaintiff's refusal to cooperate fully with the examination of his lower back does not undermine the expert's opinion that his back was asymptomatic. Defendants' expert, relying on plaintiff's MRI reports, also opined that the injuries were not causally related to the accident because the MRI report of the right knee revealed preexisting conditions that could cause a meniscal tear, and the MRI reports of the cervical and lumbar spine revealed bulging discs that may exist absent any trauma (*see Vasquez v Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]).

Although plaintiff's orthopedic surgeon opined that the right knee injury was caused by the accident, plaintiff failed to present any evidence of quantified or qualitative limitations in use of his right knee, either before or after surgery to repair the meniscal tear. A tear of the meniscus, standing alone, without any evidence of limitations caused by the tear, is not sufficient to raise a triable issue of fact (*see Valdez v Benjamin*, 101 AD3d 622, 623 [1st Dept 2012]).

Plaintiff, however, raised triable issues of fact with respect to the alleged injuries to his cervical and lumbar spine. Although plaintiff did not submit a copy of the MRI reports, defendants' expert relied on plaintiff's MRI reports in forming his opinion as to causation, and defendants did not present any evidence to dispute the findings of multiple bulging discs (*see Windham v New York City Tr. Auth.*, 115 AD3d 597, 598 [1st Dept 2014]). Further, the affidavit of plaintiff's chiropractor set forth range-of-motion limitations measured shortly after the accident, averred that limitations continued throughout the course of treatment, and measured limitations 2½ years later. Plaintiff's chiropractor and orthopedic surgeon both opined that the spinal injuries were causally related to the accident; their opinions are entitled to the same weight as defendants' expert's opinion and are sufficient to raise an issue of fact (*see Vaughan v Leon*, 94 AD3d 646, 648 [1st Dept 2012]). Defendants' argument that plaintiff had not explained a gap in his treatment is not properly before us, as it was raised for the first time in their reply affirmations in support of their motions (*see Rosa v Mejia*, 95 AD3d 402, 405 [1st Dept 2012]).

If plaintiff demonstrates that his spine injuries are serious injuries within the meaning of the Insurance Law, he can recover for all injuries proximately caused by the accident, including his knee injury (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]). Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

18 FROSS, ZELNICK, LEHRMAN & ZISSU, P.C., Appellant, v LOUISE GEER, as Trustee of the DILLE FAMILY TRUST, Respondent. [993 NYS2d 300]—

Attorney and Client—Retainer—Validity of Engagement Letter

Attorney and Client—Compensation—Ratification of Letter of Engagement and Retainer

Attorney and Client—Malpractice—Proximate Cause

Attorney and Client—Malpractice—Speculative Evidence of Actual Ascertainable Damages

Order, Supreme Court, New York County (Louis B. York, J.), entered May 21, 2013, which, in this action to recover legal fees, denied plaintiff's motion for summary judgment on its account stated claim and for summary judgment dismissing defendant's counterclaims, unanimously modified, on the law, to grant the motion for summary judgment on the account stated claim except as to the amount due under the August 25, 2009 invoice for the period ending July 31, 2009, and for summary judgment dismissing defendant's counterclaims, and otherwise affirmed, without costs.

The Dille Family Trust (the Trust), of which defendant is trustee, owned trademarks and copyrights for "Buck Rogers." Two of the Dille family members are beneficiaries of the Trust; their grandfather's syndicate had obtained the Buck Rogers trademark and copyrights. The syndicate had hired Philip Nowlan to create comic strips based on the character, and his heirs started cancellation proceedings to terminate the syndicate's trademark rights and obtain the rights for themselves. The beneficiaries of the Trust retained plaintiff law firm to handle intellectual property matters, including the cancellation action.

Contrary to the motion court's conclusion, there was a valid fee agreement between plaintiff and the Trust. The better practice would have been to send the engagement letter to the trustee, rather than only to the beneficiaries. However, the record, including email exchanges between the trustee and plaintiff, shows that the trustee was well aware of and approved of the beneficiaries' authority to act on the Trust's behalf with regard to plaintiff's retainer and representation (*see Granato v Granato*, 75 AD3d 434 [1st Dept 2010]). It is irrelevant that the original engagement letter was not signed by the client (*see* 22 NYCRR 1215.1 [a]).

Defendant's timely written objection to plaintiff's invoice dated August 25, 2009, for the period ending July 31, 2009, creates triable issues of fact as to the amount due under that invoice only. Defendant's oral and undocumented objections to

the remaining bills do not suffice to create triable issues as to the remaining amount owed (*see Brill & Meisel v Brown*, 113 AD3d 435, 437 [1st Dept 2014]; *see also Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]). Moreover, the Trust made partial payments to plaintiff throughout plaintiff's representation (*see Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668 [1st Dept 2003], *lv denied* 1 NY3d 509 [2004]).

Regarding the legal malpractice counterclaim, assuming that plaintiff's conduct, in failing to complete a chain-of-title report or failing to resolve the underlying intellectual property disputes before withdrawing, amounts to negligence, the Trust failed to demonstrate causation. The Trust failed to show how it would have successfully opposed the underlying trademark cancellation proceeding, or would otherwise have protected its intellectual property rights, but for plaintiff's omissions (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428 [2007]; *Leder v Spiegel*, 31 AD3d 266 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]).

In addition, the resulting inability to efficiently market the trademarks is too speculative to constitute the "actual ascertainable damages" required to support the malpractice counterclaim (*see e.g. Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002], *lv denied* 98 NY2d 606 [2002]).

Beneficiary Flint Dille's bare allegation that he and plaintiff had agreed to a \$25,000 fee cap is unsupported in the engagement letter sent to Dille listing an hourly rate or by anything else in the record, and therefore cannot establish a legal malpractice counterclaim.

The breach of contract counterclaim is duplicative of the legal malpractice claim, since it is based on the same factual allegations that underlie the malpractice counterclaim (*see Voutsas v Hochberg*, 103 AD3d 445 [1st Dept 2013], *lv denied* 22 NY3d 853 [2013]). Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

19 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JULIO PEREZ, Appellant. [992 NYS2d 885]—Judgment of sentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about May 5, 2012, resentencing defendant to an aggregate term of 25 years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

We perceive no basis for reducing the term of postrelease

supervision. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

20 In the Matter of RUSSELL F., Appellant, v BRANDON JAY F., Respondent. [992 NYS2d 886]—Order, Family Court, New York County (Jane Pearl, J.), entered on or about August 9, 2013, which, after a fact-finding hearing in a proceeding brought pursuant to article 8 of the Family Court Act, dismissed the petition for an order of protection, unanimously affirmed, without costs.

The Family Court properly dismissed the petition, since petitioner failed to establish by a fair preponderance of the evidence that respondent, his brother, had committed any acts warranting an order of protection in petitioner's favor (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). No basis exists to disturb the Family Court's findings that respondent and his wife were more credible witnesses than petitioner (*id.*). Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

21 ROBERT A. COLE, Respondent, v SEARS, ROEBUCK & COMPANY, Appellant. [994 NYS2d 62]—

Civil Rights—Discrimination in Employment—Sexual Orientation—Hostile Work Environment

Civil Rights—Discrimination in Employment—Sexual Orientation—Retaliation Claim

Order, Supreme Court, New York County (Debra A. James, J.), entered July 3, 2013, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing the causes of action for discrimination (hostile work environment) and retaliation under the New York State Human Rights Law, unanimously affirmed, with costs.

Viewed in the light most favorable to plaintiff (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]), the evidence shows that, from the very inception of his employment with defendant as an auto center manager, plaintiff was subjected to a constant bombardment of anti-gay remarks and other communications, which included insulting and offensive remarks about other Sears employees who were thought to be gay; crude anti-gay humor and graphic sexual images disseminated by text and email; and anti-gay hate speech made repeatedly and openly by an operations manager in the presence of plaintiff and others. The anti-gay harassment worsened after plaintiff made his first formal complaint about it in March 2007. Among other things, the operations manager was promoted to acting general manager and continued to make of-

fensive anti-gay remarks, and plaintiff received multiple offensive emails from an email address created for the apparent purpose of harassing him, which he testified were sent by a manager in another Sears store. Given this evidence, issues of fact exist whether plaintiff was subjected to harassment sufficiently severe and pervasive to alter the terms and conditions of his employment (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004]).

Issues of fact also exist whether the harassment was directed toward plaintiff based on his membership in a category protected by the statute (Executive Law § 296 [1] [a]; *see Forrest*, 3 NY3d at 307). There is evidence that Sears management was aware of plaintiff's sexual orientation by February 2007; certainly by March 2007, when plaintiff made a formal written complaint about the anti-gay harassment, the managers responsible for addressing his complaints were aware of it.

The record further shows that there are issues of fact as to whether defendant's response to plaintiff's complaints of widespread anti-gay harassment was reasonable under the circumstances, and whether, through a lack of effective action, defendant condoned or acquiesced in the hostile work environment (*see Polidori v Societe Generale Groupe*, 39 AD3d 404 [1st Dept 2007]).

As defendant tacitly concedes, plaintiff established with respect to his retaliation claim that he engaged in protected activity (he complained about the hostile work environment), that defendant was aware of this activity, and that plaintiff suffered an adverse employment action (termination) based on his activity (*see* Executive Law § 296 [7]; *Forrest*, 3 NY3d at 312-313). Contrary to defendant's contention, plaintiff raised an issue of fact as to the causal connection between the protected activity and the adverse action. Moreover, less than two months passed between plaintiff's last formal complaint on June 26 and his termination on August 23, 2007 (*see Cifra v General Elec. Co.*, 252 F3d 205, 217 [2d Cir 2001]).

Plaintiff also raised an issue of fact as to defendant's proffered legitimate, nondiscriminatory reason for the termination. Concur—Mazzarelli, J.P., Andrias, Moskowitz, Manzanet-Daniels and Clark, JJ.

SECOND DEPARTMENT, SEPTEMBER, 2014
(September 10, 2014)

1 MOHAMED H. ABDELZAHER, Respondent, v JOHN SALLUSTIO, Appellant. [992 NYS2d 311]—

Judgments—Collateral Estoppel—Action by Crime Victim to Recover Damages

In an action to recover damages for personal injuries, the defendant appeals from a judgment of the Supreme Court, Kings County (Vaughan, J.), dated May 17, 2013, which, upon, in effect, awarding the plaintiff judgment as a matter of law on the issue of liability, upon a jury verdict on the issue of damages awarding the plaintiff the principal sums of \$50,000 for past pain and suffering, \$125,000 for future pain and suffering, and \$25,000 for punitive damages, and upon the denial of his motion pursuant to CPLR 4404 (a) to set aside the verdict as contrary to the weight of the evidence and excessive, is in favor of the plaintiff and against him.

Ordered that the judgment is modified, on the facts and in the exercise of discretion, by deleting the provision thereof awarding the plaintiff the principal sum of \$125,000 for future pain and suffering; as so modified, the judgment is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for a new trial on the issue of damages for future pain and suffering, and for the entry of an appropriate amended judgment thereafter, unless, within 30 days after service upon him of a copy of this decision and order, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Kings County, a written stipulation consenting to reduce the verdict as to damages for future pain and suffering from the principal sum of \$125,000 to the principal sum of \$75,000, and to the entry of an appropriate amended judgment; in the event that the plaintiff so stipulates, then the judgment, as so reduced and amended, is affirmed, without costs or disbursements.

On April 6, 2007, the plaintiff, a livery driver, drove the defendant's daughter home, where she resided with the defendant and his wife. A dispute arose over the fare, and the defendant hit the plaintiff with a baseball bat, injuring his left knee and fracturing the little finger in his left hand.

At the commencement of the trial, the trial court noted that "the defendant entered a plea of guilty to misdemeanor assault which to my recollection is a class A misdemeanor, physical injury, an assault with a physical injury . . . therefore . . . liability has already been determined." Defense counsel did not object. Rather, he stated: "I admitted in jury selection that he pled guilty" and "we're now essentially doing damages."

At the jury trial on the issue of damages, evidence was admitted that the plaintiff was taken by ambulance to the emergency room of Coney Island Hospital, where he was treated and

released. Thereafter, he sought treatment from two doctors, and received therapy for two to three months. He claimed that he was afraid to go out at night, and did not work for eight months. He further testified that he was trained to work in the hotel industry, but could no longer work in that industry because he could not carry heavy luggage.

The plaintiff's doctor testified that the plaintiff sustained a fracture of the little finger of his left hand and also sustained a knee injury. The finger was immobilized in a cast for six weeks. Thereafter, the plaintiff sustained a permanent limitation of range of motion of the left hand and could not carry heavy objects in that hand. However, the doctor noted that the plaintiff suffered from a pre-existing disabling injury to his right hand, which could have limited his ability to carry heavy luggage.

The jury returned a verdict awarding the plaintiff the principal sums of \$50,000 for past pain and suffering, \$125,000 for future pain and suffering, and \$25,000 for punitive damages. After the verdict was rendered, the defendant moved to set aside the verdict as contrary to the weight of the evidence and excessive, and the motion was denied.

The defendant contends that the determination at the commencement of the trial that the plaintiff was entitled to judgment as a matter of law on the issue of liability was procedurally improper, because that determination was not the result of a motion. However, this issue was not raised at the trial. Indeed, defense counsel did not challenge the determination and acknowledged the defendant's criminal conviction. In view of this uncontested fact, liability was established in accordance with the legal principle that "[w]here a criminal conviction is based upon facts identical to those in issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from litigating the issue of . . . liability" (*Morrow v Gallagher*, 113 AD3d 827, 828 [2014], quoting *McDonald v McDonald*, 193 AD2d 590 [1993]).

At trial, the defendant argued that the verdict on the issue of damages was contrary to the weight of the evidence and excessive. However, he did not claim that the evidence of damages was legally insufficient. Therefore, that issue is unpreserved for appellate review (*see Blinds to Go [U.S.], Inc. v Times Plaza Dev., L.P.*, 88 AD3d 838, 839 [2011]; *Olchovy v L.M.V. Leasing*, 182 AD2d 745, 746 [1992]).

The awards for past pain and suffering and punitive damages were not excessive (*see Frederic v City of New York*, 117 AD3d 899 [2014]; *Gomez v Long Is. Coll. Hosp.*, 131 AD2d 812 [1987]).

However, the award of \$125,000 for future pain and suffering was excessive to the extent indicated herein (*see* CPLR 5501 [c]).

The defendant's remaining contentions are without merit. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

2 FERNANDO ABELLEIRA et al., Appellants-Respondents, v CITY OF NEW YORK et al., Respondents-Appellants. [992 NYS2d 324]—

Labor—Safe Place to Work—Authority to Supervise or Control Performance of Work

Labor—Safe Place to Work—Injury while Pressure Testing Pipe

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Baynes, J.), dated May 18, 2012, as denied those branches of their cross motion which were for summary judgment on the issue of liability on the causes of action alleging common-law negligence and violations of Labor Law §§ 200 and 241 (6), and, in effect, upon searching the record, awarded summary judgment to the defendants dismissing the cause of action alleging a violation of Labor Law § 241 (6), and the defendants cross-appeal from the same order.

Ordered that the cross appeal is dismissed as withdrawn; and it is further,

Ordered that the order is affirmed insofar as appealed from; and it is further,

Ordered that the defendants are awarded one bill of costs.

On September 30, 2010, the day of the subject accident, the plaintiff Fernando Abelleira (hereinafter the injured plaintiff), was working as a construction foreman employed by nonparty John P. Picone, Inc. (hereinafter Picone), for a construction project allegedly being undertaken by the defendants, the City of New York and the New York City Department of Environmental Protection. On that day, the injured plaintiff was using a pneumatic pipe plug to pressure test a pipe that was 42 inches in diameter. According to the injured plaintiff's affidavit, he inspected the plug and "it appeared normal to me, although it was older and used." He proceeded three to four feet into the pipe, inserted the plug into its interior, and inflated the plug "ever so slightly so I could check it for leaks." Upon noticing several air bubbles on the plug, which suggested a leak, the injured plaintiff called over his supervisor from Picone, who told the injured plaintiff that the plug was defective and to discontinue using it. As soon as the supervisor stepped away

from the pipe, the plug exploded without warning, propelling the injured plaintiff into the air and onto an “I” beam, where he came to rest.

The Supreme Court properly denied that branch of the plaintiffs’ cross motion which was for summary judgment on the issue of liability on the causes of action alleging common-law negligence and a violation of Labor Law § 200. Such liability generally falls into two broad categories: instances involving the manner in which the work is performed, and instances in which workers are injured as a result of dangerous or defective premises conditions at a work site (see *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). When a claim involves the manner in which the work is performed, meaning it arises out of alleged defects or dangers in the methods or materials of the work (see *Ortega v Puccia*, 57 AD3d at 61), recovery against the owner or general contractor for common-law negligence or a violation of Labor Law § 200 is unavailable unless it is shown that the defendant had the authority to supervise or control the performance of the work (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343 [1998]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Klimowicz v Powell Cove Assoc., LLC*, 111 AD3d 605, 607 [2013]; *Gallelo v MARJ Distribs., Inc.*, 50 AD3d 734, 735 [2008]; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204-205 [2007]). Here, the plaintiffs failed to establish, prima facie, that the defendants had the authority to supervise or control the performance of the work being performed at the time of the accident so as to render them liable for the accident under a theory of common-law negligence or pursuant to Labor Law § 200.

When a claim arises out of an alleged dangerous premises condition, a property owner or general contractor may be held liable in common-law negligence and under Labor Law § 200 when the owner or general contractor has control over the work site and either created the dangerous condition causing an injury, or failed to remedy the dangerous or defective condition while having actual or constructive notice of it (see *Eversfield v Brush Hollow Realty, LLC*, 91 AD3d 814 [2012]; *Bruno v Board of Educ. of Cent. School Dist. #5*, 74 AD3d 1114 [2010]; *Martinez v City of New York*, 73 AD3d 993 [2010]). Here, the plaintiffs failed to establish, prima facie, that the defendants either created or had actual or constructive notice of an allegedly dangerous condition constituting a proximate cause of the subject accident.

The Supreme Court properly denied that branch of the plaintiffs’ cross motion which was for summary judgment on

the issue of liability on the cause of action alleging a violation of Labor Law § 241 (6), and properly, in effect, searched the record and awarded summary judgment to the defendants dismissing that cause of action. In order to recover under Labor Law § 241 (6), a plaintiff must plead and prove a violation of a specific provision of the Industrial Code (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Galarraga v City of New York*, 54 AD3d 308, 309 [2008]), which sets forth a specific standard of conduct and not simply a recitation of common-law safety principles (*see St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]). However, the two Industrial Code provisions relied upon by the plaintiffs, 12 NYCRR 23-9.2 (a) and (b) (1), are inapplicable to the facts of this case. Moreover, with respect to the alleged violation of 12 NYCRR 23-9.2 (b) (1), this Court has held that the provision is “merely a general safety standard that does not give rise to a nondelegable duty under [Labor Law § 241 (6)]” (*see Hricus v Aurora Contrs., Inc.*, 63 AD3d 1004, 1005 [2009]).

Accordingly, the order should be affirmed insofar as appealed from.

Inasmuch as the defendants specifically state in their brief that they are withdrawing their cross appeal, we dismiss the cross appeal as withdrawn. Dickerson, J.P., Leventhal, Cohen and Hinds-Radix, JJ., concur. **[Prior Case History: 35 Misc 3d 1240(A), 2012 NY Slip Op 51053(U).]**

3 SOLOMON ABRAHAMS, Appellant, v COMMONWEALTH LAND TITLE INSURANCE COMPANY, Doing Business as LAND AMERICA COMMONWEALTH, Respondent. [992 NYS2d 537]—

**Estoppel—Collateral Estoppel
Judgments—Default Judgment**

In an action to recover damages for breach of fiduciary duty, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Westchester County (Connolly, J.), dated June 26, 2013, as denied his motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendant.

Ordered that the order is affirmed insofar as appealed from, with costs.

In this action to recover damages for breach of fiduciary duty, the plaintiff moved pursuant to CPLR 3215 for leave to enter a default judgment against the defendant. In support of the motion, the plaintiff submitted, inter alia, a complaint dated April 7, 2012. The defendant opposed the motion, offering proof that this complaint was the same complaint that had been filed in a

prior action to recover damages for breach of fiduciary duty. By order entered December 29, 2009, the Supreme Court granted the defendant's motion for summary judgment dismissing the complaint in that prior action, and this Court affirmed that order (*see Abrahams v Commonwealth Land Tit. Ins. Co.*, 81 AD3d 759 [2011]).

Contrary to the plaintiff's contention, the Supreme Court properly determined that the complaint in the instant action is barred by the doctrine of collateral estoppel. The doctrine of collateral estoppel bars relitigation in a subsequent action of an issue raised in a prior action and decided against that party (*see Buechel v Bain*, 97 NY2d 295, 303 [2001]; *Zanani v Schwimmer*, 117 AD3d 941 [2014]; *Nappy v Nappy*, 100 AD3d 843 [2012]). "The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party," and "[t]he party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination" (*Buechel v Bain*, 97 NY2d at 304; *see Nappy v Nappy*, 100 AD3d at 845; *Matter of Simmons v Simmons*, 91 AD3d 960 [2012]; *Nachum v Ezagui*, 83 AD3d 1017 [2011]).

Here, the defendant established that the decisive issues in this case were necessarily decided against the plaintiff in the prior case, and the plaintiff failed to demonstrate that he was not afforded a full and fair opportunity to contest that prior determination. Thus, the doctrine of collateral estoppel barred the plaintiff from maintaining this action. Although the defendant allegedly defaulted in answering the complaint in the instant action, even where such a default has occurred, a plaintiff is only entitled to a default judgment if the complaint states a viable cause of action (*see Aprea v New York State Bd. of Elections*, 103 AD3d 1059, 1061 [2013]; *Elam v Altered Ego Realty Holding Corp.*, 114 AD3d 901 [2014]; *Venturella-Ferretti v Ferretti*, 74 AD3d 792, 793 [2010]; *Garcia v Pepe*, 42 AD3d 427, 430 [2007]). Under these circumstances, the plaintiff has no viable cause of action against the defendant that would warrant entry of a default judgment against it (*see Garcia v Pepe*, 42 AD3d at 430).

The plaintiff's remaining contentions are without merit.

Accordingly, the Supreme Court properly denied the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendant. Balkin, J.P., Austin, LaSalle and Barros, JJ., concur.

4 BALDWIN UNION FREE SCHOOL DISTRICT et al., Respondents,
v COUNTY OF NASSAU et al., Appellants. [992 NYS2d 110]—

Injunctions—Preliminary Injunction

In an action for a judgment declaring, *inter alia*, that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an unauthorized exercise of the defendants' lawmaking authority and is unconstitutional under the New York and United States Constitutions, the defendants appeal from (1) an order of the Supreme Court, Nassau County (Brandveen, J.), entered October 23, 2011, which granted the plaintiffs' motion to preliminarily enjoin them from enforcing Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, and (2) an order of the same court entered July 2, 2012, which denied their motion, in effect, for summary judgment declaring that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an authorized exercise of their lawmaking authority and is constitutional under the New York and United States Constitutions.

Ordered that the order entered October 23, 2011 is affirmed, without costs or disbursements; and it is further,

Ordered that the order entered July 2, 2012 is modified, on the law, by deleting the provision thereof denying the defendants' motion, in effect, for summary judgment declaring that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an authorized exercise of their lawmaking authority and is constitutional under the New York and United States Constitutions, and substituting therefor a provision denying that motion without prejudice to renewal upon the completion of discovery; as so modified, the order entered July 2, 2012, is affirmed, without costs or disbursements.

These appeals stem from challenges to the validity and constitutionality of Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010 (hereinafter together the ordinance). The plaintiffs commenced a hybrid CPLR article 78 proceeding and action on or about February 28, 2011. They alleged, *inter alia*, that the ordinance violates the Equal Protection and Due Process Clauses of the New York and United States Constitutions, certain provisions of the General Municipal Law, and certain provisions of the Nassau County Charter, and that the adoption of the subject ordinance is precluded by the doctrine of preemption. Subsequently, the Supreme Court converted the hybrid proceeding and action to a declaratory judgment action pursuant to CPLR 103 (c).

The plaintiffs sought injunctive relief. On or about June 23,

2011, the Supreme Court granted a temporary restraining order staying the effective date of the ordinance and enjoining the defendants from taking any steps to enforce it. Thereafter, in the order appealed from entered October 23, 2011, the court granted the plaintiffs' motion to preliminarily enjoin the defendants from enforcing the ordinance.

Subsequently, the defendants moved for summary judgment, in effect, declaring that the ordinance is an authorized exercise of the defendants' lawmaking authority and is constitutional under the New York and United States Constitutions. In the order appealed from entered July 2, 2012, the Supreme Court denied the defendants' motion.

For the reasons set forth in our decision and order in the related appeals in the action entitled *Board of Educ. of E. Meadow Union Free Sch. Dist. v County of Nassau* (120 AD3d 1170 [2014] [decided herewith]), we conclude that the Supreme Court providently exercised its discretion in granting the plaintiffs' motion to preliminarily enjoin the defendants from enforcing the ordinance, and properly denied the defendants' motion, in effect, for summary judgment declaring that the ordinance is an authorized exercise of the defendants' lawmaking authority and is constitutional under the New York and United States Constitutions. However, the court should have denied the defendants' motion without prejudice to renewal upon the completion of discovery. Rivera, J.P., Leventhal, Hall and Roman, JJ., concur. **[Prior Case History: 2011 NY Slip Op 32589(U).]**

5 GEORGE BILLIS, Appellant, v CRAIG TUNJIAN, Defendant, and TERRY PHILLIPS et al., Respondents. [992 NYS2d 319]—

Motor Vehicles—Collision—Rear-End Collision

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Siegal, J.), dated May 10, 2013, which granted the motion of the defendants Terry Phillips and Rosa Phillips for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is affirmed, with costs.

The plaintiff was a passenger in a vehicle operated by the defendant Terry Phillips and owned by the defendant Rosa Phillips (hereinafter together the Phillips defendants), which was struck from the rear by a vehicle owned and operated by the defendant Craig Tunjian, while both vehicles were traveling eastbound on Route 25A. The plaintiff commenced this action against the defendants to recover damages for personal injuries he allegedly sustained as a result of the accident.

The Phillips defendants moved for summary judgment dismissing the complaint insofar as asserted against them, contending that Tunjian alone was negligent in causing the accident since their vehicle had been stopped at a red light at Route 25A's intersection with Sound Avenue when the accident occurred. The Supreme Court granted the motion.

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Scheker v Brown*, 85 AD3d 1007, 1007 [2011] [internal quotation marks omitted]). "As a general rule, 'a rear-end collision establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision'" (*Kastritsios v Marcello*, 84 AD3d 1174, 1174-1175 [2011], quoting *Plummer v Nourddine*, 82 AD3d 1069, 1069-1070 [2011]). This is true whether the lead vehicle is stopped or stopping (see *Xian Hong Pan v Buglione*, 101 AD3d 706, 707 [2012]).

Where the movant has established his or her entitlement to judgment as a matter of law, the burden shifts to the opposing party to provide sufficient evidence to raise a triable issue of fact as to the moving party's comparative fault (see *Lu Yuan Yang v Howsal Cab Corp.*, 106 AD3d 1055 [2013]; *Sirov v Troiano*, 66 AD3d 763, 764 [2009]). A bare allegation that the lead vehicle stopped short is insufficient to rebut the inference of negligence on the part of the driver of the following vehicle (see *Xian Hong Pan v Buglione*, 101 AD3d at 707; *Staton v Ilic*, 69 AD3d 606, 606 [2010]).

Here, the Phillips defendants established their prima facie entitlement to judgment as a matter of law (see *Moore v Singh*, 108 AD3d 602, 603 [2013]; *Xian Hong Pan v Buglione*, 101 AD3d at 707; *Nozine v Anurag*, 38 AD3d 631, 632 [2007]). They submitted excerpts of the deposition testimony of Terry Phillips, who stated that he saw the color of the traffic light at the subject intersection change from green to yellow when he was approximately 10 car lengths away from the intersection, that he then applied his brakes, and that, at the point of impact, he had been stopped at the red light for "a couple of seconds" when his vehicle was struck in the rear by Tunjian's vehicle. Further, the Phillips defendants submitted excerpts of Tunjian's deposition testimony, wherein he stated that just before impact, he had glanced down at his gas gauge for a split second as his vehicle was still moving and, as soon as he looked up, the front of his vehicle made contact with the rear of the Phillips defendants' vehicle despite having applied his brakes.

In opposition, the plaintiff failed to raise a triable issue of fact as to whether Terry Phillips contributed to the happening of the accident (*see Williamson v Coleman*, 114 AD3d 768, 768 [2014]; *Moore v Singh*, 108 AD3d at 603; *Nozine v Anurag*, 38 AD3d at 632). The plaintiff's contention that Terry Phillips's deposition testimony that he had stopped prior to the impact differed from his statement to the police that he had been slowing down for a yellow light at the time of the impact is immaterial to the issue of Terry Phillips's comparative fault (*see Xian Hong Pan v Buglione*, 101 AD3d at 707; *see also Schecker v Brown*, 85 AD3d at 1007; *Kastritsios v Marcello*, 84 AD3d at 1175). Moreover, the plaintiff's assertion that Terry Phillips's vehicle stopped short was insufficient to defeat the Phillips defendants' summary judgment motion (*see Xian Hong Pan v Buglione*, 101 AD3d at 707).

Accordingly, the Supreme Court properly granted the Phillips defendants' motion for summary judgment dismissing the complaint insofar as asserted against them. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

6 BOARD OF EDUCATION OF EAST MEADOW UNION FREE SCHOOL DISTRICT et al., Respondents, v COUNTY OF NASSAU et al., Appellants. [992 NYS2d 535]—

Judgments—Summary Judgment—Premature Motion

In an action for a judgment declaring, inter alia, that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an unauthorized exercise of the defendants' lawmaking authority and is unconstitutional under the New York and United States Constitutions, the defendants appeal from (1) an order of the Supreme Court, Nassau County (Brandveen, J.), entered October 26, 2011, which granted the plaintiffs' motion to preliminarily enjoin them from enforcing Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, and (2) an order of the same court dated June 27, 2012, which denied their motion, in effect, for summary judgment declaring that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an authorized exercise of their lawmaking authority and is constitutional under the New York and United States Constitutions.

Ordered that the order entered October 26, 2011 is affirmed, without costs or disbursements; and it is further,

Ordered that the order dated June 27, 2012 is modified, on the law, by deleting the provision thereof denying the defendants' motion, in effect, for summary judgment declaring that

Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an authorized exercise of the defendants' lawmaking authority and is constitutional under the New York and United States Constitutions, and substituting therefor a provision denying that motion without prejudice to renewal upon the completion of discovery; as so modified, the order dated June 27, 2012, is affirmed, without costs or disbursement.

Nassau County Charter § 1231 authorizes the County Legislature to "charge and collect rents, rates, fees or other charges . . . for direct or indirect connection with, or the use or services of, the [County sewer district's] sewer facilities." Nassau County Charter § 1231 provides that such service charges shall, as near as the County Legislature shall deem "practicable and equitable," be "uniform throughout" the County sewer district. It further provides that such charges may be based, *inter alia*, "on the consumption of water or in connection with the real property, making due allowances for commercial use of water" (*id.*).

Although Nassau County Charter § 1231 authorizes the County to charge and collect rents or fees for the use of the sewer system, the County has not heretofore exercised that power. Instead the County has funded its sewer system with an ad valorem tax upon all taxable real property pursuant to Nassau County Charter §§ 1222 and 1228. However, the ordinance challenged in this case seeks to impose such service charges upon certain users of the sewer system.

Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010 (hereinafter together the ordinance), was enacted November 3, 2010, to become effective on July 1, 2011. The ordinance establishes and imposes "service charges" upon certain users of the sewer system at a rate "not to exceed \$0.01 per gallon of water entering the County's sewer system," based on the users' reported water consumption for 2009. The users subject to these sewer service charges fall into two distinct groups, as designated by the ordinance: "Exempt Users" and "High Water Users." There is no dispute that each of the plaintiffs are "Exempt Users" as defined by the ordinance, and therefore they are subject to the sewer service charges.

The plaintiffs commenced a hybrid CPLR article 78 proceeding and declaratory judgment action, alleging, *inter alia*, that the ordinance violates the Equal Protection and Due Process Clauses of the New York and United States Constitutions, General Municipal Law §§ 451 and 452, and Nassau County Charter § 1231, and that the adoption of the subject ordinance was

precluded by the doctrine of preemption. Subsequently, they moved for injunctive relief. On or about June 23, 2011, the Supreme Court issued a temporary restraining order staying the effective date of the ordinance and enjoining the defendants from taking any steps to enforce it. By order dated September 30, 2011, the court converted the hybrid proceeding and action to, *inter alia*, a declaratory judgment action pursuant to CPLR 103 (c).

Thereafter, in the order appealed from entered October 26, 2011, the Supreme Court granted the plaintiffs' motion to preliminarily enjoin the defendants from enforcing the ordinance. Subsequently, the defendants moved, in effect, for summary judgment declaring that the ordinance is an authorized exercise of their lawmaking authority and is constitutional under the New York and United States Constitutions. In the order appealed from dated June 27, 2012, the court denied that motion.

The Supreme Court providently exercised its discretion in granting the plaintiffs' motion to preliminarily enjoin the defendants from enforcing the ordinance in order to maintain the status quo pending determination of the instant matter (*see* CPLR 6301; 6312; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Cerniglia v Church of the Holy Name of Mary*, 72 AD3d 862, 866 [2010]; *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942 [2009]).

Further, contrary to the defendants' contention, the Supreme Court did not err in denying their motion, in effect, for summary judgment declaring that the ordinance is an authorized exercise of their lawmaking authority and is constitutional under the New York and United States Constitutions. Under the circumstances of this case, including the fact that substantial discovery is outstanding, the defendants' motion for summary judgment was premature (*see* CPLR 3212 [f]; *Lettieri v Cushing*, 80 AD3d 574, 576 [2011]; *Hall Enters., Inc. v Liberty Mgt. & Constr., Ltd.*, 37 AD3d 658, 659 [2007]). Accordingly, the motion should have been denied without prejudice to renewal upon the completion of discovery (*see Cardone v Poidamani*, 73 AD3d 828 [2010]; *Hall Enters., Inc. v Liberty Mgt. & Constr., Ltd.*, 37 AD3d at 659). Rivera, J.P., Leventhal, Hall and Roman, JJ., concur.

7 PRISCILLA BROWN, Appellant, v ELIZABETH MACKIEWICZ et al., Respondents. [992 NYS2d 314]—

Motor Vehicles—Injuries to Pedestrians

In an action to recover damages for personal injuries, the

plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Baynes, J.), dated October 2, 2013, as denied her motion for summary judgment on the issue of liability.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and the plaintiff's motion for summary judgment on the issue of liability is granted.

"To prevail on a motion for summary judgment on the issue of liability in an action alleging negligence, a plaintiff has the burden of establishing, prima facie, not only that the defendant was negligent, but that the plaintiff was free from comparative fault, since there can be more than one proximate cause of an accident" (*Ramos v Bartis*, 112 AD3d 804, 804 [2013] [citations omitted]; see *Thoma v Ronai*, 82 NY2d 736 [1993]). "Where the movant has established his or her entitlement to judgment as a matter of law, the opposing party may defeat the motion for summary judgment by submitting sufficient evidence to raise a triable issue of fact as to the moving party's comparative fault" (*Ramos v Bartis*, 112 AD3d at 804).

The plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating, through her deposition testimony, that she entered the crosswalk at the subject intersection after exercising reasonable care by looking in both directions for approaching traffic, was walking within the crosswalk with the pedestrian crossing signal in her favor, and was at least half way across the street when she was struck by an ambulance operated by the defendant driver, Elizabeth Mackiewicz, who failed to yield the right of way (see Traffic Rules and Regs of City of NY [34 RCNY] § 4-03 [a] [1] [i]; [c] [1], [2]; *Ramos v Bartis*, 112 AD3d at 804; *Moreira v M.K. Travel & Transp., Inc.*, 106 AD3d 965, 966 [2013]; *Castro v New York City Tr. Auth.*, 95 AD3d 1056, 1057 [2012]; *Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053, 1053 [2012]; *Kusz v New York City Tr. Auth.*, 88 AD3d 768 [2011]).

In opposition, the defendants failed to raise a triable issue of fact. Contrary to the defendants' contentions, Mackiewicz's deposition testimony that the ambulance was stopped at a red light for 30 to 45 seconds prior to making the left turn into the intersection does not raise a triable issue of fact as to whether the plaintiff did not exercise due care by failing to see the ambulance before she entered the crosswalk, especially since Mackiewicz testified that, while the ambulance was stopped, her view of the intersection was obstructed by mounds of snow. Moreover, the defendants did not demonstrate that any failure on the part of the plaintiff to observe their vehicle stopped at a

red light contributed to or caused the accident. The defendants also failed to demonstrate that the plaintiff was intoxicated (*see Burkhard v Sunset Cruises*, 191 AD2d 669 [1993]; *Senn v Scudieri*, 165 AD2d 346, 350 [1991]), or that intoxication contributed to or caused this accident (*see Westchester Med. Ctr. v Progressive Cas. Ins. Co.*, 51 AD3d 1014, 1018 [2008]; *Martin v City of New York*, 275 AD2d 351, 353 [2000]).

The defendants' remaining contention is without merit.

Accordingly, the Supreme Court should have granted the plaintiff's motion for summary judgment on the issue of liability. Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

8 MARIO CARUSO, Respondent, v JENNIFER S. BUMGARNER, Putnam County Attorney, et al., Defendants, and WILLIAM G. SAYEGH et al., Appellants. [992 NYS2d 102]—

Injunctions—Permanent Injunction

In an action, inter alia, for injunctive relief, the defendants William J. McNamara, Gerald A. Schramek, and Debra L. Giordonello appeal, and the defendant William G. Sayegh separately appeals, as limited by their brief, from so much of an order of the Supreme Court, Putnam County (Nicolai, J.), dated August 10, 2012, as denied that branch of their cross motion which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against them.

Ordered that the appeal by the defendant William G. Sayegh is dismissed as academic; and it is further,

Ordered that the order is reversed insofar as appealed from by the defendants William J. McNamara, Gerald A. Schramek, and Debra L. Giordonello, on the law, and that branch of the cross motion of those defendants which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against them is granted; and it is further,

Ordered that one bill of costs is awarded to the defendants William J. McNamara, Gerald A. Schramek, and Debra L. Giordonello.

In February 2011, the plaintiff was convicted, upon his plea of guilty, of two counts of sexual abuse in the first degree for acts he committed in the summer of 2003. One of the plaintiff's victims, M.F., resided in the home adjacent to the plaintiff's home in Carmel. The plaintiff was designated a level three sex offender and his sentence included a 10-year period of probation. Additionally, an order of protection was issued that included a provision requiring the defendant to stay a certain distance away from M.F. The plaintiff claimed that this provi-

sion barred him from returning to his home. The plaintiff subsequently moved to amend the order of protection by deleting the provision and, after a hearing, the Supreme Court granted the motion.

Thereafter, the plaintiff commenced this action, inter alia, for injunctive relief against, among others, Putnam County Sheriff's Department employees William J. McNamara and Gerald A. Schramek, and Putnam County Probation Department employee Debra L. Giordonello. The plaintiff alleged in his verified complaint that McNamara, Schramek, and Giordonello (hereinafter collectively the appellants) violated Code of Putnam County § 55 by disclosing to the law firm that represented M.F. and M.F.'s family confidential information acquired in the course of official duties, and by disclosing confidential communications with a prosecutor. According to the plaintiff, these disclosures were made to influence the proceeding with respect to the plaintiff's motion to amend the order of protection, and to benefit the law firm that represented M.F. and M.F.'s family in the criminal proceeding and anticipated civil proceedings. The plaintiff sought to permanently enjoin the appellants from disclosing to that law firm, or any private person or attorney acting on its behalf, any information related to the plaintiff acquired in the course of their employment.

The appellants cross-moved pursuant to CPLR 3211 (a) (2), (3) and (7) to dismiss the complaint insofar as asserted against them. The Supreme Court, inter alia, denied that branch of the appellants' cross motion which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against them.

To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a "violation of a right presently occurring, or threatened and imminent," that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor (*Elow v Svenningsen*, 58 AD3d 674, 675 [2009]; see also 67A NY Jur 2d Injunctions § 45). Here, the appellants' allegedly improper conduct occurred during the pendency of the plaintiff's motion to amend the order of protection. But that proceeding has concluded and the plaintiff obtained the relief he sought. The law firm to which the appellants allegedly provided information in violation of Code of Putnam County § 55 no longer represents M.F. and M.F.'s family. While the plaintiff will be on probation for a number of years, there is no indication that any action is currently pending against him. Under these circumstances, there can be no irreparable harm in the absence of a permanent injunction, and,

thus, the cause of action for a permanent injunction against the appellants should have been dismissed (*see Ovitz v Bloomberg L.P.*, 18 NY3d 753, 760 [2012]).

The plaintiff's remaining contentions are without merit. Skelos, J.P., Dillon, Maltese and Barros, JJ., concur.

9 GEORGE A. CIMINELLO, Appellant, v BRIAN C. SULLIVAN et al., Respondents, et al., Defendants. [992 NYS2d 291]—

Pleading—Amendment

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Suffolk County (Baisley, Jr., J.), dated July 20, 2011, as granted the motion of the defendant Robert Hartford to dismiss the second amended complaint insofar as asserted against him as untimely, granted that branch of the separate motion of the defendants Brian C. Sullivan and Gerard E. Sullivan which was to dismiss the second amended complaint insofar as asserted against them as untimely, denied his cross motion pursuant to CPLR 3025 (b) for leave to file a second amended complaint, and denied his cross motion for leave to renew and reargue his opposition to the prior motion of the defendants Brian C. Sullivan and Gerard E. Sullivan, and the separate motion of the defendant Robert Hartford, which were to dismiss the first amended complaint insofar as asserted against each of them.

Ordered that the appeal from so much of the order as denied that branch of the

plaintiff's cross motion which was for leave to reargue is dismissed, as no appeal lies from the denial of a motion for leave to reargue; and it is further,

Ordered that the order is modified, on the law, (1) by deleting the provision thereof denying that branch of the plaintiff's cross motion which was for leave to file a second amended complaint, in effect, to add a cause of action to recover damages sounding in intentional tort and substituting therefor a provision granting that branch of the cross motion, and (2) by deleting the provisions thereof granting those branches of the separate motions of the defendants Brian C. Sullivan and Gerard E. Sullivan, and the defendant Robert Hartford, which were to dismiss the cause of action to recover damages sounding in intentional tort asserted in the second amended complaint insofar as asserted against the defendants Brian C. Sullivan and Robert Hartford as untimely, and substituting therefor provisions denying those branches of the separate motions; as so modified, the order is affirmed insofar as reviewed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff, payable by the respondents appearing separately and filing separate briefs.

The plaintiff, without leave of court, served and filed a second amended complaint. The defendant Robert Hartford moved to dismiss the second amended complaint insofar as asserted against him as untimely, and the defendants Brian C. Sullivan and Gerard E. Sullivan (hereinafter together the Sullivan defendants) moved, inter alia, for similar relief. The plaintiff cross-moved pursuant to CPLR 3025 (b) for leave to file the second amended complaint. The Supreme Court, among other things, granted Hartford's motion and the related branch of the Sullivan defendants' motion, and denied the plaintiff's cross motion.

Leave to amend a pleading shall be freely given absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR 3025 [b]; *Finkelstein v Lincoln Natl. Corp.*, 107 AD3d 759, 761 [2013]; *Lucido v Mancuso*, 49 AD3d 220, 222 [2008]). Here, the Supreme Court properly determined that the causes of action in the second amended complaint sounding in negligence were palpably insufficient and patently devoid of merit (see generally *Ciminello v Sullivan*, 65 AD3d 1002 [2009]). However, the plaintiff also proposed an amendment to add a cause of action which alleged facts setting forth a cognizable cause of action to recover damages sounding in intentional tort. This cause of action is not palpably insufficient or patently devoid of merit, and there is no evidence that this amendment would prejudice or surprise Brian C. Sullivan and Hartford (see *United Fairness, Inc. v Town of Woodbury*, 113 AD3d 754, 755 [2014]; see generally *Lucido v Mancuso*, 49 AD3d 220 [2008]). Although the plaintiff delayed in making the motion for leave to amend, mere lateness is not a barrier to the amendment—it must be lateness coupled with significant prejudice to the other side (see *Henry v MTA*, 106 AD3d 874, 875 [2013]; *Aurora Loan Servs., LLC v Dimura*, 104 AD3d 796, 797 [2013]; *U.S. Bank, N.A. v Sharif*, 89 AD3d 723, 724 [2011]). Brian C. Sullivan and Hartford cannot claim significant prejudice, since the proposed amendment arises out of the same facts as those set forth in the first amended complaint (see *Koenig v Action Target, Inc.*, 76 AD3d 997, 997-998 [2010]; *Maloney Carpentry, Inc. v Budnik*, 37 AD3d 558, 558 [2007]). Accordingly, the Supreme Court should have granted that branch of the plaintiff's cross motion which was for leave to file a second amended complaint, in effect, to add a cause of action to recover damages sounding in

intentional tort and should have denied those branches of the separate motions of the Sullivan defendants and Hartford which were to dismiss the cause of action to recover damages sounding in intentional tort asserted in the second amended complaint insofar as asserted against Brian C. Sullivan and Hartford.

The plaintiff's remaining contentions either are academic or need not be reached in light of our determination. Rivera, J.P., Balkin, Dickerson and Cohen, JJ., concur.

10 COUNTY OF NASSAU, on Behalf of Itself and All Others Similarly Situated, Respondent, v EXPEDIA, INC., et al., Appellants, et al., Defendant. [992 NYS2d 293]—

**Administrative Law—Failure to Exhaust Administrative Remedies
Pleading—Sufficiency of Pleading—Imposition of Constructive Trust**

In an action to enforce certain provisions of the Nassau County Hotel Tax Law, to recover damages for conversion and unjust enrichment, and to impose a constructive trust, the defendants Expedia, Inc., Hotels.com GP, LLC, Hotels.com, L.P., Hotwire, Inc., Travelnow.com, Inc., Travelport, Inc., Trip Network, Inc., doing business as Cheaptickets.com, Internetnetwork Publishing Corp., doing business as Lodging.com, Orbitz, LLC, Orbitz Worldwide, Inc., Travelocity.com, LLC, Travelocity.com, LP, Site 59.com, LLC, Priceline.com, Incorporated, TravelWeb, LLC, and LowestFare.com LLC, appeal from an order of the Supreme Court, Nassau County (Bucaria, J.), dated June 13, 2012, which denied their motion pursuant to CPLR 3211 (a) (2) and (7) to dismiss the complaint insofar as asserted against them.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the appellants' motion which was pursuant to CPLR 3211 (a) (7) to dismiss the cause of action to impose a constructive trust insofar as asserted against them, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed, with costs to the plaintiff.

The appellants are online sellers or resellers of hotel and motel accommodations. The appellants allegedly contract with hotels and motels for rooms at negotiated discount rates and then resell the rooms to members of the public at an increased rate. The plaintiff, County of Nassau, imposes a 3% hotel and motel occupancy tax on the daily rental rate for each room in Nassau County, pursuant to section 3 of title 24 of the Miscellaneous Laws of Nassau County (hereinafter the Hotel Tax), as authorized by New York Tax Law § 1202 (hereinafter the Enabling Act). The plaintiff alleges that the appellants charge

consumers the Hotel Tax based on “retail” room rental rates, but improperly remit tax amounts based on the lower, “wholesale” rates at which the appellants obtain the hotel rooms, keeping the difference for themselves. Accordingly, the plaintiff commenced this action seeking to fully enforce the Hotel Tax, to recover damages for conversion and unjust enrichment, and to impose a constructive trust. The plaintiff also moved for class action certification in order to bring this action on behalf of itself and 55 New York local governmental entities which have enacted similar Hotel Tax laws under the Enabling Act since March 1, 1995. The issue of class action certification was decided in the companion appeal decided herewith (*see County of Nassau v Expedia, Inc.*, 120 AD3d 1181 [2014]).

The appellants contend that the branch of their motion which was pursuant to CPLR 3211 (a) (2) to dismiss the first cause of action seeking enforcement of the Hotel Tax against them for lack of subject matter jurisdiction should have been granted because, inter alia, the Enabling Act required the plaintiff to exhaust certain administrative remedies before judicial intervention could be obtained, and that the plaintiff failed to do so.

In New York, local governments do not have an independent power to tax. The New York Constitution vests the taxing power in the State Legislature and authorizes the Legislature to delegate that power to local governments (*see* NY Const, art XVI, § 1; *City of New York v State of New York*, 94 NY2d 577, 591 [2000]; *Castle Oil Corp. v City of New York*, 89 NY2d 334, 338-339 [1996]; *Sonmax, Inc. v City of New York*, 43 NY2d 253, 257 [1977]; *County Sec. v Seacord*, 278 NY 34, 37 [1938]). The New York Constitution places fundamental limitations on such delegations. The Legislature must describe with specificity the taxes authorized by any enabling statute (*see* NY Const, art XVI, § 1; *Castle Oil Corp. v City of New York*, 89 NY2d at 339). In turn, local governments can only levy and collect taxes within the expressed limitations of specific enabling legislation (*see* NY Const, art IX, § 2 [c] [8]; *Matter of United States Steel Corp. v Gerosa*, 7 NY2d 454, 459 [1960]).

As a general rule, tax statutes should be strictly construed and limited to their terms, which should not be extended by implication (*see Matter of 1605 Book Ctr. v Tax Appeals Trib. of State of N.Y.*, 83 NY2d 240, 244 [1994]; *Matter of American Cyanamid & Chem. Corp. v Joseph*, 308 NY 259, 263 [1955]; *Dun & Bradstreet, Inc. v City of New York*, 276 NY 198, 204 [1937]; McKinney’s Cons Laws of NY, Book 1, Statutes § 313 [b]). Any ambiguity in a tax law should be resolved in favor of the taxpayer and against the taxing authority (*see Debevoise &*

Plimpton v New York State Dept. of Taxation & Fin., 80 NY2d 657, 661 [1993]).

Applying these principles here, contrary to the appellants' contention, the plaintiff was not required to exhaust administrative remedies before commencing this action, and judicial review is not limited to a proceeding pursuant to CPLR article 78 (see generally *Expedia, Inc. v City of N.Y. Dept. of Fin.*, 22 NY3d 121 [2013]; *Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 322 [2003]; *City of Goodlettsville, Tenn. v Priceline.com, Inc.*, 605 F Supp 2d 982 [MD Tenn 2009]; *City of Charleston, S.C. v Hotels.com, LP*, 520 F Supp 2d 757, 771 [D SC 2007]).

Accordingly, the Supreme Court correctly denied that branch of the appellants' motion which was to dismiss the first cause of action insofar as asserted against them for lack of subject matter jurisdiction. Consequently, there is no merit to the additional contention raised by the appellants that the remaining causes of action seeking damages for conversion and unjust enrichment, and to impose a constructive trust, should have been dismissed because they are dependent upon the first cause of action.

The appellants alternatively contend that the remaining causes of action should have been dismissed pursuant to CPLR 3211 (a) (7). An action will lie to recover damages for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question (see *Lucker v Bayside Cemetery*, 114 AD3d 162 [2013]). The elements of unjust enrichment are that the defendants were enriched, at the plaintiff's expense, and that it is against equity and good conscience to permit the defendants to retain what is sought to be recovered (see *Old Republic Natl. Tit. Ins. Co. v Luft*, 52 AD3d 491 [2008]). "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another" (see *Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2008], quoting *City of Syracuse v R.A.C. Holding*, 258 AD2d 905, 906 [1999]). Affording the complaint a liberal construction (see *AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Moore v Liberty Power Corp., LLC*, 72 AD3d 660 [2010]), and accepting the allegations in the complaint as true (see *Schwartz v Schwartz*, 55 AD3d 897 [2008]), the plaintiff stated causes of action to recover damages for conversion and unjust enrichment (see *City of Goodlettsville, Tenn. v Priceline.com, Inc.*, 605 F Supp 2d at 998-999; *City of Findlay v Hotels.Com, L.P.*, 441 F Supp 2d 855, 864-865 [ND Ohio 2006]).

Accordingly, the Supreme Court correctly denied that branch

of the appellants' motion which was pursuant to CPLR 3211 (a) (7) to dismiss the causes of action to recover damages for conversion and unjust enrichment insofar as asserted against them.

However, we agree with the appellants that the Supreme Court should have granted that branch of their motion which was pursuant to CPLR 3211 (a) (7) to dismiss the cause of action to impose a constructive trust insofar as asserted against them. To obtain the remedy of a constructive trust, a plaintiff generally is required to demonstrate four elements: (1) a fiduciary or confidential relationship between the parties, (2) a promise, (3) a transfer of an asset in reliance upon the promise, and (4) unjust enrichment flowing from a breach of the promise (see *Hall v McDonald*, 115 AD3d 646 [2014]; *Kalmon Dolgin Affiliates, Inc. v Tonacchio*, 110 AD3d 848, 851 [2013]). Here, the plaintiff failed to adequately plead a cause of action against the appellants to impose a constructive trust, as it failed to allege the existence of a confidential or fiduciary relationship with them (see *Hall v McDonald*, 115 AD3d at 646; *Kalmon Dolgin Affiliates, Inc. v Tonacchio*, 110 AD3d at 851; *Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678 [2005]). Therefore, we modify the order appealed from accordingly. Dillon, J.P., Chambers, Hall and Maltese, JJ., concur.

11 COUNTY OF NASSAU, on Behalf of Itself and All Others Similarly Situated, Respondent, v EXPEDIA, INC., et al., Appellants, et al., Defendant. [993 NYS2d 39]—

Actions—Class Actions—Class Certification

In an action to enforce certain provisions of the Nassau County Hotel Tax Law, to recover damages for conversion and unjust enrichment, and to impose a constructive trust, the defendants Expedia, Inc., Hotels.com GP, LLC, Hotels.com, L.P., Hotwire, Inc., Travelnow.com, Inc., Travelport, Inc., Trip Network, Inc., doing business as Cheaptickets.com, Internet-network Publishing Corp., doing business as Lodging.com, Orbitz, LLC, Orbitz Worldwide, Inc., Travelocity.com, LLC, Travelocity.com, LP, Site 59.com, LLC, Priceline.com, Incorporated, TravelWeb, LLC, and LowestFare.com LLC, appeal from an order of the Supreme Court, Nassau County (Bucaria, J.), dated April 11, 2013, which granted the plaintiff's motion pursuant to CPLR article 9 for class certification of the action.

Ordered that the order is reversed, on the law, with costs, and the plaintiff's motion pursuant to CPLR article 9 for class certification of the action is denied.

The appellants are online sellers or resellers of hotel and motel accommodations. The appellants allegedly contract with

hotels and motels for rooms at negotiated discount rates and resell the rooms to members of the public at an increased rate. The plaintiff, County of Nassau, imposes a 3% hotel and motel occupancy tax on the daily rental rate for each room in Nassau County, pursuant to section 3 of title 24 of the Miscellaneous Laws of Nassau County (hereinafter the Hotel Tax), as authorized by the New York Tax Law § 1202 (hereinafter the Enabling Act). The plaintiff alleges that the appellants charge consumers the Hotel Tax based on “retail” room rental rates, but improperly remit tax amounts based on the lower, “wholesale” rates at which the appellants obtain the hotel rooms, keeping the difference for themselves. Accordingly, the plaintiff commenced this action seeking, inter alia, to fully enforce the Hotel Tax, and to recover damages for conversion and unjust enrichment. Thereafter, the plaintiff moved pursuant to CPLR article 9 for class certification to bring this action on behalf of itself and 55 New York local governmental entities which have enacted similar Hotel Tax laws under the Enabling Act since March 1, 1995, and have been treated similarly by the appellants. The Supreme Court granted the motion, and we reverse.

Pursuant to CPLR 901 (b), “Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.” “However, even where a statute creates or imposes a penalty, the restriction of CPLR 901 (b) is inapplicable where the class representative seeks to recover only actual damages and waives the penalty on behalf of the class, and individual class members are allowed to opt out of the class to pursue their punitive damages claims” (*Downing v First Lenox Terrace Assoc.*, 107 AD3d 86, 89 [2013]; see *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604 [1987]). Nonetheless, the “waiver” exception to CPLR 901 (b) does not apply where a penalty is mandatory and cannot be waived (*Asher v Abbott Labs.*, 290 AD2d 208 [2002]).

Here, the plaintiff cannot obtain class certification of this action because, under the plaintiff’s own Hotel Tax law, it is required to recover a “penalty” of 5% of the amount of the tax allegedly due from the appellants within the meaning of CPLR 901 (b), the recovery of which in a class action is not specifically authorized in the Hotel Tax law, and the imposition of which cannot be waived, as conceded by the plaintiff’s representative during the deposition. Accordingly, the Supreme Court should have denied the plaintiff’s motion pursuant to CPLR article 9 for class certification of this action.

The appellants' remaining contentions either are without merit, improperly raised for the first time in their reply brief (see *Fucile v L.C.R. Dev., Ltd.*, 102 AD3d 915 [2013]), or need not be addressed in light of our determination. Dillon, J.P., Chambers, Hall and Maltese, JJ., concur. **[Prior Case History: 41 Misc 3d 626.]**

12 47 THAMES REALTY, LLC, Appellant-Respondent, v ELLEN ROBINSON et al., Respondents-Appellants. [994 NYS2d 123]—

Dismissal and Nonsuit—Abandoned Cases—Judgment Not Subject to 60-Day Time Limit
Attorney and Client—Compensation

In a consolidated action, inter alia, for ejectment and to recover damages for use and occupancy, (1) the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Bayne, J.), dated October 23, 2012, as, upon a decision of the same court dated July 5, 2012, made after a hearing, granted the defendants' application for an attorney's fee and expenses in the sum of \$391,339.79, prejudgment interest in the sum of \$106,621.45 for the period from September 1, 2006, through October 19, 2012, and further prejudgment interest at the rate of \$96.49 per day from October 20, 2012, through the date of entry of that order, and the defendants cross-appeal from stated portions of the same order, (2) the plaintiff appeals from an order of the same court dated November 30, 2012, which denied its motion, inter alia, pursuant to 22 NYCRR 202.48 (b) to dismiss the defendants' application for an award of an attorney's fee as abandoned and granted that branch of the defendants' cross motion which was for "acceptance" of their proposed corrected order, and (3) the defendants appeal from stated portions of a judgment of the same court dated January 2, 2013, which is in favor of them and against the plaintiff in the principal sum of only \$497,961.24, plus prejudgment interest thereon at the rate of \$96.49 per day from October 20, 2012, through January 2, 2013, and costs, and the plaintiff cross-appeals from the same judgment.

Ordered that the appeal and cross appeal from the order dated October 23, 2012, are dismissed, without costs or disbursements; and it is further,

Ordered that the appeal from the order dated November 30, 2012, is dismissed, without costs or disbursements; and it is further,

Ordered that the judgment is modified, on the law and the facts, by deleting the provision thereof awarding the defendants the principal sum of \$497,961.24, plus prejudgment interest

thereon at the rate of \$96.49 per day from October 20, 2012, through January 2, 2013, and substituting therefor a provision awarding the defendants an attorney's fee and expenses in the principal sum of \$301,098.21, plus prejudgment interest thereon at the statutory rate of 9% per annum for the period from September 1, 2006, through January 2, 2013; as so modified, the judgment is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for the recalculation of prejudgment interest in accordance herewith, and the entry of an appropriate amended judgment thereafter.

The appeal and cross appeal from the intermediate order dated October 23, 2012, and the appeal from the intermediate order dated November 30, 2012, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeals and the cross appeal from the orders are brought up for review and have been considered on the appeal and cross appeal from the judgment (*see* CPLR 5501 [a] [1]).

22 NYCRR 202.48, entitled “[s]ubmission of orders, judgments and decrees for signature,” states in pertinent part:

“(a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted.

“(b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown.”

Here, the so-called 60-day rule set forth in 22 NYCRR 202.48 is not applicable because the Supreme Court's direction that the defendants submit a proposed order with respect to an award of an attorney's fee did not specify that the proposed order be settled or submitted on notice (*see Farkas v Farkas*, 11 NY3d 300, 309 [2008]; *Shamshovich v Shvartsman*, 110 AD3d 975, 976-977 [2013]; *Matter of Village of Dobbs Ferry v Stanley Ave. Props., Inc.*, 95 AD3d 1027, 1029 [2012]). Accordingly, the plaintiff's contention that the defendants abandoned their claim for an award of an attorney's fee by failing to comply with the 60-day rule is without merit.

“In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in

the locality; and the contingency or certainty of compensation” (*Green v Silver*, 79 AD3d 1097, 1098 [2010]; see *Matter of Freeman*, 34 NY2d 1, 9 [1974]; *Matter of Gaffney v Village of Mamaroneck*, 21 AD3d 1032, 1032 [2005]). Contrary to the defendants’ contention, under the circumstances of this case, the Supreme Court’s determination as to the rate at which attorneys’ fees were to be awarded was not an improvident exercise of discretion (see e.g. *Xanboo, Inc. v Ring*, 40 AD3d 1081, 1082 [2007]).

The parties agree that the defendants’ proposed order dated October 12, 2012, and the Supreme Court’s resulting order dated October 23, 2012, contained computational errors in the award of an attorney’s fee and expenses to the defendants. Certain “of counsel” charges for work performed by attorney Stephen H. Palitz were improperly duplicated, and certain charges which had been marked “No Charge” and “Do Not Bill” were improperly included. On this record, the duplicate and improper charges amounted to the principal sum of \$90,241.58. Accordingly, the award of an attorney’s fee and expenses to the defendants in the principal sum of \$391,339.79 must be reduced by \$90,241.58, to \$301,098.21, and prejudgment interest for the period from September 1, 2006, through January 2, 2013, is to be awarded on this corrected amount.

The parties’ remaining contentions are either unpreserved for appellate review, without merit, or not properly before this Court. Rivera, J.P., Balkin, Dickerson and Cohen, JJ., concur.

13 FRIEDLAND REALTY, INC., Respondent, v 416 W, LLC, Appellant. [993 NYS2d 43]—

Contracts—Reformation—Mutual Mistake

In an action, inter alia, to recover damages for breach of contract, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Loehr, J.), dated February 15, 2013, as granted those branches of the plaintiff’s motion which were pursuant to CPLR 3211 (a) (7) to dismiss the second counterclaim, and pursuant to both CPLR 3211 (a) (7) and, in effect, CPLR 3211 (b), to dismiss the third affirmative defense.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff, a corporation, entered into a commission agreement with the defendant, a limited liability company, with respect to the rental of a commercial property owned by the defendant. The written commission agreement, which was signed by Janusz Sendowski, a principal of the defendant, provided

that the defendant would pay the plaintiff a commission of 6% of the gross aggregate rental for the first five years of a lease referable to the property, and 3% thereafter, in the event that the plaintiff found a tenant for the subject property. The commission agreement further provided that it constituted the entire agreement of the parties. In August 2010, the defendant entered into a lease with a prospective tenant introduced to the defendant by the plaintiff.

After the defendant allegedly refused to pay any commission to the plaintiff, the plaintiff commenced this action, inter alia, to recover damages for breach of contract. In its answer, the defendant interposed three counterclaims, the second of which sought reformation of the written commission agreement based on mutual mistake and an alleged oral modification, and raised 15 affirmative defenses, the third of which alleged mutual mistake. The plaintiff moved pursuant to CPLR 3211 (a) (7) to dismiss the counterclaims and pursuant to both CPLR 3211 (a) (7) and, in effect, CPLR 3211 (b), to dismiss two of the affirmative defenses, including the third affirmative defense.

The Supreme Court granted the plaintiff's motion. The defendant appeals from so much of the order as granted those branches of the plaintiff's motion which were to dismiss the second counterclaim and the third affirmative defense.

On a motion to dismiss a pleading pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Non-non v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Siracusa v Sager*, 105 AD3d 937, 938 [2013]).

"A claim of mutual mistake is stated where the allegations indicate that the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement" (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [1999]; *see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Phillips v Phillips*, 300 AD2d 642, 643 [2002]). Absent fraud, "the mistake shown must be one made by both parties to the agreement, so that the intentions of neither are expressed in it" (*Migliore v Manzo*, 28 AD3d 620, 621 [2006]; *see Ribacoff v Chubb Group of Ins. Cos.*, 2 AD3d 153, 154 [2003]; *Matter of Shaw*, 202 AD2d 433, 434 [1994]). "A claim predicated on mutual mistake must be pleaded with the requisite particularity necessitated under CPLR 3016 (b)"

(*Simkin v Blank*, 19 NY3d 46, 52 [2012]), which provides that “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.” Ultimately, the proponent of reformation based on mutual mistake must demonstrate the particulars of the actual agreement intended by the parties, based on the particularized allegations in the complaint (see *Chimart Assoc. v Paul*, 66 NY2d at 574; *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 220 [1978]).

Here, the defendant’s second counterclaim and third affirmative defense did not describe the terms of the oral modification that the parties allegedly agreed to, or how those terms differed from the terms of the written agreement. Instead, that counterclaim and affirmative defense recited, in conclusory fashion, that the terms that had actually been agreed to by the parties prior to the writing, and which were allegedly confirmed pursuant to the oral modification, provided that the plaintiff was only entitled to a “reduced fee,” but provided no specifics as to the amount of that reduced fee, or under what circumstances such a reduced fee was to be paid. Similarly, the defendant alleged that the plaintiff “was to be compensated for an introduction” to a prospective lessee, but alleged no details as to how its obligation to compensate the plaintiff for securing such an introduction differed from the terms of the written agreement.

Since the allegations of mutual mistake set forth in the defendant’s second counterclaim and third affirmative defense were not made with the requisite particularity (see generally CPLR 3016 [b]; *Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [2007]), they failed to state a cause of action or defense, respectively, and the Supreme Court correctly granted those branches of the plaintiff’s motion which were to dismiss that counterclaim and affirmative defense. Skelos, J.P., Dillon, Dickerson and Austin, JJ., concur.

14 THEODORE GRANATA, JR., as Executor of CONCETTA RUSSO CARRIERO, Deceased, et al., Respondents, v CITY OF WHITE PLAINS, Appellant. [993 NYS2d 47]—

State—Claim against State—Murder of Person Renting Monthly Parking Space in City-Owned Garage
Negligence—Foreseeability

In an action, inter alia, to recover damages for negligence and wrongful death, the defendant appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester

County (Lefkowitz, J.), entered January 8, 2013, as denied that branch of its motion which was for summary judgment dismissing the cause of action alleging failure to maintain the subject premises in a reasonably safe condition.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiffs commenced this action, inter alia, to recover damages for negligence and wrongful death after Concetta Russo Carriero was attacked and killed in a parking garage owned, operated, and maintained by the defendant City of White Plains. The City's Department of Parking was responsible for the operation and maintenance of the subject parking garage. The decedent rented a monthly parking space from the City, and was required to park on the seventh floor of the garage in an area designated for monthly customers. The City moved for summary judgment dismissing the complaint. The Supreme Court denied that branch of the City's motion which was for summary judgment dismissing the cause of action alleging a failure to maintain the subject premises in a reasonably safe condition, concluding that the City acted in a proprietary capacity in owning and operating the parking garage and, thus, had a duty to take minimal precautions to protect the decedent from foreseeable harm. The City appeals.

The City "may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection, fire protection or ambulance services" (*Etienne v New York City Police Dept.*, 37 AD3d 647, 649 [2007]). The City is not, however, immune from claims arising out of the performance of proprietary functions (*see Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [2013]). A proprietary function is one in which the governmental activities "essentially substitute for or supplement 'traditionally private enterprises'" (*Sebastian v State of New York*, 93 NY2d 790, 793 [1999], quoting *Riss v City of New York*, 22 NY2d 579, 581 [1968]; *see Miller v State of New York*, 62 NY2d 506, 511-512 [1984]).

The security deficiencies alleged by the plaintiffs do not involve governmental functions or arise out of a pure "exercise of discretion . . . with respect to [overall] security measures and the deployment of limited police resources" (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 455 [2011]). The instant matter does not involve allegations of, for example, the lack of patrol cars or officers on foot patrolling the garage and the lack of general police protection (*compare Clinger v New York City Tr. Auth.*, 85 NY2d 957, 959 [1995]; *Weiner v Metropolitan Transp. Auth.*, 55 NY2d 175 [1982]), "mobilization of

police resources for the exhaustive study of the risk of terrorist attack, the policy-based planning of effective counterterrorist strategy, and the consequent allocation of such resources” (*Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d at 448), participation by a teacher in supervising a playground as part of a school district’s overall security system strategy (*see Bonner v City of New York*, 73 NY2d 930 [1989]), or a policy decision with respect to how the issue of homelessness should be addressed (*see Doe v City of New York*, 67 AD3d 854, 856 [2009]). Rather, the gravamen of the complaint is not that the City failed to properly allocate government resources and services to the public at large, which was utilizing the garage, but that it failed in its capacity as a commercial owner of a public parking garage to meet the basic proprietary obligation of providing minimal security for its garage property via lighting, alarms, cameras, and warning signs. These measures are within the normal range of security measures necessary to satisfy the duty of care owed by any landlord or commercial property owner to its tenants or invitees. In the “continuum of responsibility to individuals and society deriving from its governmental and proprietary functions,” the lapses complained of encompass a failure to maintain the reasonable security measures expected of any landlord (*Miller v State of New York*, 62 NY2d 506, 511-512 [1984]).

Since the City acted in its proprietary, rather than its governmental, capacity here, we must consider the issue of whether or not the attack upon the decedent was foreseeable in light of a landlord’s duty to take minimal precautions to protect its tenants and invitees from foreseeable harm (*see Perez v Real Tuff Piping & Heating, Inc.*, 73 AD3d 882 [2010]). Here, the Supreme Court correctly determined that triable issues of fact existed as to the foreseeability of an attack upon the decedent, thus precluding the award of summary judgment to the City (*see Jacqueline S. v City of New York*, 81 NY2d 288 [1993]; *Guarcello v Rouse SI Shopping Ctr.*, 204 AD2d 685 [1994]).

The City’s remaining contentions are without merit. Rivera, J.P., Balkin, Chambers and Cohen, JJ., concur.

15 WILLIAM GUGEL et al., Appellants, v COUNTY OF SUFFOLK, Respondent. [992 NYS2d 543]—

Municipal Corporations—Tort Liability—Negligent Maintenance of Sewer System

In an action to recover damages for injury to property, the plaintiffs appeal from an order of the Supreme Court, Suffolk County (Jones, Jr., J.), entered January 16, 2013, which granted the defendant’s motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

A municipality is immune from liability "arising out of claims that it negligently designed [a] sewerage system" (*Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d 781, 782 [2004]; see *Fireman's Fund Ins. Co. v County of Nassau*, 66 AD3d 823, 824 [2009]). However, a municipality "is not entitled to governmental immunity arising out of claims that it negligently maintained the sewerage system as these claims challenge conduct which is ministerial in nature" (*Tappan Wire & Cable, Inc. v County of Rockland*, 7 AD3d at 782; see *De Witt Props. v City of New York*, 44 NY2d 417, 423-424 [1978]; *Biernacki v Village of Ravena*, 245 AD2d 656, 657 [1997]; *Moore v City of Yonkers*, 54 AD3d 397 [2008]). In order for a municipality to demonstrate its prima facie entitlement to judgment as a matter of law in sewer backup cases, the municipality must show that it had no "'notice of a dangerous condition,'" and that "it regularly inspected and maintained the subject sewer line" (*Fireman's Fund Ins. Co. v County of Nassau*, 66 AD3d at 824, quoting *De Witt Props. v City of New York*, 44 NY2d at 424; see *Azizi v Village of Croton-on-Hudson*, 79 AD3d 953, 955 [2010]; *Holy Temple First Church of God in Christ v City of Hudson*, 17 AD3d 947 [2005]).

Here, although there is nothing in the record to show that the defendant County of Suffolk had prior notice of a dangerous condition in the subject sewer system, the County's proof regarding its regular inspection and maintenance of the sewer system was deficient. Specifically, the records that the County submitted in support of its motion for summary judgment were confusing, internally inconsistent, and did not support the conclusion made in an accompanying affidavit of a County Department of Public Works employee, who stated that the subject sewer line was annually "jetted" to clear blockages. In this regard, we note that the County also submitted a deposition transcript of another Department of Public Works employee, who testified at his deposition that he thought the subject sewage backup was caused by "grease and grit that form[ed] blockages." Accordingly, the County failed to demonstrate its prima facie entitlement to judgment as a matter of law and, thus, its motion should have been denied regardless of the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Westchester Med. Ctr. v State Farm Mut. Auto. Ins. Co.*, 44 AD3d 750, 754 [2007]). Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

16 HOFSTRA UNIVERSITY, Respondent, v NASSAU COUNTY et al., Appellants. (Action No. 1.) ST. FRANCIS HOSPITAL et al., Respondents, v NASSAU COUNTY et al., Appellants. (Action No. 2.) [993 NYS2d 41]—

Injunctions—Preliminary Injunction

In two related actions, inter alia, for a judgment declaring that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an unauthorized exercise of the defendants' lawmaking authority and is unconstitutional under the New York and United States Constitutions, which were joined for trial, the defendants in both actions appeal from (1) an order of the Supreme Court, Nassau County (Brandveen, J.), entered October 23, 2011, which granted the plaintiffs' motion to preliminarily enjoin them from enforcing Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, (2) an order of the same court entered June 28, 2012, which denied their motion in action No. 1, in effect, for summary judgment declaring that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an authorized exercise of their lawmaking authority and is constitutional under the New York and United States Constitutions, and (3) an order of the same court, also entered June 28, 2012, which denied their motion in action No. 2, in effect, for summary judgment declaring that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an authorized exercise of their lawmaking authority and is constitutional under the New York and United States Constitutions.

Ordered that the order entered October 23, 2011 is affirmed, without costs or disbursements; and it is further,

Ordered that the orders entered June 28, 2012 are modified, on the law, by deleting the respective provisions thereof denying the defendants' motions in action Nos. 1 and 2, in effect, for summary judgment declaring that Nassau County Ordinance No. 184-2010, as amended by Nassau County Ordinance No. 199-2010, is an authorized exercise of the defendants' lawmaking authority and is constitutional under the New York and United States Constitutions, and substituting therefor respective provisions denying each motion without prejudice to renewal upon the completion of discovery; as so modified, the orders entered June 28, 2012, are affirmed, without costs or disbursements.

These appeals stem from actions challenging the validity and constitutionality of Nassau County Ordinance No. 184-2010, as

amended by Nassau County Ordinance No. 199-2010 (hereinafter together the ordinance). The plaintiffs commenced CPLR article 78 proceedings, asserting, inter alia, that the ordinance violates certain provisions of the General Municipal Law and Nassau County Charter § 1231, and is “constitutionally infirm.” Subsequently, the Supreme Court converted the CPLR article 78 proceedings to actions for a declaratory judgment pursuant to CPLR 103 (c), and joined the actions for trial.

The plaintiffs sought injunctive relief. On or about June 23, 2011, the Supreme Court issued a temporary restraining order staying the effective date of the ordinance and enjoining the defendants from taking any steps to enforce it. Thereafter, in the order appealed from entered October 23, 2011, the court granted the plaintiffs’ motion to preliminarily enjoin the defendants from enforcing the ordinance.

Subsequently, the defendants moved separately in each action, in effect, for summary judgment declaring that the ordinance is an authorized exercise of the defendants’ lawmaking authority and constitutional under the New York and United States Constitutions. In the orders entered June 28, 2012, the Supreme Court denied the defendants’ respective motions.

For the reasons set forth in our decision and order in the related appeals in the action entitled *Board of Educ. of E. Meadow Union Free Sch. Dist. v County of Nassau* (120 AD3d 1170 [2014] [decided herewith]), we conclude that the Supreme Court providently exercised its discretion in granting the plaintiffs’ motion to preliminarily enjoin the defendants from enforcing the ordinance, and properly denied the defendants’ motions, in effect, for summary judgment declaring that the ordinance is an authorized exercise of the defendants’ lawmaking authority and is constitutional under the New York and United States Constitutions. However, the court should have denied the defendants’ motions without prejudice to renewal upon the completion of discovery. Rivera, J.P., Leventhal, Hall and Roman, JJ., concur.

17 PETER IASILLO et al., Appellants, v DENNIS PILLA, as Mayor of the Village of Port Chester, et al., Respondents. [992 NYS2d 143]—

Civil Service—Retirement and Pension Benefits—Health Insurance

In an action, inter alia, in effect, for a judgment declaring that a resolution of the Board of Trustees of the Village of Port Chester dated April 21, 2010, is null and void and without legal effect, the plaintiffs appeal from an order of the Supreme Court, Westchester County (Colabella, J.), entered December 17, 2012,

which, in effect, granted the defendants' converted motion for summary judgment dismissing the cause of action for injunctive relief and declaring that the resolution is not null and void or without legal effect.

Ordered that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Westchester County, for the entry of a judgment, inter alia, declaring that the resolution dated April 21, 2010, is not null and void or without legal effect.

The plaintiffs are former mayors and members of the Board of Trustees (hereinafter the Board) of the defendant Village of Port Chester. Upon their retirement from office, the plaintiffs continued to receive health care benefits payable by the Village pursuant to Board resolutions dated June 1, 1988, and November 2, 1994. By resolution dated April 21, 2010, the Board rescinded the June 1, 1988, and November 2, 1994, resolutions, thereby terminating the plaintiffs' post-retirement health care benefits.

The plaintiffs commenced this action against the Village, the Mayor of the Village, the Board, and the individual trustees of the Board, seeking, in effect, a judgment declaring that the resolution dated April 21, 2010, is null and void and without legal effect, and a permanent injunction enjoining the defendants from terminating or otherwise modifying the plaintiffs' post-retirement health care benefits. The plaintiffs alleged, inter alia, that the Village was contractually obligated to provide them with post-retirement health care benefits, and that it was estopped from terminating those benefits. The Supreme Court, in effect, granted the defendants' converted motion for summary judgment dismissing the complaint and declaring that the resolution dated April 21, 2010, is not null and void or without legal effect.

The Supreme Court properly determined that the defendants established, prima facie, their entitlement to judgment as a matter of law by demonstrating that the Board was entitled to terminate the post-retirement health care benefits afforded by the June 1, 1988, and November 2, 1994, resolutions (*see Matter of Kapell v Incorporated Vil. of Greenport*, 63 AD3d 940 [2009]; *Matter of Handy v County of Schoharie*, 244 AD2d 842 [1997]). Those resolutions did not establish a vested interest in those post-retirement health care benefits (*see Matter of Kapell v Incorporated Vil. of Greenport*, 63 AD3d 940 [2009]). "A municipal resolution is, in general, a unilateral action that is temporary in nature and, thus, it does not create any vested contractual rights" (*Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 333 [1998]). Furthermore, the de-

defendants are not barred by the doctrine of equitable estoppel from terminating the plaintiffs' post-retirement health care benefits (*see Town of Hempstead v Incorporated Vil. of Freeport*, 15 AD3d 567, 570 [2005]). Since the plaintiffs failed to raise a triable issue of fact in opposition, the Supreme Court properly granted the defendants' motion.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Westchester County, for the entry of a judgment, inter alia, declaring that the resolution dated April 21, 2010, is not null and void or without legal effect (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

18 JP MORGAN CHASE BANK, N.A., Respondent, v CHRISTINE PHILLIPS-OSUJI et al., Defendant. SAMUEL OSUJI, Nonparty Appellant. [991 NYS2d 895]—

Parties—Intervention

In an action to foreclose a mortgage, nonparty Samuel Osuji appeals from an order of the Supreme Court, Nassau County (Adams, J.), dated October 15, 2012, which denied his motion for leave to intervene as a defendant.

Ordered that the order is affirmed, without costs or disbursements.

The Supreme Court properly denied the proposed intervenor's motion for leave to intervene as a defendant. The proposed intervenor, the spouse of the defendant Christine Phillips-Osuji, was not, under the facts of this case, entitled to intervene as of right (*see* CPLR 1012; *State St. Bank & Trust Co. v Calandro*, 243 AD2d 705 [1997]; *Arbor Natl. Mtge. v Goldsmith*, 154 Misc 2d 853 [Sup Ct, Nassau County 1992]). Moreover, the denial of leave to intervene by permission was a provident exercise of the Supreme Court's discretion (*see* CPLR 1013; *Pappas v Pappas*, 95 AD3d 1283 [2012]).

The proposed intervenor's remaining contentions are not properly before this Court. Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

19 JP MORGAN CHASE BANK, N.A., Respondent, v CHRISTINE PHILLIPS-OSUJI et al., Defendants. SAMUEL OSUJI, Nonparty Appellant. [991 NYS2d 775]—In an action to foreclose a mortgage, nonparty Samuel Osuji appeals from an order of the Supreme Court, Nassau County (Adams, J.), entered June 21, 2013, which, inter alia, granted that branch of the plaintiff's motion which was to strike the answer interposed by him, and enjoined him "from filing any further motions in the underlying action without prior written approval" of the court.

Ordered that the order is affirmed, without costs or disbursements.

On this record, we conclude that the Supreme Court's striking of the nonparty-appellant's answer was proper (*see Matter of Friends World Coll. v Nicklin*, 249 AD2d 393 [1998]).

Under the circumstances of this case, the Supreme Court providently exercised its discretion in enjoining the nonparty-appellant from filing any further motions in the underlying action without prior written approval of the court (*see Ram v Torto*, 111 AD3d 814, 815-816 [2013]; *Berson v Berson*, 265 AD2d 439 [1999]).

The nonparty-appellant's remaining contentions are without merit. Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

20 ILIA KAJO et al., Appellants, v E.W. HOWELL CO., INC., et al., Defendants/Third-Party Plaintiffs-Respondents, et al., Defendant. CUMBERLAND ELECTRIC CORP., Third-Party Defendant-Respondent. [991 NYS2d 891]—In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Kings County (Kramer, J.), dated February 7, 2012, which denied their motion for leave to renew that branch of their prior cross motion which was for summary judgment on the issue of liability on the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against the defendants third-party plaintiffs E.W. Howell Co., Inc., and Norwegian Christian Home and Health Center, which had been denied in an order of the same court dated November 28, 2006.

Ordered that the order dated February 7, 2012, is affirmed, with costs.

The Supreme Court properly denied the plaintiffs' motion for leave to renew. In support of their motion, the plaintiffs failed to establish that the decision in *Runner v New York Stock Exch., Inc.* (13 NY3d 599 [2009]) created a change in the law that would alter the prior determination in this matter (*see* CPLR 2221 [e] [2]).

The parties' remaining contentions are without merit. Mastro, J.P., Balkin, Miller and LaSalle, JJ., concur.

21 KEY FAT CORP. et al., Respondents, v RUTGERS CASUALTY INSURANCE COMPANY, Appellant. [992 NYS2d 327]—

Insurance—Disclaimer of Coverage—Failure to Provide Timely Written Notice of Disclaimer

In an action, inter alia, for a judgment declaring that the plaintiffs are entitled to be reimbursed by the defendant for attorney's fees and litigation costs incurred by the plaintiff Key

Fat Corp. in an underlying action entitled *Gualpa v Key Fat Corp.*, commenced in the Supreme Court, Queens County, under Index No. 19005/06, the defendant appeals from an order of the Supreme Court, Queens County (Hart, J.), entered February 5, 2013, which denied its motion, inter alia, for summary judgment declaring that it is not so obligated, and granted the plaintiffs' cross motion, among other things, for summary judgment declaring that the defendant is obligated to reimburse them for attorney's fees and litigation costs incurred in the underlying action.

Ordered that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Queens County, for entry of a judgment declaring that the defendant is obligated to reimburse the plaintiffs for attorney's fees and litigation costs incurred in the underlying action.

While working as a construction worker for his employer, Bando Construction, Inc. (hereinafter Bando), at a property Bando leased from the plaintiff Key Fat Corp. (hereinafter Key Fat), on June 30, 2006, Manuel Gualpa allegedly fell from a ladder, sustaining injuries. He commenced an action to recover damages for personal injuries against Key Fat (hereinafter the underlying action), which instituted a third-party action against Bando. Key Fat's insurer, Seneca Insurance Company (hereinafter Seneca), informed Bando and its insurer, Rutgers Casualty Insurance Company (hereinafter Rutgers Casualty), that although it was providing defense and indemnification for the underlying action, it was requesting that Rutgers immediately assume those obligations. On March 26, 2007, Rutgers Casualty informed Bando that it was disclaiming coverage based upon a certain exclusion in the commercial general liability insurance policy it had issued to Bando (hereinafter the Policy). By letter dated April 17, 2007, Rutgers Casualty informed Seneca of the disclaimer. Key Fat was not so informed. A judgment was ultimately entered in favor of Gualpa and against Key Fat, awarding damages for his injuries, and Key Fat was awarded summary judgment on its third-party claims against Bando for common-law and contractual indemnification. Following an inquest, the Supreme Court entered a judgment on September 16, 2011, in favor of Key Fat and against Bando in the total sum of \$90,502.87 for attorney's fees and costs incurred in the underlying action.

Key Fat and Seneca together commenced the instant action against Rutgers Casualty. The complaint alleged that Rutgers Casualty was not entitled to disclaim coverage based on the Policy exclusion of certain injuries sustained by an employee of

the insured. Rutgers Casualty counterclaimed against the plaintiffs, and moved, inter alia, for summary judgment declaring that it was not obligated to reimburse Key Fat for such previously incurred defense costs in the underlying action. The plaintiffs cross-moved, among other things, for summary judgment declaring that Rutgers Casualty was so obligated. The Supreme Court denied Rutgers Casualty's motion and granted the plaintiffs' cross motion. Rutgers Casualty appeals. We affirm.

Pursuant to Insurance Law § 3420 (d), an insurance carrier is required to provide its insured and any other claimant with timely notice of its disclaimer or denial of coverage on the basis of a policy exclusion, and will be estopped from disclaiming liability or denying coverage if it fails to do so (*see Brighton Cent. School Dist. v American Cas. Co. of Reading, Pa.*, 19 AD3d 528, 529 [2005]; *Moore v Ewing*, 9 AD3d 484, 487 [2004]). Although Insurance Law § 3420 (d) (2) does not apply if the underlying claim does not involve death or bodily injury (*see Incorporated Vil. of Pleasantville v Calvert Ins. Co.*, 204 AD2d 689, 690 [1994]), contrary to Rutgers Casualty's contention, this provision is applicable where, as here, the coverage the defendant seeks to disclaim is for defense costs incurred in connection with an underlying personal injury action. Accordingly, the plaintiffs made a prima facie showing of their entitlement to judgment as a matter of law, inter alia, declaring that Rutgers Casualty was estopped from disclaiming insurance coverage under the Policy by submitting evidence that it failed to provide a timely written notice of this disclaimer to Key Fat, a claimant in this litigation (*see Insurance Law § 3420 [d] [2]*; *233 E. 17th St., LLC v L.G.B. Dev., Inc.*, 78 AD3d 930, 932 [2010]; *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84, 90 [2005]). In opposition, Rutgers Casualty failed to raise a triable issue of fact.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, Rutgers Casualty's motion for summary judgment was properly denied, and the plaintiffs' cross motion for summary judgment was properly granted.

Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Queens County, for the entry of a judgment declaring that Rutgers Casualty is obligated to reimburse the plaintiffs for attorney's fees and litigation costs incurred in the underlying action (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Dillon, J.P., Hall, Sgroi and Barros, JJ., concur.

22 ISRAEL LEBOVITS, Also Known as GEORGE I. LEBOVITS, Appellant, v GERSHON BASSMAN et al., Defendants, and SOVEREIGN BANK, Respondent. [992 NYS2d 316]—

Pleading—Sufficiency of Pleading—Fraud

Pleading—Sufficiency of Pleading—Money Had and Received

Pleading—Sufficiency of Pleading—Unjust Enrichment

In an action, inter alia, to set aside a recorded mortgage on the ground of fraud and to recover damages for fraud and unjust enrichment, the plaintiff appeals from an order of the Supreme Court, Orange County (Slobod, J.), dated August 29, 2012, which granted the motion of the defendant Sovereign Bank pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it.

Ordered that the order is affirmed, with costs.

“On a motion to dismiss, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Thomas v LaSalle Bank N.A.*, 79 AD3d 1015, 1017 [2010]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Applying this standard here, the plaintiff failed to state a cause of action against the defendant Sovereign Bank (hereinafter Sovereign) to set aside a recorded mortgage on the ground of fraud and to recover damages for fraud and unjust enrichment.

The plaintiff is a member of BLT Monroe, LLC (hereinafter BLT Monroe), a limited liability company that is the lessee of a shopping center located in Orange County, owned by Bassman Family, LLC (hereinafter Bassman). In the third cause of action, the plaintiff seeks to set aside a mortgage that was recorded in connection with the parcel of property on which the shopping center was erected, given by Bassman, as mortgagor, to Sovereign, as mortgagee. The plaintiff contends that the mortgage should be set aside because Sovereign is not a bona fide encumbrancer for value, inasmuch as Bassman allegedly committed a fraud upon Sovereign by failing to inform Sovereign of the leasehold interest in the subject property held by BLT Monroe and BLT Monroe’s option to purchase the subject property.

The elements of a cause of action based on fraud are “a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury” (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 [2006]). The misrepresentation may be in the form

of an omission of a material fact (see *Michaelson v Albora*, 12 AD3d 648, 650 [2004]). Although the question of what constitutes reasonable reliance is usually fact-intensive (see *Schlaifer Nance & Co. v Estate of Warhol*, 119 F3d 91, 98 [2d Cir 1997]), where the plaintiff alleges only that the defendant omitted a material fact when making a representation to another party, the plaintiff has failed to state a cause of action against either the representor or the representee (cf. *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147 [2010]). Although a mortgagee such as Sovereign is not a bona fide encumbrancer where, despite being aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue, it fails to make such inquiries (see *Thomas v LaSalle Bank N.A.*, 79 AD3d at 1017), here, the plaintiff did not and cannot allege that it relied on any misrepresentation or omission of fact made by Bassman to Sovereign, and the plaintiff did not allege that Sovereign itself committed a fraud. Accordingly, the Supreme Court properly directed the dismissal of the third cause of action insofar as asserted against Sovereign Bank.

The Supreme Court also properly directed the dismissal of the fourth and fifth causes of action, which sought to recover damages in quasi-contract, insofar as asserted against Sovereign. Specifically, the fourth cause of action sought to recover money had and received, while the fifth cause of action alleged unjust enrichment.

“The essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money” (*Goel v Ramachandran*, 111 AD3d 783, 790 [2013]; see *Matter of Witbeck*, 245 AD2d 848, 850 [1997]). In his complaint, the plaintiff did not identify any corpus of funds that belonged to him or BLT Monroe, or which was supposed to be paid to him or BLT Monroe but was instead paid to Sovereign.

In a cause of action to recover damages for unjust enrichment, “[a] plaintiff must show that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]). The plaintiff, in his complaint, did not identify any money that was retained by Sovereign at his expense and, in any event, “[a]lthough privity is not required for an unjust enrichment claim, a claim will not be supported if the connec-

tion between the parties is too attenuated” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 182; see *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516-517 [2012]; *Sperry v Crompton Corp.*, 8 NY3d 204, 215 [2007]). In this case, the alleged connection between the parties, as set forth in the complaint, is too attenuated to support such a cause of action. Thus, the plaintiff failed to state a cause of action against Sovereign for money had and received, or to recover damages for unjust enrichment.

The plaintiff’s remaining contentions are without merit.

Accordingly, the Supreme Court properly granted Sovereign’s motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it. Rivera, J.P., Leventhal, Austin and Roman, JJ., concur.

23 LORETTA L. LENTINI, Respondent, v ROBERT WESCHLER, Appellant. [992 NYS2d 135]—

Disclosure—Penalty for Failure to Disclose—Spoliation of Evidence—Answer Stricken and Summary Judgment on Issue of Liability Granted

In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Nassau County (Feinman, J.), entered June 28, 2013, which granted the plaintiff’s motion pursuant to CPLR 3126 to strike the defendant’s answer and affirmative defenses on the ground of spoliation of evidence and, thereupon, for summary judgment on the issue of liability.

Ordered that the order is affirmed, with costs.

The plaintiff alleged that, on July 31, 2011, while she was walking on a brick walkway on the defendant’s property, some of the bricks collapsed, causing her to fall and sustain injury. The plaintiff commenced this action in December 2011 to recover damages for her personal injuries. Issue was joined in February 2012 by service of the defendant’s answer. In May 2012, the plaintiff served upon the defendant a notice to permit entry on, and inspection of, his real property on July 31, 2012. In a telephone conversation on June 21, 2012, and in a letter dated June 25, 2012, counsel for the defendant advised counsel for the plaintiff that the bricks along the walkway had been removed, but if counsel for the plaintiff was still interested in conducting an inspection of the uncovered walkway, he should so indicate by July 18, 2012, as the defendant was planning to pave over the walkway with cement. Counsel for the plaintiff sent a letter dated July 11, 2012, indicating that he was still interested in conducting an inspection but that he would not be able to make arrangements to do so until after July 23, 2012, and that the defendant should thus not proceed with his plans

to pave the walkway. Despite this, the walkway was paved over with fresh cement prior to the plaintiff having the opportunity to inspect the premises but after the defendant's own expert was afforded an opportunity to inspect the walkway.

The plaintiff moved to strike the defendant's answer and affirmative defenses based on spoliation of the evidence and, thereupon, for summary judgment on the issue of liability. The Supreme Court granted the motion.

"The nature and severity of the sanction [for spoliation] depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714 [2013]). The determination of spoliation sanctions, whether the spoliation was intentional or negligent, lies within the broad discretion of the court (*see Ortega v City of New York*, 9 NY3d 69, 76 [2007]; *Shayovich v 800 Ocean Parkway Apt. Corp.*, 77 AD3d 814, 815 [2010]; *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]). "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to' " prove its claim or defense (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2009], quoting *Lawson v Aspen Ford, Inc.*, 15 AD3d 628, 629 [2005]; *see Gagliardi v Preferred Mut. Ins. Co.*, 102 AD3d 741, 742 [2013]).

Here, the Supreme Court providently exercised its discretion in striking the defendant's answer and awarding the plaintiff summary judgment on the issue of liability since the defendant paved over the walkway after receiving notice that the plaintiff intended to inspect it and after his own expert was afforded an opportunity to inspect the walkway prior to it being covered in cement (*see Thornhill v A.B. Volvo*, 304 AD2d 651, 652 [2003]). Further, the plaintiff demonstrated that the condition of the ground which was underneath the bricks was central to the prosecution of her case and that its permanent change in character preventing inspection and analysis was prejudicial, since she would be unable to rely on other evidence to prove her claims (*see Xiao Yang Chen v Fischer*, 73 AD3d 1167 [2010]; *Ingolia v Barnes & Noble Coll. Booksellers, Inc.*, 48 AD3d 636, 637 [2008]; *Neal v Easton Aluminum, Inc.*, 15 AD3d 459, 460 [2005]; *Thornhill v A.B. Volvo*, 304 AD2d at 652).

The defendant's remaining contentions are either improperly raised for the first time on appeal or without merit. Balkin, J.P., Austin, LaSalle and Barros, JJ., concur.

24 ANGELA LEPORE et al., Respondents, v TOWN OF GREENBURGH et al., Appellants, et al., Defendant. [992 NYS2d 329]—

**Municipal Corporations—Tort Liability—Police—Excessive Force
Employment Relationships—Respondeat Superior
Limitation of Actions—Tolling**

In an action, inter alia, to recover damages for civil rights violations pursuant to 42 USC § 1983, etc., the defendants Town of Greenburgh and P.O. Roberts appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Westchester County (O. Bellantoni, J.), entered June 10, 2013, as denied those branches of their motion which were for summary judgment dismissing the first, fifth, and sixth causes of action insofar as asserted against them and, in effect, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against P.O. John Does 1 through 8, and (2) so much of an order of the same court entered December 5, 2013, as, upon reargument, adhered to the original determination.

Ordered that the appeal from the order entered June 10, 2013 is dismissed, without costs or disbursements, as the portions of the order appealed from were superseded by the order entered December 5, 2013, made upon reargument; and it is further,

Ordered that the order entered December 5, 2013 is modified, on the law, by deleting the provisions thereof, upon reargument, adhering to so much of the original determination in the order entered June 10, 2013 as denied those branches of the motion of the defendants Town of Greenburgh and P.O. Roberts which were for summary judgment dismissing the first cause of action insofar as asserted against the Town of Greenburgh, and, in effect, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against P.O. John Does 1 through 8, and substituting therefor a provision, upon reargument, vacating so much of the prior determination as denied those branches of the motion of the defendants Town of Greenburgh and P.O. Roberts and thereupon granting those branches of the motion; as so modified, the order entered December 5, 2013 is affirmed insofar as appealed from, without costs or disbursements.

The Supreme Court properly, upon reargument, adhered to so much of its original determination as denied those branches of the motion of the defendants Town of Greenburgh and P.O. Roberts (hereinafter together the Town defendants) which were for summary judgment dismissing the first cause of action, which alleged a violation of 42 USC § 1983 predicated upon allegations of excessive force, insofar as asserted against P.O. Roberts, a police officer employed by the Town, and the fifth cause action to recover damages for battery insofar as asserted

against them. “Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness” (*Moore v City of New York*, 68 AD3d 946, 947 [2009]; see *Graham v Connor*, 490 US 386, 394-395 [1989]). “The reasonableness of an officer’s use of force must be ‘judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight’ ” (*Rivera v City of New York*, 40 AD3d 334, 341 [2007], quoting *Graham v Connor*, 490 US at 396; see *Eckardt v City of White Plains*, 87 AD3d 1049 [2011]). Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide (see *Holland v City of Poughkeepsie*, 90 AD3d 841, 844 [2011]; *Harvey v Brandt*, 254 AD2d 718, 719 [1998]). If found to be objectively reasonable, the officer’s actions are privileged under the doctrine of qualified immunity (see *Holland v City of Poughkeepsie*, 90 AD3d at 844; *Hayes v City of Amsterdam*, 2 AD3d 1139, 1140 [2003]; *Higgins v City of Oneonta*, 208 AD2d 1067, 1070 n 1 [1994]). “To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and intent to make the contact without the plaintiff’s consent” (*Higgins v Hamilton*, 18 AD3d 436, 436 [2005]).

Here, in opposition to the Town defendants’ prima facie showing that P.O. Roberts’s use of force in arresting the plaintiff Angela Lepore was objectively reasonable, the plaintiffs adduced evidence raising a triable issue of fact as to whether P.O. Roberts’s use of force was excessive and wrongful under the circumstances.

However, the Supreme Court erred, upon reargument, in adhering to so much of its original determination as denied that branch of the Town defendants’ motion which was for summary judgment dismissing the first cause of action insofar as asserted against the Town. “A municipality is not liable under 42 USC § 1983 for an injury inflicted solely by its employees or agents” (*Hudson Val. Mar., Inc. v Town of Cortlandt*, 79 AD3d 700, 703 [2010]; see *Monell v New York City Dept. of Social Servs.*, 436 US 658, 694 [1978]), or “solely upon the doctrine of respondeat superior or vicarious liability” (*Lopez v Shaughnessy*, 260 AD2d 551, 552 [1999]; see *Connick v Thompson*, 563 US —, —, 131 S Ct 1350, 1359 [2010]; *Eckardt v City of White Plains*, 87 AD3d at 1052; *Alex LL. v Department of Social Servs. of Albany County*, 60 AD3d 199, 205 [2009]). Accordingly, since the first cause of action seeks to impose liability on the Town pursuant to 42

USC § 1983 solely for the actions of P.O. Roberts, the Town is entitled to summary judgment dismissing that cause of action.

However, the fifth cause of action, alleging common-law battery against the Town defendants, is still viable because the Town may be vicariously liable for the actions of its employee, P.O. Roberts. Unlike cases commenced under 42 USC § 1983, municipalities may be liable, under the doctrine of respondeat superior, for the common law torts, such as false arrest, malicious prosecution, assault, and battery, committed by their employees (see *Eckardt v City of White Plains*, 87 AD3d at 1051; see also *Merritt v Village of Mamaroneck*, 233 AD2d 303, 304 [1996]).

The Supreme Court properly, upon reargument, adhered to so much of its original determination as denied that branch of the Town defendants' motion which was for summary judgment dismissing the sixth cause of action, which alleged loss of consortium, insofar as asserted against them. They failed to adduce evidence demonstrating their prima facie entitlement to judgment as a matter of law dismissing that cause of action (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

The Supreme Court erred, upon reargument, in adhering to so much of its original determination as denied that branch of the Town defendants' motion which was, in effect, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against P.O. John Does 1 through 8. The Town defendants demonstrated that the complaint should be dismissed insofar as asserted against the John Does by showing that the plaintiffs failed to identify the John Does and serve them with process prior to the expiration of the statutes of limitations applicable to this case. In opposition, the plaintiffs failed to raise a triable issue of fact as to whether they exercised due diligence in attempting to identify and serve the John Does such that the applicable limitations periods had tolled or were otherwise inapplicable (see *Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL-CIO*, 91 AD3d 768 [2012]; *Temple v New York Community Hosp. of Brooklyn*, 89 AD3d 926 [2011]). Accordingly, upon reargument, the Supreme Court should have granted that branch of the Town defendants' motion which was pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against P.O. John Does 1 through 8. Consequently, the plaintiffs' remaining viable causes of action are the first cause of action, alleging a violation of 42 USC § 1983 against P.O. Roberts, the fifth cause of action, alleging common-law battery against the Town defendants, and the sixth cause of action, alleging loss of consortium by Frank Lepore. Dillon, J.P., Chambers, Hall and Maltese, JJ., concur.

25 ANTHONY N. MACALUSO, SR., a 50% Shareholder of S&M HEATING CORP., Suing in the Right of S&M HEATING CORP., Appellant, v JOSEPH MACALUSO, as Executor of SANTO F. MACALUSO, JR., Deceased, Respondent, et al., Defendant. [991 NYS2d 772]—

Judgments—Default Judgment—Vacatur

In an action, inter alia, pursuant to Business Corporation Law § 716 to remove Santo F. Macaluso, Jr., as an officer and director of the defendant S&M Heating Corp., the plaintiff appeals from so much of an order of the Supreme Court, Suffolk County (Emerson, J.), dated October 2, 2012, as denied his motion, in effect, pursuant to CPLR 5015 (a) (4) to vacate a judgment entered October 20, 2010, which, upon an order of the same court dated June 18, 2010, was in favor of the defendant Joseph Macaluso, as executor of the estate of Santo F. Macaluso, Jr., and against him individually, on the ground that it was entered against an improper party.

Ordered that the order dated October 2, 2012 is affirmed insofar as appealed from, with costs.

Where there is no legal or equitable basis to enter a judgment against a particular party, such judgment must be vacated pursuant to CPLR 5015 (a) (4) (*see Mazelier v 634 W. 135, LLC*, 22 AD3d 361, 364 [2005]). Here, however, the judgment entered October 20, 2010 was properly issued, pursuant to an order dated June 18, 2010, against the plaintiff individually, as a remedy for the plaintiff's failure to comply with his personal obligations under the parties' stipulation of settlement. Contrary to the plaintiff's contention, while he may have commenced this action "in the right of S&M Heating Corp.," the record is clear that the corporation was not a party to the stipulation. Rather, the agreement, which was placed on the record in open court, provided that the plaintiff would discontinue the action and would receive certain benefits from, and undertake certain obligations to, his late brother, Santo F. Macaluso, Jr. Accordingly, the Supreme Court properly denied the plaintiff's motion, in effect, pursuant to CPLR 5015 (a) (4) to vacate the judgment. Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

26 HERSCHEL MEUSA, Respondent, v BETH SCHLOSSMAN, Appellant. [991 NYS2d 891]—In an action to recover damages for personal injuries, the defendant appeals from an order of the Supreme Court, Kings County (Lewis, J.), dated October 18, 2013, which denied her motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The defendant failed to establish her prima facie entitlement to judgment as a matter of law. The evidence she submitted in support of her motion failed to eliminate all triable issues of fact as to whether her vehicle was the one that struck the plaintiff while he was lawfully in a crosswalk at the intersection of West 40th Street and Seventh Avenue in Manhattan on July 15, 2011, and then left the scene (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Since the defendant failed to sustain her prima facie burden, we need not consider the adequacy of the plaintiff's submissions in opposition to the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint. Mastro, J.P., Dickerson, Cohen and Miller, JJ., concur.

27 LISA MINOR et al., Appellants, v COMBO STORES COMPANY et al., Respondents. [991 NYS2d 890]—In an action, inter alia, for an accounting, the plaintiffs appeal from an order of the Supreme Court, Nassau County (Bucaria, J.), entered June 15, 2012, which, inter alia, granted the cross motion of the defendants Combo Stores Company, P & S Realty Company, Sons Realty Company, Initial Realty Company, Flatlands Management Company, Queens Syndicate Company, Cambridge V, LLC, Quincy V, LLC, Victor Vitlin, Janice Sheinberg, and Robert Feinerman, and the separate cross motion of the defendant Shelly Herman, as executrix of the estate of Stephen Cooperman, for leave to renew their prior motions for summary judgment, which had been denied, in part, in order of the same court dated April 12, 2011, and, upon renewal, granted the defendants' prior motions for summary judgment.

Ordered that the order entered June 15, 2012 is affirmed, with costs.

The plaintiffs contend that a certain settlement agreement and release of the parties did not preclude them from seeking, in this action, an accounting that accrues after the date of the release, and thus, the Supreme Court erred in granting the defendants' cross motions for leave to renew and, upon renewal, granting their prior motions for summary judgment. The plaintiffs' contentions are raised for the first time on appeal and, thus, are not properly before this Court (*see Opalinski v City of New York*, 110 AD3d 694, 696 [2013]; *Buck Realty of Long Is., Inc. v Elliott*, 106 AD3d 768 [2013]; *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 617 [2011]). Dillon, J.P., Chambers, Hall and Maltese, JJ., concur. [**Prior Case History: 2012 NY Slip Op 31667(U).**]

28 KELSEY MOHR, Respondent, v NEAL M. CARLSON, Appellant, et al., Defendants. [992 NYS2d 321]—

**Motor Vehicles—Injuries to Bicyclist
Negligence—Emergency Doctrine**

In an action to recover damages for personal injuries, the defendant Neal M. Carlson appeals from an order of the Supreme Court, Kings County (Dabiri, J.), dated June 28, 2013, which denied his motion for summary judgment dismissing the complaint insofar as asserted against him.

Ordered that the order is affirmed, with costs.

On November 11, 2010, at approximately 7:15 p.m., the plaintiff was riding her bicycle northbound on Columbia Street, a two-way street in Brooklyn, when the defendant Henry Jovanovic opened the door of the car he was operating, striking the plaintiff. That vehicle had been parked on Columbia Street in the lane for parking, which was to the right of the lane for traffic. When she was struck by the opening door, the plaintiff and her bicycle fell toward her left and onto the ground in the lane for traffic traveling northbound on Columbia Street. As the plaintiff was lying on the ground, her right foot and her bicycle were allegedly run over by a vehicle operated by the defendant Neal M. Carlson. There was no separate lane for bicycle traffic on Columbia Street.

Carlson moved for summary judgment dismissing the complaint insofar as asserted against him on the basis that he had been presented with an emergency situation and acted as a reasonably prudent person would have under the circumstances. The Supreme Court denied the motion. We affirm.

“The emergency doctrine holds that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency” (*Tarnavska v Manhattan & Bronx Surface Tr. Operating Auth.*, 106 AD3d 1079, 1079 [2013] [internal quotation marks omitted]; see *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]; *Pavane v Marte*, 109 AD3d 970, 971 [2013]; *Hendrickson v Philbor Motors, Inc.*, 101 AD3d 812, 813 [2012]). “‘This is not to say that an emergency automatically absolves one from liability for his [or her] conduct. The standard then still remains that of a reasonable [person] under the given circumstances, except that the circumstances have changed’ ” (*Marks v Robb*, 90 AD3d 863, 864 [2011], quoting *Ferrer v Harris*, 55 NY2d 285, 293 [1982]). “Both the existence of an emergency and the reasonableness of a party’s response thereto will ordinarily pre-

sent questions of fact” (*Pavane v Marte*, 109 AD3d at 971 [internal quotation marks omitted]; see *Hendrickson v Philbor Motors, Inc.*, 101 AD3d at 813; *Williams v City of New York*, 88 AD3d 989, 990 [2011]; *Crawford-Dunk v MV Transp., Inc.*, 83 AD3d 764 [2011]).

Here, Carlson failed to make a prima facie showing of his entitlement to judgment as a matter of law. The evidence submitted in support of his motion consisted, inter alia, of excerpts of the deposition testimony of Carlson and the plaintiff. The plaintiff testified that Carlson’s vehicle ran over her right foot and the back wheel of her bicycle two to three seconds after she had fallen to the ground, while Carlson testified that only approximately one second had elapsed from the time that there was contact between the door of the parked car and the bicyclist, to the time that there was contact between his vehicle and the bicycle. This evidence was insufficient to eliminate all triable issues of fact as to whether Carlson was negligent in failing to exercise due care to avoid the collision with the plaintiff (see Vehicle and Traffic Law § 1146 [a]; *Bonilla v Calabria*, 80 AD3d 720 [2011]; see also *Brenner v Dixon*, 98 AD3d 1246, 1248 [2012]). Moreover, contrary to Carlson’s contention, he failed to demonstrate that he was entitled to judgment as a matter of law pursuant to the emergency doctrine, given the existence of triable issues of fact as to whether his actions were reasonable and prudent under the circumstances (see *Williams v City of New York*, 88 AD3d at 990).

In light of Carlson’s failure to meet his prima facie burden, we need not consider the sufficiency of the plaintiff’s opposition papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Accordingly, the Supreme Court properly denied Carlson’s motion for summary judgment dismissing the complaint insofar as asserted against him. Mastro, J.P., Leventhal, Chambers and Austin, JJ., concur.

29 NATIONAL COMMERCE EXCHANGE OF LONG ISLAND, INC., Respondent, v COSMOPOLITAN COACH, LTD., et al., Appellants. [992 NYS2d 309]—

Accounts and Accounting—Account Stated—Summary Judgment

In an action, inter alia, to recover damages for breach of contract and on an account stated, the defendants appeal, as limited by their brief, from so much of a judgment of the Supreme Court, Nassau County (Brown, J.), entered August 6, 2012, as, upon an order of the same court dated February 7, 2012, granting the plaintiff’s motion for summary judgment on

the causes of action to recover damages for breach of contract, on an account stated, and on the individual defendant's personal guaranty, and upon an order of the same court dated May 17, 2012 (K. Murphy, J.), is in favor of the plaintiff and against them in the principal sum of \$97,308.82.

Ordered that the judgment is affirmed insofar as appealed from, with costs.

The plaintiff operated a barter exchange company that facilitated trade transactions between its members for goods and services. The plaintiff earned transaction fees and other fees based on the exchanges that occurred. By execution of membership and trading agreements, the defendants became members of the barter exchange. In or about 2011, the plaintiff terminated the defendants' membership in the barter exchange because of their alleged failure to make certain payments. The plaintiff commenced this action to collect amounts owed, interposing, among others, causes of action to recover damages for breach of contract, on an account stated, and on the individual defendant's personal guaranty. The plaintiff thereafter moved for summary judgment on those causes of action. The Supreme Court granted that motion. Following a hearing to set the amount of contractually owed attorney's fees, the Supreme Court entered a judgment in favor of the plaintiff and against the defendants in the principal sum of \$97,308.82.

In support of its motion for summary judgment, the plaintiff submitted monthly billing statements from 1993 to 2011, together with an affidavit from its vice-president and credit manager explaining that the billing statements were sent to the defendants in the ordinary course of business and that the defendants accepted and retained those statements without objection. The billing statements also demonstrated that the defendants had made partial payments on the account until on or about May 2010. This was sufficient to establish the plaintiff's prima facie entitlement to judgment as a matter of law on the cause of action to recover on an account stated (*see American Express Centurion Bank v Gabay*, 94 AD3d 795 [2012]). In opposition, the defendants failed to submit any evidence that would raise a triable issue of fact as to whether they received the billing statements or ever disputed the bills. Their specific argument that the plaintiff was required, and failed, to submit proof of the manner in which the statements were mailed, which was not raised before the Supreme Court, is not properly before this Court (*see Emigrant Mtge. Co., Inc. v Persad*, 117 AD3d 676 [2014]; *HSBC Bank USA, N.A. v Calderon*, 115 AD3d 708 [2014]).

Moreover, the Supreme Court properly determined that the plaintiff established, *prima facie*, that the individual defendant, Frank Deluca, by virtue of the language in the parties' agreement, personally guaranteed the amounts owed (*see Manufacturers & Traders Trust Co. v Capital Bldg. & Dev., Inc.*, 114 AD3d 912 [2014]; *HSBC Bank USA, N.A. v Goldberger*, 105 AD3d 906, 907 [2013]). In opposition, the defendants failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The defendants' remaining contention, that the plaintiff failed to submit evidence that the defendants were contractually or otherwise liable for the amounts owed by the predecessor company of the defendant Cosmopolitan Coach, Ltd., is likewise without merit. Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

30 ADAM PLOTCH, Appellant, v CITIBANK, N.A., Respondent. [992 NYS2d 114]—

Condominiums and Cooperatives—Common Charges and Special Assessments—Lien Priority—Mortgage Consolidation

In an action, *inter alia*, for a judgment declaring that a second mortgage held by the defendant against the subject condominium unit in the amount of \$38,000 is subordinate to a subsequently recorded common charge lien and extinguished pursuant to a judgment of foreclosure and sale, the plaintiff appeals from an order of the Supreme Court, Richmond County (Minardo, J.), dated June 14, 2012, which, *inter alia*, denied his motion for summary judgment on the complaint and granted that branch of the defendant's cross motion which was for summary judgment declaring that its consolidation agreement is the first mortgage of record against the subject property.

Ordered that the order is affirmed, with costs.

The plaintiff, the winning bidder in a foreclosure action commenced by a condominium board to recover unpaid common charges, purchased the subject condominium unit (hereinafter the premises) in 2010 for the sum of \$15,100. The judgment of foreclosure and sale, as well as the terms of the sale, stated that the premises were to be sold subject to "[t]he first Mortgage of record against the premises." It is undisputed that in 2000, the former condominium unit owner gave a mortgage on the premises to the defendant Citibank, N.A. (hereinafter Citibank), in the sum of \$54,000 and, in 2001, gave a second mortgage to Citibank in the sum of \$38,000 and executed a consolidation agreement consolidating the two mortgages "into a single mortgage lien" in the amount of \$92,000. The mortgages and

the agreement were recorded approximately seven years prior to the filing of a common charges lien (*see* Real Property Law § 339-aa).

In 2011, the plaintiff commenced this action seeking a judgment declaring, *inter alia*, that the second mortgage is subordinate to the common charges lien pursuant to Real Property Law § 339-z.

Contrary to the plaintiff's contention, the Supreme Court correctly denied his motion for summary judgment on the complaint and properly granted that branch of Citibank's cross motion which was for summary judgment declaring that Citibank's consolidation agreement is the first mortgage of record against the premises. Since Real Property Law § 339-z is in derogation of the common-law principle of "first in time, first in right," the statutory right to priority must be narrowly construed (*see Greenpoint Bank v El-Basary*, 184 Misc 2d 888, 891 [Sup Ct, NY County 2000]). Moreover, Citibank's second mortgage comes within the ambit of the statutory priority accorded to all sums unpaid on a first mortgage of record over a lien for unpaid common charges (*see Board of Mgrs. of Parkchester N. Condominium v Richardson*, 238 AD2d 282, 284 [1997]; Real Property Law § 339-z; *Greenpoint Bank v El-Basary*, 184 Misc 2d at 892; *Dime Sav. Bank of N.Y. v Levy*, 161 Misc 2d 480 [Sup Ct, Rockland County 1994]). Thus, the common charges lien does not have priority over the consolidation agreement.

Since this is a declaratory judgment action, we remit the matter to the Supreme Court, Richmond County, for the entry of a judgment, *inter alia*, declaring that Citibank's consolidation agreement is the first mortgage of record against the premises (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

31 S.E.M. SECURITY SYSTEMS, INC., Respondent, v EARL LORENCE ENTERPRISES, Formerly Known as E.F. LORENCE & SONS, INC., Doing Business as INTER COUNTY ALARM SYSTEMS, et al., Appellants. [992 NYS2d 539]—

Contracts—Breach or Performance of Contract—Summary Judgment

In an action, *inter alia*, to recover damages for breach of contract, the defendants appeal (1) from an order of the Supreme Court, Orange County (Bartlett, J.), dated May 8, 2012, which granted the plaintiff's application to strike an errata sheet annexed to the transcript of the deposition testimony of the defendant Scott Lorence, (2), as limited by their brief, from so much of an order of the same court dated October 17, 2012, as granted the plaintiff's motion for summary judgment on the

issue of liability on the cause of action alleging breach of contract and dismissing their counterclaims, denied their cross motion for summary judgment dismissing the complaint and on their counterclaims, and, upon reargument, adhered to the determination in the order dated May 8, 2012, granting the plaintiff's application to strike the errata sheet annexed to the transcript of the deposition testimony of Scott Lorence, and (3), from an order of the same court dated January 9, 2013, which, in effect, denied their motion for leave to renew and reargue their opposition to the plaintiff's motion for summary judgment.

Ordered that the appeal from the order dated May 8, 2012 is dismissed, without costs or disbursements, as no appeal lies as of right from an order that does not decide a motion made on notice (*see* CPLR 5701 [a] [2]), leave to appeal has not been granted, and the order was superseded by the order dated October 17, 2012, made upon reargument; and it is further,

Ordered that the appeal from so much of the order dated January 9, 2013 as denied that branch of the defendants' motion which was for leave to reargue is dismissed, without costs or disbursements, as no appeal lies from an order denying reargument; and it is further,

Ordered that the order dated October 17, 2012 is modified, on the law, by deleting the provisions thereof granting the plaintiff's motion for summary judgment on the issue of liability on the cause of action alleging breach of contract and dismissing the defendants' counterclaims, and substituting therefor a provision denying the plaintiff's motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements; and it is further,

Ordered that the order dated January 9, 2013 is affirmed insofar as reviewed, without costs or disbursements.

The defendants installed, serviced, and monitored fire alarm systems. The plaintiff sought to purchase the defendants' business pursuant to an asset purchase agreement (hereinafter the APA), with the purchase price dependent on revenues received from existing customers. The APA provided that the parties were required to work together in good faith to determine which customer contracts were to be included in the purchase price. The details of those contracts were to be compiled in a "Closing Date Statement" that was to be generated no later than 10 days prior to the closing.

The APA stated that the closing date was December 1, 2010. According to the complaint, that date was selected for closing because the defendants were concerned that capital gains taxes

would increase as of January 1, 2011. Accordingly, if the closing occurred on December 1, 2010, the plaintiff was entitled to receive the Closing Date Statement by November 20, 2010.

The APA required that customer accounts included in the Closing Date Statement be supported by binding written contracts between the customer and the defendants that were assignable without consent of the customer, not modified from their printed form, and automatically renewable “without any action by or on behalf of any Person.” Pursuant to General Obligations Law § 5-903, contracts that are automatically renewable for a period of more than one month must provide that the customer be notified that the contract is being automatically renewed. Therefore, the provision of the APA requiring automatic renewal of existing customer contracts, “without any action by or on behalf of any Person,” required the existence of customer contracts that conflicted with the General Obligations Law. The plaintiff’s president, Stephen E. Mocarsky, noted this discrepancy in his deposition.

A customer contract was defined in the APA as a contract on the customer’s written form, or a contract on the defendants’ written form or a form created by another seller where the customer had the sole discretion to accept or reject the form of the customer contract. The plaintiff’s president stated at his deposition that he did not have a problem with the form contracts used by the defendants. The plaintiff’s attorney nevertheless took the position that if the defendants’ customer contracts did not employ the plaintiff’s own form customer contract, those customer contracts, and the accounts represented by those customer contracts, were only acceptable as part of the APA in the plaintiff’s sole discretion. The plaintiff’s attorney also informed the defendants’ attorney that 80% of the defendants’ customer contracts were deemed unenforceable by virtue of General Obligations Law § 5-903 and, consequently, the defendants would not be compensated for them.

In an email message dated November 15, 2010, the defendants informed the plaintiff that they no longer wanted to sell. The defendants failed to deliver the Closing Date Statement on November 20, 2010. By letter dated November 26, 2010, the plaintiff notified the defendants that it would not be prepared to close the transaction until a reasonable time after it received the Closing Date Statement, and advised the defendants that the failure to deliver the Closing Date Statement constituted a breach of the APA. The defendants’ attorney replied that the APA was not binding because the parties had not agreed to the purchase price and which customer contracts and accounts were

eligible for inclusion in the calculation of the purchase price. However, in an email message dated December 5, 2010, the defendant Scott Lorence advised the plaintiff's president that the defendants decided to "move forward" with the transaction, and listed a number of items that needed "to be discussed more thoroughly."

The defendants retained Raymond Lynn & Associates, LLC, to prepare the Closing Date Statement in accordance with the APA. The Closing Date Statement was completed on or about January 20, 2011, and delivered to the plaintiff on that day by email. The plaintiff's president admitted that he received it, but claimed he did not know why, because it was past due and incomplete.

The plaintiff scheduled a meeting with the defendants for January 25, 2011. The plaintiff's attorney said the agenda was simple: "*Do defendants want to deliver the Closing Date Statement to Buyer as they are required to do under the detailed written agreement they signed and then close the transaction to get cash into their pockets, and begin to rehabilitate any non-performing accounts so that they can get even more money into their pocket OR would they prefer to retain and pay for defense counsel, defend this case through discovery and motion practice and then go to trial so that a judge can decide how much in damages we are entitled to receive?*" The record does not reflect that the meeting took place and, on February 22, 2011, the plaintiff commenced the instant action, inter alia, to recover damages for breach of contract. The defendants counterclaimed, inter alia, for reformation and rescission.

After issue was joined, the plaintiff moved for summary judgment on the issue of liability on the cause of action alleging breach of contract and dismissing the defendants' counterclaims, and the defendants cross-moved, inter alia, for summary judgment on their counterclaims for reformation and rescission, contending that the plaintiff breached the implied covenant of good faith and fair dealing. The Supreme Court granted the plaintiff's motion for summary judgment and denied the defendants' cross motion.

Contrary to the determination of the Supreme Court, the plaintiff failed to establish the absence of material issues of fact, thus precluding the award of summary judgment to it (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In November 2010, the defendants committed an anticipatory breach, leaving the plaintiff with a choice of either treating the contract as terminated and seeking damages, or ignoring the breach and waiting to see if the defendants would perform (*see*

Velazquez v Equity LLC, 28 AD3d 473 [2006]). The plaintiff pursued the latter course. The Supreme Court found that the anticipatory breach became an actual breach when the defendants failed to deliver a Closing Date Statement by November 20, 2010. However, as the defendants correctly noted in opposition to the plaintiff's motion for summary judgment, the APA did not make time of the essence (*see #1 Funding Ctr., Inc. v H & G Operating Corp.*, 48 AD3d 908 [2008]). Further, the plaintiff did not terminate the contract on November 20, 2010, and the Closing Date Statement was ultimately provided on January 20, 2011.

The plaintiff's submission revealed the existence of triable issues of fact, inter alia, as to whether the defendants' failure to deliver the Closing Date Statement earlier than January 20, 2011, constituted a material breach of the APA, or whether the Closing Date Statement that was ultimately delivered was incomplete, thus precluding an award of summary judgment to it. Further, there are triable issues of fact as to the meaning of the terms of the APA, since certain terms are ambiguous, the plaintiff's president and the plaintiff's own attorney offered differing views as to the meaning of those terms, and the term requiring automatic renewal of customer contracts was facially inconsistent with New York law. In view of the foregoing, the plaintiff was not entitled to summary judgment on the issue of liability on the cause of action alleging a breach of contract or dismissing the defendants' counterclaims.

However, upon reargument, the Supreme Court properly adhered to its determination granting the plaintiff's application to strike an errata sheet attached to the transcript of the deposition of the defendant Scott Lorrance, since the defendant did not provide adequate reasons for the proposed changes to his deposition testimony (*see Ashford v Tannenhauser*, 108 AD3d 735, 736 [2013]). Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

32 SCOTTSDALE INDEMNITY COMPANY, Appellant, v JULIANNE W. BECKERMAN, Individually and as Mayor of the Incorporated Village of Muttontown, Respondents, et al., Defendants. [992 NYS2d 117]—

Insurance—Exclusions—Taking Involving or Related to Principles of Eminent Domain

In an action for a judgment declaring, inter alia, that the plaintiff, Scottsdale Indemnity Company, is not obligated to defend or indemnify the defendants Julianne W. Beckerman, individually and as Mayor of the Incorporated Village of Mut-

tontown, Carl Juul-Nielson, J. Randolph Bartholomew, Steven Fine, and Pat Miller, individually and in their official capacities as Members of the Board of Trustees of the Incorporated Village of Muttontown, Vivian Van Wagner, as Village Clerk of the Incorporated Village of Muttontown, the Board of Trustees of the Incorporated Village of Muttontown, and the Incorporated Village of Muttontown in an underlying hybrid action for a declaratory judgment and proceeding pursuant to CPLR article 78 entitled *Lexjac, LLC v Beckerman*, pending in the Supreme Court, Nassau County, under index No. 12654/07, and an underlying action to recover damages for alleged violations of Federal constitutional rights entitled *Lexjac, LLC v Beckerman*, pending in the United States District Court for the Eastern District of New York, under Case No. 2007 Civ. 4614, the plaintiff appeals (1) as limited by its brief, from so much of an order of the Supreme Court, Nassau County (Feinman, J.), dated December 13, 2012, as denied its motion for summary judgment declaring that it is not obligated to defend or indemnify those defendants in the underlying matters, and granted that branch of the cross motion of those defendants which was for summary judgment dismissing the complaint insofar as asserted against them and declaring that the plaintiff is so obligated, and (2) from a judgment of the same court dated March 27, 2013, which, upon the order, is in favor of those defendants and against it dismissing the complaint insofar as asserted against those defendants.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is reversed, on the law, the plaintiff's motion for summary judgment declaring that it is not obligated to defend or indemnify the defendants Julianne W. Beckerman, individually and as Mayor of the Incorporated Village of Muttontown, Carl Juul-Nielson, J. Randolph Bartholomew, Steven Fine, and Pat Miller, individually and in their official capacities as Members of the Board of Trustees of the Incorporated Village of Muttontown, Vivian Van Wagner, as Village Clerk of the Incorporated Village of Muttontown, the Board of Trustees of the Incorporated Village of Muttontown, and the Incorporated Village of Muttontown in the underlying matters is granted, those branches of the cross motion of those defendants which were for summary judgment dismissing the complaint insofar as asserted against them and declaring that the plaintiff is so obligated is denied, the order is modified accordingly, and the matter is remitted to the Supreme Court, Nassau County, for the entry of a judgment, inter alia, declaring

that the plaintiff is not obligated to defend or indemnify those defendants in the underlying matters; and it is further,

Ordered that one bill of costs is awarded to the plaintiff, payable by the respondents.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241 [1976]). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see CPLR 5501 [a]*).

At issue in this case is the taking, by the Village of Muttontown, of a 1.1-acre parcel of real property from the defendants Richard Entel and his limited liability company, Lexjac, LLC (hereinafter together the Entel defendants). A predecessor in interest to the Entel defendants offered to dedicate the parcel to the Village as parkland, but the Village did not accept the dedication (*see Foreal Homes v Incorporated Vil. of Muttontown*, 128 AD2d 585 [1987], *affd* 71 NY2d 821 [1988]). In 2005, the Board of Trustees of the Village of Muttontown (hereinafter the Board of Trustees), with Entel, who was then a member, recusing himself, officially declined the offer of dedication, and Lexjac, LLC, delivered a conservation easement over the parcel to the Village. In 2007, after a hotly contested mayoral election between Entel and the defendant Julianne W. Beckerman, in which Beckerman prevailed, the Village rescinded its 2005 resolution declining the dedication, and thereupon accepted the dedication.

The Entel defendants challenged that taking by commencing an action in the United States District Court against, among others, Beckerman, individually and as Mayor of the Village, Carl Juul-Nielson, J. Randolph Bartholomew, Steven Fine, and Pat Miller, individually and in their official capacities as members of the Board of Trustees, the Board of Trustees, and the Village alleging (1) a violation of the right to equal protection, (2) a deprivation of substantive due process, (3) a deprivation of procedural due process, and (4) a violation of the right to free speech. In 2011, after the Entel defendants were awarded summary judgment on the cause of action alleging a deprivation of procedural due process, the remaining causes of action in the federal court action were dismissed. The Entel defendants also commenced a hybrid action and proceeding in the Supreme Court, Nassau County, against Beckerman, individually and as Mayor of the Village, Vivian Van Wagner, as Clerk of the Village, the Board of Trustees, and the Village, seeking (1) damages for breach of a contract allegedly created by the 2005 resolution of the Board of Trustees declining the offer of dedication, (2) a

judgment declaring that the Village failed to comply with the Eminent Domain Procedure Law, (3) to quiet title to the parcel in dispute, (4) damages for a de facto taking, (5) the annulment of the 2007 resolution accepting the dedication on the ground that the determination adopting the resolution was arbitrary and capricious, (6) the annulment of the 2007 resolution on the ground that the acceptance of the parcel did not comply with the State Environmental Quality Review Act (ECL art 8), and (7) to compel the Village to decline the dedication.

The plaintiff is an insurance carrier that insured the Village and its officials for claims arising from public officials' wrongful acts. However, the relevant insurance policy contained an exclusion for "[a]ny injury or damage arising out of or resulting from a taking that involves or is in any way related to the principles of eminent domain, inverse condemnation . . . or dedication by adverse use or by whatever name used." In 2012, the plaintiff commenced the instant action against Beckerman, Van Wagner, the individual members of the Board of Trustees, the Board of Trustees itself, and the Village (hereinafter collectively the Village defendants) for a judgment declaring that the exclusion absolves the plaintiff from defending and indemnifying the Village, its agencies, and its officials in relation to the Entel defendants' remaining claims in both the underlying federal and state-court matters (see *QBE Ins. Corp. v Jinx-Proof Inc.*, 22 NY3d 1105 [2014]).

An insurer's contractual duty to defend is liberally construed, and is broader than the duty to indemnify (see *Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co., Inc.*, 16 NY3d 257, 264 [2011]). The duty to defend "'arises whenever the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy'" (*id.*, quoting *Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 65 [1991]; see *BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007]). "The duty to defend is not triggered, however, when the only interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion" (*Yangtze Realty, LLC v Sirius Am. Ins. Co.*, 90 AD3d 744, 744-745 [2011] [internal quotation marks omitted]; see *Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006]; *Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002]).

Policy exclusions "are subject to strict construction and must be read narrowly" (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d at 137), and any ambiguities in the insurance policy are to be construed against the insurer (see *Ace Wire & Cable Co. v*

Aetna Cas. & Sur. Co., 60 NY2d 390, 398 [1983]; *Lancer Ins. Co. v Marine Motor Sales, Inc.*, 84 AD3d 1318 [2011]). However, unambiguous provisions of insurance contracts will be given their “plain and ordinary” meaning (*Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986]; see *ABM Mgmt. Corp. v Harleysville Worcester Ins. Co.*, 112 AD3d 763, 764 [2013]).

In the context of a policy exclusion, the phrase “arising out of” is unambiguous, and is interpreted broadly to mean “originating from, incident to, or having connection with” (*Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005] [internal quotation marks omitted]; see *Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010]; *Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d 347, 350-352 [1996]; *Natural Organics, Inc. v OneBeacon Am. Ins. Co.*, 102 AD3d 756, 759 [2013]; *Dzielski v Essex Ins. Co.*, 90 AD3d 1493, 1497 [2011], *revd on dissenting op* 19 NY3d 871, 873 [2012]). A “but-for” test applies to determine the applicability of an “arising out of” exclusion (see *Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d at 350-352; *U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d 821 [1995]). In other words, if the plaintiff in an underlying action or proceeding alleges the existence of facts clearly falling within such an exclusion, and none of the causes of action that he or she asserts could exist but for the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action (see *Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d at 350-352; *U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d at 823; *Natural Organics, Inc. v OneBeacon Am. Ins. Co.*, 102 AD3d at 759).

Here, the plaintiff established its prima facie entitlement to judgment as a matter of law by demonstrating that the remaining claims asserted by the Entel defendants in the underlying federal and state-court matters all arose out of “a taking that involves or is in any way related to the principles of eminent domain, inverse condemnation . . . or dedication,” a situation that is specifically excluded from coverage by the clear and unambiguous language of the policy (see *Mount Vernon Fire Ins. Co. v Creative Hous.*, 88 NY2d at 352; *U.S. Underwriters Ins. Co. v Val-Blue Corp.*, 85 NY2d at 823). In opposition to the plaintiff’s showing, the Village defendants failed to raise a triable issue of fact.

The parties’ remaining contentions either are without merit or need not be addressed in light of our determination.

Accordingly, the Supreme Court should have granted the

plaintiff's motion for summary judgment declaring that it is not obligated to defend or indemnify the Village defendants in the underlying federal and state-court matters, and denied those branches of the Village defendants' cross motion which were for summary judgment dismissing the complaint insofar as asserted against them (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]) and declaring that the plaintiff is so obligated.

Since this is a declaratory judgment action, the matter must be remitted to the Supreme Court, Nassau County, for the entry of a judgment declaring that the plaintiff is not obligated to defend or indemnify the Village defendants in the underlying federal and state-court matters (*see Lanza v Wagner*, 11 NY2d at 334). Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

33 JACOB SELECHNIK et al., Appellants, v LAW OFFICE OF HOWARD R. BIRNBACH, Respondent, et al., Defendant. [991 NYS2d 894]—

Judgments—Default Judgment—Vacatur

In an action, inter alia, to recover damages for fraud and negligent hiring and retention, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Rockland County (Garvey, J.), entered September 26, 2012, as denied their motion to vacate an order of the same court dated January 12, 2012, entered upon their default in appearing at pretrial conferences, directing the dismissal of the complaint insofar as asserted against the defendant Law Office of Howard R. Birnbach.

Ordered that the order is affirmed insofar as appealed from, with costs.

To vacate their default in appearing at a pretrial conference, the plaintiffs were required to demonstrate both a reasonable excuse for their default and a potentially meritorious cause of action (*see* CPLR 5015 [a] [1]; *Dobbins v Vartabedian*, 23 AD3d 431, 431 [2005]). Since the plaintiffs failed to proffer a reasonable excuse for their failure to appear at numerous court-ordered conferences, it is unnecessary to consider whether they demonstrated a potentially meritorious cause of action (*see Ogazi v Ogazi*, 46 AD3d 646, 646 [2007]). Accordingly, the Supreme Court providently exercised its discretion in denying that branch of their motion which was to vacate an order of the same court dated January 12, 2012, entered upon their default, directing the dismissal the complaint insofar as asserted against the defendant Law Office of Howard R. Birnbach (*see* CPLR 5015 [a] [1]; *Dobbins v Vartabedian*, 23 AD3d at 431). Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

34 ROSEMARIE STEPHEN, Appellant, v BROOKLYN PUBLIC LIBRARY, Respondent, et al., Defendant. [992 NYS2d 101]—

Negligence—Maintenance of Premises—Duty of Out-of-Possession Landlord

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Silber, J.), dated May 4, 2012, which denied her motion to vacate the dismissal of the complaint insofar as asserted against the defendant Brooklyn Public Library and, thereupon, to restore the action against that defendant to the trial calendar.

Ordered that the order is affirmed, with costs.

Contrary to the plaintiff's contention, the Supreme Court did not improperly direct the dismissal of the complaint insofar as asserted against the defendant Brooklyn Public Library (hereinafter the Library), sua sponte, as the record reflects that the Library moved for summary judgment dismissing the complaint insofar as asserted against it. Moreover, the plaintiff waived any argument with respect to the motion being untimely (*see Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466 [1978]; *Gresser v Princi*, 128 AD2d 752 [1987]).

On the merits, the Supreme Court properly denied the plaintiff's motion to vacate the dismissal of the complaint insofar as asserted against the Library and, thereupon, to restore the action against that defendant to the trial calendar. An out-of-possession landlord's duty to repair a dangerous condition on leased premises is imposed by statute or regulation, by contract, or by a course of conduct (*see Reyderman v Meyer Berfond Trust #1*, 90 AD3d 633 [2011]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 15 [2011]). The Library established that the defendant City of New York owned the premises abutting the sidewalk area where the accident allegedly occurred and that the Library did not assume a duty to maintain that area of the sidewalk (*see Reyderman v Meyer Berfond Trust #1*, 90 AD3d at 633). Pursuant to Administrative Code of the City of New York § 7-210, the City, as owner, had a statutory duty to maintain the sidewalk abutting its premises at the alleged accident location (*see Reyderman v Meyer Berfond Trust #1*, 90 AD3d at 633).

The plaintiff's remaining contentions are without merit. Rivera, J.P., Leventhal, Austin and Roman, JJ., concur.

35 HENRY F. STUVE, JR., Respondent, v FRANCISCO BAINGAN, Respondent, and SANDRA S. DOZIER, Appellant. [993 NYS2d 46]—

**Motions and Orders—Reargument or Renewal
Motor Vehicles—Collision**

In an action to recover damages for personal injuries, the defendant Sandra S. Dozier appeals from an order of the Supreme Court, Suffolk County (Whelan, J.), dated August 5, 2013, which granted the plaintiff's motion for leave to reargue his opposition to that branch of her motion which was for summary judgment dismissing the complaint insofar as asserted against her, which had been granted in an order of the same court dated March 18, 2013, and, upon reargument, vacated the order dated March 18, 2013, and thereupon denied that branch of the motion.

Ordered that the order dated August 5, 2013, is affirmed, with one bill of costs.

The Supreme Court providently exercised its discretion in granting the plaintiff leave to reargue because it had previously misapprehended the facts of the case (*see* CPLR 2221 [d]). Upon reargument, the Supreme Court properly vacated its prior order and thereupon denied that branch of the motion of the defendant Sandra S. Dozier which was for summary judgment dismissing the complaint insofar as asserted against her. Dozier established her prima facie entitlement to judgment as a matter of law by showing that the subject accident occurred when the vehicle operated by the defendant Francisco Baingan crossed over the double-yellow line and entered the lane of oncoming traffic in which Dozier and the plaintiff were separately traveling (*see Ferebee v Amaya*, 83 AD3d 997, 997 [2011]; *Barbaruolo v DiFede*, 73 AD3d 957, 957 [2010]; *Sullivan v Mandato*, 58 AD3d 714, 714 [2009]). However, in opposition, the plaintiff raised triable issues of fact as to whether Dozier's vehicle struck his vehicle and, if so, as to whether Dozier contributed to the accident by following the plaintiff too closely.

Accordingly, the Supreme Court properly granted the plaintiff's motion for reargument, upon reargument, vacated its prior order, and thereupon denied that branch of Dozier's motion which was for summary judgment dismissing the complaint insofar as asserted against her. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

36 US BANK, N.A., Respondent, v CLEMENT MORRISON, Also Known as CLEMENT A. MORRISON, et al., Appellants, et al., Defendants. [991 NYS2d 773]—

Parties—Standing

In an action to foreclose a mortgage, the defendants Clement Morrison, also known as Clement A. Morrison, and Vyanne McBean appeal from an order of the Supreme Court, Queens County (Butler, J.), dated September 27, 2011, which denied their motion pursuant to CPLR 3211 (a) to dismiss the

complaint insofar as asserted against them for lack of standing, and denied their separate motion for leave to renew and reargue their prior motion, in effect, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against the defendant Vyanne McBean for lack of personal jurisdiction, which had been denied in an order of the same court dated July 1, 2011.

Ordered that the appeal from so much of the order dated September 27, 2011, as denied that branch of the appellants' motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument (*see Indymac Bank, F.S.B. v Moise*, 107 AD3d 851, 852 [2013]); and it is further,

Ordered that the order dated September 27, 2011 is affirmed insofar as reviewed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The Supreme Court properly denied that branch of the appellants' motion which was for leave to renew their prior motion, in effect, pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against the defendant Vyanne McBean for lack of personal jurisdiction. Among other things, the appellants failed to demonstrate that the "new facts" would have changed the prior determination (CPLR 2221 [e] [2]; *see Courtview Owners Corp. v Courtview Holding B.V.*, 113 AD3d 722, 724 [2014]).

The Supreme Court also properly denied the appellants' separate motion pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them for lack of standing. The evidence the appellants submitted in support of this motion did not qualify as "documentary" within the meaning of CPLR 3211 (a) (1) (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2010]), and was insufficient to demonstrate that the issue of standing could be determined as a matter of law (*see* CPLR 3211 [a] [3]; *Deutsche Bank Natl. Trust Co. v Rivas*, 95 AD3d 1061, 1062 [2012]), or that the plaintiff's allegation that it had standing to commence this action was "not a fact at all" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see* CPLR 3211 [a] [7]). Mastro, J.P., Leventhal, Chambers and Austin, JJ., concur.

37 US BANK, N.A., Respondent, v CLEMENT MORRISON, Also Known as CLEMENT A. MORRISON, et al., Appellants, et al., Defendants. [993 NYS2d 50]—

Mortgages—Foreclosure—Standing

In an action to foreclose a mortgage, the defendants Clement Morrison, also known as Clement A. Morrison, and Vyanne McBean appeal from (1) an order of the Supreme Court, Queens

County (Butler, J.), dated June 19, 2012, which granted the plaintiff's motion for summary judgment on the complaint and for the appointment of a referee to compute the amounts due to it, and denied their cross motion for summary judgment dismissing the complaint insofar as asserted against them and to cancel a notice of pendency, and (2) an order of the same court dated March 25, 2013, which denied their motion for leave to renew and reargue their opposition to the plaintiff's motion for summary judgment on the complaint and for the appointment of a referee to compute the amounts due to it and their cross motion for summary judgment dismissing the complaint insofar as asserted against them and to cancel a notice of pendency.

Ordered that the order dated June 19, 2012 is affirmed; and it is further,

Ordered that the appeal from so much of the order dated March 25, 2013 as denied that branch of the appellants' motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument (*see Indymac Bank, F.S.B. v Moise*, 107 AD3d 851, 852 [2013]); and it is further,

Ordered that the order dated March 25, 2013 is affirmed insofar as reviewed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

"Where, as here, a plaintiff's standing to commence a foreclosure action is placed in issue by the defendant, it is incumbent upon the plaintiff to prove its standing to be entitled to relief" (*Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2011]; *see Bank of N.Y. v Silverberg*, 86 AD3d 274, 279 [2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753 [2009]). "A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Kondaur Capital Corp. v McCary*, 115 AD3d 649, 650 [2014]; *see HSBC Bank USA v Hernandez*, 92 AD3d 843 [2012]; *Bank of N.Y. v Silverberg*, 86 AD3d at 279; *U.S. Bank, N.A. v Collymore*, 68 AD3d at 753). "The plaintiff may demonstrate that it is the holder or assignee of the underlying note by showing '[e]ither a written assignment of the underlying note or the physical delivery of the note' " (*Kondaur Capital Corp. v McCary*, 115 AD3d at 650, quoting *U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; *see Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2011]).

Here, the plaintiff met its prima facie burden of establishing its entitlement to judgment as a matter of law by demonstrating, among other things, an absence of triable issues of fact concerning its standing, and, in opposition, the appellants failed

to raise a triable issue of fact (*see Aurora Loan Servs., LLC v Taylor*, 114 AD3d 627, 629 [2014]). Accordingly, the Supreme Court properly granted the plaintiff's motion for summary judgment on the complaint and for the appointment of a referee to compute the amounts due to it.

The Supreme Court properly denied the appellants' cross motion for summary judgment dismissing the complaint insofar as asserted against them and to cancel a notice of pendency, as they failed to satisfy their prima facie burden of establishing their entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The Supreme Court also properly denied that branch of the appellants' subsequent motion which was for leave to renew that cross motion and their opposition to the plaintiff's motion for summary judgment on the complaint and for the appointment of a referee to compute the amounts due to it, as the appellants failed to demonstrate that the "new facts" would have changed the prior determination (CPLR 2221 [e] [2]; *see Courtview Owners Corp. v Courtview Holding B.V.*, 113 AD3d 722, 724 [2014]). Mastro, J.P., Leventhal, Chambers and Austin, JJ., concur.

38 WELLS FARGO BANK, NA, Trustee under Pooling and Servicing Agreement Dated as of September 1, 2005 ABFC Asset-Backed Certificates, Series 2005-WMC1, Appellant, v SERGEY AMBROSOV et al., Defendants. [993 NYS2d 322]—

**Mortgages—Foreclosure—Order of Reference
Pleading—Amendment**

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (F. Rivera, J.), dated August 26, 2011, which, in effect, denied its motion for an order of reference, to reform the subject mortgage to correct a scrivener's error in the legal description of the subject property, for leave to amend the complaint and notice of pendency, and for leave to amend the caption to remove the defendants sued herein as "John Does" and "Jane Does," and, sua sponte, directed the dismissal of the complaint.

Ordered that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, directed the dismissal of the complaint is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order is reversed, on the law, without costs or disbursements, and the plaintiff's motion for an order of reference, to reform the mortgage to correct a scrivener's error in the legal description of the subject property, for leave to amend

the complaint and notice of pendency, and for leave to amend the caption to remove the defendants sued herein as “John Does” and “Jane Does” is granted.

The Supreme Court erred in, in effect, denying the plaintiff’s motion for an order of reference, to reform a certain mortgage to correct a scrivener’s error in the legal description of the subject property, for leave to amend the complaint and notice of pendency, and for leave to amend the caption to remove the defendants sued herein as “John Does” and “Jane Does,” and, sua sponte, directing the dismissal of the complaint on the ground that the plaintiff had not filed an attorney affirmation in accordance with Administrative Order 548/10, which was issued by the Chief Administrative Judge of the State of New York on October 20, 2010. Administrative Order 548/10 (hereinafter the Administrative Order), which has since been replaced by Administrative Order 431/11, requires the plaintiff’s counsel in a residential mortgage foreclosure action to file with the court an affirmation confirming the accuracy of the plaintiff’s pleadings. Where, as here, the action was pending on the Administrative Order’s effective date and no judgment of foreclosure has been entered, the affirmation must be filed “at the time of filing either the proposed order of reference or the proposed judgment of foreclosure.”

Here, as the plaintiff filed its motion and proposed order of reference before the Administrative Order took effect, it could not have filed the newly required affirmation at the “time of filing . . . the proposed order of reference.” Thus, “[b]ased on the plain language of the Administrative Order, the plaintiff is . . . required to file the attorney affirmation at the time it files the proposed judgment of foreclosure” (*US Bank, N.A. v Boyce*, 93 AD3d 782, 782 [2012]; see *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 1045 [2012]).

Furthermore, the Supreme Court should have granted the plaintiff’s motion in its entirety. The plaintiff was entitled to a proposed order of reference inasmuch as, in support of its motion, it submitted the mortgage, the underlying unpaid note, the complaint setting forth the facts establishing the claim, and an affidavit of its employee attesting to the default, and the defendants did not answer within the time allowed (see RPAPL 1321; *HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 816 [2013]; *Bank of N.Y. v Alderazi*, 99 AD3d 837, 838 [2012]; *US Bank, N.A. v Boyce*, 93 AD3d at 782).

The plaintiff established prima facie that, due to a scrivener’s error, the Schedule A legal description appended to the mortgage referenced incorrect tax lot numbers, and that, in accordance

with the intent of the parties, Schedule A should have referred to the tax lot number corresponding to the street address by which the mortgage described the subject property (*see Harris v Uhlendorf*, 24 NY2d 463, 467 [1969]). Inasmuch as none of the defendants opposed the motion, no triable issue was raised as to whether a property other than the one described by the street address was the property the parties intended the mortgage to cover. Accordingly, the plaintiff was entitled to reformation of the mortgage to accurately reflect the parties' agreement (*see Baiting Hollow Props., LLC v Knolls of Baiting Hollow, LLC*, 89 AD3d 776, 778 [2011]; *Resource Fin. v Pece*, 195 AD2d 840, 841 [1993]; *McPherson v Goldstein*, 256 App Div 1006 [1939]).

Likewise, the Supreme Court should have granted those branches of the plaintiff's motion which were for leave to amend the complaint and notice of pendency to correct the typographical errors in the legal description of the subject property (*see CPLR 2001; Schulman Family Enters. v Schulman*, 104 AD3d 934, 935 [2013]; *Key Bank Natl. Assn. v Stern*, 14 AD3d 656, 657 [2005]; *LGD Assoc. v Hastingwood Trading*, 220 AD2d 350 [1995]).

Finally, the plaintiff demonstrated that the caption should be amended by removing the defendants sued herein as "John Does" and "Jane Does" by showing that there were no "John Does" or "Jane Does" occupying the premises (*see Flagstar Bank v Bellafigliore*, 94 AD3d at 1046; *US Bank, N.A. v Boyce*, 93 AD3d at 783; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 AD3d 872, 873-874 [2009]). Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

39 In the Matter of PAULA ANDREWS, Respondent, v COUNTY OF ROCKLAND, Appellant. [992 NYS2d 131]—

Arbitration—Confirming or Vacating Award—Failure to Dispose of Controversy

In a proceeding pursuant to CPLR article 75 to vacate an arbitration award dated April 17, 2012, the County of Rockland appeals from an order of the Supreme Court, Rockland County (Jamieson, J.), dated November 2, 2012, which granted the petition, vacated the arbitration award, and remitted the matter to a different arbitrator for a new hearing and a new determination.

Ordered that the order is affirmed, with costs.

The petitioner commenced this proceeding pursuant to CPLR 7511 to vacate an arbitration award in favor of the County of Rockland issued in connection with an action she commenced against the County to recover damages for personal injuries. In

the action, the petitioner alleged that, while she was a passenger on a bus for the disabled that was owned and operated by the County, she sustained personal injuries when she was thrown from her seat to the floor as the bus rounded a corner. The parties agreed to arbitrate the issue of negligence and agreed to a “high-low” limit to the amount of damages, the sums of which were not disclosed to the arbitrator. The arbitrator was asked to decide the issue of liability, to wit, the negligence of each of the parties in connection with the incident, and, if established, to render a determination as to damages.

After a hearing, the arbitrator determined that the petitioner was barred from any recovery irrespective of any negligence of the County because she was not wearing her seatbelt. Nonetheless, the arbitrator awarded the petitioner “the low” sum of damages in light of the parties’ private agreement as to damages. The petitioner then commenced this proceeding to vacate the arbitration award, contending that the arbitrator exceeded his powers, that the award was not final and definite, and that the arbitrator acted in manifest disregard of the law. The Supreme Court vacated the arbitration award on the ground that it was not final and definite. We affirm.

Although judicial review of arbitration awards is limited (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006]; *Matter of Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 81 AD3d 966, 967 [2011]), an award will be vacated when the arbitrator making the award “so imperfectly executed it that a final and definite award upon the subject matter submitted was not made” (CPLR 7511 [b] [1] [iii]; *see Papapietro v Pollack & Kotler*, 9 AD3d 419, 420 [2004]). An award will be vacated as indefinite or nonfinal for purposes of CPLR 7511 if it does not “dispose of a particular issue raised by the parties” (*Hamilton Partners v Singer*, 290 AD2d 316, 316 [2002]; *see Papapietro v Pollack & Kotler*, 9 AD3d at 419-420), or “‘if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy’” (*Matter of Westchester County Corr. Officers Benevolent Assn., Inc. v Cheverko*, 112 AD3d 840, 841 [2013], quoting *Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]).

Here, the arbitrator’s award was neither definite nor final, as it failed to resolve the controversy submitted, to wit, the negligence of each party and the amount of damages, if any. The arbitrator did not make any specific findings of fact or credibility or dispose of the issues raised by the parties. Instead, the arbitrator pointed to a fact not in dispute—that the petitioner

was not wearing a seatbelt—and determined that he did not need to decide whether the County was negligent. In doing so, the arbitrator failed to dispose of the controversy with which he had been charged (see *Matter of Westchester County Corr. Officers Benevolent Assn., Inc. v Cheverko*, 112 AD3d at 841; *Matter of Scott v Bridge Chrysler Plymouth*, 214 AD2d 675, 676 [1995]).

Moreover, the arbitrator also failed to determine damages and instead referred to the parties' agreement, to which he was not privy, and awarded the petitioner "the low" sum of damages, despite finding that the petitioner was barred from recovering any damages (see *Matter of Westchester County Corr. Officers Benevolent Assn., Inc. v Cheverko*, 112 AD3d at 841; *Papapietro v Pollack & Kotler*, 9 AD3d at 420; *Hamilton Partners v Singer*, 290 AD2d at 316). In so doing, the arbitrator did not perform the job he was required to do pursuant to the parties' arbitration agreement.

Accordingly, the Supreme Court properly vacated the arbitration award as indefinite and nonfinal (see *Papapietro v Pollack & Kotler*, 9 AD3d at 419-420; *Matter of Scott v Bridge Chrysler Plymouth*, 214 AD2d at 676). Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

40 In the Matter of PHILIP J. ELENIDIS, Deceased. YOLANDE ELENIDIS, Petitioner. JOSEPH H. GRUNER et al., Nonparty Appellants. [992 NYS2d 128]—

Executors and Administrators—Counsel Fees—Accountant's Fees
Executors and Administrators—Counsel Fees

In a proceeding for the administration of the estate of Philip J. Elenidis, in which the administrator of the estate petitioned to settle her account, nonparty accountants Gerard Esposito & Company, Inc., and Gerard Esposito appeal, as limited by their brief, from so much of an order of the Surrogate's Court, Westchester County (Scarpino, Jr., S.), dated August 15, 2012, as, upon denying that branch of the administrator's petition which was for approval of an accountant's fee already paid to them by the administrator, disallowed their accountant's fee and directed them to repay the fee in its entirety to the administrator, and nonparty attorneys Joseph H. Gruner, P.C., and Joseph H. Gruner separately appeal, as limited by their brief, from so much of the same order, as, upon denying that branch of the administrator's petition which was for approval of the portion of the attorney's fee already paid to them by the administrator, fixed the reasonable amount of their attorney's fee in the sum of only \$9,100, and directed them to return any attorney's fee paid to them in excess of \$9,100.

Ordered that the order is modified, on the facts and in the exercise of discretion, by deleting the provision thereof fixing the attorney's fee for Joseph H. Gruner, P.C., and Joseph H. Gruner in the sum of \$9,100, and substituting therefor a provision fixing the attorney's fee in the amount of \$12,600; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The decedent, Philip J. Elenidis, died intestate on June 25, 2003, survived by his wife, Yolande Elenidis, the petitioner herein, and his adult daughter and son, as his sole distributees. During his lifetime, the decedent was an accountant.

The petitioner entered into a retainer agreement with attorney Joseph H. Gruner and his firm (hereinafter together the Gruner appellants) in July 2003, pursuant to which the Gruner appellants were to represent her in connection with obtaining letters of administration from the Surrogate's Court, Westchester County, and to assist her with the administration of the decedent's estate, which was nearly devoid of assets, and subject to creditors' claims in excess of \$450,000. Letters of administration were issued to the petitioner on August 21, 2003.

The petitioner also entered into an "asset and transfer and consulting agreement" dated August 1, 2003, in both her individual and representative capacities, with accountant Gerard Esposito and his firm (hereinafter together the Esposito appellants). Esposito described this agreement as providing services to the decedent's former accounting clients so as to preserve the accounting practice as an asset of the estate. Notably, the agreement provided that no payments would be made to the petitioner in her individual capacity as a "consultant," or in her representative capacity as the administrator of the decedent's estate, until the Esposito appellants fully recouped the sum of more than \$32,000, which they billed to the estate for accounting fees for services rendered in connection with the decedent's accounting practice in July 2003.

In a petition to settle her final account filed January 5, 2012, the petitioner indicated that the decedent's estate received approximately \$30,000 as a distribution from the estate of the decedent's predeceased mother, plus \$75,942.77 in installment payments from the Esposito appellants, while unpaid creditors' claims, including those of the Internal Revenue Service and the New York State Department of Taxation and Finance, totaled in excess of \$450,000. The petition requested approval and allowance of the Gruner appellants' fee, which the petitioner had paid in the amount of \$35,172.08 for services rendered from July 2003 through September 2009, the approval of an ad-

ditional attorney's fee in the sum of \$10,830 for services rendered from September 2009 through December 2011, and the approval and allowance of fees for 287 hours of accounting services provided by the Esposito appellants and their staff in July 2003, which the petitioner also paid in the discounted amount of \$32,836. The petition also requested approval of additional accountancy fees in the amount of \$35,122 for services that the Esposito appellants allegedly performed from August 2003 through January 2007 and, inter alia, authorization to pay the balance of estate assets to the Internal Revenue Service for its claim for the decedent's unpaid income taxes in the amount of \$174,000, and a determination that all other creditors' claims had abated due to the insolvency of the estate.

In an order dated August 15, 2012, the Surrogate disallowed the request for approval of an accountancy fee to the Esposito appellants, directed the return of any accountancy fees paid to the Esposito appellants, fixed and determined the reasonable amount of the Gruner appellants' legal fee in the sum of \$9,100, and directed the return of any fees paid to the Gruner appellants in excess of that sum.

"The determination of a reasonable attorney's fee in a matter concerning an estate is within the sound discretion of the Surrogate's Court" (*Matter of Weinberg*, 107 AD3d 729, 730 [2013]; see *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *Matter of Benjamin*, 72 AD3d 1078 [2010]; *Matter of Mero*, 62 AD3d 1003, 1004 [2009]; *Matter of Piterniak*, 38 AD3d 780, 781 [2007]). The Surrogate has the ultimate responsibility for determining a reasonable attorney's fee, based on his or her "far superior position to judge those factors integral to the fixing of counsel fees such as the time, effort and skill required" (*Matter of Mero*, 62 AD3d at 1004, quoting *Matter of Drossos*, 26 AD3d 602, 602-603 [2006]; see *Matter of Driscoll*, 273 AD2d 381, 382 [2000]). Notably, the Surrogate has the authority to determine a reasonable professional fee independent of the terms of a retainer agreement or the consent of interested parties to the requested compensation (see *Matter of Weinberg*, 107 AD3d at 730; *Matter of Talbot*, 84 AD3d 967 [2011]; *Matter of Benjamin*, 72 AD3d 1078 [2010]).

Here, the Surrogate providently exercised his discretion in disallowing any part of the accountant's fees requested on behalf of the Esposito appellants, and directing the return of fees already paid to them in the sum of \$36,772. The services that the Esposito appellants provided in July 2003 covered their due diligence in connection with Esposito's interest in the decedent's accounting practice, which did not benefit the estate, and there

was no basis for the petitioner to employ an accountant on behalf of this clearly insolvent estate (*cf. Matter of Musil*, 254 App Div 765 [1938]).

The Surrogate properly considered the relevant factors in fixing the reasonable amount of the attorney's fee to be paid to the Gruner appellants, which included the size of the estate and whether the services benefitted the estate (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]; *Matter of Benjamin*, 72 AD3d 1078 [2010]; *Matter of Morris*, 57 AD3d 674 [2008]). However, the Surrogate improvidently exercised his discretion in allowing an attorney's fee for only 20 hours of services rendered in connection with the administration of the estate. As the Gruner appellants demonstrated their entitlement to a fee for 30 hours of services rendered to the estate, the order must be modified accordingly (*see Matter of Weinberg*, 107 AD3d 729 [2013]). Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

41 In the Matter of BEATA GADALINSKA, Respondent, v ABUBAKER AHMED, Appellant. [992 NYS2d 115]—

Parent, Child and Family—Support—Downward Modification

In a child support proceeding pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Nassau County (Aaron, J.), dated February 1, 2013, which denied his objection to so much of a corrected order of the same court (Bloom, S.M.) dated December 18, 2012, as, without a hearing, in effect, dismissed his petition for a downward modification of his child support obligation for failure to state a cause of action.

Ordered that the order dated February 1, 2013 is reversed, on the law, without costs or disbursements, the father's objection to so much of the corrected order dated December 18, 2012 as, without a hearing, in effect, dismissed his petition for a downward modification of his child support obligation for failure to state a cause of action is granted, so much of the corrected order dated December 18, 2012 as, in effect, dismissed the father's petition for a downward modification of his child support obligation is vacated, and the matter is remitted to the Family Court, Nassau County, for further proceedings on the father's modification petition.

The parties entered into a stipulation of settlement in July 2010 which provided that the mother would have custody of the parties' children and that the father would pay child support in a specified amount each week. The stipulation of settlement was incorporated but not merged into a subsequent judgment of divorce. The father subsequently petitioned for a downward

modification of his child support obligation. The Support Magistrate, in a corrected order dated December 18, 2012, in effect, dismissed the father's petition, without a hearing, on the ground that it failed to state a cause of action. We reverse.

The parties' stipulation of settlement was executed prior to the effective date of the 2010 amendments to Family Court Act § 451 (*see* L 2010, ch 182, § 13). Therefore, in order to establish his entitlement to a downward modification of his child support obligation, the father had the burden of showing a substantial and unanticipated change in circumstances since the time he agreed to the support amount (*see* Family Ct Act § 451 [2] [a]; *Matter of Dimaio v Dimaio*, 111 AD3d 933, 933-934 [2013]; *Matter of Sabini v Sabini*, 105 AD3d 749, 749 [2013]).

When determining whether a change in circumstances warranting a modification has occurred, courts must consider several factors, including "a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children" (*Shedd v Shedd*, 277 AD2d 917, 918 [2000]; *see Matter of Love v Love*, 303 AD2d 756 [2003]). "Child support is not a one-sided obligation placed upon a single parent, but rather an evaluation of the means and responsibilities of both parents and the needs and best interest of the child" (*Matter of Chariff v Carl*, 191 AD2d 795, 796 [1993]).

Contrary to the Support Magistrate's conclusion, the father's petition was sufficient to state a cause of action for a downward modification of his child support obligation. The father alleged that the mother's income and resources had significantly increased since the parties entered into the stipulation of settlement (*see Matter of Love v Love*, 303 AD2d 756 [2003]; *Matter of Davis v Vaught*, 82 AD2d 805, 805-806 [1981]; *cf. Matter of Corbisiero v Corbisiero*, 112 AD3d 625, 626 [2013]). Furthermore, the father had not been unemployed when the stipulation of settlement was entered, and the father alleged that his subsequent unemployment, coupled with the depletion of his financial resources, substantially affected his ability to pay the amount that was agreed to in the stipulation (*see Matter of Silver v Reiss*, 74 AD3d 1441 [2010]). Since the allegations in the father's petition, if substantiated, were sufficient to constitute a change in circumstances warranting a modification of his child support obligation, the Support Magistrate should not have, in effect, dismissed his petition for failure to state a cause of action (*see Matter of Green v Silver*, 96 AD3d 843, 845 [2012]; *cf. Reese v Reese*, 112 AD3d 602 [2013]). Accordingly, the matter must be remitted to the Family Court, Nassau County, for fur-

ther proceedings, including a hearing, on the father's modification petition, which shall include consideration of the evidence submitted by the father in support of his allegations. Dillon, J.P., Balkin, Miller and Maltese, JJ., concur.

42 In the Matter of STEPHEN MITCHELL, Petitioner, v CLERK OF SUPREME COURT OF KINGS COUNTY et al., Respondents. [991 NYS2d 899]—Proceeding pursuant to CPLR article 78 in the nature of prohibition to prohibit any justice other than Yvonne Lewis, a Justice of the Supreme Court, Kings County, from determining the petitioner's motion pursuant to CPL 460.50 to stay the enforcement of a criminal judgment and, in effect, in the nature of mandamus to compel Yvonne Lewis to decide that motion, and application by the petitioner for poor person relief.

Ordered that the application for poor person relief is granted to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied as academic; and it is further,

Adjudged that the petition is denied as academic, and the proceeding is dismissed, without costs or disbursements.

The instant proceeding has been rendered academic in light of the order of the Supreme Court, Kings County, entered July 15, 2014, which determined the petitioner's motion pursuant to CPL 460.50. Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

43 In the Matter of ADAM MORALES, Petitioner, v HELENE F. GUGERTY, Respondent. [991 NYS2d 901]—Proceeding pursuant to CPLR article 78 in the nature of mandamus, inter alia, to compel the respondent, Helene F. Gugerty, an Acting Justice of the Supreme Court, Nassau County, to permit the petitioner to proceed pro se and to recuse herself from presiding over the criminal action entitled *People v Morales*, commenced in that court under Indictment No. 1628/13, and application by the petitioner for poor person relief.

Ordered that the application for poor person relief is granted to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied; and it is further,

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear

legal right to the relief sought. Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

44 In the Matter of NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., Respondents-Appellants, v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Appellant-Respondent. (Appeal No. 1.) In the Matter of NATURAL RESOURCES DEFENSE COUNCIL, INC., et al., Appellants, v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Respondent. (Appeal No. 2.) [994 NYS2d 125]—

Environmental Conservation—State Pollutant Discharge Elimination System Permit—Statewide General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems

Motion by the petitioners/plaintiffs for leave to reargue (1) appeals from an order and judgment (one paper) of the Supreme Court, Westchester County, entered January 10, 2012, as amended by an order of the same court entered, upon the parties' consent, on April 18, 2012, and (2) a separate appeal from the order of the same court entered upon the parties' consent on April 18, 2012, which were determined by a decision and order of this Court dated November 13, 2013.

Upon the papers filed in support of the motion and the papers filed in relation thereto, it is,

Ordered that the motion for leave to reargue is granted and, upon reargument, the decision and order of this Court dated November 13, 2013 (*Matter of Natural Resources Defense Council, Inc. v New York State Dept. of Env'tl. Conservation*, 111 AD3d 737 [2013], *lv granted* 23 NY3d 901 [2014]) is recalled and vacated, and the following decision and order is substituted therefor:

In a hybrid proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Environmental Conservation approving the issuance of state pollutant discharge elimination system general permit GP-0-10-002 for stormwater discharges from municipal separate storm sewer systems, and action for a judgment declaring that state pollutant discharge elimination system general permit GP-0-10-002 for stormwater discharges from municipal separate storm sewer systems is contrary to certain state and federal laws, (1) the respondent/defendant New York State Department of Environmental Conservation appeals, as limited by its brief, from so much of an order and judgment (one paper) of the Supreme Court, Westchester County (Lefkowitz, J.), entered January 10, 2012, as amended by an order of the same court entered, upon the parties' consent, on April 18, 2012, as was in favor of the

petitioners/plaintiffs and against it declaring that the general permit created an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the “maximum extent practicable,” as required by section 402 of title IV of the Federal Clean Water Act of 1972, as amended by Pub L 100-4, § 405, 101 US Stat 7 (Water Quality Act of 1987) (33 USC § 1342 [p] [3] [B] [iii]) and ECL 17-0808 (3) (c), and unlawfully failed to provide an opportunity for public hearings on proposed notices of intent before they were submitted to it, in violation of 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix), granted those branches of the petition which were to annul its determination approving the issuance of the general permit on the grounds that it was affected by error of law and was arbitrary and capricious to the extent that the general permit created an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the “maximum extent practicable,” as required by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c), and unlawfully failed to provide an opportunity for public hearings on proposed notices of intent before they were submitted to it, in violation of 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix), and, inter alia, in effect, directed it to issue revisions to the general permit consistent with the disposition of the causes of action which were for a declaration that the general permit created an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the “maximum extent practicable,” as required by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c), and unlawfully failed to provide an opportunity for public hearings on proposed notices of intent before they were submitted to it, in violation of 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix), and the petitioners/plaintiffs cross-appeal, as limited by their notices of appeal and brief, from so much of the order and judgment entered January 10, 2012, as amended by the order entered, upon the parties’ consent, on April 18, 2012, as was in favor of the respondent/defendant New York State Department of Environmental Conservation and against them, in effect, declaring that the general permit did not fail to ensure that small municipalities complied with state water quality standards and, thus, was not in violation of ECL 17-0811 (5), did not unlawfully fail to ensure that small municipalities monitored their storm water discharges and, thus, was not in violation of 33 USC § 1318 (a), and did not fail to provide for public hearings on proposed stormwater management plans and proposed watershed improvement strategies and, thus, was not in violation of 33 USC § 1251 (e),

and (2) the petitioners/plaintiffs separately appeal from the order of the same court entered upon the parties' consent on April 18, 2012.

Ordered that the appeal from the order entered April 18, 2012 is dismissed, without costs or disbursements, as that order was entered upon the parties' consent, and no appeal lies from an order entered on consent (*see* CPLR 5511; *Barry v Barry*, 60 AD3d 882 [2009]); and it is further,

Ordered that the order and judgment entered January 10, 2012, as amended April 18, 2012, is affirmed insofar as cross-appealed from; and it is further,

Ordered that the order and judgment entered January 10, 2012 is reversed insofar as appealed from, on the law, those branches of the petition which were to annul the determination of the respondent/defendant New York State Department of Environmental Conservation approving the issuance of the general permit on the grounds that it was affected by error of law and was arbitrary and capricious to the extent that the general permit created an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the "maximum extent practicable," as required by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c), and unlawfully failed to provide an opportunity for public hearings on proposed notices of intent before they were submitted to it, in violation of 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix), are denied, and the matter is remitted to the Supreme Court, Westchester County, for the entry of an appropriate amended judgment dismissing those portions of the proceeding and declaring, *inter alia*, that the general permit did not create an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the "maximum extent practicable," as required by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c), and did not unlawfully fail to provide an opportunity for public hearings on proposed notices of intent before they were submitted to it, as required by 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix); and it is further,

Ordered that one bill of costs is awarded to the New York State Department of Environmental Conservation.

The Federal Water Pollution Control Act, 33 USC §§ 1251 *et seq.* (hereinafter the Clean Water Act), was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 USC § 1251 [a]). To effectuate this purpose, the Clean Water Act established the national pollutant discharge elimination system (hereinafter NPDES), which gen-

erally prohibits the discharge of water pollution from point sources into surface waters, except in compliance with a NPDES permit issued by the Administrator of the United States Environmental Protection Agency (hereinafter the EPA) or a state pollutant discharge elimination system (hereinafter SPDES) permit issued by an EPA-authorized state agency (*see* 33 USC § 1342). The Clean Water Act, as implemented by the EPA, authorizes the issuance of individual NPDES and SPDES permits to specific industrial pollutant dischargers or general NPDES and SPDES permits that cover multiple dischargers within a geographical area (*see* 40 CFR 122.2, 122.26 [c]; 122.28, 123.25 [a] [11]).

The Environmental Conservation Law established a SPDES permit program to ensure that New York had “adequate authority to issue permits regulating the discharge of pollutants from new or existing outlets or point sources into the waters of the state,” in conformance with the Clean Water Act’s rules and regulations and to participate in the NPDES created by the Clean Water Act (ECL 17-0801). On October 28, 1975, the EPA authorized New York to issue NPDES permits through the state’s SPDES program, and the New York State Department of Environmental Conservation (hereinafter the DEC) was empowered to administer the SPDES permit program pursuant to article 17, title 8, of the ECL (*see* Memorandum of Agreement between the State of New York Department of Environmental Conservation and the United States Environmental Protection Agency, dated October 28, 1975, as renewed and amended).

In 1987, the Clean Water Act was amended to establish a framework for regulating municipal and industrial storm water pollutant discharges through the NPDES and SPDES permit system (*see* Water Quality Act of 1987, Pub L 100-4, § 405, 101 Stat 7 [1987] [codified at 33 USC § 1342 (p)]). A municipality’s discharge of storm water from a “municipal separate storm sewer system” (hereinafter an MS4) was prohibited unless the municipality obtained an individual NPDES or SPDES permit or obtained coverage under a NPDES or SPDES general permit (*see* 33 USC 1342 [p] [3] [B]; 40 CFR 122.26 [a] [5]; 123.25 [a] [9], [11]; 122.28 [a] [2] [i]; ECL 17-0808, 70-0117 [6] [b] [i]; 6 NYCRR 750-1.21 [b] [5]; 750-1.4 [b]).

On April 29, 2010, the DEC issued state pollutant discharge elimination system general permit GP-0-10-002, effective May 1, 2010, for stormwater discharges from MS4s (hereinafter the General Permit). By its own terms, the General Permit is set to expire on April 30, 2015.

The petitioners/plaintiffs (hereinafter the petitioners) commenced this hybrid proceeding pursuant to CPLR article 78 to review the determination of the DEC approving the issuance of the General Permit, and action for a judgment declaring that the General Permit was contrary to certain enumerated state and federal laws.

To the extent that the petitioners sought relief pursuant to CPLR article 78, the petition/complaint (hereinafter the petition), in effect, alleged that the determination approving the issuance of the General Permit “was affected by an error of law” (CPLR 7803 [3]) since it violated the enumerated state and federal laws, and was arbitrary and capricious since the public hearing protocol adopted by the DEC was based, in part, on a misinterpretation of what constitutes a “permit application” within the meaning of the Clean Water Act and the ECL that would trigger the need for a public hearing. To the extent that the petitioners sought declaratory relief, the petition, in effect, sought a judgment declaring that the General Permit was contrary to each of the enumerated state and federal laws.

The petition organized the alleged violations of state and federal law into four general groups, asserting that:

- (1) the General Permit failed to ensure that small municipalities reduced their pollutant discharges to the maximum extent practicable, in violation of 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c);
- (2) the General Permit failed to ensure that small municipalities complied with state water quality standards, in violation of ECL 17-0811 (5) and ECL 17-0813;
- (3) the General Permit failed to ensure that small municipalities monitored their storm water discharges, in violation of 33 USC § 1318 (a) and ECL 17-0815 (8); and
- (4) the General Permit did not provide for public participation in the permit process, in violation of 33 USC §§ 1251 (e); 1342 (a) (1) and (j) and ECL 17-0805 (1) (a) (ix).

An order and judgment (one paper) was entered by the Supreme Court on January 10, 2012, in favor of the petitioners and against the DEC declaring, inter alia, that the General Permit created an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the “maximum extent practicable,” as required by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c), and that the General Permit unlawfully failed to provide an opportunity for a public hearing on proposed notices of intent before they were submitted to the DEC, in violation of 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix).

However, the order and judgment was in favor of the DEC and against the petitioners declaring that the General Permit did not fail to ensure that small municipalities complied with state water quality standards and, thus, was not in violation of ECL 17-0811 (5), did not fail to ensure that small municipalities monitored their storm water discharges and, thus, was not in violation of 33 USC § 1318 (a), and did not fail to provide for public hearings on proposed stormwater management plans and proposed watershed improvement strategies and, thus, was not in violation of 33 USC § 1251 (e).

In light of its determination that the general permit violated, among other things, 33 USC §§ 1342 (a) (1) and (p) (3) (B) (iii); ECL 17-0805 (1) (a) (ix) and 17-0808 (3) (c), the Supreme Court also granted that branch of petition which was, in effect, pursuant to CPLR 7803 (3) to annul the DEC's determination to approve the issuance of the General Permit on the ground that the determination was affected by error of law. Accordingly, the court, in effect, directed the DEC to issue revisions to the General Permit consistent with its determination of the causes of action for a declaratory judgment.

The order and judgment was subsequently amended by an order entered April 18, 2012, upon the parties' consent. The substance of the amendment is not relevant to this appeal.

The DEC appeals from so much of the order and judgment, as amended by the order made upon the parties' consent, as was adverse to it. The petitioners cross-appeal from, inter alia, the portions of the order and judgment, which were adverse to them.

Initially, since the parties charted a summary judgment course in addressing the several declaratory judgment causes of action, which present no factual disputes and involve only the legal interpretation of various statutes and regulations, it was not inappropriate for the Supreme Court, under the unique circumstances presented here, to reach the merits of those causes of action (see *O'Hara v Del Bello*, 47 NY2d 363, 367-368 [1979]; *Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 258-259 [2012]).

Contrary to the Supreme Court's conclusion, the General Permit did not violate 33 USC § 1342 (p) (3) (B) (iii) or ECL 17-0808 (3) (c). Under state and federal law, "[p]ermits for discharges from municipal storm sewers . . . shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants" (33 USC § 1342 [p] [3] [B] [iii]; compare ECL 17-0808 [3] [c]).

Accordingly, the “[m]aximum extent practicable . . . is the statutory standard that establishes the level of pollutant reductions that operators of regulated MS4s must achieve” (64 Fed Reg 68722, 68754 [1999]; *see* 40 CFR 122.34 [a]). The “EPA has intentionally not provided a precise definition of [maximum extent practicable] to allow maximum flexibility in MS4 permitting” (64 Fed Reg 68722, 68754 [1999]). It has determined that “MS4s need the flexibility to optimize reductions in storm water pollutants on a location-by-location basis” (*id.*). The “EPA envisions that this evaluative process will consider such factors as conditions of receiving waters, specific local concerns, . . . MS4 size, climate, implementation schedules, current ability to finance the program, beneficial uses of receiving water, hydrology, geology, and capacity to perform operation and maintenance” (*id.*).

To assist in this process, the EPA has “outline[d] six minimum control measures that constitute the framework for a storm water discharge control program for regulated small MS4s that, when properly implemented, will reduce pollutants to the maximum extent practicable” (64 Fed Reg 68722, 68752 [1999]; *see* 40 CFR 122.34 [a]). The EPA has determined that, in most cases, the “[p]roper implementation of the measures will significantly improve water quality” (64 Fed Reg 68722, 68753 [1999]). “[H]owever, small MS4 permittees should modify their programs if and when available information indicates that water quality considerations warrant greater attention or prescriptiveness in specific components of the municipal program” (*id.*).

“In issuing the general permit, the NPDES permitting authority” is to “establish requirements for each of the minimum control measures” (64 Fed Reg 68722, 68754 [1999]). The minimum control measures are to be addressed by a municipality through the identification of “best management practices,” which are to be utilized to address each of the minimum control measures (*see* 40 CFR 122.34 [a]). “Permits typically will require small MS4 permittees to identify in their [notices of intent] the [best management practices] to be performed and to develop the measurable goals by which implementation of the [best management practices] can be assessed” (64 Fed Reg 68722, 68754 [1999]).

“Upon receipt of the [notice of intent] from a small MS4 operator, the NPDES permitting authority will have the opportunity to review the [notice of intent] to verify that the identified [best management practices] and measurable goals are consistent with the requirement to reduce pollutants under the [maximum extent practicable] standard, to protect water

quality, and to satisfy the appropriate water quality requirements of the Clean Water Act” (64 Fed Reg 68722, 68754 [1999]). “If necessary, the NPDES permitting authority may ask the permittee to revise their [sic] mix of [best management practices], for example, to better reflect the [maximum extent practicable] pollution reduction requirement” (*id.*). “If, after implementing the six minimum control measures there is still water quality impairment associated with discharges from the MS4, after successive permit terms the permittee will need to expand or better tailor its [best management practices] within the scope of the six minimum control measures for each subsequent permit” (*id.*).

The General Permit at issue on this appeal is consistent with the scheme for general permits envisioned by the EPA, and is designed to meet the maximum extent practicable standard prescribed by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c). The General Permit requires entities seeking coverage to “develop, implement and enforce” a stormwater management plan designed to address pollutants of concern and “reduce the discharge of pollutants from the small MS4” to the maximum extent practicable, so as “to protect water quality, and to satisfy the appropriate water quality requirements of the ECL and the Clean Water Act” (*see* General Permit at 14, 95). A stormwater management plan must, *inter alia*, identify and describe the chosen best management practices and include measurable goals for each such practice (*see* General Permit at 95). The General Permit provides applicants with resources, including examples of successful stormwater management plans, a “menu” of best management practices, and suggested measurable goals (*see* General Permit at 95).

It is noted in the General Permit that “[i]f a covered entity chooses only a few of the least expensive methods, it is likely that [the maximum extent practicable standard] has not been met” (General Permit at 91). “On the other hand, if a covered entity employs all applicable [best management practices] except those where it can be shown that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard” (General Permit at 91). The maximum extent practicable standard requires covered entities to choose effective best management practices, and to reject applicable best management practices only where other effective best management practices that could be used to eliminate or control the discharge of pollutants will serve the same purpose, the best management practices would not be technically feasible, or the cost would be prohibitive (*see* General Permit at 91).

The petitioners nevertheless argued, and the Supreme Court concluded, that the General Permit creates a self-regulatory system that does not ensure that entities operating under the General Permit have satisfied the maximum extent practicable standard articulated in 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c). Specifically, the petitioners contended that the General Permit does not require any review of the notices of intent submitted by municipalities seeking coverage so as to ensure that the selected best management practices do, in fact, represent measures that will reduce the discharge of pollutants to the maximum extent practicable (*see Environmental Defense Ctr., Inc. v United States Env'tl. Protection Agency*, 344 F3d 832 [9th Cir 2003]; *see also Waterkeeper Alliance, Inc. v United States Env'tl. Protection Agency*, 399 F3d 486 [2d Cir 2005]).

Contrary to the petitioners' contention, the General Permit does include a variety of enforcement measures that are sufficient to comply with the maximum extent practicable standard, as described in state and federal statutes (*see* 33 USC § 1342 [p] [3] [B] [iii]; ECL 17-0808 [3] [c]).

In order to come within the ambit of the General Permit, a municipality must submit a "complete and accurate" notice of intent (General Permit at 8). The public must be given notice of each notice of intent that is submitted to the DEC, and public comments are received for a minimum of 28 days thereafter (*see* General Permit at 8). "After the public comment period has expired, the [DEC] may extend the public comment period, require submission of an application for an individual SPDES permit or alternative SPDES general permit, or accept the [notice of intent] or [stormwater management program] as complete" (General Permit at 8). Operators who submit a complete notice of intent in accordance with the requirements of the General Permit are authorized to discharge stormwater from small MS4s, under the terms and conditions of the General Permit, "upon written notification from the [DEC] that a complete [notice of intent] has been received" (General Permit at 9).

DEC regulations further provide that "[p]ermits may include and the permittee shall comply with such other terms, provisions, requirements or conditions as may be necessary to meet the requirements of ECL Article 17 and 40 CFR 122 . . . including but not limited to requirements to implement best management practices plans" (6 NYCRR 750-1.14 [f]). Moreover "[g]eneral permits may be issued, modified, and reissued, or terminated" by the DEC (6 NYCRR 750-1.21 [d]). In addition, the DEC "may require any discharger authorized to discharge

in accordance with a general permit to apply for and obtain an individual SPDES permit or apply for authorization to discharge in accordance with another general permit” where, *inter alia*, “[t]he discharger is not in compliance with the conditions of the general permit” (6 NYCRR 750-1.21 [e] [1] [i]).

Under the General Permit itself and state implementing regulations in general, the DEC is vested with sufficient authority to enforce the statutory mandates of 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c) to reduce pollution discharge to the maximum extent practicable. Although the General Permit allows a municipality to identify and develop the best management practices it will utilize in light of the particular circumstances facing it, the ultimate determination of whether that municipality’s discharges are covered by the General Permit lies with the DEC, since coverage is not afforded until the DEC accepts the notice of intent or stormwater management plan as complete, and issues written notification (*see* General Permit at 8-9). The DEC may refuse to accept a notice of intent that fails to set forth best management practices adequately addressing the six required minimum control measures or otherwise failing to comply with the maximum extent practicable standard (*see* General Permit at 14, 95). Even after a notice of intent has been accepted as complete, the DEC may modify the General Permit or require an entity covered under the General Permit to apply for a special individual permit on the ground that the entity has failed to reduce the discharge of pollutants to the maximum extent practicable (6 NYCRR 750-1.21 [e] [1] [i]).

The petitioners have not demonstrated, nor have they even asserted, that the permitting scheme implemented through the General Permit necessarily results in coverage of municipalities whose stormwater management plans do not meet the maximum extent practicable standard. Indeed, the petitioners have not demonstrated a single instance where the General Permit has authorized discharges of pollutants in contravention of the maximum extent practicable standard.

The petitioners’ argument that the entire permitting scheme is flawed constitutes a systemic challenge to the General Permit. The DEC adequately rebutted this allegation by establishing that it had the power to review the best management practices enumerated in a municipality’s notice of intent and to reject a municipality’s stormwater management plan by exercising its power to reject a notice of intent as incomplete. The determination of the DEC to exercise its authority to require compliance with the maximum extent practicable standard in any particular case must necessarily be evaluated with reference to the par-

ticular circumstances of that case, since a determination of what constitutes the maximum extent practicable will vary depending on the circumstances facing each municipality. Since the petitioners have not challenged the DEC's assessment of any particular stormwater management plan on the ground that it does not comply with the maximum extent practicable standard, such issues are not before this Court.

Since the petitioners failed to demonstrate that the General Permit violated 33 USC § 1342 (p) (3) (B) (iii) or ECL 17-0808 (3) (c), the Supreme Court should have awarded judgment in favor of the DEC declaring that the general permit did not create an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the "maximum extent practicable," as required by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c). Furthermore, the court erred to the extent that it relied on alleged violations of 33 USC § 1342 (p) (3) (B) (iii) or ECL 17-0808 (3) (c) in annulling the DEC's determination approving the issuance of the General Permit on the ground that it was affected by error of law.

We disagree with the Supreme Court's determination that the General Permit was issued in violation of 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix). Congress did not explicitly define "permit application" to refer only to applications submitted for an individual permit or to notices of intent submitted to obtain coverage under an existing general permit (*see Texas Ind. Producers & Royalty Owners Assn. v Environmental Protection Agency*, 410 F3d 964, 978 [2005]). Accordingly, unless the DEC's interpretation of "permit application" is arbitrary and capricious, it is entitled to deference in this regard (*see Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, 467 US 837, 843 [1984]; *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]; *Matter of 427 W. 51st St. Owners Corp. v Division of Hous. & Community Renewal*, 3 NY3d 337, 342 [2004]). It was not arbitrary and capricious for the DEC to limit the opportunity for public hearings to those situations in which a new general permit is proposed or an existing general permit is renewed, since any modifications to a draft general permit resulting from public comment and hearings will extend to all covered entities (*see Texas Ind. Producers & Royalty Owners Assn. v Environmental Protection Agency*, 410 F3d at 978). Accordingly, the Supreme Court should have awarded judgment in favor of the DEC declaring that the General Permit did not unlawfully fail to provide an opportunity for a public hearing on proposed notices of intent before they

were submitted to the DEC and, thus, was not in violation of 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix). Furthermore, the court erred to the extent that it relied on alleged violations of 33 USC § 1342 (a) (1) or ECL 17-0805 (1) (a) (ix) in annulling the DEC's determination to approve the issuance of the General Permit on the grounds that it was affected by error of law or was arbitrary and capricious.

We agree with the Supreme Court that the General Permit does not fail to ensure compliance with State water quality standards (*see* ECL 17-0811 [5]; 17-0813). Federal law requires the EPA and the States to develop water quality standards for interstate and intrastate waters, respectively (*see* 33 USC § 1313 [a]; *Natural Resources Defense Council, Inc. v Fox*, 909 F Supp 153, 156 [1995]), and allows the EPA and States discretion in the development of a program to meet those standards (*see* 33 USC § 1313 [e]). Moreover, although Congress specifically provided that permits issued to industrial dischargers must be conditioned on compliance with effluent limitations set forth in 33 USC § 1311 (*see* 33 USC § 1342 [p] [3] [A]; *Defenders of Wildlife v Browner*, 191 F3d 1159, 1164-1165, *amended on other grounds* 197 F3d 1035 [1999]), it specifically provided that permits for *municipal dischargers* with respect to municipal storm sewers “shall require controls to reduce the discharge of pollutants to the maximum extent practicable” (33 USC § 1342 [p] [3] [B] [iii]), without reference to any numerical limitation established under the Clean Water Act in connection with any particular effluent. Accordingly, with respect to the municipal dischargers covered under the General Permit, Congress, rather than imposing specific effluent limitations, vested the EPA and the States with discretion in imposing pollution controls sufficient to meet water quality standards which could, but are not required to, incorporate effluent limitations. Thus, the provisions of the General Permit challenged by the petitioners in their cross appeal with respect to effluent limitations and water quality standards are not contrary to law (*see Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, 467 US at 843; *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d at 232; *Matter of 427 W. 51st St. Owners Corp. v Division of Hous. & Community Renewal*, 3 NY3d at 342; *Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 513-514 [1997]).

Furthermore, Congress did not specifically address the nature or extent of the public participation that is required for the establishment of any effluent limitations that the EPA or the States, in the exercise of their discretion, seek to promulgate

(see 33 USC § 1251 [e]). The DEC's determination to provide for public participation in the establishment of effluent limitations at the general permit issuance and renewal stages, but not after the issuance of the general permit, is not contrary to 33 USC § 1251 (e) (see *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 US at 843; *Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d at 232; *Matter of 427 W. 51st St. Owners Corp. v Division of Hous. & Community Renewal*, 3 NY3d at 342; *Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d at 513-514).

The parties' remaining contentions are without merit.

Accordingly, those branches of the petition which were to annul the determination of the respondent/defendant New York State Department of Environmental Conservation approving the issuance of the General Permit on the grounds that it was affected by error of law and was arbitrary and capricious to the extent that the General Permit created an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the "maximum extent practicable," as required by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c), and unlawfully failed to provide an opportunity for public hearings on proposed notices of intent before they were submitted to it, in violation of 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix), should have been denied, and judgment should have been awarded to the DEC declaring that the General Permit did not create an impermissible self-regulatory system that failed to ensure that small municipalities reduced their pollutant discharges to the "maximum extent practicable," as required by 33 USC § 1342 (p) (3) (B) (iii) and ECL 17-0808 (3) (c), and did not unlawfully fail to provide an opportunity for public hearings on proposed notices of intent before they were submitted to it, as required by 33 USC § 1342 (a) (1) and ECL 17-0805 (1) (a) (ix). Rivera, J.P., Leventhal, Austin and Miller, JJ., concur. **[Prior Case History: 35 Misc 3d 652.]**

45 In the Matter of JEAN OCCEAN, Petitioner, v BARRY KRON, Respondent. [991 NYS2d 777]—Proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent Barry Kron, an Acting Justice of the Supreme Court, Queens County, to grant the petitioner's motion pursuant to CPL 30.30 to dismiss the indictment in an underlying criminal action entitled *People v Occean*, commenced in the Supreme Court, Queens County, under Indictment No. 284/13, and application by the petitioner for poor person relief.

Ordered that the application for poor person relief is granted

to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied; and it is further,

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner has failed to demonstrate a clear legal right to the relief sought. Rivera, J.P., Austin, Sgroi and Duffy, JJ., concur.

46 In the Matter of MANUEL H. QUINTANA and Another, as Executors of EDITH S. QUINTANA, Deceased, et al., Respondents-Appellants, v BOARD OF ZONING APPEALS OF INCORPORATED VILLAGE OF MUTTONTOWN, Appellant-Respondent. [992 NYS2d 332]—

Municipal Corporations—Zoning—Variance—Lot-Depth Variance

In a proceeding pursuant to CPLR article 78 to review a determination of the Board of Zoning Appeals of the Incorporated Village of Muttontown dated June 10, 2012, which, after a hearing, denied the petitioners' application for a lot-depth variance, the Board of Zoning Appeals of the Incorporated Village of Muttontown appeals, as limited by its brief, from so much of a judgment of the Supreme Court, Nassau County (McCormack, J.), entered September 24, 2012, as granted that branch of the amended petition which was to annul the determination on the ground that it was arbitrary and capricious, annulled the determination, and directed it to grant the petitioner's application for a lot-depth variance, and the petitioners cross-appeal from so much of the same judgment as denied that branch of the amended petition which was to annul the determination on the ground that the proposed lot complied with the minimum lot-depth requirement.

Ordered that the judgment is affirmed, without costs or disbursements.

"Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion" (*Matter of Matejko v Board of Zoning Appeals of Town of Brookhaven*, 77 AD3d 949, 949 [2010]; *see Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613 [2004]). "Accordingly, on judicial review, the determination of a zoning board should be sustained if it is not illegal, has a rational basis, and is not arbitrary and

capricious” (*Matter of Pinnetti v Zoning Bd. of Appeals of Vil. of Mount Kisco*, 101 AD3d 1124, 1125-1126 [2012]; see *Matter of Sasso v Osgood*, 86 NY2d 374, 384 [1995]).

In determining whether to grant an area variance, a zoning board of appeals is required to engage in a balancing test, weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted (see Village Law § 7-712-b [3] [b]; *Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d at 612; *Matter of Pinnetti v Zoning Bd. of Appeals of Vil. of Mount Kisco*, 101 AD3d at 1126; *Matter of Jonas v Stackler*, 95 AD3d 1325, 1327 [2012]). A zoning board must also consider “(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance” (Village Law § 7-712-b [3] [b]).

Here, although there was some support in the record for the conclusions of the Board of Zoning Appeals of the Incorporated Village of Muttontown (hereinafter the Board) that the petitioners’ difficulty was self-created, and that the requested lot-depth variance was substantial, there was no evidence that granting the variance would produce an undesirable change in the character of the neighborhood, adversely impact on physical and environmental conditions, or otherwise result in a detriment to the health, safety, and welfare of the neighborhood or community (see Village Law § 7-712-b [3] [b]; *Matter of Daneri v Zoning Bd. of Appeals of the Town of Southold*, 98 AD3d 508, 510 [2012]; *Matter of Schumacher v Town of E. Hampton, N.Y. Zoning Bd. of Appeals*, 46 AD3d 691, 693 [2007]; *Matter of Gonzalez v Zoning Bd. of Appeals of Town of Putnam Val.*, 3 AD3d 496, 497 [2004]). Additionally, the determination was irrational, as it rested largely on subjective considerations of general community opposition (see *Matter of Caspian Realty, Inc. v Zoning Bd. of Appeals of Town of Greenburgh*, 68 AD3d 62 [2009]). Moreover, the Board’s conclusions that the benefit sought could be achieved by a feasible alternative method did

not have a rational basis in the record. Accordingly, the Supreme Court properly annulled the determination on the ground that it was arbitrary and capricious and directed the Board to grant the application for a lot-depth variance.

The petitioners' contention that a lot-depth variance was not required is without merit. Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

47 In the Matter of DASHAWN R., a Person Alleged to be a Juvenile Delinquent, Appellant. [992 NYS2d 122]—

Infants—Juvenile Delinquents
Crimes—Unlawful Search and Seizure
Crimes—Identification of Defendant

In a juvenile delinquency proceeding pursuant to Family Court Act article 3, Dashawn R. appeals from an order of disposition of the Family Court, Kings County (Ambrosio, J.), dated September 4, 2013, which, upon an order of fact-finding of the same court (McElrath, J.), dated July 2, 2013, finding that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree, assault in the second degree, grand larceny in the fourth degree, assault in the third degree, and criminal possession of stolen property in the fifth degree, adjudged him to be a juvenile delinquent, and placed him on probation for a period of 18 months. The appeal brings up for review the order of fact-finding and the denial, after a hearing (Ambrosio, J.), of those branches of the appellant's motion which were to suppress identification testimony and his statements to law enforcement officials.

Ordered that the order of disposition is modified, on the law, by deleting the provision thereof reciting that count 2 is "Covered by Penal Law 160.10 01 CF," and substituting therefor a provision reciting that count 2 is withdrawn; as so modified, the order of disposition is affirmed, without costs or disbursements, and the order of fact-finding is modified accordingly.

The appellant contends, and the presentment agency agrees, that the order of fact-finding and order of disposition inaccurately describe the disposition of count 2 (acts which, if committed by an adult, would constitute the crime of attempted robbery in the second degree). Accordingly, the order of fact-finding and order of disposition are modified to indicate that count 2 was withdrawn by the presentment agency.

The Family Court properly declined to suppress the appellant's statements to law enforcement officials (*see* Family Ct Act § 344.2). The hearing evidence demonstrated that the arresting detective properly placed the appellant in a designated juvenile

room in a police station prior to questioning (see 22 NYCRR 205.20 [d]; *Matter of Javier L.*, 272 AD2d 474 [2000]). The appellant, in the presence of his mother, was given the proper *Miranda* warnings (see *Miranda v Arizona*, 384 US 436 [1966]), and they indicated that they understood those rights. Nonetheless, the appellant agreed to answer questions posed by law enforcement officials (see Family Ct Act § 305.2 [7], [8]; *Matter of Dominique R.*, 29 AD3d 702 [2006]; *Matter of Michael L.*, 285 AD2d 466 [2001]; *Matter of Javier L.*, 272 AD2d at 474). Even if the Family Court believed the mother's testimony regarding a promise of leniency, this would not render the appellant's statements involuntary, since the appellant concedes that no promise was ever conveyed to him (cf. *People v Morillo*, 225 AD2d 479 [1996]).

Contrary to the appellant's contentions, the victim's identification of the perpetrators in a videotape of the incident was not a formal identification procedure, as the victim was simply ratifying the events depicted on the videotape that she had experienced firsthand (cf. *People v Gee*, 99 NY2d 158, 162 [2002]). Furthermore, the victim's inability to identify the appellant in a photograph prior to trial goes to the weight of her in-court identification, and not to its admissibility (cf. *People v Grant*, 94 AD3d 1139 [2012]).

Viewing the evidence adduced at the fact-finding hearing in the light most favorable to the presentment agency (see *Matter of Tanasia Elanie E.*, 49 AD3d 642 [2008]; *Matter of Shariff A.*, 28 AD3d 546, 547 [2006]), we find that it was legally sufficient to support the determinations made in the order of fact-finding, other than the determination as to count 2.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence, we nevertheless accord great deference to the opportunity of the factfinder to view the witnesses, hear the testimony, and observe demeanor (see *Matter of Briona T.G.*, 47 AD3d 811 [2008]; *Matter of Carliph T.*, 26 AD3d 440 [2006]; *Matter of Jabari W.*, 18 AD3d 767, 768 [2005]; cf. *People v Mateo*, 2 NY3d 383, 410 [2004]). The Family Court's credibility determinations should thus be accorded great weight on appeal and should not be disturbed unless clearly unsupported by the record (see *Matter of Charles S.*, 41 AD3d 484 [2007]; *Matter of Steven L.*, 21 AD3d 962, 963 [2005]; *Matter of Kryzstof K.*, 283 AD2d 431 [2001]). Upon reviewing the record here, we are satisfied that the determination of the Family Court was not against the weight of the evidence (cf. *People v Romero*, 7 NY3d 633 [2006]).

Counsel provided meaningful representation throughout the

proceedings (see *Matter of Shaheen P.J.*, 29 AD3d 996 [2006]; cf. *People v Benevento*, 91 NY2d 708 [1998]; *People v Baldi*, 54 NY2d 137 [1981]). Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

48 In the Matter of STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellant, v WARREN F. O'BRIEN, JR., Respondent. [992 NYS2d 126]—

Insurance—Automobile Insurance—Underinsured Motorist Endorsement—Temporary Substitute Car

In a proceeding pursuant to CPLR article 75 to permanently stay arbitration of a claim for underinsured motorist benefits, the petitioner appeals from an order of the Supreme Court, Nassau County (Jaeger, J.), entered September 13, 2013, which denied the petition and directed the parties to proceed to arbitration.

Ordered that the order is affirmed, with costs.

On December 23, 2011, Warren F. O'Brien, Jr., was employed as a mechanic at Massapequa Auto Repair, Inc. On that date, Robert Auletta, his customer, asked O'Brien to return Auletta's loaner Mercedes-Benz vehicle to Mercedes-Benz of Massapequa on his behalf. O'Brien, who was named an additional driver on the loaner vehicle agreement, acceded to Auletta's request. O'Brien sustained injuries when the Mercedes-Benz he was operating was struck in the rear by another vehicle. The vehicle that struck O'Brien's vehicle had a basic \$25,000/\$50,000 policy through GEICO. O'Brien then commenced a personal injury action, and GEICO tendered the full amount of the policy to settle the claim. The petitioner consented to a \$25,000 settlement.

O'Brien then sought to receive compensation through Auletta's supplementary uninsured/underinsured motorist (hereinafter SUM) coverage with State Farm Mutual Automobile Insurance Company (hereinafter State Farm), by filing a request for SUM arbitration with the American Arbitration Association. State Farm commenced this article 75 proceeding to permanently stay arbitration, asserting that O'Brien was not entitled to SUM coverage. During the pendency of this proceeding, the parties stipulated that the vehicle used by O'Brien was a "temporary substitute car" under Auletta's policy. The Supreme Court denied State Farm's petition, determining that the plain language of the insurance policy provided SUM coverage for a "temporary substitute car."

"Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage" (*Consolidated Edison Co. of N.Y. v Allstate Ins.*

Co., 98 NY2d 208, 218 [2002]). Whether the burden of proof rests on the insured to establish coverage, or on the insurer to establish an exclusion, rests on the language of the policy (*see id.*). “Where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement. The policy must, of course, be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured’s favor and against the insurer” (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986] [internal quotation marks and citations omitted]; *see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]).

Here, State Farm bears the burden of establishing that O’Brien’s use of a “substitute temporary car” was excluded from SUM benefits. The opening language of the SUM endorsement states: “This endorsement is a part of the policy. Except for the changes it makes, all other provisions of the policy remain the same and apply to this endorsement.” Moreover, the opening language of the policy states: “We define certain words and phrases below for use throughout the policy. Each coverage includes additional definitions only for use with that coverage.” The general definition section includes a definition of “temporary substitute car,” which is to be applied throughout the policy: “Temporary Substitute Car means a car that is in the lawful possession of the person operating it and that: 1. replaces your car for a short time while your car is out of use due to its: a. breakdown; b. servicing; c. repair; d. loss; or e. destruction; and 2. neither you nor the person operating it own or have registered.”

This Court has held that the purpose of a provision relating to a “temporary substitute” vehicle “is to afford continuous coverage to the insured during the period that a vehicle scheduled under the policy is out of commission, and at the same time limit the risk to the insurer to one operating vehicle at a time for a single, fair premium. Coverage for a substitute vehicle ceases when the insured vehicle is repaired and returned to its owner” (*Lancer Ins. Co. v Republic Franklin Ins. Co.*, 304 AD2d 794, 797 [2003] [internal quotation marks and citation omitted]). Here, the SUM endorsement fails to articulate any exclusion for a “temporary substitute car.” Therefore, the Supreme Court properly denied State Farm’s petition to permanently stay arbitration and directed the parties to proceed to arbitration. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

49 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v FRANK ADAMS, Respondent. [992 NYS2d 133]—

Crimes—Evidence—DNA Identification Tests**Crimes—Evidence—Exclusionary Rule—Inevitable Discovery Exception**

Appeal by the People from an order of the Supreme Court, Nassau County (Robbins, J.), dated May 28, 2013, which, after a hearing pursuant to a stipulation in lieu of motions, suppressed DNA evidence, identification evidence, and a statement made by the defendant to law enforcement officials.

Ordered that the order is modified, on the law and the facts, by deleting the provision thereof suppressing identification evidence and the statement made by the defendant to law enforcement officials, and substituting therefor a provision denying the suppression of identification evidence and the statement made by the defendant to law enforcement officials; as so modified, the order is affirmed.

The hearing court properly suppressed DNA evidence as tainted since the Nassau County Probation Department (hereinafter the Probation Department) took an unauthorized buccal swab from the defendant, which was a bodily intrusion subject to the constraints of the Fourth Amendment (*see Matter of Abe A.*, 56 NY2d 288, 297-299 [1982]; *People v Fomby*, 103 AD3d 28, 29 [2012]; *People v Smith*, 95 AD3d 21, 24-26 [2012]; *People v Sterling*, 57 AD3d 1110, 1111 [2008]; *see also People v King*, 232 AD2d 111 [1997]). The People's contentions that the defendant was not deprived of his constitutional rights because he was a probationer and because the unauthorized buccal swab taken by the Probation Department was merely a statutory violation are unpreserved for appellate review, inasmuch as the People failed to raise them before the hearing court (*see CPL 470.05 [2]*). In any event, the People's claims are without merit. The defendant's status as a probationer did not "justify departures from the customary constitutional standards that apply in other settings" (*People v Hale*, 93 NY2d 454, 459 [1999], citing *Griffin v Wisconsin*, 483 US 868, 873-874 [1987]), where, as here, it is undisputed that the provision of a DNA sample was not a condition of the defendant's probation under any statutory or judicial authority. Moreover, since the DNA sample taken from the defendant implicated his constitutional rights, we reject the People's argument that the Probation Department, in taking the unauthorized buccal swab, only committed a statutory violation that did not warrant suppression of evidence (*cf. People v Patterson*, 78 NY2d 711 [1991]).

However, as the People correctly contend, the hearing court erred in suppressing disputed identification evidence and the defendant's statement to law enforcement officials as fruit of the poisonous tree because this evidence fell under the inevit-

able discovery exception to the exclusionary rule (*see People v Fitzpatrick*, 32 NY2d 499, 506 [1973]). Contrary to the defendant's contention, the People's argument in this regard was preserved for appellate review (*see* CPL 470.05 [2]; *People v Gray*, 86 NY2d 10, 19 [1995]). Since an authorized DNA sample was taken from the defendant in connection with another unrelated charge shortly after he was arrested on the charges at issue on this appeal, the People established a very high degree of probability that the evidence in question would have been obtained independently of the tainted source during the normal course of police investigation (*see People v Turriago*, 90 NY2d 77, 85 [1997]; *People v Stith*, 69 NY2d 313, 318 [1987]; *People v Barber*, 268 AD2d 485, 486 [2000]). Accordingly, the hearing court should not have suppressed the identification evidence and the defendant's statement to the police.

The People's remaining contention is unpreserved for appellate review (*see* CPL 470.05 [2]), and, in any event, without merit. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur. **[As amended, see 2014 NY Slip Op 89139(U).]**

50 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DMITRIY ARTEEV, Appellant. [991 NYS2d 776]—Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Delligatti, J.), rendered June 13, 2013, convicting him of promoting a sexual performance by a child as a sexually motivated felony, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, the record demonstrates that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Ramos*, 7 NY3d 737, 738 [2006]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]). The defendant's valid waiver of his right to appeal precludes appellate review of his contention that the sentence imposed was excessive (*see People v Bradshaw*, 18 NY3d 257, 264-267 [2011]; *People v Lopez*, 6 NY3d at 255; *People v Seaberg*, 74 NY2d 1, 11 [1989]). Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

51 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TYRE BROOKS, Appellant. [991 NYS2d 899]—

Crimes—Appeal—Waiver of Right to Appeal
 Infants—Youthful Offenders

Appeal by the defendant (1) from a judgment of the Supreme Court, Kings County (Foley, J.), rendered September 20, 2010, convicting him of attempted robbery in the second degree, upon

his plea of guilty, and imposing sentence, and (2) by permission, from an order of the same court entered March 7, 2013, which denied his motion pursuant to CPL 440.10 to vacate the judgment of conviction.

Ordered that the matter is remitted to the Supreme Court, Kings County, to hear and determine whether the defendant should be afforded youthful offender treatment, and the appeals are held in abeyance in the interim.

The defendant's purported general waiver of his right to appeal was invalid (*see People v Curras*, 105 AD3d 973 [2013]). In any event, the defendant's claim that the Supreme Court failed to consider youthful offender treatment is not barred by a general waiver of the right to appeal (*see People v Rudolph*, 21 NY3d 497, 501 [2013]; *People v Pacheco*, 110 AD3d 927 [2013]). Nor was it barred by his failure to properly raise the issue at sentencing, or by his plea agreement (*see People v Rudolph*, 21 NY3d at 501; *People v Pacheco*, 110 AD3d at 927).

Pursuant to CPL 720.20 (1) "at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender." That determination was not made in this case. As the People correctly concede, the sentencing court should have considered and determined whether the defendant should be treated as a youthful offender.

Generally, under such circumstances, the sentence is vacated, and the matter remitted to the sentencing court for resentencing after determining whether the defendant should be treated as a youthful offender (*see People v Ramirez*, 115 AD3d 992 [2014]; *People v Smith*, 113 AD3d 453 [2014]; *People v Pacheco*, 110 AD3d 927 [2013]; *People v Tyler*, 110 AD3d 745 [2013]; *People v Brownell*, 109 AD3d 1172 [2013]). However, in this case, the defendant has served his sentence. Under these circumstances, we remit the matter to the Supreme Court, Kings County, to determine whether the defendant should be afforded youthful offender treatment, and hold the appeals in abeyance in the interim (*see People v Scott*, 115 AD3d 1342 [2014]; *People v Potter*, 114 AD3d 1183 [2014]; *People v Flagg*, 111 AD3d 1438 [2013]).

We reach no other issue at this juncture. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

52 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v FIDEL A. CASTROBRITO, Appellant. [991 NYS2d 894]—Appeal by the defendant, as limited by his motion, from two sentences of the County Court, Suffolk County (Kahn, J.), both imposed June 21, 2013, on the ground that the sentences were excessive.

Ordered that the sentences are affirmed.

The sentences imposed were not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Mastro, Hall, Miller and LaSalle, JJ., concur.

53 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v GERALD GRIFFIN, Appellant. [991 NYS2d 896]—

Crimes—Vacatur of Judgment of Conviction

Appeal by the defendant, by permission, from an order of the Supreme Court, Kings County (Gary, J.), dated January 3, 2013, which denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment of the same court rendered December 4, 1998, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the order is affirmed.

The Supreme Court properly denied, without a hearing, that branch of the defendant's motion which was to vacate his conviction based on newly discovered evidence, since the evidence the defendant offered was not newly discovered within the meaning of CPL 440.10 (1) (g). In this regard, the defendant failed to meet his burden of demonstrating that the testimony of one particular witness could not have been produced at the trial with due diligence, or that the testimony of another witness, on its own, would probably change the result if a new trial were granted (*see People v Salemi*, 309 NY 208, 216 [1955]; *People v Cruz*, 23 AD3d 577 [2005]; *People v Bravo*, 243 AD2d 640 [1997]; *People v Jackson*, 238 AD2d 877 [1997]).

The Supreme Court also providently exercised its discretion in summarily denying that branch of the defendant's motion which was pursuant to CPL 440.10 (1) (h) to vacate his conviction based on actual innocence. “[A]ctual innocence” means factual innocence, not mere legal insufficiency of evidence of guilt, and must be based upon reliable evidence which was not presented at the trial” (*People v Hamilton*, 115 AD3d 12, 23 [2014] [citation omitted]; *see Bousley v United States*, 523 US 614, 623-624 [1998]). “A prima facie showing of actual innocence is made out when there is ‘a sufficient showing of possible merit to warrant a fuller exploration’ by the court” (*People v Hamilton*, 115 AD3d at 27, quoting *Goldblum v Klem*, 510 F3d 204, 219 [2007]; *see People v Caldavado*, 116 AD3d 877 [2014]; *People v Jones*, 115 AD3d 984 [2014]). If the defendant meets this prima facie burden, a hearing on the claim is conducted (*see People v Hamilton*, 115 AD3d at 27). Here, the defendant failed to make the requisite prima facie showing, and, thus, no hearing was warranted (*see People v Hamilton*, 115

AD3d at 28; *People v Caldavado*, 116 AD3d at 877; *People v Jones*, 115 AD3d at 984). Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur. [**Prior Case History: 2013 NY Slip Op 30077(U).**]

54 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v STEVEN HENDERSON, Appellant. [992 NYS2d 140]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Gary, J.), rendered February 17, 2011, convicting him of rape in the first degree and criminal sexual act in the first degree (two counts), upon a jury verdict, and imposing sentence.

Ordered that judgment is affirmed.

In felony cases, the People are required to be ready for trial within six months after the commencement of the criminal action (*see* CPL 30.30 [1] [a]; *People v Headley*, 100 AD3d 775, 775-776 [2012]). “A defendant seeking dismissal of the indictment on speedy trial grounds under CPL 30.30 meets his or her initial burden on the motion simply by alleging that the People failed to declare readiness within the statutorily prescribed period” (*People v Allard*, 113 AD3d 624, 625 [2014]; *see People v Beasley*, 16 NY3d 289, 292 [2011]; *People v Goode*, 87 NY2d 1045, 1047 [1996]). “ ‘[O]nce the defendant has shown the existence of a delay greater than six months, the burden of proving that certain periods within that time should be excluded falls upon the People’ ” (*People v Headley*, 100 AD3d at 776, quoting *People v Berkowitz*, 50 NY2d 333, 349 [1980]; *see People v Santos*, 68 NY2d 859, 861 [1986]; *People v Allard*, 113 AD3d at 625; *People v Wearen*, 98 AD3d 535, 537 [2012]).

After the People “identify the exclusions on which they intend to rely . . . the defense must identify any legal or factual impediments to the use of these exclusions” in order to preserve challenges to the People’s reliance on those exclusions for appellate review (*People v Luperon*, 85 NY2d 71, 78 [1995]; *see People v Beasley*, 16 NY3d at 292; *People v Goode*, 87 NY2d at 1047). The fact that the People may have failed to set forth any proof to substantiate their claimed exclusions does not serve to obviate the defendant’s obligation to preserve his objection to the People’s failure to sustain their substantive burden of proof on this issue or to any other deficiency in the People’s response to the defendant’s motion (*see People v Beasley*, 16 NY3d at 292; *People v Luperon*, 85 NY2d at 78; *People v Goode*, 87 NY2d at 1047).

Here, after the People set forth the statutory exclusions they intended to rely upon in opposition to the defendant’s motion, the defendant failed to raise before the Supreme Court the legal

or factual impediments to the exclusions that he seeks to raise on appeal. Accordingly, the defendant failed to preserve for appellate review his contention that the Supreme Court erred in denying his motion pursuant to CPL 30.30 to dismiss the indictment on the ground that he was denied the statutory right to a speedy trial (*see People v Beasley*, 16 NY3d at 292; *People v Luperon*, 85 NY2d at 78; *People v Goode*, 87 NY2d at 1047), and, under the circumstances of this case, we decline to reach the issue in the exercise of our interest of justice jurisdiction (*see* CPL 470.05 [2]).

The defendant's challenge to the legal sufficiency of the evidence with respect to his convictions of rape in the first degree (Penal Law § 130.35 [1]), and criminal sexual act in the first degree (Penal Law § 130.50 [1]) are unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492-493 [2008]; *People v Hines*, 97 NY2d 56, 61 [2001]; *People v Gray*, 86 NY2d 10, 19-21 [1995]), and we decline to review them in the exercise of our interest of justice jurisdiction (*see e.g. People v Bridges*, 63 AD3d 752 [2009]).

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt with respect to the convictions of rape in the first degree (*see* Penal Law § 130.35 [1]), and criminal sexual act in the first degree (*see* Penal Law § 130.50 [1]), were not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

Contrary to the defendant's contention, he failed to establish that he was deprived of his constitutional right to effective assistance of counsel (*see People v Ryan*, 90 NY2d 822, 824 [1997]; *People v Rivera*, 71 NY2d 705, 708-709 [1988]). Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

55 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v NORMAN S. HOWARD, Appellant. [992 NYS2d 144]—

Crimes—Sentence—Reduction in Sentence

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Modica, J.), rendered November 20, 2012, convicting him of burglary in the second degree and criminal trespass in the third degree, upon a jury verdict, and sentencing him, as a persistent violent felony offender, to an in-

determinate term of imprisonment of 20 years to life upon his conviction of burglary in the second degree and a definite term of imprisonment of 90 days upon his conviction of criminal trespass in the third degree, to run concurrently with each other.

Ordered that the judgment is modified, as a matter of discretion in the interest of justice, by reducing the indeterminate term of imprisonment of 20 years to life imposed upon the defendant's conviction of burglary in the second degree to an indeterminate term of imprisonment of 16 years to life; as so modified, the judgment is affirmed.

The defendant's contention that certain remarks made by the prosecutor during summation were improper is unpreserved for appellate review since he either failed to object to the remarks or made only a general objection (*see People v Ambers*, 115 AD3d 671 [2014]; *People v Stevens*, 114 AD3d 969 [2014]). In any event, the defendant's contention is without merit. The prosecutor's remarks were either fair comment on the evidence or responsive to defense counsel's summation (*see People v Caldwell*, 115 AD3d 870 [2014]; *People v Polin*, 63 AD3d 1180 [2009]). Contrary to the defendant's alternative contention, he was not deprived of the effective assistance of counsel by his attorney's failure to raise specific objections to certain remarks made by the prosecutor during summation. There can be no deprivation of effective assistance of counsel arising from the failure to make a motion or argument that had little or no chance of success (*see People v Ennis*, 11 NY3d 403, 415 [2008]; *People v Stultz*, 2 NY3d 277, 287 [2004]; *People v Kent*, 79 AD3d 52, 72 [2010], *mod on other grounds* 19 NY3d 290 [2012]).

The defendant also contends that reversal is warranted because a prosecution witness testified that, in addition to others, she spoke to "the parole officer" at the scene of the crimes. This contention is without merit. The trial court sua sponte ruled that the statement was inadmissible, and directed that the statement be stricken from the record. The jury is presumed to have followed the court's instruction to disregard anything stricken from the record (*see People v Baker*, 14 NY3d 266, 274 [2010]).

The defendant was convicted of burglary in the second degree and criminal trespass in the third degree with respect to two neighboring properties. The sentence imposed—i.e., an indeterminate term of imprisonment of 20 years to life on the burglary count and a concurrent definite term of imprisonment of 90 days on the criminal trespass count—was excessive (*see People v Suitte*, 90 AD2d 80 [1982]). While the sentencing of a criminal defendant is a matter entrusted to the discretion of the sentenc-

ing court, this Court may exercise its interest of justice jurisdiction to substitute its own judgment for that of the sentencing court even where the sentencing court has not abused its discretion (*see id.* at 85-86; CPL 470.15 [3] [c]).

The interest of justice warrants a reduction in the sentence imposed upon the defendant's conviction of burglary in the second degree from an indeterminate term of imprisonment of 20 years to life to an indeterminate term of imprisonment of 16 years to life (*see People v Cubino*, 50 AD3d 312 [2008]). Based on the defendant's criminal history, he was adjudicated a persistent violent felony offender and, as a result, faced a sentencing range of between 16 and 25 years to life imprisonment upon his conviction of burglary in the second degree (*see* Penal Law §§ 70.02 [1] [b]; 70.08 [2], [3] [b]). The evidence at trial showed that, although the defendant entered his neighbor's home unlawfully with the intent to commit a crime therein, no items were taken from the home, and no one was threatened or physically harmed.

Considering the nature of the crime, the minimal harm to the victims, the particular circumstances of this defendant—who has a history of mental health issues—and the purpose of a penal sanction, an indeterminate sentence of 16 years to life imprisonment upon the defendant's conviction of burglary in the second degree is just and appropriate (*see People v Suitte*, 90 AD2d at 83). Specifically, the defendant has been diagnosed with bipolar disorder, a mental illness that runs in his family, and has also been diagnosed with major depression and has struggled with drug addiction. Following the defendant's release from prison in 2009, he made positive strides in his life by participating in outpatient mental health counseling and taking medication, and enrolling in college full-time. He performed well academically, was working toward a bachelor's degree, and had plans to pursue a master's degree, and a career in youth counseling. However, the defendant experienced a setback in July 2011, one month before the instant offenses were committed, when his 28-year-old son was shot and killed, causing his depression to worsen. The instant offenses were committed during this period of his life. Nonetheless, the defendant had been living in the community for two years without incident before committing the instant offenses. While we agree with our dissenting colleague that the defendant's criminal history is extensive, such criminal history is adequately taken into consideration by the Penal Law provisions providing increased sentences for persistent violent felony offenders (*see* Penal Law § 70.08 [2], [3]). Based on the circumstances of the defendant's

commission of burglary in the second degree and his efforts at rehabilitation, a sentence of imprisonment longer than the statutory minimum of 16 years to life is unduly harsh and excessive, and we modify the sentence accordingly (*see* CPL 470.15 [6] [b]). Hall, J.P., Duffy and LaSalle, JJ., concur.

Roman, J., concurs in part, and dissents in part, and votes to affirm the judgment, with the following memorandum: I agree with the majority's determination that the defendant's convictions should not be disturbed. However, I disagree with the majority's conclusion that the indeterminate sentence of imprisonment of 20 years to life imposed upon the defendant's conviction of burglary in the second degree was excessive and would, therefore, affirm the judgment of conviction.

Generally, the determination as to what constitutes an appropriate sentence is a matter entrusted to the sound discretion of the sentencing court, "after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*People v Farrar*, 52 NY2d 302, 305 [1981]; *see People v Appelgate*, 176 AD2d 888, 890 [1991]; *People v Suitte*, 90 AD2d 80, 83 [1982]; *People v Junco*, 43 AD2d 266, 268 [1974], *affd* 35 NY2d 419 [1974]). The sentencing court "is in the most advantageous position to determine the proper sentence, having observed the defendant and being intimately familiar with the facts and circumstances underlying the conviction" (*People v Junco*, 43 AD2d at 268; *see People v Suitte*, 90 AD2d at 85).

Here, the defendant was convicted of burglary in the second degree and criminal trespass in the third degree after he broke into his neighbor's home, and, upon being seen by her relatives, who were house guests visiting from Texas, fled from the premises and into another neighbor's backyard. As a persistent violent felony offender, the defendant faced a sentencing range of between 16 and 25 years to life imprisonment on his conviction of burglary in the second degree, a class C violent felony offense (*see* Penal Law §§ 70.02 [1] [b]; 70.08 [2], [3] [b]). At sentencing, the People requested that the Supreme Court impose the maximum sentence, which was an indeterminate term of imprisonment of 25 years to life. The court, noting, among other things, the "unsettling" nature of the defendant's act of burglarizing the home of his next-door neighbor "in broad daylight with People actually in the house," as well as the defendant's significant criminal history, sentenced the defendant, as a persistent violent felony offender, to concurrent terms of imprisonment of 20 years to life on his conviction of burglary in

the second degree and 90 days on his conviction of trespass in the third degree.

The defendant's instant convictions represent his latest in a criminal history that spans almost three decades, and includes six arrests and multiple felony convictions. According to the presentence investigation report, in February 1984, the defendant was sentenced to concurrent indeterminate terms of imprisonment of 1 to 3 years in connection with two separate convictions of attempted robbery in the second degree. The defendant was released to parole in August 1985. However, his parole was revoked one year later, due to a violation. In June 1986, the defendant was convicted of robbery in the second degree, and sentenced to an indeterminate term of imprisonment of 4 to 8 years. He was paroled again in November 1989, and discharged in March 1993. In April 1998, the defendant was convicted of attempted burglary in the second degree and attempted criminal possession of a weapon in the third degree, and sentenced to concurrent indeterminate terms of imprisonment of 12 years to life and 2 years to life, respectively. The defendant was placed on lifetime parole in November 2009.

The record thus reflects that, between 1984 and the commission of the instant offenses in August 2011, the defendant spent more than 15 years in prison in connection with the aforementioned convictions. The escalating sentences that the defendant received during that time clearly did not deter him from engaging in further criminal activity. Notably, the defendant committed the instant offenses while on lifetime parole.

Moreover, the record reveals that the defendant did not express any remorse for his actions. To the contrary, he denied guilt of the burglary charge by impugning the character of one of the members of the household of the home that he entered. In this regard, he told the New York City Department of Probation that he "was having an affair" when "the woman's husband came home," so he left the house and went into another neighbor's yard, which was why he was also charged with criminal trespass. The defendant's account of the events was contrary to the overwhelming evidence at trial, which established that, at the time of the incident on August 4, 2011, the female homeowner had left for work, and the defendant entered the house without permission and fled upon being seen by her house guests, who had arrived from Texas the evening before the burglary.

Under the circumstances of this case, it cannot be said that the sentencing court improvidently exercised or abused its discretion in sentencing the defendant to an indeterminate term

of imprisonment of 20 years to life upon his conviction of burglary in the second degree, which was five years less than the maximum permissible sentence for a persistent violent felony offender convicted of a class C violent felony offense, and four years greater than the minimum (*see* Penal Law §§ 70.02 [1] [b]; 70.08 [3] [b]). Moreover, the defendant failed to establish the existence of any “extraordinary circumstances that would warrant disturbing the sentence imposed” in the interest of justice (*People v Bussey*, 67 AD3d 819, 820 [2009]; *see People v McCants*, 73 AD3d 1086 [2010]).

Accordingly, I find that the sentence imposed on the defendant’s conviction of burglary in the second degree was not excessive, and would affirm the judgment of conviction.

56 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RICHARD JONES, Appellant. [991 NYS2d 898]—Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Suffolk County (Toomey, J.), imposed on March 13, 2013, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant’s purported waiver of his right to appeal was invalid (*see People v Bradshaw*, 18 NY3d 257, 265 [2011]; *People v Lopez*, 6 NY3d 248, 256-257 [2006]) and, thus, does not preclude review of his excessive sentence claim. However, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Mastro, Hall, Miller and LaSalle, JJ., concur.

57 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v COREY A. LATIMER, Appellant. [991 NYS2d 897]—

Crimes—Sentence—Resentence

Appeal by the defendant from a resentence of the County Court, Dutchess County (Forman, J.), imposed March 15, 2012, upon his conviction of robbery in the first degree (two counts), upon his plea of guilty, the resentence being the determinate terms of imprisonment previously imposed on August 1, 2002.

Ordered that the resentence is affirmed.

The defendant was resentenced to the determinate terms of imprisonment that had originally been imposed upon his conviction of two counts of robbery in the first degree. Penal Law § 70.85 provides, in relevant part, that, under the circumstances presented here, “the court may, notwithstanding any other provision of law but only on consent of the district attorney, reimpose the originally imposed determinate sentence of imprison-

ment without any term of post-release supervision, which then shall be deemed a lawful sentence.” The defendant’s contention that Penal Law § 70.85 is unconstitutional because it deprives him of his right to vacate his plea of guilty is without merit (*see People v Pignataro*, 22 NY3d 381 [2013]).

While the defendant asks this Court to modify his sentence in the interest of justice so that it runs concurrently with other sentences imposed on him, this Court lacks the authority to do so on this appeal (*cf. People v Lingle*, 16 NY3d 621 [2011]; *People v Cooke*, 94 AD3d 1138 [2012]; *People v Singh*, 93 AD3d 867, 868 [2012]; *People v Hoffman*, 84 AD3d 978 [2011]).

The defendant’s contention that he was deprived of the effective assistance of counsel at the plea proceeding is not reviewable by this Court because his appeal is only from the resentencing (*see* CPL 450.30 [3]; *People v Ferrufino*, 33 AD3d 623 [2006]). Furthermore, to the extent that the defendant claims that he was deprived of the effective assistance of appellate counsel, this claim cannot be addressed on this appeal, as the proper procedure for addressing such a claim is an application for a writ of error coram nobis (*see People v Velez*, 286 AD2d 406 [2001]). Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

58 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
DAMON MITCHELL, Appellant. [992 NYS2d 112]—

Crimes—Unlawful Search and Seizure

Appeal by the defendant from a judgment of the Supreme Court, Richmond County (Collini, J.), rendered May 4, 2011, convicting him of robbery in the second degree (two counts), upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing, of those branches of the defendant’s omnibus motion which were to suppress statements he made to law enforcement officials, identification testimony, and physical evidence.

Ordered that the judgment is affirmed.

The defendant was convicted of two separate robberies on Staten Island. The first occurred at a laundromat and the second took place two days later at a delicatessen. On appeal, the defendant contends, *inter alia*, that the police lacked reasonable suspicion to stop and detain him on the street, and therefore, the Supreme Court erred in denying his motion to suppress statements he made to law enforcement officials, identification testimony, and physical evidence recovered from his person. However, contrary to the defendant’s contention, the evidence adduced at the hearing established that the police officers had reasonable suspicion to stop and detain him, and the suppres-

sion motion was properly denied on that ground (see *People v Brannon*, 16 NY3d 596, 601-602 [2011]; *People v De Bour*, 40 NY2d 210 [1976]; *People v Shuler*, 98 AD3d 695 [2012]; *People v Davenport*, 92 AD3d 689 [2012]).

The defendant's contention that the evidence was legally insufficient to support his convictions of robbery in the second degree is unpreserved for appellate review (see CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), we find that, contrary to the defendant's contentions, it was legally sufficient to establish his identity as the person who committed each robbery and that the complainant in the delicatessen robbery suffered physical injury within the meaning of the Penal Law (see Penal Law §§ 10.00 [9]; 160.10 [2] [a]; cf. *People v Tejada*, 78 NY2d 936 [1991]; *People v Maturevitz*, 149 AD2d 908, 909 [1989]). Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (see CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342, 348 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (see *People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence.

The defendant's contention concerning an alleged *Brady* violation (see *Brady v Maryland*, 373 US 83 [1963]) is unpreserved for appellate review and, in any event, without merit.

The defendant received the effective assistance of counsel (see *People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

The sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]). Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

59 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
TARIK PHILIPS, Appellant. [992 NYS2d 104]—

Crimes—Assault—Serious Physical Injury
Crimes—Argument and Conduct of Counsel

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Lott, J.), rendered January 3, 2006, convicting him of murder in the second degree, attempted murder in the second degree, assault in the first degree (two counts), and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for

review the denial, after a hearing, of that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement authorities.

Ordered that the judgment is modified, on the law, by reducing the defendant's conviction of assault in the first degree under count three of the indictment to assault in the third degree, and vacating the sentence imposed thereon; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for further proceedings in accordance herewith.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish, beyond a reasonable doubt, the defendant's guilt of murder in the second degree, attempted murder in the second degree, criminal possession of a weapon in the second degree, and assault in the first degree under count four of the indictment. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt on those counts was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

However, we agree with the defendant that the evidence was not legally sufficient to establish his guilt of assault in the first degree under count three of the indictment because it did not demonstrate that the complainant Spraus sustained a "serious physical injury" (Penal Law §§ 10.00 [10]; 120.10 [3]; *see People v Brown*, 100 AD3d 1035 [2012]; *People v Adames*, 52 AD3d 617, 618 [2008]; *People v Gray*, 30 AD3d 771, 772-773 [2006]; *People v Phillip*, 279 AD2d 802, 803 [2001]). Spraus's testimony and the medical records submitted into evidence were insufficient to prove that the injuries Spraus suffered created a substantial risk of death, or caused "serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" within the meaning of Penal Law § 10.00 (10) (*see People v Mazariago*, 117 AD3d 1082 [2014]; *People v Nimmons*, 95 AD3d 1360 [2012]; *People v Tucker*, 91 AD3d 1030, 1031-1032 [2012]). Nevertheless, the evidence was legally sufficient to establish the defendant's guilt of the lesser-included offense of assault in the third degree (*see* Penal Law § 120.00 [2]). Accordingly, we reduce the

conviction of assault in the first degree under count three of the indictment to a conviction of assault in the third degree, and vacate the sentence imposed under count three of the indictment. Although the defendant has already served the maximum sentence that could be imposed for assault in the third degree (see Penal Law § 70.15 [1]), we nevertheless remit the matter to the Supreme Court, Kings County, for the imposition of an authorized sentence for that offense (see *People v Mighty*, 109 AD3d 841 [2013]; *People v Sutherland*, 102 AD3d 897 [2013]; *People v Rumley*, 102 AD3d 894 [2013]).

Contrary to the defendant's contention, the Supreme Court providently exercised its discretion in granting the People's application to reopen their case to admit certain evidence concerning a witness's ability to describe the defendant shortly after the shooting in order to rectify a misleading impression created by defense counsel's summation (see *People v Thompson*, 81 AD3d 670, 671-672 [2011], *affd* 22 NY3d 687 [2014]; *People v Loney*, 43 AD3d 726 [2007]; *People v De Los Angeles*, 270 AD2d 196, 199 [2000], *affd sub nom. People v Collins*, 96 NY2d 837 [2001]; see also *People v Massie*, 2 NY3d 179, 185 [2004]).

The defendant's contention that certain remarks made by the prosecutor during summation deprived him of a fair trial is largely unpreserved for appellate review, since he either failed to object to the remarks at issue, made only a general objection, or failed to request further curative relief when his objections were sustained, and he failed to make a timely motion for a mistrial on the specific grounds he now asserts on appeal (see CPL 470.05 [2]; *People v Martin*, 116 AD3d 981 [2014]; *People v Jorgensen*, 113 AD3d 793, 794 [2014]; *People v Hoke*, 111 AD3d 959 [2013]). In any event, the challenged portions of the prosecutor's summation were fair comment upon the evidence, were responsive to the defense counsel's summation, were within the bounds of rhetorical comment, or do not otherwise require reversal (see *People v Galloway*, 54 NY2d 396, 399 [1981]; *People v Ashwal*, 39 NY2d 105, 109-110 [1976]; *People v Martin*, 116 AD3d 981 [2014]; *People v Herb*, 110 AD3d 829, 831 [2013]). To the extent that any prejudicial effect may have resulted from certain remarks, it was ameliorated by the trial court's immediate admonitions (see *People v Martinez*, 58 AD3d 754 [2009]; *People v White*, 5 AD3d 511 [2004]).

The sentence imposed with respect to the remaining crimes of which the defendant was convicted was not excessive (see *People v Sutte*, 90 AD2d 80 [1982]).

The defendant's contention, in his pro se supplemental brief, that his statements should have been suppressed because they

were obtained in violation of his right to counsel is based on matter dehors the record and, thus, cannot be reviewed on direct appeal (*see People v Lee*, 105 AD3d 870, 871 [2013]).

The defendant's remaining contentions are unpreserved for appellate review and, in any event, without merit. Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

60 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANGEL ROLDAN, Appellant. [991 NYS2d 900]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Mondo, J.), imposed December 9, 2011, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's purported waiver of his right to appeal was invalid (*see People v Bradshaw*, 18 NY3d 257, 267 [2011]; *People v Lopez*, 6 NY3d 248, 257 [2006]) and, thus, does not preclude review of his excessive sentence claim. However, contrary to the defendant's contention, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Mastro, Hall and Roman, JJ., concur.

61 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KENNETH SLIZEWSKI, Appellant. [991 NYS2d 776]—

Crimes—Appeal—Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the County Court, Suffolk County (Kahn, J.), imposed on December 21, 2012, upon his plea of guilty, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

A defendant who has validly waived the right to appeal cannot invoke this Court's interest of justice jurisdiction to obtain a reduced sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]). Here, however, this Court is not precluded from exercising its interest of justice jurisdiction because the defendant's purported waiver of his right to appeal was invalid. The record does not demonstrate that the defendant "grasped the concept of the appeal waiver and the nature of the right he was forgoing" (*People v Bradshaw*, 18 NY3d 257, 267 [2011]; *see People v Pelaez*, 100 AD3d 803, 804 [2012]; *People v Jacob*, 94 AD3d 1142, 1143 [2012]; *cf. People v Ramos*, 7 NY3d 737, 738 [2006]). Therefore, "notwithstanding the written appeal waiver form, it cannot be said that defendant knowingly, intelligently and voluntarily waived his right to appeal" (*People v Bradshaw*, 18 NY3d at 267; *see People v Elmer*, 19 NY3d 501, 510 [2012]; *People v Vasquez*, 101 AD3d 1054 [2012]).

Nevertheless, contrary to the defendant's contention, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Skelos, Leventhal, Roman and Duffy, JJ., concur.

62 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DESMOND SMITH, Appellant. [991 NYS2d 895]—

Crimes—Appeal—Waiver of Right to Appeal

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Brennan, J.), imposed January 7, 2013, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

A defendant who has validly waived the right to appeal cannot invoke this Court's interest of justice jurisdiction to obtain a reduced sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]). Here, however, this Court is not precluded from exercising its interest of justice jurisdiction because the defendant's purported waiver of his right to appeal was invalid. The record does not demonstrate that the defendant "grasped the concept of the appeal waiver and the nature of the right he was forgoing" (*People v Bradshaw*, 18 NY3d 257, 267 [2011]; *see People v Pelaez*, 100 AD3d 803, 804 [2012]; *People v Jacob*, 94 AD3d 1142, 1143 [2012]; *cf. People v Ramos*, 7 NY3d 737, 738 [2006]). Therefore, "notwithstanding the written appeal waiver form, it cannot be said that defendant knowingly, intelligently and voluntarily waived his right to appeal" (*People v Bradshaw*, 18 NY3d at 267; *see People v Elmer*, 19 NY3d 501, 510 [2012]; *People v Vasquez*, 101 AD3d 1054 [2012]).

Nevertheless, contrary to the defendant's contention, the period of postrelease supervision imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Skelos, Leventhal, Roman and Duffy, JJ., concur.

63 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHAWN STEWART, Appellant. [991 NYS2d 898]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Hirsch, J.), imposed May 22, 2013, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Balkin, Dickerson, Chambers and Hinds-Radix, JJ., concur.

64 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v FRANCIS SUAZO, Appellant. [992 NYS2d 138]—

Judges—Recusal

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Kron, J.), rendered August 12, 2011, convicting him of burglary in the first degree, upon his plea of guilty, and imposing sentence. The appeal brings up for review the denial, after a hearing (Holder, J.), of that branch of the defendant's omnibus motion which was to suppress identification testimony.

Ordered that the matter is remitted to the Supreme Court, Queens County, for a de novo suppression hearing before a different hearing Justice, and a report thereafter, on that branch of the defendant's omnibus motion which was to suppress identification testimony, and the appeal is held in abeyance in the interim. The Supreme Court, Queens County, shall file its report with all convenient speed.

Contrary to the People's contention, the defendant's purported waiver of his right to appeal was invalid (*see People v Moyett*, 7 NY3d 892, 892-893 [2006]; *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Woods*, 115 AD3d 997 [2014]).

At the outset of the hearing on that branch of the defendant's omnibus motion which was to suppress identification testimony, it was revealed that one of the People's witnesses was married to the hearing Justice's law clerk. Nonetheless, the hearing Justice presided over the hearing, found the People's witnesses to be credible, and denied the defendant's motion.

Contrary to the People's contention, under the particular circumstances of this case, the defendant did not affirmatively waive his contention that the hearing Justice improvidently exercised his discretion in presiding over the hearing (*cf. People v Grier*, 273 AD2d 403 [2000]). While this contention is unpreserved for appellate review, we nevertheless reach it in the exercise of our interest of justice jurisdiction (*see* CPL 470.05 [2]).

"Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court" (*People v Moreno*, 70 NY2d 403, 405 [1987]). "A court's decision in this respect may not be overturned unless it was an improvident exercise of discretion" (*D'Andraia v Pesce*, 103 AD3d 770, 771 [2013]). "Recusal, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion, or where a clash in judicial roles is seen to exist" (*People v Alomar*, 93 NY2d 239, 246 [1999] [citation omitted]).

It was an improvident exercise of discretion for the hearing Justice to preside over the suppression hearing. “[A] law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge’s own exercise of the judicial function” (*Oliva v Heller*, 839 F2d 37, 40 [2d Cir 1988]). “Law clerks are simply extensions of the judges at whose pleasure they serve” (*id.* at 40 [internal quotation marks omitted]). Here, the hearing Justice was the trier of fact, and the credibility of Detective William Wilkerson, who was married to the Justice’s law clerk, was a critical issue at the hearing. The marital relationship between Detective Wilkerson and the hearing Justice’s law clerk created, at a minimum, the appearance that the hearing Justice could not be impartial in assessing Detective Wilkerson’s credibility. While it is true that, unlike a lay jury, a judge is “uniquely capable of . . . making an objective determination based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision” (*People v Best*, 19 NY3d 739, 744 [2012] [internal quotation marks omitted]), “judges are human,” and not immune from “psychological” and unconscious influences (*id.* at 744; see *Caperton v A. T. Massey Coal Co.*, 556 US 868, 883 [2009]; *People v Browne*, 220 AD2d 313, 314-315 [1995]; *People v Zappacosta*, 77 AD2d 928, 930 [1980]). Under these circumstances, the hearing Justice should have recused himself “in a special effort to maintain the appearance of impartiality” (*People v Moreno*, 70 NY2d at 406).

Accordingly, we hold the appeal in abeyance and remit the matter to the Supreme Court, Queens County, before a different hearing Justice, to hear and report on that branch of the defendant’s omnibus motion which was to suppress identification testimony. Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

65 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CHESTER WALTERS, Appellant. [992 NYS2d 124]—

Crimes—Appeal—Preservation of Issue for Review—Discretionary Review of Unpreserved Issue

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Honorof, J.), rendered May 8, 2012, convicting him of driving while intoxicated per se in violation of Vehicle and Traffic Law § 1192 (2), driving while intoxicated as a felony in violation of Vehicle and Traffic Law § 1192 (3), and failing to stop at a stop sign, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing pursuant to a stipulation in lieu of motions (Grella, J.), of the suppression, inter alia, of the defendant’s statements to law enforcement officials.

Ordered that the judgment is modified, as a matter of discretion in the interest of justice, by vacating the conviction of failing to stop at a stop sign and the sentence imposed thereon, and dismissing that count of the indictment; as so modified, the judgment is affirmed.

The defendant was charged, inter alia, with two counts of failing to stop at a stop sign (Vehicle and Traffic Law § 1172), but was convicted of that offense under only one of those counts. The two counts related to two different stop signs, at different locations. The identically worded counts failed to identify which stop sign was the subject of which count, and the trial court's instructions to the jury did not link each count to a specific stop sign. The defendant contends that, accordingly, his conviction of failing to stop at a stop sign should be vacated. Although the defendant failed to preserve this claim for appellate review, we vacate the conviction of failing to stop at a stop sign and the sentence imposed thereon, and dismiss that count of the indictment, in the exercise of our interest of justice jurisdiction (*see* CPL 470.15 [6] [a]; *People v Aponte*, 249 AD2d 553, 555 [1998]; *People v Jones*, 233 AD2d 342, 342 [1996]).

The defendant's current contentions in support of his claim that the Supreme Court should have suppressed certain evidence on the ground that the police lacked reasonable suspicion to stop his vehicle and probable cause to arrest him were not asserted at the suppression hearing and, thus, are unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Bowen-Allen*, 97 AD3d 598, 599 [2012]; *People v Parker*, 74 AD3d 1365, 1366 [2010]). They are, in any event, without merit (*see People v Frazier*, 33 AD3d 934, 935 [2006]; *People v Robinson*, 140 AD2d 723, 723 [1988], *affd* 74 NY2d 773 [1989]).

The defendant's allegations in support of his claim of ineffective assistance of counsel concern matter dehors the record and, thus, may not be reviewed on direct appeal (*see People v Crawford*, 115 AD3d 672 [2014]).

The defendant's remaining contention is without merit. Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

66 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JUAN ZARUMA, Appellant. [991 NYS2d 884]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Zayas, J.), imposed September 14, 2012, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's waiver of his right to appeal was invalid and, therefore, does not preclude appellate review of his excessive

sentence claim (*see People v Bradshaw*, 18 NY3d 257, 265 [2011]). However, the sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Balkin, Dickerson, Chambers and Hinds-Radix, JJ., concur.

67 THE PEOPLE OF THE STATE OF NEW YORK ex rel. JARED KNEITEL, on Behalf of ISRAEL ROBINSON, Petitioner, v WARDEN, RIKERS ISLAND CORRECTIONAL FACILITY, Respondent. [991 NYS2d 774]—

Appeal—Academic and Moot Questions

Writ of habeas corpus in the nature of an application pursuant to CPL 170.70 to release the defendant in a criminal action entitled *People v Robinson*, commenced in the Criminal Court of the City of New York, Kings County, under Docket No. 2014KN060754. Application by the Legal Aid Bureau of Buffalo, Inc., for leave to serve and file an amicus curiae brief.

Upon the papers filed in support of the application for leave to serve and file an amicus curiae brief, and no papers having been filed in opposition or in relation thereto, it is

Ordered that the application for leave to serve and file an amicus curiae brief is denied; and it is further,

Adjudged that the writ is dismissed as academic, without costs or disbursements.

The arguments raised in connection with this writ of habeas corpus have been rendered academic, as the detainee on whose behalf the writ is sought has been released from custody (*see People ex rel. Kneitel v Warden, Rikers Is. Corr. Facility*, 104 AD3d 795, 796 [2013]). Furthermore, under the circumstances of this case, review of the issues raised by the petitioner is not warranted under the exception to the mootness doctrine (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; *People ex rel. Kneitel v Warden, Rikers Is. Corr. Facility*, 104 AD3d at 796; *People ex rel. Crow v Warden, Anna M. Kross Detention Ctr.*, 76 AD3d 646 [2010]). Accordingly, the writ is dismissed as academic. Balkin, J.P., Leventhal, Maltese and Barros, JJ., concur.

68 THE PEOPLE OF THE STATE OF NEW YORK ex rel. LANCE LAZZARO, on Behalf of MIGUEL VICENTE, Petitioner, v WARDEN, YAPHANK CORRECTIONAL FACILITY, Respondent. [991 NYS2d 775]—
Writ of habeas corpus in the nature of an application for bail reduction upon Suffolk County Indictment No. 724-14.

Adjudged that the writ is dismissed, without costs or disbursements.

The determination of the Supreme Court, Suffolk County,

was not an improvident exercise of discretion, and did not violate “constitutional or statutory standards” (*People ex rel. Klein v Krueger*, 25 NY2d 497, 499 [1969]; see *People ex rel. Rosenthal v Wolfson*, 48 NY2d 230 [1979]). Mastro, J.P., Chambers, Austin and Sgroi, JJ., concur.

(September 17, 2014)

1 MAHER ABDELQADER, Respondent, v ANWAR ABDELQADER et al., Appellants. [993 NYS2d 71]—

Process—Service of Process—Nail and Mail Service—Attestation of Process Server Prima Facie Evidence That Service Made
Judgments—Default Judgment—Failure to Establish Reasonable Excuse

In an action to recover damages for breach of a settlement agreement, the defendants appeal from an order of the Supreme Court, Queens County (Agate, J.), entered July 24, 2012, which denied their motion to vacate a default judgment entered September 16, 2011, in favor of the plaintiff and against them in the principal sum of \$942,857.

Ordered that the appeals by the defendants Anwar Abdelqader and Jawad Abdelqader are dismissed as academic in light of the determination of the Supreme Court in an order dated August 16, 2013, made upon renewal, in effect, vacating the determination in the order entered July 24, 2014, denying those branches of the defendants’ motion which were to vacate the default judgment insofar as against the defendants Anwar Abdelqader and Jawad Abdelqader, and thereupon granting those branches of the motion (see *Abdelqader v Abdelqader*, 120 AD3d 1277 [2014] [decided herewith]); and it is further,

Ordered that the order entered July 24, 2012 is affirmed on the appeal by the defendants Nashat Abdelqader and Mayson Zaben; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

An affidavit of service dated July 13, 2011, in which a process server attested to personally delivering a copy of the summons and complaint on June 18, 2011, to the defendant Mayson Zaben constitutes prima facie evidence that service was properly made on her pursuant to CPLR 308 (1) (see *Wisselman, Harounian & Assoc., P.C. v Dowlah*, 117 AD3d 822 [2014]; *Academic Fed. Credit Union v Duhe*, 116 AD3d 721 [2014]). Zaben’s “bare and unsubstantiated” denial of receipt of process was insufficient to raise any issue of fact in this respect (*Deutsche Bank Natl. Trust Co. v Quinones*, 114 AD3d 719, 719 [2014]; see *Reich v Redley*, 96 AD3d 1038 [2012]; *Citimortgage, Inc. v Phillips*, 82 AD3d

1032 [2011]). Zaben failed to contradict the process server's description of her as set forth in the relevant affidavit of service (cf. *Wells Fargo Bank, N.A. v Final Touch Interiors, LLC*, 112 AD3d 813 [2013]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896 [2013]).

In an affidavit of service dated June 16, 2011, the process server attested to affixing a copy of the summons and complaint to the door of the residence of the defendant Nashat Abdelqader (hereinafter Nashat) and properly mailing an additional copy to him at that residence, after diligent attempts at personal delivery and "deliver and mail" service were unsuccessful. This affidavit constitutes prima facie evidence that service was properly effected on Nashat pursuant to CPLR 308 (4) (see *Wisselman, Harounian & Assoc., P.C. v Dowlah*, 117 AD3d 822 [2014]). Nashat's unsubstantiated denial of receipt of process was insufficient to raise any issue of fact in this respect (see *Deutsche Bank Natl. Trust Co. v White*, 110 AD3d 759 [2013]; *Burekhovitch v Tatarchuk*, 99 AD3d 653 [2012]).

Since Nashat and Zaben "failed to come forward with any factually specific, detailed evidence to rebut the presumption of valid service created by" the relevant affidavits of service (*Academic Fed. Credit Union v Duhe*, 116 AD3d at 721), the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 5015 (a) (4) to vacate the respective defaults of Nashat and Zaben in appearing or answering the complaint.

Nashat argues, in the alternative, that the Supreme Court should have vacated his default pursuant to CPLR 5015 (a) (1), inasmuch as he had a reasonable excuse for his default in answering the complaint and a potentially meritorious defense to the action. Nashat's sole contention in support of his argument that he had a reasonable excuse for his default is that, regardless of whether he was properly served with process, he did not actually receive a copy of the summons and complaint in time to answer or appear and, thus, had no knowledge or notice of the commencement of the action against him. Nashat's submissions, however, failed to rebut the presumption of receipt based on proof of proper mailing (see *Engel v Lichterman*, 62 NY2d 943 [1984]; *Clover M. Barrett, P.C. v Gordon*, 90 AD3d 973 [2011]; *Centennial El. Indus., Inc. v Ninety-Five Madison Corp.*, 90 AD3d 689 [2011]; *C&H Import & Export, Inc. v MNA Global, Inc.*, 79 AD3d 784 [2010]; *Deutsche Bank Natl. Trust Co. v Matos*, 77 AD3d 606 [2010]) and, thus, failed to establish a reasonable excuse for his default in answering the complaint. Consequently, we need not address the question of whether

Nashat had a potentially meritorious defense (*see Wells Fargo Bank, N.A. v Gioia*, 114 AD3d 766 [2014]; *Vardaros v Zapas*, 105 AD3d 1037, 1038 [2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724 [2013]; *Maida v Lessing's Rest. Servs., Inc.*, 80 AD3d 732 [2011]; *O'Donnell v Frangakis*, 76 AD3d 999 [2010]). Accordingly, the Supreme Court properly denied that branch of the defendants' motion which was pursuant to CPLR 5015 (a) (1) to vacate Nashat's default.

The remaining contentions of Nashat and Zaben are without merit. Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

2 MAHER ABDELQADER, Appellant, v ANWAR ABDELQADER et al., Respondents, et al., Defendants. [993 NYS2d 68]—

Process—Service of Process—Discretionary Extension of Time to Serve Process

In an action to recover damages for breach of a settlement agreement, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Queens County (Agate, J.), dated August 16, 2013, as, upon renewal, and after a hearing, in effect, vacated the determination in an order of the same court entered July 24, 2012, denying the defendants' motion to vacate a default judgment entered September 16, 2011, insofar as it was in favor of him and against the defendant Anwar Abdelqader in the principal sum of \$942,857 and thereupon granted the defendants' motion to vacate that judgment, and thereafter granted that branch of the defendants' motion which was to dismiss the complaint insofar as asserted against the defendants Anwar Abdelqader and Jawad Abdelqader for lack of personal jurisdiction.

Ordered that the order dated August 16, 2013 is reversed insofar as appealed from, on the facts and in the exercise of discretion, that branch of the defendants' motion which was to dismiss the complaint insofar as asserted against the defendants Anwar Abdelqader and Jawad Abdelqader is denied, and, upon renewal, the determination in the order entered July 24, 2012, denying that branch of the defendants' motion which was to vacate the default judgment entered September 16, 2011, insofar as it was in favor of the plaintiff and against the defendant Anwar Abdelqader in the principal sum of \$942,857 is adhered to; and it is further,

Ordered that the plaintiff is authorized, if he be so advised, to serve or re-serve copies of the summons and complaint upon the defendant Jawad Abdelqader at any time within 120 days following the date of this decision and order; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

As noted in this Court's companion decision in *Abdelqader v Abdelqader* (120 AD3d 1275 [2014] [decided herewith]), the Supreme Court, in an order entered July 24, 2012, denied the defendants' motion pursuant to CPLR 5015 (a) to vacate a default judgment that had been entered against them. Thereafter, the defendants moved to renew their motion to vacate the default judgment pursuant to CPLR 5015 (a), and thereupon to dismiss the complaint for lack of personal jurisdiction. Upon renewal, the Supreme Court denied the defendants' motion insofar as it sought the vacatur of the default judgment as against the defendants Mayson Zaben and Nashat Abdelqader (hereinafter Nashat), but directed a hearing with respect to those branches of the motion which sought relief on behalf of Anwar Abdelqader (hereinafter Anwar) and Jawad Abdelqader (hereinafter Jawad). After the hearing, the court, upon renewal, granted those branches of the motion which were to vacate the default judgment insofar as entered against Anwar and Jawad. The court also granted those branches of the motion which were to dismiss the complaint insofar as asserted against Anwar and Jawad. The plaintiff appeals.

Contrary to the determination of the Supreme Court, the plaintiff established that Anwar was properly served with process, and that CPLR 5015 (a) (4) provides no basis for vacatur of the default judgment insofar as entered against him (*see Toyota Motor Credit Corp. v Lam*, 93 AD3d 713 [2012]; *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588 [2009]; *cf. Rowlan v Brooklyn Jewish Hosp.*, 100 AD2d 844, 844-845 [1984]; *cf. also Wells Fargo Bank, N.A. v Chaplin*, 100 AD3d 744, 745 [2012]). For reasons that parallel those expressed with respect to Zaben and Nashat (*see Abdelqader v Abdelqader*, 120 AD3d 1275 [2014] [decided herewith]), we further conclude that Anwar is not entitled to relief from the default judgment pursuant to CPLR 5015 (a) (1).

The plaintiff argues that this Court should, in the interest of justice, grant an extension of time within which to effect service upon Jawad and Anwar pursuant to CPLR 306-b. Although, in light of our determination, this argument has been rendered academic with respect to Anwar, that is not the case with respect to Jawad.

Here, the four defendants and the plaintiff are all siblings, and the action arises from transactions in which the four sibling defendants allegedly acted in concert. For the reasons stated above and in *Abdelqader v Abdelqader* (120 AD3d 1275 [2014] [decided herewith]), the defendants Anwar, Nashat, and Zaben are in default in answering or appearing, and will necessarily be

bound by the default judgment, while Jawad is presently not in default since the evidence submitted at the hearing to determine the propriety of service demonstrated that service of process was not validly, timely, or properly effected upon Jawad. Under these particular circumstances, the interest of justice requires that fairness be maintained amongst the siblings. Accordingly, rather than granting that branch of the motion which was to dismiss the complaint insofar as asserted against Jawad for lack of personal jurisdiction over him, we exercise our discretion and permit the plaintiff, if he be so advised, to serve or re-serve process upon Jawad within 120 days of the date of this decision and order (*see* CPLR 306-b; *Prudence v Wright*, 94 AD3d 1073 [2012]; *see Gurevitch v Goodman*, 269 AD2d 355 [2000]). Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

3 BAMBI DAWN ACKERMAN, Appellant, v SHEILA ACKERMAN et al., Respondents. [993 NYS2d 53]—

Fraud—Actual Fraud—Transfer of Real Property Valid Where Transferor Had Knowledge of Documents She Signed

Husband and Wife and Other Domestic Relationships—Matrimonial Domicile—Transfer of Domicile to Husband's Mother—Attempt to Gain Unequal Financial Advantage

In an action, inter alia, to recover damages for fraud, the plaintiff appeals, as limited by her brief, from (1) so much of an order of the Supreme Court, Nassau County (McCormack, J.), entered July 9, 2012, as granted the motion of the defendant Sheila Ackerman for summary judgment dismissing the complaint insofar as asserted against her and, upon searching the record, awarded summary judgment dismissing the complaint insofar as asserted against the defendant Gregg Ackerman, and (2) so much of an order of the same court entered January 25, 2013, as, upon reargument, adhered to so much of the original determination as granted the motion of the defendant Sheila Ackerman for summary judgment dismissing the complaint insofar as asserted against her and, upon searching the record, awarded summary judgment dismissing the complaint insofar as asserted against the defendant Gregg Ackerman.

Ordered that the appeal from the order entered July 9, 2012 is dismissed, without costs or disbursements, on the ground that it was superseded by the order entered January 25, 2013, made upon reargument; and it is further,

Ordered that the order entered January 25, 2013 is modified, on the law, by deleting the provision thereof, upon reargument, adhering to so much of the determination in the order entered July 9, 2012 as, upon searching the record, awarded summary

judgment dismissing the causes of action in the complaint which sought to recover damages for fraud and breach of fiduciary duty against the defendant Gregg Ackerman, and to impose a constructive trust against that defendant, and substituting therefor a provision, upon reargument, vacating so much of that determination in the order entered July 9, 2012; as so modified, the order entered January 25, 2013 is affirmed insofar as appealed from, without costs or disbursements.

In or around 2000, the defendant Sheila Ackerman and her late husband purchased certain residential property. In or around 2008, Sheila transferred ownership of the property to her son, the defendant Gregg Ackerman, and the plaintiff. Gregg and the plaintiff were married and resided on the property. In 2010, in the presence of the attorney for Sheila, the plaintiff and Gregg executed a deed transferring the property to Sheila. Several weeks later, Gregg moved from the property and commenced a divorce action against the plaintiff. Thereafter, Sheila moved to evict the plaintiff from the property.

The plaintiff commenced the instant action alleging fraud and conspiracy to defraud against both Gregg and Sheila, and breach of fiduciary duty against Gregg. The complaint also sought to impose a constructive trust against both Gregg and Sheila, and to rescind the deed conveying title to Sheila. The plaintiff alleged, inter alia, that she was fraudulently induced by the defendants into executing the subject deed and that she did not know that, by her execution of the deed with Gregg, she was transferring full ownership to Sheila. She further alleged that Gregg was unjustly enriched by the transfer in that Sheila holds title to the property for the benefit of Gregg. Sheila moved for summary judgment dismissing the complaint insofar as asserted against her. The Supreme Court granted the motion and, upon searching the record, awarded summary judgment dismissing the complaint insofar as asserted against Gregg. The plaintiff moved for leave to reargue her opposition to Sheila's motion, and upon reargument, the court adhered to the original determination.

The gravamen of the plaintiff's complaint is fraud in the factum, that the plaintiff was induced to sign something entirely different than what she thought she was signing (*see First Natl. Bank of Odessa v Fazzari*, 10 NY2d 394, 397 [1961]). However, a party is under an obligation to read a document before signing it, and generally such a cause of action only arises if the signor is illiterate, blind, or not a speaker of the language in which the document is written (*see First Natl. Bank of Odessa v Fazzari*, 10 NY2d at 397; *Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785,

788 [2009]). Sheila established her prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff signed the deed in an attorney's office and that the attorney explained to her the content of the document. In opposition, the plaintiff failed to raise a triable issue of fact.

Gregg, however, did not move for summary judgment, and the evidence in the record did not establish his prima facie entitlement to judgment as a matter of law. As spouses, the plaintiff and Gregg had a fiduciary relationship to each other (*see Christian v Christian*, 42 NY2d 63, 72 [1977]; *Barchella v Barchella*, 44 AD3d 696, 697 [2007]). Based upon the fiduciary relationship that exists between spouses, postnuptial agreements are closely scrutinized by the courts and are more readily set aside on grounds that would be insufficient to nullify an ordinary contract (*see Barchella v Barchella*, 44 AD3d at 696). Since Gregg left the plaintiff and commenced a divorce action against her shortly after the plaintiff executed the deed transferring the property to Sheila, an inference could be drawn that he asked the plaintiff to sign the deed to gain a financial advantage in the matrimonial action by effecting an unequal division of marital property while Sheila held the property in her name for his benefit (*see Mattera v Mattera*, 125 AD2d 555, 556 [1986]).

In view of the foregoing, the Supreme Court erred in searching the record and awarding summary judgment dismissing the causes of action alleging fraud and breach of fiduciary duty against Gregg, and to impose a constructive trust against Gregg (*see Iwanow v Iwanow*, 39 AD3d 476, 477 [2007]; *Mattera v Mattera*, 125 AD2d at 556). Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur. [**Prior Case History: 2012 NY Slip Op 31881(U).**]

4 SHLOMO ATTIAS, Appellant, v RICHARD COSTIERA et al., Respondents. [993 NYS2d 59]—

Evidence—Documentary Evidence—Insufficiency of Proposed Documents in Action for Breach of Contract for Sale of Real Property
Pleading—Amendment—Palpably Insufficient Amendment Devoid of Merit

In an action to recover damages for breach of a contract for the sale of real property and for the return of a down payment given pursuant to that contract, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Woodard, J.), dated February 13, 2013, as granted that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (1) to dismiss the complaint, and denied that branch of his cross motion which was pursuant to CPLR 3025 (b) for leave to amend the verified complaint.

Ordered that the order is modified, on the law, by deleting the provision thereof granting that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (1) to dismiss the complaint and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff commenced this action to recover a \$25,000 down payment pursuant to a contract for the sale of certain real property and \$100,000 in damages sustained as a result of the alleged breach of that contract. The defendants moved to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (1). In support of their motion, the defendants submitted, among other things, the contract of sale, their own affidavits, their attorney's affirmation, and various correspondence between the parties' attorneys. The plaintiff cross-moved, inter alia, pursuant to CPLR 3025 (b) for leave to amend the verified complaint to add a cause of action against the defendants and to join their attorney as a party defendant and thereupon assert two causes of action against the attorney. The Supreme Court granted that branch of the defendants' motion which was pursuant to CPLR 3211 (a) (1) to dismiss the complaint, and denied that branch of the plaintiff's cross motion which was for leave to amend the verified complaint pursuant to CPLR 3025 (b). We modify.

"On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference" (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996 [2010]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]). A motion pursuant to CPLR 3211 (a) (1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Rodolico v Rubin & Licatesi, P.C.*, 114 AD3d 923, 924-925 [2014]). "The evidence submitted in support of such motion must be documentary or the motion must be denied" (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2012] [internal quotation marks omitted]; see *Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2010]; see also David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 21-23).

In order for evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condo-*

minium III Assn. v Palomino, 78 AD3d 996, 996-997 [2010] [internal quotation marks omitted]; see *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d at 714). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Fontanetta v John Doe 1*, 73 AD3d at 84-85 [internal quotation marks omitted]; see *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d at 714). At the same time, “[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a) (1)” (*Granada Condominium III Assn. v Palomino*, 78 AD3d at 997 [internal quotation marks omitted]; see *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d at 714; *Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017 [2010]).

Here, the affidavits submitted by the defendants, their attorney’s affirmation, and the correspondence that was submitted in support of the defendants’ motion did not constitute documentary evidence within the meaning of CPLR 3211 (a) (1), and should not have been relied upon by the Supreme Court in directing the dismissal of the complaint pursuant to CPLR 3211 (a) (1) (see *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d at 714; *Granada Condominium III Assn. v Palomino*, 78 AD3d at 997; *Fontanetta v John Doe 1*, 73 AD3d at 84-85). The only documentary evidence submitted in support of the defendants’ motion was the contract of sale and the rider to the contract of sale. However, these submissions did not “utterly refute” the plaintiff’s allegations or “conclusively establish[] a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d at 326; see *Rodolico v Rubin & Licatesi, P.C.*, 114 AD3d at 924-925; *JP Morgan Chase Bank, N.A. v Balliraj*, 113 AD3d 821, 821 [2014]; *Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928, 930 [2010]). Accordingly, the Supreme Court erred in granting that branch of the defendants’ motion which was to pursuant to CPLR 3211 (a) (1) to dismiss the complaint.

However, the Supreme Court providently exercised its discretion in denying that branch of the plaintiff’s cross motion which was for leave to amend the verified complaint pursuant to CPLR 3025 (b). “In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Marcum, LLP v Silva*, 117 AD3d 917, 917 [2014]; see CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d 220, 229 [2008]). “The determination to permit or deny amendment is committed to the sound discretion of the trial court”

(*Marcum, LLP v Silva*, 117 AD3d at 917; *see* CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d at 229).

Here, the plaintiff sought to amend the verified complaint by adding a cause of action against the defendants and to join the defendants' attorney as a party defendant and thereupon assert two causes of action against the attorney. Since the plaintiff's proposed amendments were palpably insufficient and patently devoid of merit, the Supreme Court providently exercised its discretion in denying that branch of the plaintiff's cross motion (*see generally Longo v Long Is. R.R.*, 116 AD3d 676 [2014]; *Young v Brown*, 113 AD3d 761, 762 [2014]). Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

5 ISHAT BHUIYAN, an Infant, by Her Mother and Natural Guardian, REHANA BHUIYAN, et al., Appellants, v NEW YORK CITY HEALTH & HOSPITALS CORPORATION, Respondent. [993 NYS2d 62]—

Judgments—Default Judgment—Failure to Demonstrate Reasonable Excuse for Failure to Submit Opposition Papers in Medical Malpractice Action

In an action, inter alia, to recover damages for medical malpractice, etc., the plaintiffs appeal from an order of the Supreme Court, Kings County (Knipel, J.), dated April 19, 2013, which denied their motion, in effect, to vacate an order of the same court dated July 20, 2012, granting the defendant's unopposed motion pursuant CPLR 3126 to dismiss the complaint.

Ordered that the order dated April 19, 2013 is affirmed, with costs.

A party seeking to vacate an order entered upon his or her failure to oppose a motion is required to demonstrate, through the submission of supporting facts in evidentiary form, both a reasonable excuse for the default and the existence of a potentially meritorious opposition to the motion (*see Garcia v Shaw*, 118 AD3d 943 [2014]; *Karamuco v Cohen*, 90 AD3d 998 [2011]; *Thapt v Lutheran Med. Ctr.*, 89 AD3d 837 [2011]; *Donovan v Chiapetta*, 72 AD3d 635, 636 [2010]). "The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion, and the Supreme Court has the discretion to accept law office failure as a reasonable excuse where that claim is supported by a detailed and credible explanation of the default or defaults at issue" (*Swensen v MV Transp., Inc.*, 89 AD3d 924, 925 [2011] [internal quotation marks and citations omitted]).

Here, the Supreme Court providently determined that the plaintiffs failed to present a reasonable excuse for their failure to submit opposition papers. Contrary to the plaintiffs' conten-

tions, the defendant appropriately served its motion upon the pro se plaintiffs pursuant to CPLR 2103 (c) when the plaintiffs had not yet retained counsel.

Accordingly, we need not address the issue of whether the plaintiffs demonstrated a potentially meritorious opposition to the motion (*see Garcia v Shaw*, 118 AD3d at 943; *Silva v Honeydew Cab Corp.*, 116 AD3d 691, 692 [2014]). Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

6 SOKOL BIBERAJ, Respondent-Appellant, v FRANK A. ACCELLA, Appellant-Respondent. [993 NYS2d 64]—

Attorney and Client—Malpractice—Existence of Attorney-Client Relationship—Failure to Use Reasonable Skill and Common Knowledge—Entangling Client in Ponzi Scheme

Fraud—Damages—Failure to Allege Damages Distinct from Legal Malpractice Claim—Dismissal of Duplicitous Cause of Action

In an action, inter alia, to recover damages for fraud and legal malpractice, the defendant appeals from so much of an order of the Supreme Court, Westchester County (Giacomo, J.), entered October 2, 2012, as denied those branches of his motion which were for summary judgment dismissing the causes of action to recover damages for fraud, money had and received, constructive trust, and breach of contract, and the plaintiff cross-appeals, as limited by his brief, from so much of the same order as granted those branches of the defendant's motion which were for summary judgment dismissing the causes of action to recover damages for breach of fiduciary duty, negligence, and legal malpractice.

Ordered that the order is modified, on the law, (1) by deleting the provision thereof granting that branch of the motion which was for summary judgment dismissing the cause of action to recover damages for legal malpractice, and substituting therefor a provision denying that branch of the motion, and (2) by deleting the provisions thereof denying those branches of the motion which were for summary judgment dismissing the causes of action to recover damages for fraud and breach of contract, and substituting therefor a provision granting those branches of the motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

The plaintiff and the defendant, an attorney licensed in New York, met in or about 2001, when the plaintiff sought the defendant's legal representation. The parties established a business relationship, which later evolved into a friendship. In 2007, upon the defendant's recommendation, the plaintiff made an investment of \$260,000 in an enterprise known as Agape World (hereinafter Agape), which purportedly used investor money to

provide bridge loans to businesses, and paid interest to the investors. The defendant allegedly also invested large sums of his own money in Agape. In 2008, it was revealed that Agape was, in fact, a Ponzi scheme, in which new investors' funds were used to pay earlier investors' returns. The plaintiff and the defendant allegedly lost their investments in Agape.

In July 2009, the plaintiff commenced the instant action to recover damages for fraud (first cause of action), breach of fiduciary duty (second cause of action), negligence (third cause of action), money had and received (fourth cause of action), legal malpractice (fifth cause of action), based on a constructive trust (sixth cause of action), and for breach of contract (seventh cause of action). After issue was joined, the defendant moved for summary judgment dismissing the complaint. The Supreme Court granted those branches of the defendant's motion which were for summary judgment dismissing the causes of action to recover damages for breach of fiduciary duty, negligence, and legal malpractice, and denied the remaining branches of the motion. The defendant appeals and the plaintiff cross-appeals from stated portions of this order.

To recover damages for legal malpractice, a plaintiff must prove the existence of an attorney-client relationship (*see Berry v Utica Natl. Ins. Group*, 66 AD3d 1376 [2009]; *Rechberger v Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.*, 45 AD3d 1453 [2007]; *Moran v Hurst*, 32 AD3d 909, 910 [2006]). A plaintiff is also required to establish that the defendant failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]; *Gershkovich v Miller, Rosado & Algios, LLP*, 96 AD3d 716, 717 [2012]). "To succeed on a motion for summary judgment dismissing the complaint in a legal malpractice action, the defendant must present evidence in admissible form establishing that the plaintiff is unable to prove at least one essential element of his or her cause of action alleging legal malpractice" (*Scartozzi v Potruch*, 72 AD3d 787, 789-790 [2010]; *see Gershkovich v Miller, Rosado & Algios, LLP*, 96 AD3d at 717).

Here, in support of that branch of his motion which was for summary judgment dismissing the cause of action to recover damages for legal malpractice, the defendant met his prima facie burden of establishing that he had no attorney-client relationship with the plaintiff referable to the plaintiff's investment in Agape (*see Volpe v Canfield*, 237 AD2d 282, 283 [1997]). In

opposition, however, the plaintiff raised a triable issue of fact as to the existence of an attorney-client relationship in that context. Moreover, with regard to this cause of action, the defendant failed to show, *prima facie*, that he exercised the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession in allegedly advising the plaintiff regarding Agape, or that the alleged breach of this duty did not proximately cause the plaintiff to sustain damages. Accordingly, the Supreme Court should have denied that branch of the defendant's motion which was for summary judgment dismissing the cause of action to recover damages for legal malpractice.

The Supreme Court should have granted those branches of the motion which were for summary judgment dismissing the causes of action to recover damages for fraud and breach of contract as duplicative of the cause of action to recover damages for legal malpractice, because they arose from the same facts as the legal malpractice cause of action, and do not allege distinct damages (*see Palmieri v Biggiani*, 108 AD3d 604, 608 [2013]; *Scartozzi v Potruch*, 72 AD3d at 789).

The parties' remaining contentions are without merit. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

7 KRISTA BRINKLEY, Appellant, v NASSAU HEALTH CARE CORPORATION et al., Respondents. [993 NYS2d 73]—

Hospitals—Malpractice—Gastric Leak—Plaintiff's Failure to Show Defendants Departed from Proper Standard of Care

In an action to recover damages, *inter alia*, for medical malpractice, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Woodard, J.), entered April 9, 2012, as granted that branch of the motion of the defendants Nassau Health Care Corporation, Nassau University Medical Center, Lambros Angus, Sasha Sotirovic, Tariq Kelker, Yuriy Zhurov, and Maria Spizzirri which was for summary judgment dismissing the medical malpractice cause of action insofar as asserted against Nassau University Medical Center, and that branch of the separate motion of the defendant Good Samaritan Hospital Medical Center which was for summary judgment dismissing the medical malpractice cause of action insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

On July 23, 2008, the plaintiff underwent bariatric surgery performed by the defendant physician Lambros Angus at the

defendant Nassau University Medical Center (hereinafter NUMC). She was discharged from NUMC on July 28, 2008. At 11:05 a.m. on the following day, she was brought by ambulance to the emergency room at the defendant Good Samaritan Hospital Medical Center (hereinafter Good Samaritan), complaining of abdominal pain. A CT scan was ordered, and the plaintiff was examined by an attending physician at Good Samaritan. Before the results of the CT scan came back, an attending surgeon recommended that the plaintiff be transferred back to Angus at NUMC. Angus was consulted about a suspected gastric leak. Thereafter, the plaintiff was eventually transferred from Good Samaritan to NUMC after spending approximately eight hours at Good Samaritan.

Once the plaintiff was transferred back to NUMC, a CT scan was performed. The results of the test indicated that an anastomotic leak might be present. Angus informed the plaintiff of these findings, and recommended an exploratory laparotomy. The plaintiff did not want to undergo another surgical procedure unless Angus knew definitively that a leak had occurred in her abdomen. The presence of an anastomotic leak was confirmed when the results of scans of the plaintiff's upper gastrointestinal tract, commonly known as upper GI series, were received on July 30 at 2:05 a.m. Based on the results of the upper GI series, surgery to repair the leak was performed approximately six hours later.

The plaintiff commenced this action against NUMC, Nassau Health Care Corporation, Angus, and physicians Sasha Sotirovic, Tariq Kelker, Yuriy Zhurov, and Maria Spizzirri (hereinafter collectively the NUMC defendants), as well as Good Samaritan, to recover damages for, *inter alia*, medical malpractice. Good Samaritan moved for summary judgment dismissing the complaint insofar as asserted against it, and the NUMC defendants separately moved for summary judgment dismissing the complaint insofar as asserted against them. In an order entered April 9, 2012, the Supreme Court granted both motions in their entirety.

The plaintiff appeals, as limited by her brief, only from so much of the order as awarded summary judgment to NUMC and Good Samaritan dismissing the medical malpractice causes of action insofar as asserted against them.

On a motion for summary judgment dismissing a medical malpractice cause of action, a defendant has the *prima facie* burden of establishing that there was no departure from good and accepted medical practice, or, if there was a departure, the departure was not the proximate cause of the alleged injuries

(see *Fritz v Burman*, 107 AD3d 936, 940 [2013]; *Makinen v Torelli*, 106 AD3d 782, 783-784 [2013]; *Shehebar v Boro Park Obstetrics & Gynecology, PC.*, 106 AD3d 715, 715 [2013]). Once the defendant has made such a showing, the burden shifts to the plaintiff to submit evidentiary facts or materials to rebut the prima facie showing made by the defendant, so as to demonstrate the existence of a triable issue of fact (see *Fritz v Burman*, 107 AD3d at 940; *Lingfei Sun v City of New York*, 99 AD3d 673, 675 [2012]; *Bezerman v Bailine*, 95 AD3d 1153, 1154 [2012]). General allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of such a claim, are insufficient to defeat a summary judgment motion (see *Barrett v Hudson Val. Cardiovascular Assoc., PC.*, 91 AD3d 691, 692 [2012]; *Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563, 565 [2009]).

NUMC established its prima facie entitlement to judgment as a matter of law with respect to the medical malpractice cause of action asserted against it by submitting, inter alia, a detailed expert affirmation, based upon the medical records, which demonstrated that NUMC did not depart from good and accepted medical practice in its treatment of the plaintiff, and that, in any event, any alleged departures were not a proximate cause of the plaintiff's injuries (see *Rivers v Birnbaum*, 102 AD3d 26, 43 [2012]; *Lahara v Auteri*, 97 AD3d 799, 799 [2012]). NUMC's expert, Dr. Thomas Magnuson, a board-certified surgeon, explained that leakage can occur spontaneously, is a known risk of the subject procedure of which the plaintiff was fully aware, and occurs in approximately 1% of patients. He opined that the plaintiff was stable when discharged from NUMC on July 28, 2008, at which time there was no evidence of any leakage from the anastomosis, or any other indication of an intra-abdominal complication, and that she exhibited no signs, symptoms, or complications from the surgery. He also opined that the course of treatment and outcome for the plaintiff would not have been different had she remained at NUMC rather than being discharged on July 28, 2008, the day before the leak occurred on the morning of July 29, 2008. Further, he opined that NUMC promptly diagnosed and treated the leak, that performing surgery without first stabilizing the plaintiff and resuscitating her with fluids and antibiotics would have placed her at an unreasonable risk of complications from surgery, including, but not limited to, death, and that the outcome for the plaintiff would not have been different if the surgery had been performed earlier. He thus concluded that the care and treatment rendered by NUMC and the individual physicians employed by NUMC was in accordance with the accepted standard of medical care,

and was not a proximate cause of any of the plaintiff's alleged injuries (*see Barrett v Hudson Val. Cardiovascular Assoc., P.C.*, 91 AD3d at 692).

In opposition to the prima facie showing made by NUMC, the plaintiff failed to raise a triable issue of fact. The affirmation of the plaintiff's expert, Dr. Peter Wilk, was conclusory and speculative, and failed to address specific assertions made by Dr. Magnuson, including those regarding proximate cause (*see Forrest v Tierney*, 91 AD3d 707, 709 [2012]; *Graziano v Cooling*, 79 AD3d 803, 805 [2010]; *Rebozo v Wilen*, 41 AD3d 457 [2007]).

Good Samaritan established its prima facie entitlement to judgment as a matter of law with respect to the medical malpractice cause of action asserted against it by submitting transcripts of the deposition testimony of the medical personnel who treated the plaintiff, and an affirmation from its own expert witness, Dr. Robert H. Leviton, who is board-certified in emergency medicine and family medicine. The evidence submitted by Good Samaritan demonstrated that the care provided by it to the plaintiff was reasonable and within the accepted standard of care, and that its treatment of the plaintiff did not proximately cause the plaintiff any injury (*see Matos v Schwartz*, 104 AD3d 650, 651-652 [2013]; *Lahara v Auteri*, 97 AD3d at 799). Dr. Leviton's conclusions were supported by the evidence demonstrating that the plaintiff was hemodynamically stable when she was transferred, without incident, from Good Samaritan to NUMC.

In opposition to Good Samaritan's showing, the plaintiff failed to raise a triable issue of fact. Dr. Wilk's opinion that the delay in surgical intervention was caused by the treatment she received at Good Samaritan, and that such delay caused complications, thereby injuring the plaintiff, was conclusory, speculative, and without basis in the record (*see Flanagan v Catskill Regional Med. Ctr.*, 65 AD3d 563, 566 [2009]; *Rebozo v Wilen*, 41 AD3d at 459).

Accordingly, the Supreme Court properly granted that branch of the motion of the NUMC defendants which was for summary judgment dismissing the medical malpractice cause of action insofar as asserted against NUMC and that branch of the separate motion of Good Samaritan which was for summary judgment dismissing the medical malpractice cause of action insofar as asserted against it. Balkin, J.P., Austin, Sgroi and Cohen, JJ., concur. **[Prior Case History: 2012 NY Slip Op 30961(U).]**

8 VIVIAN CRUZ, Appellant, v KEYSpan et al., Defendants, and VERIZON NEW YORK, INC., Respondent. [992 NYS2d 549]—

Negligence—Maintenance of Premises—Trip and Fall—Failure to Show Defendant's Responsibility for Alleged Defective Condition

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Lewis, J.), dated February 7, 2014, which granted the motion of the defendant Verizon New York, Inc., for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed, with costs.

The plaintiff allegedly sustained personal injuries when she tripped and fell over a pothole in the part of a roadway which was near a curb. The plaintiff thereafter commenced this action against, among others, the defendant Verizon New York, Inc. (hereinafter Verizon). Verizon moved for summary judgment dismissing the complaint insofar as asserted against it, contending that it did not create the alleged defect. The Supreme Court granted the motion.

Verizon established, *prima facie*, that it did not perform any work in the area where the accident occurred and that it did not create the alleged defect (*see Walton v City of New York*, 105 AD3d 732 [2013]; *Sand v City of New York*, 83 AD3d 923, 925 [2011]; *Loughlin v City of New York*, 74 AD3d 757, 758 [2010]; *Jones v City of New York*, 45 AD3d 735 [2007]). In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact. The mere fact that a permit had been issued to Verizon to open up the sidewalk was insufficient to raise a triable issue of fact as to whether Verizon performed work in the roadway where the accident occurred and created the alleged defect (*see Garcia v City of New York*, 53 AD3d 644 [2008]; *Rubina v City of New York*, 51 AD3d 761, 762 [2008]; *Cendales v City of New York*, 25 AD3d 579, 580-581 [2006]).

Accordingly, the Supreme Court properly granted Verizon's motion for summary judgment dismissing the complaint insofar as asserted against it. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

9 CHRISTINA M. D'AGOSTINO, Appellant, v YRC, INC., et al., Respondents, et al., Defendants. [992 NYS2d 358]—

Motor Vehicles—Collision—Rear-End Collision

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Orange County (Bartlett, J.), dated July 31, 2012, which denied her motion for summary judgment on the issue of liability.

Ordered that the order is affirmed, with costs.

During the late night hours of October 22, 2010, the plaintiff was driving in the northbound right lane of Interstate 87, near Tuxedo, when her vehicle was involved in a collision with a tractor-trailer. As a result of the collision, the plaintiff's vehicle became disabled and was stopped in the right lane. As the plaintiff sat in her vehicle after the collision, it was struck from behind by a tractor-trailer operated by the defendant Peter J. Timpe, Jr., and owned by the defendant YRC, Inc. (hereinafter YRC), a trucking company. The plaintiff commenced this action against, among others, YRC and Timpe (hereinafter together the YRC defendants). The plaintiff moved for summary judgment on the issue of liability, and the Supreme Court denied the motion.

A rear-end collision with a stopped vehicle establishes a prima facie case of negligence against the driver of the moving vehicle (see *Robayo v Aghaabdul*, 109 AD3d 892 [2013]; *Gleason v Villegas*, 81 AD3d 889, 890 [2011]; *Gross v Marc*, 2 AD3d 681 [2003]; *Filippazzo v Santiago*, 277 AD2d 419, 420 [2000]). A defendant can overcome the presumption of negligence by providing a nonnegligent explanation for the collision (see *Perez v Roberts*, 91 AD3d 620 [2012]; *Leal v Wolff*, 224 AD2d 392 [1996]). However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (*Barile v Lazzarini*, 222 AD2d 635, 636 [1995]). A nonnegligent explanation includes, but is not limited to, "sudden or unavoidable circumstances" (*Gambino v City of New York*, 205 AD2d 583, 583 [1994]).

Here, although the plaintiff established her prima facie entitlement to judgment as a matter of law by demonstrating that YRC's vehicle struck the rear of her vehicle while it was stopped in the right lane (see *Robayo v Aghaabdul*, 109 AD3d at 893), the YRC defendants raised a triable issue of fact as to whether they had a nonnegligent explanation for the collision (see *Rivera v Gardillo*, 113 AD3d 667 [2014]). Accordingly, the Supreme Court correctly denied the plaintiff's motion for summary judgment on the issue of liability. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

10 MARIE DEINZER, Respondent, v MIDDLE COUNTRY PUBLIC LIBRARY et al., Appellants, and BOARD OF EDUCATION OF MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT et al., Respondents. [992 NYS2d 557]—

Negligence—Maintenance of Premises—Failure to Provide Adequate Security to Prevent Assault of Patron

In an action to recover damages for personal injuries, the defendants Middle Country Public Library and Middle Country Central School District #11 appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Garguilo, J.), dated September 17, 2013, as denied their motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs payable to the plaintiff.

On July 20, 2010, the plaintiff allegedly sustained personal injuries when she was assaulted by an assailant as she was walking toward the entrance of the Middle Country Public Library. The plaintiff commenced the instant action against, among others, the defendants Middle Country Public Library and Middle Country Central School District #11 (hereinafter together the appellants) alleging, among other things, that they failed to provide adequate security. The appellants moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. The Supreme Court denied their motion.

A possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 518-519 [1980]; *Bryan v Crobar*, 65 AD3d 997, 999 [2009]). Here, in support of their motion for summary judgment, the appellants failed to meet their prima facie burden of establishing entitlement to judgment as a matter of law by demonstrating that they took reasonable security measures against foreseeable criminal acts of third parties (*see Perez v Real Tuff Piping & Heating, Inc.*, 73 AD3d 882, 883 [2010]; *Gonzalez v Long Is. Univ.-C.W. Post Campus*, 15 AD3d 349 [2005]; *cf. Maheshwari v City of New York*, 2 NY3d 288, 294-295 [2004]; *Bryan v Crobar*, 65 AD3d at 999). Moreover, the appellants cannot satisfy their initial burden merely by pointing to gaps in the plaintiff's case (*see Rallo v Man-Dell Food Stores, Inc.*, 117 AD3d 705 [2014]; *Kempf v Magida*, 116 AD3d 736 [2014]). Since the appellants failed to satisfy their initial burden of establishing their prima facie entitlement to judgment as a matter of law, their motion was properly denied, without regard to the sufficiency of the papers submitted in opposition (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

11 GEORGIA DIMOULAS et al., Appellants, v JAVIER ROCA, M.D., et al., Respondents, et al., Defendants. [993 NYS2d 26]—

Disclosure—Physical Examination—Failure to Show Plaintiff Willfully Refused to Attend Examination—Medical Malpractice—Extension of Time to Conduct Examination
Pleading—Amendment—Modification of Dates and Times of Alleged Medical Malpractice

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from (1) an order of the Supreme Court, Queens County (O'Donoghue, J.), entered January 16, 2013, which granted the motion of the defendants New York Hospital Queens and Sidney Obas to conditionally preclude them from introducing, at trial, evidence of the neurological injuries sustained by the plaintiff Georgia Dimoulas and for the imposition of sanctions against her pursuant to 22 NYCRR 130-1.1 (a) unless she appeared for a neuropsychological examination, as set forth in a so-ordered stipulation dated November 1, 2012, and (2) an order of the same court entered March 11, 2013, which denied their motion, in effect, for the plaintiff Georgia Dimoulas to comply with the so-ordered stipulation by appearing for the neuropsychological examination, and for leave to amend their bill of particulars.

Ordered that the orders are reversed, on the law, on the facts, and in the exercise of discretion, with one bill of costs to the plaintiffs, payable by the respondents appearing separately and filing separate briefs, the motion of the defendants New York Hospital Queens and Sidney Obas to conditionally preclude the plaintiffs from introducing, at trial, evidence of the neurological injuries sustained by the plaintiff Georgia Dimoulas and for the imposition of sanctions against her pursuant to 22 NYCRR 130-1.1 (a) unless she appeared for a neuropsychological examination, as set forth in a so-ordered stipulation dated November 1, 2012, is denied, the plaintiffs' motion, in effect, for an extension of time for the plaintiff Georgia Dimoulas to comply with the so-ordered stipulation by appearing for the neuropsychological examination, and for leave to amend their bill of particulars, is granted, and the plaintiffs' time to schedule the examination of the plaintiff Georgia Dimoulas and to serve an amended bill of particulars is extended until 60 days after service upon the plaintiffs of a copy of this decision and order.

The injured plaintiff, Georgia Dimoulas, appeared on October 8, 2012, with her attorney for a neuropsychological examination that was to be conducted by a physician retained jointly by New York Hospital Medical Center Queens, sued herein as New York Hospital Queens, and the defendant Sidney Obas, a physician's assistant (hereinafter together the hospital defendants). However, the examination was terminated early when the retained physician would not allow the plaintiffs' attorney to

audiotape the examination. While the hospital defendants' subsequent motion to preclude the plaintiffs from offering any evidence of her neurological injuries and for the imposition of sanctions was pending, the parties entered into a so-ordered stipulation dated November 1, 2012, pursuant to which the plaintiff was directed to appear for a second time at an examination no later than January 7, 2013.

In an order dated January 7, 2013, and entered January 16, 2013, the Supreme Court conditionally granted the hospital defendants' motion unless the injured plaintiff appeared for an examination, as set forth in the so-ordered stipulation dated November 1, 2012—that is, on January 7, 2013, the same date as the order. The plaintiffs moved for an extension of time for the injured plaintiff to comply with the so-ordered stipulation by appearing for a neuropsychological examination, and for leave to amend the bill of particulars. In an order entered March 11, 2013, the Supreme Court denied the plaintiffs' motion.

“The Supreme Court has broad discretion in making determinations concerning matters of disclosure, including the nature and degree of the penalty to be imposed under CPLR 3126” (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 209 [2012] [citation omitted]; see *Roug Kang Wang v Chien-Tsang Lin*, 94 AD3d 850 [2012]). However, “before a court invokes the drastic remedy of striking a pleading, or even of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious” (*Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 739 [2012]; see *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d at 210; *Moog v City of New York*, 30 AD3d 490, 490 [2006]). Here, the Supreme Court improvidently exercised its discretion in granting that branch of the hospital defendants' motion which was to conditionally preclude the plaintiffs from introducing evidence of the injured plaintiff's neurological injuries, since there was no clear showing that the injured plaintiff had willfully and contumaciously failed to appear for a neuropsychological examination. Moreover, under the circumstances of this case, it cannot be said that the conduct of the plaintiffs or their attorney warranted the imposition of sanctions.

Furthermore, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was for an extension of time for the injured plaintiff to comply with the stipulation dated November 1, 2012, by appearing for a neuropsychological examination, since the plaintiffs demonstrated a reasonable excuse for the inability of the injured plaintiff to appear for an examination on or before the date

designated in the stipulation, as well as the existence of a potentially meritorious cause of action. However, contrary to the plaintiffs' contentions, they failed to establish the existence of such special and unusual circumstances that would warrant the audiotaping of the examination (*see Cooper v McInnes*, 112 AD3d 1120 [2013]; *Savarese v Yonkers Motors Corp.*, 205 AD2d 463 [1994]).

The plaintiffs sought leave to amend their bill of particulars so as to slightly revise the dates and times during which the hospital defendants and the defendant physician Javier Roca allegedly engaged in conduct that constituted medical malpractice. "Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a bill of particulars should be freely granted unless 'the proposed amendment is palpably insufficient or patently devoid of merit' " (*Rodgers v New York City Tr. Auth.*, 109 AD3d 535, 536 [2013], quoting *Delahaye v Saint Anns School*, 40 AD3d 679, 684-685 [2007]). Where there is an unreasonable delay in seeking leave to amend, without excuse, and the motion for leave to amend is made close to or on the eve of trial, it is an improvident exercise of discretion to grant the relief (*see Navarette v Alexiades*, 50 AD3d 869 [2008]). However, lateness alone is "not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side" (*Worthen-Caldwell v Special Touch Home Care Servs., Inc.*, 78 AD3d 822, 823 [2010]). In this case, the proposed amendment was first sought in September 2011. Since the hospital defendants and Roca were aware of the plaintiffs' allegations well before the eve of trial, they were not prejudiced by the amendment. Under the totality of the circumstances, the Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was for leave to amend the bill of particulars (*see Dickstein v Dogali*, 303 AD2d 443 [2003]). Dillon, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

12 JIMMY GARCIA et al., Respondents, v LENOX HILL FLORIST III, INC., et al., Appellants, et al., Defendants. [993 NYS2d 86]—

Appeal—Dismissal—Termination of Right of Direct Appeal from Order upon Entry of Judgment

Motor Vehicles—Injuries to Pedestrians—Injured Plaintiff Struck in Crosswalk

In an action to recover damages for personal injuries, etc., the defendants Lenox Hill Florist III, Inc., and George Seretis appeal (1), as limited by their brief, from so much of an order of the Supreme Court, Queens County (McDonald, J.), dated September 20, 2013, as granted that branch of the plaintiffs' motion which was for summary judgment on the issue of li-

ability insofar as asserted against them, and (2) from a judgment of the same court entered October 15, 2013, which, upon the order, is in favor of the plaintiffs and against them on the issue of liability.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The appeal from the order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment.

The plaintiff Jimmy Garcia (hereinafter the injured plaintiff) allegedly was injured when he was struck by a vehicle owned by the defendant Lenox Florist III, Inc., and operated by the defendant George Seretis (hereinafter together the Florist defendants). The plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability insofar as asserted against the Florist defendants by presenting proof that the injured plaintiff was walking within an unmarked crosswalk and that he looked for approaching traffic before he began to cross (*see Vehicle and Traffic Law* § 1152 [a]; *Hamilton v King Tung Kong*, 93 AD3d 821 [2012]; *Roman v A1 Limousine, Inc.*, 76 AD3d 552 [2010]; *Rosenblatt v Venizelos*, 49 AD3d 519 [2008]; *Abramov v Miral Corp.*, 24 AD3d 397 [2005]).

In opposition, the Florist defendants failed to raise a triable issue of fact. A transcript of an alleged telephone conversation that a nonparty witness had with the defendants' insurance personnel, which is not authenticated, certified, or sworn, was inadmissible and insufficient to raise a triable issue of fact (*see Moore v 3 Phase Equestrian Ctr., Inc.*, 83 AD3d 677 [2011]; *Dan's Supreme Supermarkets v Redmont Realty Co.*, 261 AD2d 353 [1999]). Additionally, Seretis's unsupported speculation in his affidavit that the injured plaintiff was comparatively negligent was insufficient to raise a triable issue of fact (*see Hamilton v King Tung Kong*, 93 AD3d 821 [2012]; *Sulaiman v Thomas*, 54 AD3d 751 [2008]).

Contrary to the Florist defendants' contention, that branch of the plaintiffs' motion which sought summary judgment on the issue of liability was not premature, since the Florist defendants failed "to offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to

justify opposition to the motion were exclusively within the knowledge and control of the plaintiff[s]’ ” (*Martinez v Kreychmar*, 84 AD3d 1037, 1038 [2011], quoting *Cavitch v Mateo*, 58 AD3d 592, 593 [2009]; see *Rodriguez v Farrell*, 115 AD3d 929 [2014]; *Robinson v Bond St. Levy, LLC*, 115 AD3d 928 [2014]).

Accordingly, the Supreme Court properly granted that branch of the plaintiffs’ motion which was for summary judgment on the issue of liability insofar as asserted against the Florist defendants. Mastro, J.P., Dickerson, Hinds-Radix and Duffy, JJ., concur.

13 FRANCIA GARCIA, Respondent, v LORRAINE STEWART, Respondent, and THOMAS ALFANO, JR., et al., Appellants. [993 NYS2d 90]—

Negligence—Emergency Doctrine—Multiple Automobile Collision

In an action to recover damages for personal injuries, the defendants Thomas Alfano, Jr., and Thomas Alfano, Sr., appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Sher, J.), dated July 25, 2013, as denied that branch of their motion which was for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with one bill of costs, and the appellants’ motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them is granted.

Under the emergency doctrine, “when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context” (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]; see *Koenig v Lee*, 53 AD3d 567 [2008]; *Vitale v Levine*, 44 AD3d 935, 936 [2007]).

Here, the plaintiff’s vehicle was traveling northbound on Rockaway Avenue near its intersection with Fifth Street in the Village of Valley Stream when the defendant Lorraine Stewart, whose vehicle was traveling southbound on Rockaway Avenue, admittedly fell asleep behind the wheel and crossed over the double-yellow line into the northbound lane and into the plaintiff’s vehicle. The uncontroverted evidence demonstrates that as a result of the force of the impact, the plaintiff’s vehicle spun backward toward the vehicle owned by the defendant Thomas Alfano, Sr., and operated by the defendant Thomas

Alfano, Jr. (together hereinafter the Alfano defendants), which, immediately prior to the collision, had been traveling directly behind the plaintiff's vehicle. Despite Thomas Alfano, Jr.'s efforts to avoid the collision by applying his brakes and attempting to veer to the right, his vehicle collided with the rear of the plaintiff's vehicle approximately one to two seconds after the initial impact.

The Alfano defendants made a prima facie showing of their entitlement to judgment as a matter of law by demonstrating that Thomas Alfano, Jr., was faced with an emergency not of his own making, which left him with only seconds to react and virtually no opportunity to avoid a collision (see *Quinones v Altman*, 116 AD3d 686, 686 [2014]; *Parastatidis v Holbrook Rental Ctr., Inc.*, 95 AD3d 975, 976-977 [2012]; *Koenig v Lee*, 53 AD3d at 568).

In opposition, neither the plaintiff nor Stewart raised a triable issue of fact as to whether Thomas Alfano, Jr.'s actions were reasonable and prudent under the circumstances. While the plaintiff contends that Thomas Alfano, Jr.'s proffered testimony and averments are incredible, we note that "[i]t is not the court's function on a motion for summary judgment to assess credibility" (*Silva v FC Beekman Assoc., LLC*, 92 AD3d 754, 756 [2012], quoting *Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]; see *A Dan Jiang v Jin-Liang Liu*, 97 AD3d 707 [2012]). Neither the plaintiff nor Stewart offered any testimony or evidence to contradict Thomas Alfano, Jr.'s consistent account of the accident (see *Rankel v Saccardo*, 100 AD3d 613, 613 [2012]; *Vainer v DiSalvo*, 79 AD3d 1023, 1023 [2010]; cf. *Tringali v Sieber*, 115 AD3d 934 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]). Further, the plaintiff and Stewart offered nothing more than mere speculation and surmise as to how Thomas Alfano, Jr., could have avoided the accident (see *Quinones v Altman*, 116 AD3d at 686; *Kenney v County of Nassau*, 93 AD3d 694, 696 [2012]; *Koenig v Lee*, 53 AD3d at 568).

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Accordingly, the Supreme Court should have granted that branch of the Alfano defendants' motion which was for summary judgment dismissing the complaint and all cross claims insofar as asserted against them. Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

14 GREEN TREE CREDIT, LLC, Formerly Known as CONSECO FINANCE CREDIT CORP., Respondent, v GODFREY JELKS, Individually and as Executor of EVA T. CLARK, Deceased, Appellant, et al., Defendants. [991 NYS2d 903]—

Appeal—Dismissal—Failure to Perfect Prior Appeal

In an action to foreclose a mortgage, the defendant Godfrey Jelks appeals from a judgment of foreclosure and sale of the Supreme Court, Kings County (Schmidt, J.), dated April 1, 2011, which, inter alia, directed the sale of the subject premises.

Ordered that the judgment is affirmed, with costs.

The appellant, Godfrey Jelks, failed to perfect an appeal from an order dated December 23, 2009, which, inter alia, granted the plaintiff's motion for summary judgment on the complaint insofar as asserted against him. As a general rule, we do not consider any issue raised on a subsequent appeal that could have been raised in an earlier appeal which was dismissed for lack of prosecution, although this Court has the inherent jurisdiction to do so (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750 [1999]; *Bray v Cox*, 38 NY2d 350 [1976]; *Madison Realty Capital, L.P. v Broken Angel, LLC*, 107 AD3d 766 [2013]). We decline to exercise our jurisdiction to determine the merits of the present appeal to the extent that it raises issues that could have been raised on the appeal from the prior order that was dismissed for failure to perfect (*see Bray v Cox*, 38 NY2d at 350; *Spiritis v Village of Hempstead Community Dev. Agency*, 63 AD3d 907 [2009]).

The appellant's remaining contention is without merit. Dillon, J.P., Chambers, Hall and Maltese, JJ., concur.

15 GREEN TREE CREDIT, LLC, Formerly Known as CONSECO FINANCE CREDIT CORP., Respondent, v GODFREY JELKS, Individually and as Executor of EVA T. CLARK, Deceased, Appellant, et al., Defendants. [991 NYS2d 902]—

Appeal—Records and Briefs on Appeal—Inadequate Record

In an action to foreclose a mortgage, the defendant Godfrey Jelks appeals from an order of the Supreme Court, Kings County (Schmidt, J.), dated October 24, 2012, which, inter alia, upon denying the plaintiffs' motion for an order directing the foreclosure sale of the subject premises, provided him only until January 7, 2013, to obtain a reverse mortgage with which he could satisfy the mortgage being foreclosed upon.

Ordered that the appeal is dismissed, with costs.

It is the appellant's obligation to assemble a proper record on appeal (*see Keita v United Parcel Serv.*, 65 AD3d 571 [2009]; *Salem v Mott*, 43 AD3d 397 [2007]). Here, the record is inadequate because it does not include all of the relevant papers and documents that were before the Supreme Court. Since the record is inadequate to enable this Court to render an informed de-

cision on the merits, the appeal must be dismissed (*see CitiMortgage, Inc. v Thorpe*, 87 AD3d 1048 [2011]; *Keita v United Parcel Serv.*, 65 AD3d at 572). Dillon, J.P., Chambers, Hall and Maltese, JJ., concur.

16 WAYNE HABERMAN, Appellant, v JACK MEYER et al., Respondents. [993 NYS2d 80]—

Negligence—Maintenance of Premises—Slip and Fall on Ice—Notice of Dangerous Condition
Motions and Orders—Reargument or Renewal—Facts Already Known on Motion to Renew

In an action to recover damages for personal injuries, the plaintiff appeals from (1) an order of the Supreme Court, Queens County (Weiss, J.), dated September 13, 2012, which granted the defendants' motion for summary judgment dismissing the complaint, and (2) an order of the same court dated April 22, 2013, which denied his motion, denominated as one for leave to renew his opposition to the defendants' motion for summary judgment dismissing the complaint, but treated as one for leave to reargue.

Ordered that the orders are affirmed, with one bill of costs.

The plaintiff, a home health aide caring for the defendants' decedent, allegedly sustained serious injuries when he slipped on a patch of black ice in the decedent's carport on his way to dispose of a bag of recyclables.

"A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (*Cuillo v Fairfield Prop. Servs., L.P.*, 112 AD3d 777, 778 [2013]; *see Cruz v Rampersad*, 110 AD3d 669 [2013]; *Olivieri v GM Realty Co., LLC*, 37 AD3d 569 [2007]). To establish their prima facie entitlement to judgment as a matter of law, the defendants were required to establish that they neither created nor had actual or constructive notice of the ice that allegedly caused the plaintiff to fall (*see Sweeney v Doria*, 95 AD3d 1298, 1299 [2012]; *Simon v PABR Assoc., LLC*, 61 AD3d 663, 664 [2009]; *Aurilia v Empire Realty Assoc.*, 58 AD3d 773, 774 [2009]; *Olivieri v GM Realty Co., LLC*, 37 AD3d at 569).

Here, the defendants met their prima facie burden by submitting the deposition testimony of the plaintiff, in which he stated, inter alia, that he had been working for the defendants' decedent at the premises five days a week for three months prior to the accident, from 9:00 or 10:00 a.m. to 4:00 p.m., had taken the same path along the side of the car in the covered

carport to throw out the recyclables at least 10 times during that three-month period, did not notice any ice or snow or accumulation of water in that area of the carport during that period or on the day of the accident, and that he did not see the ice on which he slipped, which he described as being clear, until after he fell. Thus, the defendants demonstrated, *prima facie*, that they neither created nor had actual or constructive notice of the ice that allegedly caused the plaintiff to fall (*see Simon v PABR Assoc., LLC*, 61 AD3d at 664; *see Werny v Roberts Plywood Co.*, 40 AD3d 977 [2007]).

In opposition, the plaintiff failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). The Supreme Court correctly concluded that the affidavit and site plan of the plaintiff's expert failed to establish that any pooling condition allegedly created by the decedent caused the ice to form where the plaintiff slipped and fell.

Contrary to the plaintiff's contention, he was not unfairly prejudiced by the Supreme Court's refusal to consider his improper surreply affirmation (*see CPLR 2214; Graffeo v Paciello*, 46 AD3d 613 [2007]; *Mu Ying Zhu v Zhi Rong Lin*, 1 AD3d 416, 417 [2003]).

While the plaintiff correctly denominated his motion as one for leave to renew, as opposed to leave to reargue, the facts set forth in support of renewal were available to the plaintiff at the time he opposed the defendants' motion for summary judgment, and he failed to demonstrate a reasonable justification for failing to submit such facts on the prior motion (*see CPLR 2221 [e] [2], [3]; Okumus v Living Room Steak House, Inc.*, 112 AD3d 799, 800 [2013]; *Deutsche Bank Natl. Trust Co. v Wilkins*, 97 AD3d 527, 528-529 [2012]; *Sobin v Tylutki*, 59 AD3d 701, 702 [2009]; *Worrell v Parkway Estates, LLC*, 43 AD3d 436, 437 [2007]). Accordingly, the plaintiff's motion for leave to renew his opposition to the defendants' motion for summary judgment dismissing the complaint was properly denied. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

17 FRANCIS R. HONEYMAN et al., Respondents, v CURIOSITY WORKS, INC., et al., Defendants, and NATIONAL UNDERWRITER COMPANY, Appellant. [993 NYS2d 77]—

Parties—Proper Parties—Service on Trade Name Not Amenable to Suit—Lack of Jurisdiction over Real Party

In an action, *inter alia*, to recover damages for personal injuries, the defendant National Underwriter Company appeals from an order of the Supreme Court, Queens County (Greco,

Jr., J.), entered March 6, 2013, which denied its motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against the defendant Summit Business Media, and granted the plaintiffs' cross motion for leave to amend the caption by substituting the names Summit Business Media, LLC, and National Underwriter Company, as successor-in-interest to Summit Business Media, for the defendant Summit Business Media, and for an extension of time to serve the amended summons and complaint upon the defendants Summit Business Media, LLC, and National Underwriter Company.

Ordered that the order is reversed, on the law, with costs, the appellant's motion is granted, and the plaintiff's cross motion is denied.

On February 23, 2009, the plaintiff Francis R. Honeyman (hereinafter the plaintiff) allegedly was injured while working at the Jacob K. Javits Convention Center during an art exhibition conducted by National Underwriter Company, as successor-in-interest to Summit Business Media, LLC (hereinafter the appellant). On February 17, 2012, the plaintiff, and his wife suing derivatively, commenced this action against, among others, "Summit Business Media," by filing a summons and complaint with the Queens County Clerk's Office. On May 3, 2012, the plaintiffs purported to serve "Summit Business Media" by delivering copies of the papers to an agent authorized to accept service on behalf of Summit Business Media Holding Company.

In support of its motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against "Summit Business Media," the appellant's principal averred that Summit Business Media Holding Company, a holding company for a subsidiary holding company which owns the appellant, had forwarded a copy of the complaint to the appellant, and its attorney argued that the plaintiffs had incorrectly commenced this action against the trade name "Summit Business Media." The plaintiffs cross-moved for leave to amend the summons and complaint to correct the caption by substituting the names "Summit Business Media, LLC, and The National Underwriter Company" for the defendant Summit Business Media, and for an extension of time to serve the amended summons and complaint upon the appellant and Summit Business Media, LLC. The Supreme Court denied the motion and granted the cross motion.

The Supreme Court should have granted the appellant's motion pursuant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against "Summit Business Media," as a trade name is not a jural entity amenable to suit (*see Holtzman*

v KTB Athletics SB TM, 113 AD3d 656, 656 [2014]; *Equestrian Assoc. v Freidus*, 192 AD2d 572, 574 [1993]; *Provosty v Lydia E. Hall Hosp.*, 91 AD2d 658 [1982], *affd* 59 NY2d 812 [1983]). In addition, under CPLR 305 (c), “an amendment to correct a misnomer will be permitted ‘if the court has acquired jurisdiction over the intended but misnamed defendant provided that . . . the intended but misnamed defendant was fairly apprised that [it] was the party the action was intended to affect . . . [and] would not be prejudiced’ by allowing the amendment” (*Holster v Ross*, 45 AD3d 640, 642 [2007], quoting *Simpson v Kenston Warehousing Corp.*, 154 AD2d 526, 527 [1989]; see *Sally v Keyspan Energy Corp.*, 106 AD3d 894 [2013]; *Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [1990]). Here, because neither the appellant nor its predecessor-in-interest, Summit Business Media, LLC, were served with process, the Supreme Court lacked personal jurisdiction over them, and lacked the authority to grant leave to amend the summons and complaint (see *Associated Geriatric Info. Network, Inc. v Split Rock Multi-Care Ctr., LLC*, 111 AD3d 861, 862 [2013]; *Henriquez v Inserra Supermarkets, Inc.*, 68 AD3d 927, 928 [2009]; *Smith v Giuffre Hyundai, Ltd.*, 60 AD3d 1040, 1042 [2009]). Further, the plaintiffs failed to establish that the relation-back doctrine applied (see CPLR 203 [b]; *Kinder v Braunius*, 63 AD3d 885 [2009]; *Hirsh v Perlmutter*, 53 AD3d 597 [2008]; *Tricoche v Warner Amex Satellite Entertainment Co.*, 48 AD3d 671 [2008]).

The parties’ remaining contentions either are without merit or need not be reached in light of our determination. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

18 HUDSON CITY SAVINGS BANK, Appellant, v JEAN COHEN et al., Respondents, et al., Defendants. [993 NYS2d 66]—

Mortgages—Foreclosure—Court’s Equitable Power to Vacate Judgment of Foreclosure

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Westchester County (Colabella, J.), entered December 4, 2012, which granted those branches of the motion of the defendants Jean Cohen and Julius Cohen which were, in effect, pursuant to CPLR 5015 (a) to vacate a judgment of foreclosure and sale dated June 1, 2011, upon their failure to appear or answer the complaint, and to set aside the sale of the subject property.

Ordered that the order is affirmed, with costs.

In December 2010, the plaintiff commenced this action to foreclose a mortgage. On June 1, 2011, the Supreme Court issued a judgment of foreclosure and sale upon the failure of the

defendants Jean Cohen and Julius Cohen (hereinafter together the Cohen defendants) to appear or answer the complaint. At the foreclosure sale held in July 2011, the plaintiff was the highest bidder and acquired title to the subject property. In May 2012, the Cohen defendants moved, inter alia, in effect, pursuant to CPLR 5015 (a) to vacate the judgment of foreclosure and sale and to set aside the sale. The Supreme Court, inter alia, granted those branches of their motion, invoking the court's inherent power to vacate a judgment in the interest of substantial justice.

“ ‘A foreclosure action is equitable in nature and triggers the equitable powers of the court’ ” (*Deutsche Bank Natl. Trust Co. v Luden*, 91 AD3d 701, 701 [2012], quoting *Mortgage Elec. Registration Sys., Inc. v Horkan*, 68 AD3d 948, 948 [2009]). “Under CPLR 5015 (a), a court is empowered to vacate a default judgment for several reasons, including excusable neglect; newly-discovered evidence; fraud, misrepresentation or other misconduct by an adverse party; lack of jurisdiction; or upon the reversal, modification or vacatur of a prior order” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

“In addition to the grounds set forth in section 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice” (*id.*; see *Nationscredit Fin. Servs. Corp. v Atherley*, 91 AD3d 922, 922 [2012]; *Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 884, 885 [2011]; *Katz v Marra*, 74 AD3d 888, 891 [2010]). Indeed, the drafters of CPLR 5015 (a) “intended that courts retain and exercise their inherent discretionary power in situations that warranted vacatur but which the drafters could not easily foresee” (*Woodson v Mendon Leasing Corp.*, 100 NY2d at 68).

“The decision as to the setting aside of a default in answering is generally left to the sound discretion of the Supreme Court, the exercise of which will generally not be disturbed if there is support in the record therefor” (*Manigat v Louis*, 262 AD2d 289, 289 [1999]; see *Tobin v Perlmutter*, 288 AD2d 210, 210 [2001]).

Under the unique circumstances of this case, the Supreme Court providently exercised its discretion in vacating the judgment of foreclosure and sale entered on the default of the Cohen defendants “in the interests of substantial justice” (*Nationscredit Fin. Servs. Corp. v Atherley*, 91 AD3d at 922 [internal quotation marks omitted]). The documentary evidence submitted in support of the motion raises issues including, among others, whether the plaintiff had “knowledge of facts that would lead a reasonable, prudent lender to make inquiries of the cir-

cumstances of the transaction at issue” (*LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 600 [2007]; see *Fischer v Sadov Realty Corp.*, 34 AD3d 630, 631 [2006]).

The plaintiff’s remaining contention, that vacatur should have been denied on the ground that the Cohen defendants were seeking the same relief as plaintiffs in a separate plenary action, is without merit (see *James v Shave*, 62 NY2d 712, 714 [1984]; *Egloff v Town of Lewisboro*, 89 AD3d 792, 793 [2011]; *Matter of Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 83 AD3d 1060, 1061 [2011]). Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

19 TIMOTHY EDWARD KLEIN, as Administrator of the Estate of EDWARD T. KLEIN, Deceased, Respondent, v EILEEN T. DOOLEY, Appellant. [992 NYS2d 337]—

Partition—Property Held by Tenants in Common—Credit for Carrying Costs

In an action, inter alia, to partition real property, the defendant appeals from an interlocutory judgment of the Supreme Court, Suffolk County (Pitts, J.), dated October 18, 2012, which, upon an order dated April 26, 2012, granting the plaintiff’s motion to confirm a referee’s report dated October 18, 2011, and denying her cross motion to reject the report, directed the sale of the subject property and distribution of the proceeds of the sale in accordance with the referee’s recommendations.

Ordered that the interlocutory judgment is modified, on the law and the facts, by (1) deleting the provision thereof directing the distribution of proceeds to the plaintiff from the sale of the subject premises in the sum of \$35,897.27, representing the reduction of the principal amount of the mortgage on the premises since the decedent’s death, and (2) adding a provision thereto directing that the defendant is entitled to a credit for one-half of the payments made by her subsequent to the decedent’s death until the sale of the subject premises for maintenance, upkeep, and repair of the premises, including payments made toward the mortgage, insurance, and property taxes; as so modified, the interlocutory judgment is affirmed, with costs to the defendant, the order dated April 26, 2012, is modified accordingly, and the matter is remitted to the Supreme Court, Suffolk County, for further proceedings in accordance herewith.

The Supreme Court erred in granting that branch of the plaintiff’s motion which was to confirm that portion of the referee’s report which recommended that all the amounts paid by the defendant for ordinary repairs, improvements, insurance, taxes, and mortgage interest with respect to the subject prop-

erty while she was the sole occupant of the property were her responsibility alone, and denying that branch of the defendant's cross motion which was to reject that portion of the referee's report. A tenant in common "has the right to take and occupy the whole of the premises and preserve them from waste or injury, so long as he or she does not interfere with the right of [the other tenant] to also occupy the premises" (*Jemzura v Jemzura*, 36 NY2d 496, 503 [1975]). Mere occupancy alone by one of the tenants does not make that tenant liable to the other tenant for use and occupancy absent an agreement to that effect or an ouster (see *Gamman v Silverman*, 98 AD3d 995 [2012]; *Misk v Moss*, 41 AD3d 672 [2007]; *Degliuomini v Degliuomini*, 12 AD3d 634 [2004]). Absent an ouster, tenants-in-common equally bear the costs incurred in maintaining the property (see *Degliuomini v Degliuomini*, 45 AD3d 626 [2007]). Here, the plaintiff failed to establish that the decedent's estate was ousted from the property merely because the plaintiff was unaware of the decedent's interest in the property until almost 12 years after the decedent's death. Accordingly, the defendant, as sole occupant of the property since the decedent's death, was entitled to a credit for one-half of the payments made by her subsequent to the decedent's death for maintenance, upkeep, and repair of the premises, including payments made toward the mortgage, insurance, and property taxes (see *McIntosh v McIntosh*, 58 AD3d 814 [2009]), and we remit the matter to the Supreme Court, Suffolk County, for a determination of the amount of such credit.

The defendant's remaining contentions are without merit. Skelos, J.P., Dickerson, Cohen and Duffy, JJ., concur.

20 GERSH KORSINSKY, Appellant, v GARY H. ROSE, a New York City Marshal, Respondent, et al., Defendants. [993 NYS2d 92]—

Torts—Conversion—City Marshal Taking Possession of Gas Meter under Color of Right

Process—Abuse of Process—City Marshal Taking Possession of Gas Meter under Color of Right

In an action to recover damages for, inter alia, conversion, trespass, abuse of process, and negligence, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Rothenberg, J.), dated November 15, 2012, as granted the motion of the defendant Gary H. Rose pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against him.

Ordered that the order is affirmed insofar as appealed from, with costs.

In considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Nerey v Greenpoint Mtge. Funding, Inc.*, 116 AD3d 1015 [2014]; *Goldberg v Rosenberg*, 116 AD3d 919 [2014]). Where, however, a defendant has submitted evidence in support of a motion to dismiss pursuant to CPLR 3211 (a) (7), and the motion has not been converted into one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, “unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see *Xia-Ping Wang v Diamond Hill Realty, LLC*, 116 AD3d 767 [2014]; *Paino v Kaieyes Realty, LLC*, 115 AD3d 656 [2014]; *Constructamax, Inc. v Dodge Chamberlin Luzine Weber, Assoc. Architects, LLP*, 109 AD3d 574 [2013]). Dismissal pursuant to CPLR 3211 (a) (7) is warranted if the evidentiary proof disproves an essential allegation of the complaint, even if the allegations of the complaint, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914 [2009]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2007]; *McGuire v Sterling Doubleday Enters., L.P.*, 19 AD3d 660 [2005]).

Here, the plaintiff alleged, inter alia, that Rose, a New York City marshal, entered his premises and took possession of a gas meter, and that he did so without the benefit of a properly obtained court order, without notice, and without proper procedure. Rose, in support of his motion pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against him, submitted, inter alia, a copy of an order of seizure issued in an action entitled *Brooklyn Union Gas Co. v Korsinsky*, commenced against the plaintiff in the New York City Civil Court, Kings County, under Index No. 415236/10, pursuant to which the Civil Court directed a City marshal to remove the gas meter at issue.

New York City marshals are government officers, neutral and free of any conflict of interest concerning the removal of collateral (see *Cla-Mil E. Holding Corp. v Medallion Funding Corp.*, 6 NY3d 375, 378-379 [2006]; see also CCA 1601, 1601-a). They

do not owe allegiance to, or take orders from, the creditors whose collateral they recover; rather, they act under the direction of a court (see *Cla-Mil E. Holding Corp. v Medallion Funding Corp.*, 6 NY3d at 378-379). In executing a facially valid order of seizure, a City marshal may rely on the presumption of regularity that attaches to such an order, a presumption that may be overcome by a showing that he or she knowingly or negligently executed an invalid order of seizure or similar warrant (see *Rodriguez v 1414-1422 Ogden Ave. Realty Corp.*, 304 AD2d 400 [2003]; *Mayes v UVI Holdings*, 280 AD2d 153 [2001]; *Iovinella v Sheriff of Schenectady County*, 67 AD2d 1037 [1979]). Moreover, a City marshal may be held liable for damages negligently caused in the course of executing a valid order of seizure (see *Cla-Mil E. Holding Corp. v Medallion Funding Corp.*, 6 NY3d 375 [2006]).

“To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant’s part to plaintiff, breach of the duty and damages” (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]). Accepting the facts as alleged in the amended complaint as true and according the plaintiff the benefit of every possible favorable inference, the evidence submitted by Rose established that Rose did not knowingly or negligently execute an invalid order of seizure, and there is no significant dispute in this regard. Accordingly, the plaintiff does not have a cause of action sounding in negligence against Rose in connection with the execution of the order of seizure (see *Cla-Mil E. Holding Corp. v Medallion Funding Corp.*, 6 NY3d 375 [2006]).

“In order to establish a cause of action to recover damages for conversion, ‘the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question . . . to the exclusion of the plaintiff’s rights’ ” (*Messiah’s Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 [2010], quoting *Independence Discount Corp. v Bressner*, 47 AD2d 756, 757 [1975]; see *State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002]; *Fitzpatrick House III, LLC v Neighborhood Youth & Family Servs.*, 55 AD3d 664 [2008]). Here, the Supreme Court properly directed the dismissal of the cause of action sounding in conversion as against Rose because the order of seizure undisputedly established that Rose did not exercise “unauthorized dominion” over the gas meter at issue.

The essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another

without justification or permission (*see Marone v Kally*, 109 AD3d 880 [2013]; *Volunteer Fire Assn. of Tappan, Inc. v County of Rockland*, 101 AD3d 853 [2012]). Here, the Supreme Court properly directed the dismissal of the cause of action sounding in trespass as against Rose, because the order of seizure undisputedly established that Rose did not enter on the plaintiff's property without justification or permission.

The essential elements of a cause of action sounding in abuse of process are: “(1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective” (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Here, the Supreme Court properly directed the dismissal of the cause of action sounding in abuse of process as against Rose, because the facts as alleged in the amended complaint failed to describe conduct on Rose's behalf constituting the second and third elements of a cause of action to recover damages for abuse of process.

Accordingly, the Supreme Court properly granted Rose's motion pursuant to CPLR 3211 (a) (7) to dismiss the amended complaint insofar as asserted against him. Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

21 SOL LEINER, Respondent, v MICHELLE HAUSER, Defendant, and ESTATE OF NOEL HAUSER et al., Appellants. [992 NYS2d 359]—

Attorney and Client—Malpractice—Failure to Assert Defendants' Negligence Caused Plaintiff Damages

In an action to recover damages for legal malpractice, the defendants Estate of Noel Hauser and Noel Hauser & Associates appeal, as limited by their notice of appeal and a letter dated June 20, 2014, from so much of an order of the Supreme Court, Kings County (Schmidt, J.), dated May 2, 2012, as denied those branches of their motion which were pursuant to CPLR 3211 (a) to dismiss so much of the complaint insofar as asserted against them as was premised upon allegations that they caused an action to be commenced against the plaintiff and a preclusion order to be entered against him in that action, and that they failed to assert the defenses of laches and statute of limitations in the underlying action.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and those branches of the motion of the defendants Estate of Noel Hauser and Noel Hauser & Associates which were pursuant to CPLR 3211 (a) to dismiss so much of the complaint insofar as asserted against them as was

premised upon allegations that they caused an action to be commenced against the plaintiff and a preclusion order to be entered against him in that action, and that they failed to assert the defenses of laches and statute of limitations in the underlying action, are granted.

On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). “ ‘To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney’s breach of the duty proximately caused the plaintiff actual and ascertainable damages’ ” (*Held v Seidenberg*, 87 AD3d 616, 617 [2011], quoting *Dempster v Liotti*, 86 AD3d 169, 176 [2011] [internal quotation marks omitted]). To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages but for the attorney’s negligence (see *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 441 [2007]). “ ‘A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel’ ” (*Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083 [2005], quoting *Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1990]).

Here, the Supreme Court should have granted that branch of the motion of the defendants Estate of Noel Hauser and Noel Hauser & Associates (hereinafter together the appellants) which was pursuant to CPLR 3211 (a) to dismiss so much of the complaint insofar as asserted against them as was premised upon allegations that they caused a preclusion order to be entered against the plaintiff in an underlying action. Viewing the complaint in the light most favorable to the plaintiff, it fails to plead specific factual allegations showing that, but for the appellants’ alleged negligence in causing the preclusion order to be entered, the plaintiff would have obtained a more favorable outcome in the underlying action (see CPLR 3211 [a] [7]; *Benishai v Epstein*, 116 AD3d 726, 728 [2014]; *Keness v Feldman, Kramer & Monaco, P.C.*, 105 AD3d 812, 813 [2013]; *Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d at 1083).

Furthermore, the Supreme Court should have granted that branch of the appellants' motion which was pursuant to CPLR 3211 (a) to dismiss so much of the complaint insofar as asserted against them as was premised upon allegations that they caused an action to be commenced against the plaintiff, and that they failed to assert the defenses of laches and statute of limitations in that action. With respect to these allegations, viewing the complaint in the light most favorable to the plaintiff, it fails to set forth facts sufficient to allege that the appellants' alleged failure to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession proximately caused the plaintiff actual and ascertainable damages (*see* CPLR 3211 [a] [7]; *Held v Seidenberg*, 87 AD3d at 617). Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

22 THOMAS LUKOSE, Appellant, v LONG ISLAND MEDICAL DIAGNOSTIC IMAGING, P.C., Doing Business as ZILKHA RADIOLOGY, et al., Respondents. [993 NYS2d 84]—

**Labor—Termination from Employment—Retaliation by Employer Unfounded—Plaintiff's Failure to Perform Duties
Costs—Counsel Fees—Legal Fees Unfounded in Employee Discharge Action**

In an action to recover damages for unlawful termination of employment in violation of Labor Law § 740, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Spinner, J.), dated August 2, 2012, which granted the defendants' motion for summary judgment dismissing the complaint and on their counterclaim for an award of an attorney's fee pursuant to Labor Law § 740 (6).

Ordered that the order is modified, on the facts and in the exercise of discretion, by deleting the provision thereof granting that branch of the defendants' motion which was for summary judgment on their counterclaim for an award of an attorney's fee pursuant to Labor Law § 740 (6), and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, without costs or disbursements.

The plaintiff was employed by the defendants as a nuclear medical technologist at the defendants' radiology facility. In 2009, the defendants terminated the plaintiff's employment. The plaintiff thereafter commenced this action to recover damages for unlawful termination of employment in violation of Labor Law § 740. He alleged, inter alia, that he was discharged for complaining that he was being pressured to use the CT portion of a PET-CT scanner, despite the fact that he was not licensed to do so, and for complaining about a report, dated over a year before his employment was terminated, indicating his

possible excessive exposure to radiation in the workplace. The defendants moved for summary judgment dismissing the complaint and on their counterclaim for an award of an attorney's fee pursuant to Labor Law § 740 (6). The Supreme Court granted the defendants' motion.

Labor Law § 740 prohibits an employer from taking "any retaliatory personnel action against an employee" who discloses to a supervisor or public body "an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety" (Labor Law § 740 [2] [a]). Labor Law § 740 (4) (c) provides, however, that "[i]t shall be a defense to any action brought pursuant to this section that the personnel action was predicated upon grounds other than the employee's exercise of any rights protected by this section."

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence demonstrating that the termination of the plaintiff's employment was predicated upon his failure to properly perform his duties, including those involving quality control of equipment, rather than his exercise of rights protected by Labor Law § 740. Moreover, the defendants also submitted evidence establishing, as a matter of law, that they did not violate Labor Law § 740 because there was no predicate violation of a law, rule, or regulation which created a substantial and specific danger to the public health or safety (*see Cotrone v Consolidated Edison Co. of N.Y., Inc.*, 50 AD3d 354, 355 [2008]; *Nadkarni v North Shore-Long Is. Jewish Health Sys.*, 21 AD3d 354 [2005]; *Khan v State Univ. of N.Y. Health Science Ctr. at Brooklyn*, 288 AD2d 350 [2001]; *Hughes v Gibson Courier Servs. Corp.*, 218 AD2d 684 [1995]).

In opposition, the plaintiff failed to raise a triable issue of fact as to whether the grounds asserted by the defendants for the termination of his employment were unsupported by the facts or a pretext (*see* Labor Law § 740 [4] [c]; *Hookman v Lenox Hill Hosp.*, 241 AD2d 333 [1997]). Furthermore, the plaintiff failed to raise a triable issue of fact as to the existence of an actual violation of a law, rule, or regulation necessary to sustain a cause of action under Labor Law § 740.

However, the Supreme Court improvidently exercised its discretion in granting that branch of the defendants' motion which was for summary judgment on their counterclaim for an award of an attorney's fee pursuant to Labor Law § 740 (6). The plaintiff's allegations, while ultimately unpersuasive, cannot reasonably be characterized as being "without basis in law

or in fact” (Labor Law § 740 [6]; *see Tomo v Episcopal Health Servs., Inc.*, 85 AD3d 766, 769 [2011]; *cf. Garner v China Natural Gas, Inc.*, 71 AD3d 825, 827 [2010]). Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

23 MAURO LILLING NAPARTY, LLP, Appellant, v DAISY HUANG et al., Respondents, et al., Defendant. [992 NYS2d 354]—

Accounts and Accounting—Account Stated—Responsibility for Legal Fees

In an action, inter alia, to recover damages for breach of contract and on an account stated for legal fees, the plaintiff appeals from so much of an order of the Supreme Court, Nassau County (Bruno, J.), dated November 22, 2013, as denied that branch of its motion which was for summary judgment on the cause of action to recover on an account stated for legal fees against the defendants Daisy Huang and Platinum Star Enterprises, LLC.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the plaintiff’s motion which was for summary judgment on the cause of action to recover on an account stated for legal fees against the defendants Daisy Huang and Platinum Star Enterprises, LLC, is granted.

The plaintiff established its prima facie entitlement to judgment as a matter of law on the cause of action to recover on an account stated for legal fees against the defendants Daisy Huang and Platinum Star Enterprises, LLC (hereinafter together the Huang defendants), by submitting copies of its invoices for professional services setting forth the billable hours expended and identifying the services rendered, and by demonstrating that the Huang defendants received and retained the invoices without objecting to them within a reasonable time, and made partial payment on the invoices (*see Law Offs. of Clifford G. Kleinbaum v Shurkin*, 88 AD3d 659 [2011]; *Pryor & Mandelup, LLP v Sabbeth*, 82 AD3d 731 [2011]; *Gassman & Keidel, P.C. v Adlerstein*, 63 AD3d 784 [2009]). In opposition, the Huang defendants’ unsupported and conclusory allegations were insufficient to raise a triable issue of fact (*see Law Offs. of David J. Sutton, P.C. v NYC Hallways & Lobbies, Inc.*, 105 AD3d 1010 [2013]; *Law Offs. of Clifford G. Kleinbaum v Shurkin*, 88 AD3d at 660; *Thaler & Gertler v Weitzman*, 282 AD2d 522, 523 [2001]). The Huang defendants’ allegations that they were unaware that they would be responsible for the plaintiff’s legal fees, and that they did not receive any bills for the plaintiff’s services, were unsupported by the evidence, which included evidence showing that they made a partial payment of \$15,000 to the plaintiff.

Accordingly, the Supreme Court should have granted that

branch of the plaintiff's motion which was for summary judgment on the cause of action to recover on an account stated for legal fees against the Huang defendants. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

24 ANDREW McDONALD, Appellant, v WINTER BROS. TRANSFER STATION CORP., Respondent. [992 NYS2d 568]—

Workers' Compensation—Existence of Employer-Employee Relationship—Defendant and Plaintiff's Employer Operated as Single Integrated Entity

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Suffolk County (Pitts, J.), dated December 6, 2012, which granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

“The protection against lawsuits by injured workers that is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities that are alter egos of the entity which employs the plaintiff” (*Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 618-619 [2013]; see *Batts v IBEX Constr., LLC*, 112 AD3d 765, 766 [2013]; *Andrade v Brookwood Communities, Inc.*, 97 AD3d 711, 711 [2012]). “A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity” (*Quizhpe v Luvin Constr. Corp.*, 103 AD3d at 619; see *Batts v IBEX Constr., LLC*, 112 AD3d at 766; *Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 595 [2010]).

Here, the defendant established, prima facie, a defense under the Workers' Compensation Law by demonstrating that it and the plaintiff's employer, the nonparty Winter Bros. Waste Systems, Inc., operate as a single integrated entity (see *Quizhpe v Luvin Constr. Corp.*, 103 AD3d at 619; *Coonjeberry v Altone Elec., LLC*, 94 AD3d 1306, 1307-1308 [2012]; *Morato-Rodriguez v Riva Constr. Group, Inc.*, 88 AD3d 549, 549 [2011]; *Anduaga v AHRC NYC New Projects, Inc.*, 57 AD3d 925, 925 [2008]). In opposition, the plaintiff failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Quizhpe v Luvin Constr. Corp.*, 103 AD3d at 619). Accordingly, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint.

In light of the foregoing, we need not reach the defendant's remaining contention. Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

25 RAQUEL McMAHON, Respondent, v MORGAN McMAHON, Appellant. DONALD O’SULLIVAN, Nonparty Respondent. [992 NYS2d 550]—

Husband and Wife and Other Domestic Relationships—Counsel Fees—Exercise of Discretion—Conduct of Defendant During Litigation

In a matrimonial action, the defendant appeals (1) from a money judgment of the Supreme Court, Nassau County (Palmeri, J.), entered April 3, 2013, which, upon an order of the same court dated February 8, 2013, granting the plaintiff’s application for an award of counsel fees, is in favor of the plaintiff’s counsel and against him in the principal sum of \$22,480, (2) from a money judgment of the same court, also entered April 3, 2013, which upon the order, is in favor of the plaintiff and against him in the principal sum of \$22,520, and (3), as limited by his brief, from so much of an order of the same court dated April 16, 2013, as, sua sponte, awarded an additional \$3,500 in counsel fees to the plaintiff for “having had to defend against [the] motion to reargue.”

Ordered that on the Court’s own motion, the notice of appeal from so much of the order as, sua sponte, awarded an additional \$3,500 in counsel fees to the plaintiff is deemed an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the money judgments are affirmed, without costs or disbursements; and it is further,

Ordered that the order is reversed insofar as appealed from, on the law, without costs or disbursements.

Pursuant to Domestic Relations Law § 237 (a), an award of counsel fees is a matter within the sound discretion of the trial court, and the issue “is controlled by the equities and circumstances of each particular case” (*Prichep v Prichep*, 52 AD3d 61, 64 [2008], quoting *Morrissey v Morrissey*, 259 AD2d 472, 473 [1999]; *see Mueller v Mueller*, 113 AD3d 660 [2014]; *Carr-Harris v Carr-Harris*, 98 AD3d 548, 552 [2012]; *see also Timpone v Timpone*, 28 AD3d 646 [2006]). In determining whether to award counsel fees, the court should “review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties’ positions” (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *see Guzzo v Guzzo*, 110 AD3d 765, 766 [2013]; *Matter of Baribault v Sauvola*, 101 AD3d 865, 866 [2012]; *Ciampa v Ciampa*, 47 AD3d 745, 748 [2008]). The court may also consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation

(see *Guzzo v Guzzo*, 110 AD3d at 766; *Khan v Ahmed*, 98 AD3d 471, 473 [2012]; *Prichep v Prichep*, 52 AD3d at 64; *Ciampa v Ciampa*, 47 AD3d at 748).

Here, considering all of the relevant circumstances, the Supreme Court providently exercised its discretion in awarding the principal sums of \$22,480 and \$22,520, respectively, for the plaintiff's counsel fees in the two subject money judgments. In particular, we note that the plaintiff earns considerably less than the defendant, that the plaintiff is not receiving any significant equitable distributive award, and that the defendant's conduct throughout these proceedings, including his failure to abide by a pendente lite order, unnecessarily protracted the litigation (see *Mueller v Mueller*, 113 AD3d at 661; *Guzzo v Guzzo*, 110 AD3d at 765-766; *Carr-Harris v Carr-Harris*, 98 AD3d at 552; *Gallagher v Gallagher*, 93 AD3d 1311, 1314 [2012]; *Peritore v Peritore*, 50 AD3d 874, 875 [2008]; cf. *Griggs v Griggs*, 44 AD3d 710, 714 [2007]). The defendant's remaining contentions regarding the propriety of those counsel fee awards are without merit.

However, the Supreme Court improvidently exercised its discretion in, sua sponte, awarding an additional \$3,500 in counsel fees to the plaintiff for "having had to defend against [the defendant's] motion [for leave] to reargue." The additional counsel fees were awarded without any application by the plaintiff for such relief, and without any supporting documentation or other evidence demonstrating the propriety thereof (see *Horowitz v Horowitz*, 63 AD3d 1001, 1002 [2009]). Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

26 DIANE MONTAGNINO et al., Appellants, v INAMED CORPORATION et al., Defendants, and ALAN R. SHONS, M.D., Respondent. [993 NYS2d 82]—

Physicians and Surgeons—Malpractice—Defendant Not Deviating from Relevant Standard of Care Entitled to Summary Judgment

Torts—Spoliation of Evidence—No Independent Tort for Negligent Spoliation—Medical Malpractice

In an action to recover damages for medical malpractice, etc., the plaintiffs appeal from an order of the Supreme Court, Nassau County (Parga, J.), entered May 11, 2012, which granted the motion of the defendant Alan R. Shons for summary judgment dismissing the complaint insofar as asserted against him, denied their cross motion to strike that defendant's answer or to preclude him from offering any expert evidence on the ground of spoliation of evidence, and declined to search the record and award them summary judgment on their causes of action alleging negligence, medical malpractice, and negligent spoliation of evidence insofar as asserted against that defendant.

Ordered that the order is affirmed, with costs.

The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury (see *Schofield v Edward B. Borden, M.D., P.C.*, 117 AD3d 936 [2014]; *Mancuso v Friscia*, 108 AD3d 748 [2013]; *Faicco v Golub*, 91 AD3d 817, 818 [2012]; *Roca v Perel*, 51 AD3d 757, 758 [2008]; *Furey v Kraft*, 27 AD3d 416, 417 [2006]). Accordingly, a physician moving for summary judgment dismissing a cause of action alleging medical malpractice must establish, prima facie, either that there was no departure or that any departure was not a proximate cause of the plaintiff's injuries (see *Fink v DeAngelis*, 117 AD3d 894 [2014]; *DiGeronimo v Fuchs*, 101 AD3d 933, 936 [2012]; *Gillespie v New York Hosp. Queens*, 96 AD3d 901, 902 [2012]; *Garrett v University Assoc. in Obstetrics & Gynecology, P.C.*, 95 AD3d 823, 825 [2012]; *Faicco v Golub*, 91 AD3d 817 [2012]; *Stukas v Streiter*, 83 AD3d 18, 24 [2011]). Once the defendant physician has established a prima facie entitlement to judgment as a matter of law, the burden then shifts to the plaintiff to demonstrate the existence of a triable issue of fact, but only as to the elements on which the defendant met his or her prima facie burden (see *DiGeronimo v Fuchs*, 101 AD3d at 936; *Savage v Quinn*, 91 AD3d 748, 750 [2012]).

Here, the defendant Alan R. Shons established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony, the injured plaintiff's medical and hospital records, and the affirmation of a medical expert stating that Shons did not deviate from the relevant standard of care in his treatment of the plaintiff. In opposition, the plaintiffs failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

The Supreme Court also properly declined to search the record and award the plaintiffs summary judgment on their causes of action alleging negligence, medical malpractice, and negligent spoliation of evidence. As to the negligence and medical malpractice causes of action, the plaintiffs failed to establish their prima facie entitlement to judgment as a matter of law (see *Catalano v Tanner*, 23 NY3d 976 [2014]; *Valdes v Timberger*, 41 AD3d 836, 837 [2007]). With respect to the cause of action alleging negligent spoliation of evidence, New York does not recognize an independent cause of action for damages for such a tort (see *Ortega v City of New York*, 9 NY3d 69 [2007]; *Vargas v Crown Container Co., Inc.*, 114 AD3d 762 [2014]; *Hillman v Sinha*, 77 AD3d 887 [2010]). As to the applicability of the doctrine of res ipsa loquitur, the Supreme Court correctly deter-

mined that the doctrine was not applicable to this case (*see Bucsko v Gordon*, 118 AD3d 653 [2014]).

The Supreme Court also properly denied the plaintiffs' cross motion to strike Shons' answer or to preclude him from offering any expert evidence on the ground of spoliation of evidence. The Supreme Court correctly found that the plaintiffs failed to sustain their burden of demonstrating that these sanctions were warranted under the circumstances of this case (*see Shay v Mozer, Inc.*, 80 AD3d 687, 688 [2011]; *Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2009]). Skelos, J.P., Hall, Duffy and Barros, JJ., concur. **[Prior Case History: 35 Misc 3d 1229(A), 2012 NY Slip Op 50924(U).]**

27 WAYNE F. MURPHY, Appellant, v PHYLLIS F. MURPHY, Respondent. [992 NYS2d 565]—

Husband and Wife and Other Domestic Relationships—Stipulations—Distribution of Assets of Pension Plan—Validity of Stipulation

In a matrimonial action in which the parties were divorced by judgment entered July 1, 1994, the plaintiff appeals, as limited by his brief, from (1) so much of an order of the Supreme Court, Queens County (McDonald, J.), dated July 17, 2012, as, upon a decision of the same court dated March 5, 2012, in effect, granted that branch of the defendant's motion which was to for leave to enter an amended domestic relations order providing for distribution of the plaintiff's pension in accordance with the parties' stipulation of settlement and, in effect, denied that branch of his cross motion which was for leave to enter an amended domestic relations order providing for the distribution of his pension in accordance with the formula set forth in *Majauskas v Majauskas* (61 NY2d 481 [1984]), (2) so much of an order of the same court entered July 27, 2012, as, upon reargument, adhered to the determinations in the order dated July 17, 2012, and (3) stated portions of an amended domestic relations order of the same court entered August 3, 2012, which, *inter alia*, directed that the defendant's share of his pension was to be calculated using the formula set forth in the parties' stipulation of settlement.

Ordered that the appeal from the order dated July 17, 2012 is dismissed, as that order was superseded by the order entered July 27, 2012, made upon reargument; and it is further,

Ordered that on the Court's own motion, the notice of appeal from the amended domestic relations order is deemed to be an application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the order entered July 27, 2012 and the

amended domestic relations order are affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the defendant.

The parties were divorced pursuant to a judgment dated July 1, 1994, which incorporated but did not merge their stipulation of settlement dated April 18, 1994. In relevant part, the stipulation of settlement provided that the defendant would be entitled to a percentage of the accrued pension benefits that the plaintiff accumulated as an employee of the New York Transit Authority in a pension plan administered by the New York City Employees' Retirement System (hereinafter NYCERS), in an amount to be computed by applying that percentage to "the number of months the parties were married, i.e., November 4, 1972, until the commencement of this action on April 18, 1994, which is 257 months, divided by the number of months [the plaintiff] participated in the plan at the date of his retirement from the plan." After the plaintiff retired, the Supreme Court issued a domestic relations order in September 2010 (hereinafter the 2010 DRO), but it was rejected by the pension plan administrator.

Thereafter, the defendant moved to vacate the 2010 DRO and for the issuance of an amended domestic relations order (hereinafter the amended DRO) providing for distribution of the plaintiff's pension in accordance with the formula set forth in the parties' stipulation of settlement. In addition to seeking the vacatur of the 2010 DRO, the plaintiff cross-moved for the issuance of an amended DRO providing for the distribution of his pension in accordance with the formula set forth in *Majauskas v Majauskas* (61 NY2d 481 [1984]).

A stipulation of settlement that has been incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation (*see Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990]; *Tamburello v Tamburello*, 113 AD3d 752, 753 [2014]; *Ackermann v Ackermann*, 82 AD3d 1020, 1020 [2011]; *Rosenberger v Rosenberger*, 63 AD3d 898, 899 [2009]). "A court may not write into a contract conditions the parties did not insert or, under the guise of construction, add or excise terms, and it may not construe the language in such a way as would distort the apparent meaning" (*Tamburello v Tamburello*, 113 AD3d at 753 [2009], quoting *Ayers v Ayers*, 92 AD3d 623, 624 [2012]). A domestic relations order entered pursuant to a stipulation of settlement "can convey only those rights to which the parties stipulated as a basis for the judgment" (*McCoy v Feinman*, 99 NY2d 295, 304 [2002]).

Here, the Supreme Court properly rejected the plaintiff's contention that the distribution of his pension should be made in accordance with the formula set forth in *Majauskas v Majauskas* (61 NY2d 481 [1984]). In this regard, the stipulation of settlement makes no reference to the *Majauskas* formula, nor can one be implied from its plain terms. Instead, the relevant provision of the stipulation of settlement is clear and unambiguous, as it sets forth the specific formula to be used to determine the defendant's share of the pension. Contrary to the plaintiff's contention, the reference to "any survivor benefits" in the provision of the amended DRO applicable to the payment of arrears did not provide a right to survivor benefits that was not provided for in the stipulation of settlement. Consequently, the Supreme Court properly granted that branch of the defendant's motion which was for leave to enter an amended DRO providing for distribution of the plaintiff's pension in accordance with the parties' stipulation of settlement and, in effect, denied that branch of the plaintiff's cross motion which was for leave to enter an amended DRO providing for the distribution of his pension in accordance with the *Majauskas* formula.

The plaintiff's remaining contention, raised for the first time on appeal, is not properly before this Court (*see Wells Fargo Bank, N.A. v IPA Asset Mgt. III, LLC*, 111 AD3d 820, 822 [2013]; *Buck Realty of Long Is., Inc. v Elliott*, 106 AD3d 768, 768 [2013]).

We decline the defendant's request for the imposition of sanctions, as neither the plaintiff nor his counsel engaged in sanctionable conduct on this appeal (*see* 22 NYCRR 130-1.1 [c]). Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

28 VERONICA NARRO, Respondent, v MMC HOLDING OF BROOKLYN, INC., Defendant, and MAIMONIDES MEDICAL CENTER, Appellant. [992 NYS2d 561]—

Workers' Compensation—Exclusiveness of Remedy—Primary Jurisdiction of Workers' Compensation Board

In an action to recover damages for personal injuries, the defendant Maimonides Medical Center appeals from so much of an order of the Supreme Court, Kings County (Ruchelsman, J.), dated January 2, 2013, as denied its motion for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is reversed insofar as appealed from, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for a new determination of the appellant's motion for summary judgment dismissing the complaint insofar as asserted against it after

final resolution of a prompt application to the Workers' Compensation Board to determine the parties' rights under the Workers' Compensation Law.

The plaintiff was employed by the defendant Maimonides Medical Center (hereinafter Maimonides). The plaintiff allegedly was injured when she fell in a parking garage owned by Maimonides while walking toward the building where her workplace was located to begin her regular shift. The plaintiff did not file for workers' compensation benefits, and commenced this action to recover damages for personal injuries against, among others, Maimonides. Maimonides moved for summary judgment dismissing the complaint insofar as asserted against it solely on the ground that the Workers' Compensation Law provided the exclusive remedy for the damages alleged in the complaint. The Supreme Court denied the motion.

Primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board (hereinafter the Board). Where the issue of the applicability of the Workers' Compensation Law is in dispute, and a plaintiff fails to litigate that issue before the Board, a court should not express an opinion as to the availability of compensation, but should refer the matter to the Board because the Board's disposition of the plaintiff's compensation claim is a jurisdictional predicate to the civil action (*see Liss v Trans Auto Sys.*, 68 NY2d 15, 21 [1986]; *Botwinick v Ogden*, 59 NY2d 909, 911 [1983]; *Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 114 AD3d 905, 906 [2014]; *Monteiro v Rasraj Foods & Catering, Inc.*, 79 AD3d 827 [2010]; *O'Hurley-Pitts v Diocese of Rockville Ctr.*, 57 AD3d 633, 634 [2008]).

Here, there has been no determination by the Board as to whether the plaintiff is entitled to Workers' Compensation benefits for her alleged injuries. As the plaintiff failed to litigate this matter before the Board, the Supreme Court should not have entertained Maimonides's motion, and the matter should have been referred to the Board to decide that issue (*see Gullo v Bellhaven Ctr. for Geriatric & Rehabilitative Care, Inc.*, 114 AD3d at 907; *O'Hurley-Pitts v Diocese of Rockville Ctr.*, 57 AD3d at 634).

In light of our determination, we need not reach Maimonides's remaining contention. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

29 NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, as Assignee of Jose Tacuri, Appellant, v NATIONWIDE MUTUAL INSURANCE COMPANY, Respondent. [992 NYS2d 361]—

Judgments—Default Judgment—Vacatur—Reasonable Excuse—Clerical Oversight

In an action to recover no-fault medical benefits under an insurance contract, the plaintiff appeals from an order of the Supreme Court, Nassau County (Jaeger, J.), dated January 13, 2014, which granted the defendant's motion to vacate a clerk's judgment of the same court entered October 25, 2013, which, upon the defendant's default in appearing or answering the complaint, was in favor of the plaintiff and against the defendant in the principal sum of \$25,621.20, and pursuant to CPLR 3012 (d) to extend its time to appear and to compel the plaintiff to accept its late notice of appearance.

Ordered that the order is affirmed, with costs.

A defendant seeking to vacate a default in answering or appearing must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (*see* CPLR 5015 [a] [1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *Westchester Med. Ctr. v Allstate Ins. Co.*, 80 AD3d 695, 696 [2011]). The determination of what constitutes a reasonable excuse lies within the trial court's discretion (*see Adolph H. Schreiber Hebrew Academy of Rockland, Inc. v Needleman*, 90 AD3d 791, 792 [2011]; *Remote Meter Tech. of NY, Inc. v Aris Realty Corp.*, 83 AD3d 1030, 1032 [2011]).

Here, the defendant established a reasonable excuse through an employee's affidavit, which attested to a clerical oversight regarding the delay in forwarding the summons with notice to its attorney (*see Westchester Med. Ctr. v Allstate Ins. Co.*, 80 AD3d at 696; *Perez v Travco Ins. Co.*, 44 AD3d 738, 739 [2007]; *Sound Shore Med. Ctr. v Lumbermens Mut. Cas. Co.*, 31 AD3d 743 [2006]). Furthermore, the defendant demonstrated a potentially meritorious defense to the action. Accordingly, in light of the foregoing, as well as the public policy favoring the resolution of cases on the merits, the defendant's lack of willfulness, and the absence of any prejudice to the plaintiff, the Supreme Court providently exercised its discretion in granting the defendant's motion to vacate the default judgment, to extend its time to appear, and to compel the plaintiff to accept its late notice of appearance (*see* CPLR 3012 [d]; *NYU-Hospital for Joint Diseases v Praetorian Ins. Co.*, 98 AD3d 1101, 1102 [2012]; *Westchester Med. Ctr. v Allstate Ins. Co.*, 80 AD3d at 697). Rivera, J.P., Hall, Sgroi and Maltese, JJ., concur.

30 TARA N.P., Respondent, v WESTERN SUFFOLK BOARD OF COOPERATIVE EDUCATIONAL SERVICES, Also Known as WESTERN SUFFOLK B.O.C.E.S., Respondent, and COUNTY OF SUFFOLK et al., Appellants, et al., Defendants. [993 NYS2d 98]—

Municipal Corporations—Tort Liability—Special Relationship—Lack of Special Duty to Plaintiff Assaulted by Municipal Worker
Contribution—When Claim for Contribution Available—Lack of Direct Claim No Bar to Contribution

In an action to recover damages for personal injuries, the defendants County of Suffolk, Suffolk County Department of Social Services, and Suffolk County Department of Labor appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Jones, Jr., J.), dated August 3, 2012, as denied those branches of their motion which were for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the appellants' motion which was for summary judgment dismissing the complaint insofar as asserted against them, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with costs to the appellants, payable by the plaintiff.

The defendants North Amityville Community Economic Council, also known as N.A.C.E.C. (hereinafter NACEC), and Western Suffolk Board of Cooperative Educational Services, also known as Western Suffolk B.O.C.E.S. (hereinafter BOCES), had an agreement whereby BOCES would offer educational programs at NACEC's facility. NACEC leased its facility from Suffolk County in return for NACEC offering vocational training to members of the community. NACEC also agreed to be a work site for the Suffolk Works Employment Program, or "SWEP," a "welfare to work" program administered by the defendant Suffolk County Department of Labor (hereinafter the Department of Labor). The Department of Labor would refer a potential worker to NACEC for an interview and determination of whether to accept the candidate for SWEP participation at NACEC's work site. Under the terms of the agreement, NACEC would not accept any candidate who had a criminal record. The executive director of NACEC testified at her deposition that she interviewed candidates referred by the Department of Labor, and that she did not ask any candidate whether he or she had a criminal background because it was the executive director's understanding that the Department of Labor had been aware that NACEC would not accept any candidate with a criminal background.

The defendant Larry I. Smith was referred to NACEC despite his designation as a level three sex offender. NACEC's executive director testified that the Department of Labor did not inform

anyone at NACEC, including herself, of Smith's criminal record. She interviewed Smith and accepted him as a maintenance worker. While working at NACEC's facility, Smith sexually assaulted the plaintiff, who, at the time, was on the premises to attend a GED course offered by BOCES.

The plaintiff commenced this action to recover damages for personal injuries against, among others, the County, the Suffolk County Department of Social Services, and the Department of Labor (hereinafter collectively the appellants), Smith, NACEC, and BOCES. The appellants moved, inter alia, for summary judgment dismissing the complaint and all cross claims insofar as asserted against them, and the Supreme Court denied those branches of their motion.

The Supreme Court should have granted that branch of the appellants' motion which was for summary judgment dismissing the complaint insofar as asserted against them. "Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (*McLean v City of New York*, 12 NY3d 194, 203 [2009]). A special duty is "a duty to exercise reasonable care toward the plaintiff," and is "born of a special relationship between the plaintiff and the governmental entity" (*id.* at 199 [internal quotation marks omitted]; see *Pelaez v Seide*, 2 NY3d 186, 198-199 [2004]). This special relationship "can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Pelaez v Seide*, 2 NY3d at 199-200; see *McLean v City of New York*, 12 NY3d at 199).

The second category, voluntary assumption of a duty, requires a showing of four elements: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; see *McLean v City of New York*, 12 NY3d at 201).

Here, the appellants established, prima facie, their entitlement to judgment as a matter of law dismissing the complaint

insofar as asserted against them on the ground of governmental immunity by demonstrating that they did not voluntarily assume a special duty to the plaintiff (see *McLean v City of New York*, 12 NY3d at 201; *Pelaez v Seide*, 2 NY3d at 199-200; *Lauer v City of New York*, 95 NY2d 95, 100-101 [2000]; *Cuffy v City of New York*, 69 NY2d at 260; see also *Miller v State of New York*, 62 NY2d 506, 513 [1984]; *Nouel v 325 Wadsworth Realty LLC*, 112 AD3d 493, 494 [2013]). Furthermore, the plaintiff does not allege that the appellants violated any statutory duty, and the appellants established that they did not assume positive direction and control in the face of a known, blatant, and dangerous safety violation (see *Pelaez v Seide*, 2 NY3d at 199-200). The opposition papers failed to raise a triable issue of fact. Accordingly, the Supreme Court should have granted that branch of the appellants' motion which was for summary judgment dismissing the complaint insofar as asserted against them.

However, the Supreme Court properly denied that branch of the appellants' motion which was for summary judgment dismissing all cross claims insofar as asserted against them. "[A] defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule. A contribution claim can be made even when the contributor has no duty to the injured plaintiff. In such situations, a claim of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable" (*Raquet v Braun*, 90 NY2d 177, 182 [1997] [citations omitted]). Here, the appellants agreed not to refer anyone to NACEC who had a criminal background. Nonetheless, Smith, who was a level three sex offender, was referred to NACEC by the appellants. Under these circumstances, there is a triable issue of fact as to whether the appellants breached a duty of care to NACEC and, therefore, that branch of the appellants' motion which was for summary judgment dismissing all cross claims insofar as asserted against them was properly denied.

In light of the foregoing, we need not reach the parties' remaining contentions. Dillon, J.P., Hall, Miller and Hinds-Radix, JJ., concur.

31 STEVEN PATSIS, Respondent, v ROBERTO NICOLIA, Appellant. [992 NYS2d 349]—

Contracts—Breach or Performance of Contract—Failure to Pay Purchase Price for Restaurant

In an action, inter alia, to recover damages for breach of

contract, the defendant appeals from a judgment of the Supreme Court, Suffolk County (Pines, J.), entered March 25, 2013, which, upon an order of the same court dated August 21, 2012, granting the plaintiff's motion for summary judgment in his favor on the third and fifth causes of action and denying his cross motion for summary judgment dismissing the second, third, and fifth causes of action, and upon a so-ordered stipulation between the parties dated December 12, 2012, measuring damages in the principal sum of \$210,000, is in favor of the plaintiff and against him in the principal sum of \$210,000.

Ordered that the judgment is affirmed, with costs.

The parties entered into an agreement whereby the plaintiff assigned to the defendant his 50% interest in an entity known as Gatsby Dining, LLC (hereinafter Gatsby, LLC), which owned a restaurant known as the Gatsby (hereinafter the restaurant). Pursuant to paragraph 1 (a) of the assignment document, the defendant was obligated to pay the plaintiff the balance of the purchase price for his 50% interest in Gatsby, LLC, from the gross profits of the restaurant. However, pursuant to paragraph 1 (c), the defendant's obligation to pay the entire remaining balance of the purchase price was triggered if he sold, transferred, or conveyed his interest in Gatsby, LLC. It is undisputed that the defendant never paid off the purchase price. Following a failed attempt to sell the restaurant to a third party, the defendant sold all of Gatsby, LLC's assets. The plaintiff commenced this action against the defendant claiming, inter alia, that the defendant's sale of all of Gatsby, LLC's assets was effectively a sale of Gatsby, LLC, and hence, the defendant's interest therein, thereby triggering the defendant's obligation pursuant to paragraph 1 (c) to pay the remaining balance of \$210,000.

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see Westchester County Corr. Officers Benevolent Assn., Inc. v County of Westchester*, 99 AD3d 998, 999 [2012]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see id.*). Furthermore, interpretation of an unambiguous contract provision is a function for the court (*see id.*). When interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized (*see G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37, 40 [2012]).

The plaintiff met his prima facie burden of demonstrating that his interpretation of the unambiguous terms of paragraph 1 (c) of the assignment—that the defendant’s payment obligation thereunder was triggered by his sale of all of Gatsby, LLC’s assets—was the only reasonable interpretation (see *Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade*, 98 AD3d 403 [2012], *affd* 20 NY3d 1082 [2013]). In opposition, the defendant failed to raise a triable issue of fact. The defendant’s interpretation of paragraph 1 (c), that selling all of Gatsby’s, LLC’s, assets was neither a sale, transfer, or conveyance of his interest therein, improperly renders its terms meaningless under the circumstances of this case (see *Cortesi v R & D Constr. Corp.*, 137 AD2d 901 [1988], *mod* 73 NY2d 836 [1988]). Moreover, the Supreme Court properly determined that the defendant’s affidavit in opposition directly contradicted his earlier deposition testimony and raised feigned issues of fact to avoid the consequences of his earlier testimony and, thus, was insufficient to defeat summary judgment (see *Kudisch v Grumpy Jack’s, Inc.*, 112 AD3d 788 [2013]).

Accordingly, the Supreme Court correctly granted the plaintiff’s motion for summary judgment on the third and fifth causes of action, and correctly denied the defendant’s cross motion for summary judgment dismissing the second, third, and fifth causes of action. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

32 SANDRA PETERSON, Appellant, v CITY OF NEW YORK et al., Respondents. [993 NYS2d 88]—

Civil Rights—Discrimination in Employment—Predisposing Genetic Characteristic

In an action to recover damages for employment discrimination in violation of Executive Law § 296 and Administrative Code of the City of New York § 8-107, the plaintiff appeals from (1) an order of the Supreme Court, Queens County (Kerrigan, J.), dated August 7, 2012, which granted the defendants’ motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint and, in effect, denied her application for leave to amend the complaint, and (2) an order of the same court dated September 26, 2012, which denied her motion for leave to renew and reargue her opposition to the defendants’ motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint and for leave to amend the complaint.

Ordered that the appeal from so much of the order dated August 7, 2012, as, in effect, denied the plaintiff’s application for leave to amend the complaint is dismissed, as no appeal lies

as of right from an order that does not decide a motion made on notice (*see* CPLR 5701 [a] [2]), and leave to appeal has not been granted (*see* CPLR 5701 [c]); and it is further,

Ordered that the appeal from so much of the order dated September 26, 2012, as denied that branch of the plaintiff's motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument; and it is further,

Ordered that the orders are affirmed insofar as reviewed; and it is further,

Ordered that one bill of costs is awarded to the defendants.

"In considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the allegations in the complaint should be accepted as true, and the motion should be granted only if the facts as alleged do not fit within any cognizable legal theory" (*Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.*, 117 AD3d 1005, 1006 [2014]). Here, the Supreme Court correctly determined that the complaint failed to state a cause of action to recover damages for employment discrimination in violation of the New York State Human Rights Law (*see* Executive Law § 296) and the New York City Human Rights Law (*see* Administrative Code of City of NY § 8-107). Contrary to the plaintiff's contention, the complaint did not sufficiently plead a cause of action to recover damages for discrimination based upon a predisposing genetic characteristic in violation of the New York State Human Rights Law. Further, the New York City Human Rights Law does not proscribe discrimination based upon a predisposing genetic characteristic (*see* Administrative Code § 8-107 [1] [a]).

Moreover, the Supreme Court properly denied that branch of the plaintiff's motion which was for leave to renew her opposition to the defendants' motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint. The plaintiff did not proffer any new facts in support of that branch of her motion, but merely reiterated the same facts and arguments that she asserted in her original opposition papers (*see* CPLR 2221 [e] [2], [3]).

In addition, the Supreme Court properly denied that branch of the plaintiff's motion which was for leave to amend the complaint. The plaintiff's proposed amendments were palpably insufficient, as a matter of law, to have warranted a grant of leave to amend (*see* CPLR 3025 [b]).

The plaintiff's remaining contention is without merit. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur. **[Prior Case History: 36 Misc 3d 1225(A), 2012 NY Slip Op 51472(U).]**

33 PHH MORTGAGE CORPORATION, Appellant, v ANDREW S. ISRAEL, Also Known as ANDREW ISRAEL, et al., Defendants, and

ALISA B. ISRAEL, Also Known as ALISA ISRAEL, Respondent. [992 NYS2d 355]—

Mortgages—Foreclosure—Standing of Holder of Subject Note

In an action to foreclose a mortgage, the plaintiff appeals from an amended judgment of the Supreme Court, Suffolk County (Rebolini, J.), dated January 22, 2013, which, upon an order of the same court dated February 6, 2012, granting that branch of the motion of the defendant Alisa B. Israel, also known as Alisa Israel, which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint for lack of standing, dismissed the complaint.

Ordered that the amended judgment is reversed, on the law, with costs, that branch of the motion of the defendant Alisa B. Israel, also known as Alisa Israel, which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint for lack of standing is denied, the order is modified accordingly, and the complaint is reinstated.

PHH Mortgage Corporation established that it was the holder of the subject mortgage note when it commenced this action, and thus, made a showing sufficient to warrant denial of that branch of the motion of the defendant Alisa B. Israel, also known as Alisa Israel (hereinafter the respondent) which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint based on the plaintiff's alleged lack of standing (*see* CPLR 3211 [a] [3]). “ ‘[T]he physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident’ ” (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 281 [2011] [internal quotation marks omitted], quoting *US Bank N.A. v Madero*, 80 AD3d 751, 753 [2011]; *see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2009]; *LaSalle Bank Natl. Assn. v Ahearn*, 59 AD3d 911, 912 [2009]; *see also Deutsche Bank Trust Co. Ams. v Codio*, 94 AD3d 1040 [2012]).

The respondent's contention that the plaintiff failed to comply with the notice provisions of RPAPL 1303 and 1304 is without merit. The plaintiff provided proof that it had complied with the requirements of those provisions, and the respondent did not refute that proof (*see U.S. Bank N.A. v Tate*, 102 AD3d 859 [2013]; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2011]).

Accordingly, the Supreme Court should have denied that branch of the respondent's motion which was pursuant to CPLR 3211 (a) (3) to dismiss the complaint.

In light of our determination, we need not address the par-

ties' remaining contentions. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

34 MARIA CLARA RODRIGUEZ, Respondent, v COUNTY OF WESTCHESTER et al., Defendants, and BETTER HOMES & GARDENS RAND REALTY, Appellant. (And Third-Party Actions.) [993 NYS2d 52]—

Negligence—Maintenance of Premises—Slip and Fall on Snowy Sidewalk—Maintenance Contract

In an action to recover damages for personal injuries, the defendant Better Homes & Gardens Rand Realty appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (Walker, J.), dated December 17, 2012, as denied that branch of its motion which was for summary judgment dismissing the complaint insofar as asserted against it.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff allegedly was injured when she fell while walking on a sidewalk near her home on the day after a snowfall. The portion of the sidewalk on which the plaintiff fell had not been shoveled or treated with sand or salt and was located in front of property owned by the defendant Fannie Mae (hereinafter Fannie Mae). The defendant Better Homes & Gardens Rand Realty (hereinafter Better Homes) was retained as the listing broker for the property. Pursuant to an assignment agreement, Better Homes was required to notify nonparty contractor Safeguard when snow removal was needed at the property.

The Supreme Court did not err in denying that branch of Better Homes's motion which was for summary judgment dismissing the complaint insofar as asserted against it. Its motion for summary judgment was premature, as depositions were not yet complete (*see Wesolowski v St. Francis Hosp.*, 108 AD3d 525, 526-527 [2013]; *Juseinoski v New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637-638 [2006]).

In any event, although Better Homes made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that the plaintiff was not a party to the assignment agreement between the defendant Fannie Mae and Better Homes, and therefore, Better Homes, the listing broker, owed no duty of care to her (*see Javid v Sclafmore Constr.*, 117 AD3d 907 [2014]; *Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 811 [2013]; *Knox v Sodexho Am., LLC*, 93 AD3d 642, 643 [2012]), in opposition, the plaintiff raised a triable issue of fact as to whether the assignment agreement constituted a

comprehensive and exclusive maintenance obligation that entirely displaced Fannie Mae's duty to maintain the premises in a safe condition (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141 [2002]; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]). Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

35 SHEILA SMITH, Appellant, v JESADAN MEAT CORP., Doing Business as ASSOCIATED SUPERMARKET, et al., Respondents. [991 NYS2d 805]—

Negligence—Maintenance of Premises—Slip and Fall in Supermarket—Plaintiff Unable to Identify Cause of Fall

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Kings County (Vaughan, J.), dated November 28, 2012, which granted the separate motions of the defendants Jesadan Meat Corp., doing business as Associated Supermarket, and Nostrand Associates, also known as Nostrand Assoc. Jed Issacs, Ptr., for summary judgment dismissing the complaint insofar as asserted against each of them.

Ordered that the order is affirmed, with one bill of costs.

“In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation” (*Patrick v Costco Wholesale Corp.*, 77 AD3d 810, 810 [2010]; see *McFadden v 726 Liberty Corp.*, 89 AD3d 1067, 1068 [2011]; *Alabre v Kings Flatland Car Care Ctr., Inc.*, 84 AD3d 1286, 1287 [2011]). Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff was unable to identify the cause of her fall (see *Patrick v Costco Wholesale Corp.*, 77 AD3d at 811). In opposition, the plaintiff failed to raise a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 562-564 [1980]). Accordingly, the Supreme Court correctly granted the defendants' separate motions for summary judgment dismissing the complaint insofar as asserted against each of them.

The plaintiff's remaining contention is not properly before this Court. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

36 SOUTHSTAR III, LLC, Respondent, v CAROL ENTTIENNE, Also Known as CAROL ENTIENNE, et al., Appellants, et al., Defendants. [992 NYS2d 548]—

Mortgages—Foreclosure—Default by Debtors Waived Defense of Lack of

Standing

In an action to foreclose a mortgage, the defendants Carol Enttienne and Nicholas Pile appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Saitta, J.), dated March 6, 2013, as denied their motion pursuant to CPLR 3211 (a) (2) to dismiss the complaint insofar as asserted against them on the ground that the plaintiff lacked standing to commence the action.

Ordered that the order is affirmed insofar as appealed from, with costs.

In April 2008, the plaintiff commenced this action to foreclose a mortgage. The defendants Carol Enttienne and Nicholas Pile (hereinafter together the defendants) failed to timely appear or answer the complaint (*see* CPLR 320 [a]). In April 2011, the defendants moved to dismiss the complaint insofar as asserted against them on the ground that the plaintiff lacked standing to commence the action. In the order appealed from, the Supreme Court, among other things, denied the defendants' motion.

Since the defendants did not answer the complaint and did not make a pre-answer motion to dismiss the complaint, they waived the defense of lack of standing (*see Bank of N.Y. v Cepeda*, 120 AD3d 451 [2d Dept 2014]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821 [2014]; *Freedom Mtge. Corp. v Toro*, 113 AD3d 815 [2014]). Prior to making their instant motion to dismiss the complaint on the ground that the plaintiff lacked standing, the defendants did not seek an extension of time to answer or appear in this action (*see* CPLR 3012 [d]), or request an extension of time within which to serve and file a pre-answer motion pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against them. Further, they did not attempt to show good cause for their delay, or even address the timeliness of their motion (*see* CPLR 2004).

The defendants' remaining contentions are without merit.

Accordingly, the Supreme Court properly denied the defendants' motion to dismiss the complaint insofar as asserted against them on the ground that the plaintiff lacked standing to commence the action (*cf. U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694-695 [2012]; *Holubar v Holubar*, 89 AD3d 802 [2011]; *McGee v Dunn*, 75 AD3d 624 [2010]). Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

37 SALIM TALAMAS, Appellant, v METROPOLITAN TRANSPORTATION AUTHORITY et al., Respondents. [993 NYS2d 102]—

Negligence—Maintenance of Premises—Slip and Fall on Black Ice as Storm in Progress

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Strauss, J.), entered January 31, 2013, which granted the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff allegedly sustained personal injuries when he slipped and fell on black ice on an elevated train platform that was exposed to the elements. The plaintiff commenced this action against the defendants. The defendants moved for summary judgment dismissing the complaint, contending that they could not be held liable for the plaintiff's injuries since a storm was in progress at the time of the accident, and their efforts to keep the station platform free from snow and ice during an ongoing storm did not create or exacerbate the natural hazard presented by the storm. The Supreme Court granted the motion.

A defendant moving for summary judgment in an action predicated upon the presence of snow or ice has the burden of establishing, *prima facie*, that it neither created the snow and ice condition that allegedly caused the plaintiff to fall nor had actual or constructive notice of that condition (*see Huan Nu Lu v New York City Tr. Auth.*, 113 AD3d 818 [2014]; *McBryant v Pisa Holding Corp.*, 110 AD3d 1034 [2013]). "Under the 'storm in progress' rule, a property owner will not be held responsible for accidents caused by snow or ice that accumulates on its premises during a storm 'until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm' " (*Popovits v New York City Hous. Auth.*, 115 AD3d 657, 658 [2014], quoting *Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 AD3d 524, 524 [2012]; *see Solazzo v New York City Tr. Auth.*, 6 NY3d 734 [2005]; *Wei Wen Xie v Ye Jiang Yong*, 111 AD3d 617, 618 [2013]; *Marchese v Skenderi*, 51 AD3d 642 [2008]). "However, once a property owner elects to engage in snow removal activities, the owner must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm" (*Wei Wen Xie v Ye Jiang Yong*, 111 AD3d at 618; *see Cotter v Brookhaven Mem. Hosp. Med. Ctr., Inc.*, 97 AD3d 524 [2012]; *Kantor v Leisure Glen Homeowners Assn., Inc.*, 95 AD3d 1177 [2012]).

Here, the evidence submitted by the defendants in support of their motion for summary judgment, including certified climatological data and transcripts of the deposition testimony of the parties, demonstrated, *prima facie*, that a storm was in

progress at the time of the accident (see *Meyers v Big Six Towers, Inc.*, 85 AD3d 877 [2011]; *Skouras v New York City Tr. Auth.*, 48 AD3d 547 [2008]; *DeStefano v City of New York*, 41 AD3d 528 [2007]). Furthermore, the defendants established, prima facie, that their efforts to remove snow and ice from the platform did not create a hazardous condition or exacerbate the natural hazard created by the storm (see *Wei Wen Xie v Ye Jiang Yong*, 111 AD3d at 617; *McCurdy v KYMA Holdings, LLC*, 109 AD3d 799 [2013]; *Kaplan v DePetro*, 51 AD3d 730 [2008]). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's contention that he slipped and fell on old ice that was the product of a prior storm is speculative (see *Smith v Christ's First Presbyt. Church of Hempstead*, 93 AD3d 839 [2012]; *DeVito v Harrison House Assoc.*, 41 AD3d 420 [2007]; *Small v Coney Is. Site 4A-1 Houses, Inc.*, 28 AD3d 741 [2006]).

On appeal, the plaintiff contends that the transcripts of the hearing conducted pursuant to Public Authorities Law § 1276 (4) and the transcript of her deposition testimony, as well as the transcript of the deposition of the defendants' witness, are not in admissible form, and that, accordingly, the Supreme Court should not have considered them in connection with the defendants' motion for summary judgment. This contention, improperly raised for the first time on appeal, is not properly before this Court (see *Perez v City of New York*, 104 AD3d 661 [2013]; *Marinkovic v IPC Intl. of Ill.*, 95 AD3d 839 [2012]).

Accordingly, the Supreme Court properly granted the defendants' motion for summary judgment dismissing the complaint. Mastro, J.P., Dillon, Miller and Maltese, JJ., concur.

38 OLEG TREILE, Appellant, v BROOKLYN TILLARY, LLC, et al., Respondents, et al., Defendants. [992 NYS2d 345]—

Labor—Safe Place to Work—Fall from Truck while Unloading Heavy Materials—Failure to Provide Safety Device—Direction and Control of Plaintiff's Work

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, (1) from so much of an order of the Supreme Court, Kings County (Ruchelsman, J.), dated June 28, 2012, as granted those branches of the cross motion of the defendants Brooklyn Tillary, LLC, and Leviathan Construction Management Services, LLC, which were for summary judgment dismissing the causes of action alleging common-law negligence and violations of Labor Law §§ 200 and 240 (1), and violations of Labor Law § 241 (6) insofar as predicated on alleged violations of 12 NYCRR 23-1.32, 23-6.2 (c) and (d); 23-6.1 (j) (1); 23-2.1 (a) (2) and 23-8.2 (c) (3) insofar as asserted

against them, and denied those branches of his separate cross motion which were for summary judgment on the issue of liability on the causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6) insofar as asserted against the defendants Brooklyn Tillary, LLC, and Leviathan Construction Management Services, LLC, and (2) from so much of an order of the same court dated October 12, 2012 as denied his cross motion for leave to reargue.

Ordered that the appeal from so much of the order dated October 12, 2012, as denied the plaintiff's cross motion for leave to reargue is dismissed, without costs or disbursements, as no appeal lies from an order denying leave to reargue; and it is further,

Ordered that the order dated June 28, 2012, is modified, on the law, (1) by deleting the provisions thereof granting those branches of the cross motion of the defendants Brooklyn Tillary, LLC, and Leviathan Construction Management Services, LLC, which were for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240 (1) insofar as asserted against them and the cause of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against the defendant Leviathan Construction Management Services, LLC, and substituting therefor a provision denying those branches of the cross motion, and (2) by deleting the provision thereof denying the branch of the plaintiff's cross motion which was for summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action insofar as asserted against the defendants Brooklyn Tillary, LLC, and Leviathan Construction Management Services, LLC, and substituting therefor a provision granting that branch of the plaintiff's cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff alleges that he was injured while he and his coworkers were unloading a bundle of steel reinforcing bars, commonly known as rebar, from a flatbed truck in the course of his employment on a construction project managed by the defendant Leviathan Construction Management Services, LLC (hereinafter Leviathan), at a work site owned by the defendant Brooklyn Tillary, LLC (hereinafter Tillary). Following the issuance of a partial "stop work" order by the New York City Department of Buildings earlier on the day of the accident due to "HOISTING IN [AN] UNSAFE MANNER USING SLICED NYLON STRAPS," the plaintiff and his coworkers were prevented from using a crane to lift the bundles, which allegedly weighed approximately 8,000 to 10,000 pounds each, and

measured approximately 40 feet in length. Instead, the workers began using crow bars to roll the bundles of rebar off of the wooden “four-by-four” planks on which they were resting on the bed of the truck, which was four or five feet above the ground. As one of the bundles began to fall from the truck, the shift in weight allegedly caused one of the wooden planks to catapult the plaintiff approximately 15 feet in the air from the bed of the truck, where he had been standing on that plank. The plaintiff allegedly fell 19 to 20 feet to the ground, and was immediately thereafter struck by the same four-by-four plank when it fell onto his back.

The plaintiff commenced this action against Tillary and Leviathan (hereinafter together the Tillary respondents), among others, to recover damages for violations of Labor Law §§ 240 (1); 241 (6) and 200, and common-law negligence. The Tillary respondents cross-moved for summary judgment dismissing the complaint insofar as asserted against them, and the plaintiff separately cross-moved for summary judgment on the issue of liability on his causes of action alleging violations of Labor Law §§ 240 (1) and 241 (6). In an order dated June 28, 2012, the Supreme Court granted those branches of the Tillary respondents’ cross motion which were for summary judgment dismissing the causes of action alleging common-law negligence and violations of Labor Law §§ 200 and 240 (1) and for violations of Labor Law § 241 (6) insofar as predicated on alleged violations of 12 NYCRR 23-1.32, 23-6.2 (c) and (d); 23-6.1 (j) (1); 23-2.1 (a) (2) and 23-8.2 (c) (3) insofar as asserted against them, and denied the plaintiff’s cross motion.

“Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person” (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). “The relevant inquiry—one which may be answered in the affirmative even in situations where the object does not fall on the worker—is rather whether the harm flows directly from the application of the force of gravity to the object” (*Runner v New York Stock Exch., Inc.*, 13 NY3d at 604; see *Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 10 [2011]).

The launch of the plaintiff from the truck along with the wooden “four by four” plank upon which he was standing flowed directly from the application of the force of gravity to the bundle of rebar (see *Wilinski v 334 E. 92nd Hous. Dev. Fund*

Corp., 18 NY3d 1, 10 [2011]; *Runner v New York Stock Exch., Inc.*, 13 NY3d at 604; *see also Penaranda v 4933 Realty, LLC*, 118 AD3d 596, 597 [2014]; *Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1566 [2010]). The elevation differential between the flatbed truck and the ground was significant given the 8,000-to-10,000-pound weight of the bundles of rebar, and the amount of force they were capable of generating, “even over the course of a relatively short descent” (*Runner v New York Stock Exch., Inc.*, 13 NY3d at 605; *Gutman v City of New York*, 78 AD3d 886, 887 [2010]; *see Farrington v Bovis Lend Lease LMB, Inc.*, 51 AD3d 624, 626 [2008] [there were triable, material issues of fact as to whether there was an elevation-related risk posed by the position of certain wooden planks when they fell off of a flatbed truck and struck the plaintiff, who was standing on the ground]).

The causal connection between the bundles’ “inadequately regulated descent and plaintiff’s injury” was unmediated by any safety device, such as the crane that had hoisted the bundles earlier in the day (*Runner v New York Stock Exch., Inc.*, 13 NY3d at 605; *see Francis v Foremost Contr. Corp.*, 47 AD3d 672, 674 [2008]).

The plaintiff’s evidence established, *prima facie*, that the Tillary respondents violated Labor Law § 240 by failing to provide an enumerated safety device, such as the hoist that had been provided earlier in the day to secure the bundle of rebar as it was being lowered, and that the Tillary respondents’ failure to provide an appropriate safety device was a proximate cause of the plaintiff’s injury (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 662-663 [2014]; *Andresky v Wenger Constr. Co., Inc.*, 95 AD3d 1247, 1249 [2012]). In opposition, the Tillary respondents failed to raise a triable issue of fact. Accordingly, the Supreme Court should have denied those branches of the Tillary respondents’ cross motion which were for summary judgment dismissing the Labor Law § 240 (1) cause of action insofar as asserted against them, and should have granted the plaintiff’s cross motion for summary judgment on the issue of liability on the Labor Law § 240 (1) cause of action insofar as asserted against the Tillary respondents.

With respect to the causes of action alleging common-law negligence and a violation of Labor Law § 200, the Tillary respondents established their *prima facie* entitlement to judgment as a matter of law “by demonstrating that the subject accident was caused by the means and methods of the plaintiff’s work, that the plaintiff’s work was directed and controlled by his employer, and that they had no authority to exercise

supervisory control over his work” (*Koat v Consolidated Edison of N.Y., Inc.*, 98 AD3d 474, 475-476 [2012]). In response, the plaintiff failed to raise a triable issue of fact with respect to Tillary’s authority to exercise such supervisory control. As such, that branch of the Tillary respondents’ cross motion which was for summary judgment dismissing the cause of action alleging common-law negligence and a violation of Labor Law § 200 insofar as asserted against Tillary was properly granted. With respect to Leviathan, however, the plaintiff’s deposition testimony and affidavit raised a triable issue of fact as to whether the “supervisor” who was responsible in part for directing the workers to continue unloading the bundles manually following the issuance of the partial stop work order was one of Leviathan’s employees. Accordingly, the Supreme Court should have denied that branch of the Tillary respondents’ cross motion which was for summary judgment dismissing the common-law negligence and Labor Law § 200 cause of action insofar as asserted against Leviathan.

The parties’ remaining contentions either need not be reached in light of our determination, are without merit, or are not properly before this Court. Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

39 DELFINA URIAS, Individually and as Guardian of the Person and Property of MANUEL URIAS, an Alleged Incapacitated Person, Appellant, v DANIEL P. BUTTAUFUOCO & ASSOCIATES, PLLC, et al., Respondents. [992 NYS2d 552]—

Appeal—Dismissal—Intermediate Order

Attorney and Client—Malpractice—Dispute over Fee in Underlying Medical Malpractice Settlement—Failure to Object to Fee Award—Collateral Estoppel

In an action, inter alia, to recover damages for legal malpractice, the plaintiff appeals, as limited by her brief, from (1) so much of an order of the Supreme Court, Suffolk County (Martin, J.), dated November 14, 2012, as granted the motion of the defendant John Newman to dismiss the complaint pursuant to CPLR 3211 (a) insofar as asserted against him and those branches of the separate motion of the defendants Daniel P. Buttafuoco & Associates, PLLC, Daniel P. Buttafuoco, LLC, and Daniel P. Buttafuoco which were pursuant to CPLR 3211 (a) to dismiss the first through fifth causes of action insofar as asserted against them, and (2) so much of a judgment of the same court entered December 5, 2012, as, upon the order, is in favor of the defendant John Newman and against her dismissing the complaint insofar as asserted against that defendant and in favor of the defendants Daniel P. Buttafuoco & Associates, PLLC, Daniel P. Buttafuoco, LLC, and Daniel P. Buttafuoco

dismissing the first through fifth causes of action insofar as asserted against those defendants.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is reversed, on the law, the motion of the defendant John Newman to dismiss the complaint pursuant to CPLR 3211 (a) insofar as asserted against him, and those branches of the separate motion of the defendants Daniel P. Buttafuoco & Associates, PLLC, Daniel P. Buttafuoco, LLC, and Daniel P. Buttafuoco which were pursuant to CPLR 3211 (a) to dismiss the first through fifth causes of action insofar as asserted against them are denied, the complaint is reinstated against the defendant John Newman, the first through fifth causes of action are reinstated against the defendants Daniel P. Buttafuoco & Associates, PLLC, Daniel P. Buttafuoco, LLC, and Daniel P. Buttafuoco, and the order is modified accordingly; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

The plaintiff, Delfina Urias, individually and as guardian of her husband, Manuel Urias, commenced a medical malpractice action against the health care professionals and providers responsible for treating him. The defendant Daniel P. Buttafuoco & Associates, PLLC (hereinafter the Buttafuoco Firm), represented the plaintiff in the underlying medical malpractice action. On April 2, 2009, shortly before the trial was to begin, the medical malpractice action was settled in open court for the sum of \$3,700,000, and the liability was allocated among the various defendants in that action. On July 20, 2009, counsel for the parties to the medical malpractice action appeared before the Supreme Court, Suffolk County, in connection with a proposed change to the terms of the settlement. At that conference, the court, *inter alia*, approved the award of an attorney's fee to the Buttafuoco Firm in the sum of \$864,552. To calculate the attorney's fee, the Buttafuoco Firm applied the "sliding scale" set forth in the retainer agreement and in Judiciary Law § 474-a (2) to each individual medical malpractice defendant's settlement amount, rather than the total settlement amount, which resulted in a larger attorney's fee for the Buttafuoco Firm. The Buttafuoco Firm later reduced its attorney's fee to \$710,000.

Meanwhile, the plaintiff retained the defendant John Newman to represent her in a proceeding in the Supreme Court, Nassau County, to appoint a guardian on behalf of Manuel Urias and to obtain approval of the settlement in the medical malpractice action. The plaintiff complained to Newman about the manner in which the Buttafuoco Firm calculated its fee. Subsequently, Newman moved for approval of the medical malpractice settlement in the guardianship proceeding. In an order dated October 27, 2009, the Supreme Court, Nassau County, among other things, denied approval of the settlement and the attorney's fee, without prejudice to reconsideration, and directed that the issue of the Buttafuoco Firm's attorney's fee be revisited by the Supreme Court, Suffolk County. Newman then moved in the Supreme Court, Suffolk County, to confirm the amount of the attorney's fee awarded to the Buttafuoco Firm. In an order dated March 24, 2010, the Supreme Court, Suffolk County, formally approved the attorney's fee as previously calculated. Thereafter, in an order dated June 7, 2010, the Supreme Court, Nassau County, in the context of the guardianship proceeding before it, approved the settlement agreement and the attorney's fee awarded in the malpractice action.

In 2011, the plaintiff commenced the instant action against Newman, as well as the Buttafuoco Firm, the related law firm of Daniel P. Buttafuoco, LLC, and the Buttafuoco Firm's principal attorney, Daniel P. Buttafuoco (hereinafter collectively the Buttafuoco defendants), inter alia, to recover damages for legal malpractice. The Buttafuoco defendants and Newman separately moved pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against each of them.

"A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law" (*Mendelovitz v Cohen*, 37 AD3d 670, 670 [2007]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Here, the documentary evidence submitted by Newman, including his retainer agreement with the plaintiff, did not conclusively establish a defense as a matter of law (see *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 588 [2014]; *Harris v Barbera*, 96 AD3d 904, 905 [2012]).

"On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit

of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008]; see *Leon v Martinez*, 84 NY2d 83, 87 [1994]). “To state a cause of action to recover damages for legal malpractice, a plaintiff must allege: (1) that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession; and (2) that the attorney’s breach of the duty proximately caused the plaintiff actual and ascertainable damages” (*Rosenbaum v Sheresky Aronson Mayefsky & Sloan, LLP*, 100 AD3d 731, 732 [2012] [internal quotation marks omitted]; see *Sierra Holdings, LLC v Phillips, Weiner, Quinn, Artura & Cox*, 112 AD3d 909, 910 [2013]). Here, construing the complaint liberally, accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference, as we are required to do, the plaintiff stated a cause of action to recover damages for legal malpractice against Newman and the Buttafuoco defendants (see *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quarararo*, 113 AD3d at 589; *Palmieri v Biggiani*, 108 AD3d 604, 608 [2013]). Newman’s contention, in effect, that his failure to object to the attorney’s fee awarded to the Buttafuoco Firm was not a proximate cause of the plaintiff’s damages, and that he did not depart from the accepted standard of care, concern disputed factual issues that are not properly resolved on a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7).

Moreover, the Buttafuoco defendants were not entitled to dismissal pursuant to CPLR 3211 (a) (5) on the ground of collateral estoppel. Generally, the award of an attorney’s fee to an attorney necessarily establishes that there was no legal malpractice (see *Izko Sportswear Co., Inc. v Flaum*, 25 AD3d 534, 537 [2006]; *Siegel v Werner & Zaroff*, 270 AD2d 119, 120 [2000]). The Buttafuoco Firm established, prima facie (see *Plain v Vassar Bros. Hosp.*, 115 AD3d 922, 923 [2014]), that the issue of whether it committed legal malpractice was necessarily decided in its favor when it was awarded a fee in connection with its representation of the plaintiff in the underlying medical malpractice action (see *D’Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]; *Montoya v JL Astoria Sound, Inc.*, 92 AD3d 736, 738 [2012]). However, in opposition, the plaintiff raised a question of fact as to whether she was deprived of a full and fair opportunity to litigate the issue. Inasmuch as Newman moved, on behalf of the plaintiff, to confirm the amount of the attorney’s fee awarded to the Buttafuoco Firm, and that relief was granted, had the plaintiff attempted to appeal from that order, her appeal would have been dismissed for

lack of aggrievement (*see* CLPR 5511; *Village of Croton-on-Hudson v Northeast Interchange Ry., LLC*, 46 AD3d 546, 548 [2007]). Under these particular circumstances, where the plaintiff could not appeal, an issue of fact was raised as to whether she had a full and fair opportunity to litigate the issue of the alleged malpractice committed by the Buttafuoco Firm and, thus, whether she was collaterally estopped from asserting that the Buttafuoco defendants committed legal malpractice in obtaining judicial approval of the fee award (*see Davidov v Searles*, 84 AD3d 859, 860 [2011]).

The remaining contentions of the Buttafuoco Firm are without merit.

Accordingly, the Supreme Court should have denied Newman's motion to dismiss the complaint pursuant to CPLR 3211 (a) insofar as asserted against him, and those branches of the motion of the Buttafuoco defendants which were pursuant to CPLR 3211 (a) to dismiss the first through fifth causes of action insofar as asserted against them. Balkin, J.P., Dickerson, Chambers and Hall, JJ., concur. **[Prior Case History: 2012 NY Slip Op 32792(U).]**

40 CATHERINE VERDON, Appellant, v M. SEAN DUFFY et al., Respondents. [993 NYS2d 96]—

Attorney and Client—Malpractice—Settlement of Underlying Personal Injury Claim

In an action to recover damages for legal malpractice, the plaintiff appeals from an order of the Supreme Court, Westchester County (Tolbert, J.), entered July 3, 2012, which granted the defendants' motion for summary judgment dismissing the complaint.

Ordered that the order is affirmed, with costs.

The plaintiff retained the defendants to commence an action to recover damages for, inter alia, personal injuries that she allegedly sustained in an automobile accident. The defendant in the underlying personal injury action moved for summary judgment dismissing the complaint, on the ground that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. While that motion was pending, the plaintiff accepted a certain sum of money to settle the action.

The plaintiff subsequently commenced this action against her attorneys to recover damages for legal malpractice. The plaintiff alleges that the defendants were negligent in their representation of her in the underlying personal injury action, in that they caused her to settle that action for far less than the fair value of

her case. The defendants moved for summary judgment dismissing the complaint. The Supreme Court granted the motion.

“To sustain a cause of action alleging legal malpractice, a plaintiff must establish that the attorney ‘failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession,’ and that the attorney’s breach of this duty proximately caused the plaintiff actual and ascertainable damages” (*Di Giacomo v Michael S. Langella, P.C.*, 119 AD3d 636, 637 [2014], quoting *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). “Even if a plaintiff establishes the first prong of a legal malpractice cause of action, the plaintiff must still demonstrate that he or she would have succeeded on the merits of the action but for the attorney’s negligence” (*Di Giacomo v Michael S. Langella, P.C.*, 119 AD3d at 638). “[A]s to [this] second prong, the plaintiff must plead and prove actual, ascertainable damages as a result of an attorney’s negligence” (*id.*, quoting *Dempster v Liotti*, 86 AD3d 169, 177 [2011]).

“‘To obtain summary judgment dismissing a complaint in an action to recover damages for legal malpractice, a defendant must demonstrate that the plaintiff is unable to prove at least one of the essential elements of [his or her] legal malpractice cause of action’” (*Di Giacomo v Michael S. Langella, P.C.*, 119 AD3d at 638, quoting *Boglia v Greenberg*, 63 AD3d 973, 974 [2009]).

Here, in support of their motion for summary judgment dismissing the complaint, the defendants established, prima facie, that the plaintiff would not have succeeded on the merits of the underlying personal injury action, as there was insufficient evidence to establish that she sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the automobile accident. Consequently, the defendants also established that they did not “fail[] to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community” (*Porello v Longworth*, 21 AD3d 541, 541 [2005]) when they advised her to accept a settlement offer in the sum that she ultimately accepted. In opposition, the plaintiff failed to raise a triable issue of fact.

Accordingly, the Supreme Court properly granted the defendants’ motion for summary judgment dismissing the complaint. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

41 PAUL WARSHEFSKIE, Respondent-Appellant, v NEW YORK CITY HOUSING AUTHORITY, Appellant-Respondent. [993 NYS2d 324]—

**Municipal Corporations—Tort Liability—Failure to Show Injury Resulted from Noncompliance with Applicable Statute Ordinance or Rule
Pleading—Bill of Particulars—Amendment—Failure to Set Forth Excuse for Delay in Seeking Leave to Amend Bill of Particulars**

In an action to recover damages for personal injuries, the defendant appeals from so much of an order of the Supreme Court, Richmond County (Maltese, J.), dated January 17, 2013, as denied that branch of its motion which was for summary judgment dismissing the cause of action alleging common-law negligence, and the plaintiff cross-appeals from so much of the same order as granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging a violation of General Municipal Law § 205-e, and denied his cross motion for leave to amend the complaint and bill of particulars.

Ordered that the order is affirmed, without costs or disbursements.

The Supreme Court correctly denied that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging common-law negligence. Although the evidence presented by the defendant was sufficient to establish, *prima facie*, that it was entitled to judgment as a matter of law, in opposition, the plaintiff raised a triable issue of fact.

With respect to the cause of action to recover damages pursuant to General Municipal Law § 205-e, in opposition to the defendant's demonstration of its *prima facie* entitlement to judgment as a matter of law, the plaintiff failed to raise a triable issue of fact as to whether he was injured as a result of any negligence of the defendant in failing to comply with any applicable "statute[], ordinance[] [or] rule" (General Municipal Law § 205-e; *see Sweeney v Doria*, 95 AD3d 1298, 1299 [2012]; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing the cause of action to recover damages pursuant to General Municipal Law § 205-e.

The Supreme Court also providently exercised its discretion in denying the plaintiff's cross motion for leave to amend the complaint and bill of particulars to add allegations that section 26-286 of the 1938 New York City Building Code and section 27-2005 of the New York City Housing Maintenance Code (Administrative Code of City of NY) were violated. The plaintiff failed to set forth any excuse for his delay in seeking leave to amend the bill of particulars and complaint subsequent to the note of issue being filed and subsequent to a prior motion to amend the complaint and bill of

particulars (*see Ames v Kamco Supply Corp.*, 96 AD3d 888, 889 [2012]; *Al-Khilewi v Turman*, 82 AD3d 1021 [2011]; *Schreiber-Cross v State of New York*, 57 AD3d 881 [2008]; *Sampson v Contillo*, 55 AD3d 591 [2008]; *Navarette v Alexiades*, 50 AD3d 869, 870 [2008]; *Cohen v Ho*, 38 AD3d 705 [2007]). Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur. **[Prior Case History: 2013 NY Slip Op 30072(U).]**

42 YESHIVA CHASDEI TORAH et al., Respondents, v DELL EQUITY, LLC, et al., Appellants, et al., Defendants. [992 NYS2d 560]—

Mortgages—Foreclosure—Lien Removed by Release

In an action to foreclose a mortgage, the defendants Dell Equity, LLC, and 1600 Street Holding, LLC, appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Bayne, J.), dated November 30, 2012, as denied that branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the appellants' motion which was for summary judgment dismissing the complaint insofar as asserted against them is granted.

The Supreme Court erred in denying that branch of the motion of the defendants Dell Equity, LLC, and 1600 Street Holding, LLC (hereinafter together the appellants), which was for summary judgment dismissing the complaint insofar as asserted against them. The appellants established their prima facie entitlement to judgment as a matter of law by submitting a release that was signed by the plaintiffs' representative, and notarized and recorded. The release unambiguously removed any lien on the subject property with respect to the mortgage held by the plaintiffs (*see Burnside 711 LLC v Amerada Hess Corp.*, 109 AD3d 860, 861 [2013]; *Matter of Jacker*, 105 AD3d 1048, 1048 [2013]; *Appel v Ford Motor Co.*, 111 AD2d 731, 732 [1985]; *cf. Marculescu v Ovanez*, 27 AD3d 701 [2006]). In opposition, the plaintiffs failed to raise a triable issue of fact as to the validity or enforceability of the release. Their conclusory and unsubstantiated allegations were insufficient to defeat the subject branch of the appellants' motion (*see Votta v Votta Enters.*, 249 AD2d 536, 537 [1998]). Accordingly, the appellants were entitled to summary judgment (*see Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 884 [2010]; *Household Fin. Realty Corp. of N.Y. v Winn*, 19 AD3d 545 [2005]).

In view of the foregoing, we need not reach the parties' remaining contentions. Mastro, J.P., Rivera, Balkin and Miller, JJ., concur.

43 In the Matter of JULIUS H. ORANGE COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent; BEATRICE P. Appellant, et al., Respondent. [992 NYS2d 556]—

Parent, Child and Family—Termination of Parental Rights—Mental Illness—Long History of Psychiatric Problems

In a proceeding pursuant to Social Services Law § 384-b to terminate parental rights on the ground of mental illness, the mother appeals, as limited by her brief, from so much of an order of fact-finding and disposition of the Family Court, Orange County (Currier Woods, J.), dated June 26, 2013, as, after a fact-finding hearing, found that she is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child, terminated her parental rights, and transferred guardianship and custody of the subject child to the Orange County Department of Social Services for purposes of adoption.

Ordered that the order of fact-finding and disposition is affirmed insofar as appealed from, without costs or disbursements.

The Family Court properly found that there was clear and convincing evidence that the mother is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child (*see* Social Services Law § 384-b [4] [c]). A forensic psychiatrist, who interviewed the mother and reviewed records, including medical records, testified that the mother had a long history of psychiatric problems and had paranoid personality disorder and borderline personality disorder. That forensic psychiatrist made statements, at the hearing and in his reports, tending to show that, if the child were returned to the mother, the child would be at risk of being neglected due to the nature of the mother's illness (*see Matter of Christina L.N. [Louica J.]*, 113 AD3d 777, 777-778 [2014]; *Matter of Alexander James R.*, 48 AD3d 820, 820-821 [2008]; *Matter of Nina D.*, 6 AD3d 702, 703 [2004]; *Matter of Laura D.*, 270 AD2d 260, 261 [2000]). Such evidence is sufficient to support the Family Court's determination that the mother is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the subject child (*see* Social Services Law § 384-b [4] [c]). Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

44 In the Matter of ERICKSON HERNANDEZ, Respondent, v MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, Appellant. [992 NYS2d 563]—

Insurance—Motor Vehicle Accident Indemnification Corporation—Hit and Run Accident—Satisfaction of Notification Requirements

In a proceeding pursuant to Insurance Law § 5218 (c) for leave to commence an action against the Motor Vehicle Accident Indemnification Corporation, the Motor Vehicle Accident Indemnification Corporation appeals from an order of the Supreme Court, Queens County (Taylor, J.), entered June 24, 2013, which granted the petition.

Ordered that the order is modified, on the law and the facts, by deleting the provision thereof granting the petition in its entirety and substituting therefor a provision granting the petition only to the extent of directing an evidentiary hearing on the issues of whether the subject accident was reported to the police within 24 hours, whether the petitioner filed a notice of claim within 90 days of the accident, and whether the petitioner is a “qualified person” pursuant to article 52 of the Insurance Law, and otherwise holding the petition in abeyance; as so modified, the order is affirmed, without costs or disbursements, and the matter is remitted to the Supreme Court, Queens County, for further proceedings in accordance herewith.

The petitioner alleged that while he was riding his scooter in Queens, he was struck by an unidentified motor vehicle which fled the scene, and that, as a result of the accident, he sustained serious injuries within the meaning of Insurance Law § 5102 (d). The petitioner commenced this proceeding pursuant to Insurance Law § 5218 (c) for leave to commence an action against the Motor Vehicle Accident Indemnification Corporation (hereinafter the MVAIC). The MVAIC opposed the petition, contending that the petitioner failed to establish his compliance with the statutory requirement that notice of the subject accident be given to a police, peace, or judicial officer within 24 hours, the satisfaction of which is a condition precedent to qualifying for benefits from the MVAIC (*see* Insurance Law §§ 5208 [a] [2] [A]; 5218 [c]). The MVAIC also contended that the petitioner failed to establish that he filed a notice of claim within 90 days of the accident (*see* Insurance Law §§ 5218 [b]; 5208 [a] [2] [A]), and that he failed to establish that he was a “qualified person” within the meaning of Insurance Law § 5202 (b) because he did not demonstrate that he was a resident of New York who was not an insured under a policy of insurance. The Supreme Court granted the petition.

Entitled the “Motor Vehicle Accident Indemnification Corporation Act,” article 52 of the Insurance Law is intended to compensate, through the MVAIC, innocent victims of motor vehicle accidents caused by, inter alia, unidentified motor vehicles which leave the scene of the accident (*see* Insurance Law § 5201; *Matter of Acosta-Collado v Motor Veh. Acc. Indem. Corp.*, 103

AD3d 714, 715 [2013]; *Englington Med., P.C. v Motor Veh. Acc. Indem. Corp.*, 81 AD3d 223, 228 [2011]; *Canty v Motor Veh. Acc. Indem. Corp.*, 95 AD2d 509, 510 [1983]). The statutory provisions creating and regulating the MVAIC are to be liberally construed to serve their ends (see *Englington Med., P.C. v Motor Veh. Acc. Indem. Corp.*, 81 AD3d at 227; *Matter of Gurvich v Motor Veh. Acc. Indem. Corp.*, 66 AD3d 677, 678 [2009]; *Matter of Dixon v Motor Veh. Acc. Indem. Corp.*, 56 AD2d 650, 651 [1977]).

A petitioner seeking leave of court to commence an action against the MVAIC has the initial burden of demonstrating that he or she is a “qualified person” with the meaning of Insurance Law § 5202 (b) and by making an evidentiary showing that he or she has satisfied certain other statutory requirements (see *Englington Med., P.C. v Motor Veh. Acc. Indem. Corp.*, 81 AD3d at 232; *Matter of Troches v Motor Veh. Acc. Indem. Corp.*, 171 AD2d 873 [1991]; *Matter of Boxill v Motor Veh. Acc. Indem. Corp.*, 33 AD2d 13 [1969]). In a special proceeding, generally, if no triable issues of fact are raised, the court is empowered to make a summary determination (see CPLR 409 [b]). However, if triable issues of fact are raised, an evidentiary hearing must be held (see CPLR 410).

Here, while the petitioner sufficiently pleaded the prima facie elements necessary to commence an action against the MVAIC (see Insurance Law §§ 5217, 5218), the MVAIC raised questions of fact precluding summary determination of the petition. Based on the record before us, the issues of (1) whether the petitioner is an uninsured resident of New York, and, therefore, a “qualified person” pursuant to article 52 of the Insurance Law (see Insurance Law § 5202 [b]), (2) whether the accident was reported to the police within 24 hours (see Insurance Law §§ 5218 [b]; 5208 [a] [2] [A]), and (3) whether the petitioner served a notice of claim upon the MVAIC within 90 days of the accident (see Insurance Law § 5208 [a] [2] [A]), could not have been resolved without an evidentiary hearing (see *Matter of Pagan v Motor Veh. Acc. Indem. Corp.*, 82 AD3d 1102, 1103 [2011]; *Matter of Caceres v Motor Veh. Acc. Indem. Corp.*, 37 AD3d 215 [2007]). Thus, the Supreme Court should not have summarily determined the petition (see CPLR 409, 410).

Accordingly, we modify the order appealed from and remit the matter to the Supreme Court, Queens County, for an evidentiary hearing on the aforementioned issues and a new determination of the petition thereafter. Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

45 In the Matter of ADAM P. MORALES, Petitioner, v HELENE GUGERTY et al., Respondents. [993 NYS2d 79]—

Proceeding against Body or Officer—Prohibition—Mandamus—Failure to Demonstrate Clear Legal Right to Relief Sought

Proceeding pursuant to CPLR article 78, inter alia, in the nature of prohibition to prohibit the respondent Thomas A. Adams, a Justice of the Supreme Court, Nassau County, and the Administrative Judge of the Tenth Judicial District, Nassau County, from assigning a proceeding for a writ of habeas corpus entitled *People ex rel. Morales v Sposato*, commenced in the County Court, Nassau County, to the respondent Helene Gugerty, a Judge of the County Court, Nassau County, for hearing and determination under indictment No. 1626N/13, and to prohibit the respondent Helene Gugerty from hearing and determining the petition in that proceeding for a writ of habeas corpus, and in the nature of mandamus to compel Maureen O'Connell, the County Clerk of the County of Nassau, to assign a civil index number to that proceeding for a writ of habeas corpus, and application by the petitioner for poor person relief.

Ordered that the application for poor person relief is granted to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied; and it is further,

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

“Because of its extraordinary nature, prohibition is available only where there is a clear legal right, and then only when a court—in cases where judicial authority is challenged—acts or threatens to act either without jurisdiction or in excess of its authorized powers” (*Matter of Holtzman v Goldman*, 71 NY2d 564, 569 [1988]; see *Matter of Rush v Mordue*, 68 NY2d 348, 352 [1986]). The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (see *Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The petitioner failed to demonstrate a clear legal right to the relief sought. Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

46 In the Matter of GABRIEL RIVERA, Respondent, v VERONICA AROCHO, Appellant. [992 NYS2d 559]—

Parent, Child and Family—Custody—Limited Jurisdiction of Referee

In a child custody proceeding pursuant to Family Court Act article 6, the mother appeals from an order of the Family Court, Queens County (Seiden, Ct. Atty. Ref.), dated August 15, 2012, which, after a hearing, awarded the father sole custody of the parties' child and failed to award her visitation.

Ordered that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Family Court, Queens County, for further proceedings consistent herewith.

A referee derives authority from an order of reference by the court (*see* CPLR 4311), which can be made only upon consent of the parties, except in limited circumstances not applicable here (*see* CPLR 4317; *Matter of McClarin v Valera*, 108 AD3d 719 [2013]; *Matter of Stewart v Mosley*, 85 AD3d 931, 932 [2011]). Here, the administrative order of reference recited that, upon the parties' consent, it authorized a court attorney referee to hear and determine the parties' rights to custody of and visitation with the parties' child (*see* CPLR 4317 [a]). Upon our review of the record, however, we find that the mother did not stipulate to the reference in the manner prescribed by CPLR 2104. Absent the parties' consent to the reference, the Court Attorney Referee had the power only to hear and report her findings (*see* CPLR 4317 [a]; *see also* *Matter of McClarin v Valera*, 108 AD3d at 720; *Matter of Stewart v Mosley*, 85 AD3d at 932). Thus, the Court Attorney Referee lacked jurisdiction to issue the order dated August 15, 2012 (*see* *Matter of Aslan v Senturk*, 116 AD3d 952 [2014]; *Matter of Martinborough v Martinborough*, 98 AD3d 511 [2012]; *Matter of Gale v Gale*, 87 AD3d 1011 [2011]). Accordingly, the order dated August 15, 2012, must be reversed and the matter must be remitted to the Family Court, Queens County, for further proceedings, including, but not limited to, the filing of a written report by the Court Attorney Referee setting forth the findings of fact and conclusions of law upon which her recommendation is based (*see* CPLR 4320 [b]; *see also* *Matter of Aslan v Senturk*, 116 AD3d 952 [2014]; *Matter of McClarin v Valera*, 108 AD3d at 720).

In light of our determination, we need not reach the mother's remaining contentions. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

47 In the Matter of PIRU UMOJA, Petitioner, v DESMOND GREEN, Respondent. [992 NYS2d 357]—Proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent, Desmond Green, a Justice of the Supreme Court, Richmond County, to determine a motion pursuant to CPL 440.10 in the criminal action entitled *People v Umoja*, commenced in the Supreme Court, Kings County, under indictment No. 107/05, and application by the petitioner for poor person relief.

Ordered that the application for poor person relief is granted

to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied; and it is further,

Adjudged that the petition is denied as academic and the proceeding is dismissed, without costs or disbursements.

The instant proceeding has been rendered academic in light of the determination of the subject motion in an order of the Supreme Court, Kings County, dated August 15, 2014. Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

48 In the Matter of WESTCHESTER JOINT WATER WORKS, Appellant-Respondent, v ASSESSOR OF CITY OF RYE, Respondent-Appellant, and RYE NECK UNION FREE SCHOOL DISTRICT, Intervenor-Respondent-Respondent. [992 NYS2d 351]—

Taxation—Assessment—Failure to Give Proper Notice of Certiorari Proceedings to Taxing Authorities

In nine related proceedings pursuant to RPTL article 7 to review real property tax assessments for the tax years 2002 through 2010, the petitioner appeals, as limited by its brief, from so much of an order of the Supreme Court, Westchester County (LaCava, J.), entered July 24, 2012, as granted that branch of the motion of the intervenor, Rye Neck Union Free School District, which was to dismiss the proceedings on the ground that the notices of petition and petitions were not served upon the Superintendent of the Rye Neck Union Free School District in accordance with RPTL 708 (3), and denied that branch of its cross motion which was for leave to recommence the proceedings pursuant to CPLR 205 (a), and the Assessor of the City of Rye cross-appeals, as limited by her brief, from so much of the same order as denied that branch of her cross motion which was to dismiss the proceedings on the ground that the notices of petition and petitions were not served upon the Superintendent of the Rye Neck Union Free School District in accordance with RPTL 708 (3).

Ordered that the order is modified, on the law, (1) by deleting the provision thereof granting that branch of the motion of the intervenor, Rye Neck Union Free School District, which was to dismiss the proceedings, and substituting therefor a provision granting that branch of the motion only to the extent that the proceedings related to the parcel designated on the City of Rye Assessment Roll as section 200, block 1, lot 9, and otherwise denying that branch of the motion, and (2) by deleting the provision thereof denying that branch of the cross motion of the Assessor of the City of Rye which was to dismiss the proceedings, and substituting therefor a provision granting that branch

of the cross motion only to the extent that the proceedings related to the parcel designated on the City of Rye Assessment Roll as section 200, block 1, lot 9, and otherwise denying that branch of the cross motion; as so modified, the order is affirmed insofar as appealed and cross-appealed from, with one bill of costs to the Assessor of the City of Rye and the Rye Neck Union Free School District, payable by the petitioner.

The petitioner, Westchester Joint Water Works, commenced separate tax certiorari proceedings against the Assessor of the City of Rye (hereinafter the City) to challenge real property tax assessments levied against two of its properties for each tax year from 2002 through 2010. The petitioner gave notice of each proceeding to the City and, pursuant to RPTL 708 (3), to the Superintendent of the Rye City School District. In January 2011, the parties agreed in principle to a settlement of the proceedings, and the petitioner's counsel gave notice of the proceedings, for the first time, to the Superintendent of the Rye Neck Union Free School District (hereinafter the District), where one of the parcels was actually located, seeking the District's consent to the settlement. The District refused to consent to the settlement, and moved, inter alia, for leave to intervene in the proceedings and to dismiss the proceedings based on the failure of the petitioner to give the District timely notice of the proceedings pursuant to RPTL 708 (3). The petitioner opposed, arguing that because city personnel told its counsel that the subject parcels were listed on the city assessment roll, but were not referred to in the city tax map, its counsel was unable to determine the geographic location of the two parcels, and thus, "excusable geographical mistake" constituted good cause excusing the petitioner's noncompliance with RPTL 708 (3). The petitioner cross-moved for leave to recommence the proceedings within six months pursuant to CPLR 205 (a) in the event the proceedings were dismissed based on noncompliance with RPTL 708 (3). The City cross-moved to dismiss the proceedings on the same ground as the District.

In the order appealed from, the Supreme Court, inter alia, granted that branch of the District's motion which was to dismiss the proceedings based on the petitioner's noncompliance with RPTL 708 (3), and denied that branch of the petitioner's cross motion which was for leave to recommence the proceedings pursuant to CPLR 205 (a). The Supreme Court also denied that branch of the City's cross motion which was to dismiss the proceedings, based on the determination that the City lacked standing to seek dismissal of the proceedings due to the petitioner's failure to give the District notice of the proceedings pursuant to RPTL 708 (3).

Contrary to the Supreme Court's determination, the City had standing to seek dismissal of the proceedings based on the petitioner's failure to give notice of the proceedings to the Superintendent of the District pursuant to RPTL 708 (3) (*see Matter of Consolidated Edison Co. of N.Y., Inc. v Assessor & Bd. of Assessment Review for the Town of Pleasant Val.*, 82 AD3d 761, 762 [2011]; *Matter of Landesman v Whitton*, 46 AD3d 827 [2007]; *Matter of Macy's Primary Real Estate v Assessor of City of White Plains*, 291 AD2d 73, 77 [2002]; *cf. Matter of First Source Fed. Credit Union v Stuhlman*, 275 AD2d 908, 908 [2000]).

As the petitioner correctly concedes on appeal, it failed to give notice of the proceedings to the Superintendent of the District pursuant to RPTL 708 (3), and lacked good cause for its failure. Accordingly, the Supreme Court properly granted that branch of the District's motion which was to dismiss the proceedings, and should have granted that branch of the City's cross motion which was to dismiss the proceedings, based on the petitioner's failure to give notice of the proceedings to the Superintendent of the District pursuant to RPTL 708 (3) and the lack of good cause excusing the petitioner's noncompliance (*see Matter of Board of Mgrs. of Copley Ct. Condominium v Town of Ossining*, 19 NY3d 869 [2012]; *Matter of Cornwall Yacht Club, Inc. v Assessor*, 110 AD3d 1070 [2013]; *Matter of Wyeth Holdings Corp. v Assessor of the Town of Orangetown*, 84 AD3d 1104, 1106 [2011]; *Matter of Consolidated Edison Co. of N.Y., Inc. v Assessor & Bd. of Assessment Review for the Town of Pleasant Val.*, 82 AD3d at 762). However, since it is undisputed that only one of the two parcels at issue, namely, the parcel designated on the City Assessment Roll as section 200, block 1, lot 9, is located within the borders of the District, and that the petitioner properly gave notice of the proceedings, pursuant to RPTL 708 (3), to the Rye City District, where the other parcel is located, we grant that branch of the District's motion which was to dismiss the proceedings, and that branch of the City's cross motion which was to dismiss the proceedings, only to the extent that the proceedings relate to the parcel designated on the City Assessment Roll as section 200, block 1, lot 9 (*see Matter of Wyeth Holdings Corp. v Assessor of the Town of Orangetown*, 84 AD3d at 1107).

Since a dismissal pursuant to RPTL 708 (3) operates as a dismissal upon the merits, the relief afforded by CPLR 205 (a) is unavailable (*see Matter of Cornwall Yacht Club, Inc. v Assessor*, 110 AD3d 1070 [2013]; *Matter of Wyeth Holdings Corp. v Assessor of the Town of Orangetown*, 84 AD3d at 1107; *see generally*

Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp., 93 NY2d 375, 380 [1999]). Accordingly, the Supreme Court properly denied that branch of the petitioner's cross motion which was for leave to recommence the proceedings pursuant to CPLR 205 (a).

The petitioner's remaining contention is without merit. Skelos, J.P., Sgroi, Cohen and LaSalle, JJ., concur. [**Prior Case History: 37 Misc 3d 238.**]

49 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ALPHONSO BARNES, Appellant. [992 NYS2d 150]—

Crimes—Confession—Invalid Waiver of Rights

Crimes—Instructions—Erroneous Definition of Sex Crimes Not Substantial Error

Appeal by the defendant from a judgment of the Supreme Court, Nassau County (Robbins, J.), rendered September 5, 2012, as amended September 7, 2012, convicting him of rape in the first degree, criminal sexual act in the first degree, and sexual abuse in the first degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing pursuant to a stipulation in lieu of motions (St. George, J.), of the suppression of the defendant's statements to law enforcement officials.

Ordered that the judgment, as amended, is affirmed.

Contrary to the hearing court's determination, the evidence adduced at the suppression hearing was insufficient to establish that the defendant's statements to law enforcement officials were made after he knowingly, voluntarily, and intelligently waived his *Miranda* rights (see *Miranda v Arizona*, 384 US 436 [1966]). Although the defendant's refusal to sign the *Miranda* card did not, in itself, preclude the finding of a valid waiver (see *People v Sirno*, 76 NY2d 967, 968 [1990]; *People v Thornton*, 87 AD3d 663, 664 [2011]; *People v Saunders*, 71 AD3d 1058, 1059 [2010]), the record was devoid of any indication that the defendant clearly understood his *Miranda* rights as read to him (see *Berghuis v Thompkins*, 560 US 370 [2010]; *People v Sirno*, 76 NY2d at 970; cf. *People v Thornton*, 87 AD3d at 664; *People v Saunders*, 71 AD3d at 1059; *People v Cartwright*, 61 AD3d 695 [2009]; *People v Gill*, 20 AD3d 434 [2005]; *People v Rivas*, 182 AD2d 722, 723 [1992]; *People v Rivas*, 175 AD2d 186 [1991]). Accordingly, the hearing court should have suppressed the defendant's statements. However, the evidence of the defendant's guilt, without reference to the error, was overwhelming, and there is no reasonable possibility that the error might have contributed to the defendant's conviction (see *People v Crimmins*, 36 NY2d 230, 237 [1975]; *People v Olavarrueth*, 74 AD3d

1361, 1362 [2010]). Thus, the admission of these statements into evidence at the defendant's trial was harmless beyond a reasonable doubt.

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Romero*, 7 NY3d 633, 643-644 [2006]; *People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Cahill*, 2 NY3d 14, 58 [2003]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt as to the crimes of which the defendant was convicted was not against the weight of the evidence (*see People v Romero*, 7 NY3d at 643-644; *People v Cahill*, 2 NY3d at 58).

The defendant's objections to the Supreme Court's instructions to the jury on the charges of rape in the first degree and sexual abuse in the first degree are unpreserved for appellate review (*see People v Devers*, 82 AD3d 1261, 1263 [2011]; *People v Pruitt*, 74 AD3d 1366, 1367 [2010]; *People v Floyd*, 34 AD3d 494, 495 [2006]; *People v Soto*, 31 AD3d 793 [2006]; CPL 470.05). In any event, we are satisfied that the court's charge, as a whole, adequately conveyed to the jury the correct principles, and all of the elements of rape in the first degree (*see People v Gray*, 300 AD2d 27 [2002]). Further, although the court erred in including in its charge regarding sexual abuse in the first degree an amendment to the definition of "sexual contact," which became effective after the acts in question were committed, the error was not "substantial" and did not "seriously and prejudicially" undermine the defendant's defense (*People v Lopez*, 200 AD2d 767, 768 [1994]).

The defendant's contention that his trial counsel rendered ineffective assistance is without merit (*see People v Caban*, 5 NY3d 143, 152 [2005]; *People v Henry*, 95 NY2d 563, 565-566 [2000]; *People v Berroa*, 99 NY2d 134, 138-139 [2002]; *People v Hobot*, 84 NY2d 1021, 1022 [1995]; *People v Baldi*, 54 NY2d 137, 147 [1981]). Skelos, J.P., Austin, Sgroi and LaSalle, JJ., concur.

50 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ERNEST BENTT, Appellant. [991 NYS2d 901]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Goldberg, J.), rendered February 22, 2012, convicting him of robbery in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that his conviction was not supported by legally sufficient evidence is unpreserved for appellate review (see *People v Gray*, 86 NY2d 10 [1995]). In any event, viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Upon our independent review pursuant to CPL 470.15 (5), we are satisfied that the verdict of guilt was not against the weight of the evidence (see *People v Romero*, 7 NY3d 633 [2006]).

The defendant's remaining contentions are unpreserved for appellate review and, in any event, without merit. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

51 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ROBERT G. FRANCE, Appellant. [992 NYS2d 339]—

Crimes—Evidence—Surveillance Video

Appeal by the defendant from a judgment of the County Court, Westchester County (Hubert, J.), rendered May 10, 2012, convicting him of assault in the first degree and assault in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's contention that the County Court erred in admitting into evidence a surveillance video depicting him beating the victim at the Metro North train station in White Plains is partially unpreserved for appellate review (see CPL 470.05 [2]; *People v Meeks*, 56 AD3d 800, 801 [2008]). In any event, the contention is without merit. The video was properly authenticated by the victim's testimony that it accurately captured the defendant's attack on the victim in the station waiting room (see *People v Patterson*, 93 NY2d 80, 84 [1999]; *People v Ely*, 68 NY2d 520, 527 [1986]).

The defendant's further contention that the evidence was legally insufficient to establish that he intended to cause serious physical injury is unpreserved for appellate review (see *People v Cabrera*, 61 AD3d 884, 884-885 [2009]; *People v Dosunmu*, 267 AD2d 320, 320 [1999]; *People v Camus*, 255 AD2d 392, 392 [1998]). In any event, viewing the evidence in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish beyond a reasonable doubt that the defendant acted with intent to cause serious physical injury (see Penal Law §§ 10.00 [10]; 120.10 [1]; *People v Dosunmu*, 267 AD2d at 320; *People v Cruz*, 267 AD2d 319, 319 [1999]; *People v Camus*, 255 AD2d 392 [1998]; *People v Martinez*, 224 AD2d 254, 255 [1996]). Balkin, J.P., Leventhal, Maltese and LaSalle, JJ., concur.

52 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DERECK HARDY, Appellant. [991 NYS2d 904]—Appeals by the defendant, as limited by his motion, from four sentences of the Supreme Court, Queens County (Griffin, J.), all imposed December 15, 2011, on the ground that the sentences were excessive.

Ordered that the sentences are affirmed.

The defendant's valid waiver of his right to appeal precludes review of his contention that the sentences imposed were excessive (*see People v Bradshaw*, 18 NY3d 257, 264-267 [2011]; *People v Ramos*, 7 NY3d 737, 738 [2006]; *People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 735 [1998]; *People v Alexander*, 104 AD3d 862 [2013]). Eng, P.J., Dillon, Chambers and Austin, JJ., concur.

53 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MIKHAIL MALLAYEV, Appellant. [992 NYS2d 335]—

Crimes—Witnesses—Expert Witness—Denial of Request for Expert Witness in Eyewitness Identification

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Hanophy, J.), rendered April 21, 2009, convicting him of murder in the first degree, conspiracy in the second degree, and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

Contrary to the defendant's contention, the indictment was not jurisdictionally defective (*see People v Iannone*, 45 NY2d 589, 598 [1978]; *People v Lakomec*, 86 AD2d 77, 79 [1982]). In light of our determination with respect to this issue, the defendant's contentions regarding the lack of a valid felony complaint have been rendered academic (*see People v Smith*, 304 AD2d 677, 678 [2003]).

Contrary to the defendant's contention, since he did not demonstrate the necessity for the appointment of an expert in eyewitness identification on his behalf pursuant to County Law § 722-c, the Supreme Court providently exercised its discretion in denying his request to appoint such an expert (*see People v Wilson*, 107 AD3d 919, 920 [2013]; *People v Robinson*, 70 AD3d 728, 728 [2010]; *People v Moore*, 125 AD2d 501, 502 [1986]). The defendant's contention that the denial of his request deprived him of due process of law is unpreserved for appellate review (*see CPL 470.05* [2]; *People v Bunge*, 70 AD3d 710, 710-711 [2010]) and, in any event, without merit (*see People v Young*, 7 NY3d 40, 46 [2006]; *People v Lee*, 96 NY2d 157, 163 [2001]; *People v Linton*, 94 AD3d 962, 963 [2012]; *cf. People v Santiago*,

17 NY3d 661, 671-672 [2011]; *People v Abney*, 13 NY3d 251, 268 [2009]; *People v LeGrand*, 8 NY3d 449, 457 [2007]).

The defendant's contentions that the admission into evidence of certain fingerprint cards violated his constitutional rights to confront witnesses against him and to a fair trial are unpreserved for appellate review (see CPL 470.05 [2]) and, in any event, without merit (see *People v Rawlins*, 10 NY3d 136, 158-160 [2008]; *People v Jackson*, 108 AD3d 1079, 1080 [2013]; *People v Gonsa*, 220 AD2d 27, 30 [1996]). The defendant's contention that his fingerprints were illegally seized in violation of the Fourth Amendment to the United States Constitution also is unpreserved for appellate review (see CPL 470.05 [2]; *People v Jackson*, 105 AD3d 866, 867-868 [2013]) and, in any event, not supported by the record.

The defendant's contention that, during summation, the prosecutor impermissibly vouched for certain prosecution witnesses is without merit. The defendant's contention that certain other comments made by the prosecutor during summation deprived him of a fair trial is unpreserved for appellate review (see CPL 470.05 [2]; *People v Malave*, 7 AD3d 542, 542 [2004]) and, in any event, without merit (see *People v Hutchinson*, 106 AD3d 1105, 1105 [2013]; *People v McHarris*, 297 AD2d 824, 825 [2002]; *People v Evans*, 291 AD2d 569, 569 [2002]; *People v Clark*, 222 AD2d 446, 447 [1995]).

The defendant's contention that he was deprived of the effective assistance of counsel is based, in part, on matter appearing on the record and, in part, on matter outside the record and, thus, constitutes a " 'mixed claim[]' of ineffective assistance" (*People v Maxwell*, 89 AD3d 1108, 1109 [2011], quoting *People v Evans*, 16 NY3d 571, 575 n 2 [2011]). In this case, it is not evident from the matter appearing on the record that the defendant was deprived of the effective assistance of counsel (cf. *People v Crump*, 53 NY2d 824 [1981]; *People v Brown*, 45 NY2d 852 [1978]). Since the defendant's claim of ineffective assistance of counsel cannot be resolved without reference to matter outside the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety (see *People v Freeman*, 93 AD3d 805, 806 [2012]; *People v Maxwell*, 89 AD3d at 1109; *People v Rohlehr*, 87 AD3d 603, 604 [2011]).

The defendant's contentions that his conviction should be vacated, based upon the People's failure to produce certain evidence for his inspection, that the People destroyed certain latent fingerprints, and that the People violated his due process rights under *Brady v Maryland* (373 US 83 [1963]), by failing to turn over an alleged eyewitness account, are all based upon matter

dehors the record, and cannot be reviewed on direct appeal (*see People v Modesto*, 39 AD3d 567, 567 [2007]; *People v Rivera*, 33 AD3d 942, 942 [2006]).

The defendant's remaining contentions are without merit. Dickerson, J.P., Leventhal, Hall and Miller, JJ., concur.

54 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DARRELL ROBERTS, Appellant. [991 NYS2d 902]—

Crimes—Appeal—Waiver of Right to Appeal Precluded Review of Excessive Sentence Claim

Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (Arriaga, J.), imposed March 26, 2013, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's valid waiver of his right to appeal precludes review of his contention that the sentence imposed was excessive (*see People v Bradshaw*, 18 NY3d 257, 264-267 [2011]; *People v Lopez*, 6 NY3d 248, 255-256 [2006]). Eng, P.J., Balkin, Dickerson, Chambers and Hinds-Radix, JJ., concur.

55 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DEVENDRA SINGH, Appellant. [992 NYS2d 149]—

Crimes—Plea of Guilty—Prior Reversal of Conviction—Reinstatement of Superior Court Information—Waiver of Right to Prosecution by Grand Jury Indictment

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Mullings, J.), rendered April 26, 2012, convicting him of criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant executed a waiver of indictment in 2004 and was charged by superior court information. He pleaded guilty to criminal possession of a weapon in the second degree. In 2011, this Court reversed the judgment of conviction and vacated the defendant's plea of guilty (*see People v Singh*, 90 AD3d 1079 [2011]). In 2012, the defendant again pleaded guilty to criminal possession of a weapon in the second degree. On appeal, the defendant asserts that his plea of guilty was invalid because, in 2012, his waiver of his right to be prosecuted by grand jury indictment was not knowingly, voluntarily, and intelligently made.

The defendant's 2004 waiver of indictment was valid (*see* CPL 195.10, 195.20; *People v Cohen*, 47 AD3d 828, 828 [2008];

People v Decclisis, 18 AD3d 882, 882 [2005]; *People v Gonzalez*, 299 AD2d 581 [2002]). The waiver was not invalidated by the reversal of the original judgment of conviction and the vacatur of his plea of guilty, as the original judgment was reversed for reasons unrelated to the validity of the waiver of indictment (see *People v Cohen*, 47 AD3d at 828; *People v Rivera*, 24 AD3d 367, 371 [2005]; *People v Schultz*, 258 AD2d 879, 880 [1999]). When the defendant's original judgment of conviction was vacated, the superior court information was reinstated (see *People v Cohen*, 47 AD3d at 828; *People v Rivera*, 24 AD3d at 371; *People v Schultz*, 258 AD2d at 880). Therefore, in 2012, the defendant pleaded guilty to the charge in the original superior court information, pursuant to the original waiver of indictment (see *People v Cohen*, 47 AD3d at 828). Accordingly, the defendant's contention that his plea of guilty was invalid because, in 2012, his waiver of his right to be prosecuted by grand jury indictment was not knowingly, voluntarily, and intelligently made, is without merit. Dickerson, J.P., Leventhal, Austin and Hinds-Radix, JJ., concur.

56 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v EDDIE TOLBERT, Appellant. [991 NYS2d 903]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Kings County (DiMango, J.), imposed November 23, 2011, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's purported waiver of his right to appeal was invalid (see *People v Bradshaw*, 18 NY3d 257, 267 [2011]; *People v Pressley*, 116 AD3d 794 [2014]), and thus, does not preclude review of his claim that his sentence was excessive. However, contrary to the defendant's contention, the sentence imposed was not excessive (see *People v Suitte*, 90 AD2d 80 [1982]). Eng, P.J., Dillon, Chambers and Austin, JJ., concur.

57 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v EVERTON WAGSTAFFE and REGINALD CONNOR, Appellants. [992 NYS2d 340]—

Crimes—Disclosure—Failure to Disclose Exculpatory Material—Records Casting Doubt on Reliability of Key Prosecution Witness

Appeals by the defendants, by permission, from an order of the Supreme Court, Kings County (Parker, J.), dated October 28, 2011, which, after a hearing, denied their separate motions pursuant to CPL 440.10 to vacate judgments of the same court (Goldstein, J.) rendered February 16, 1993, and February 22,

1993 (one as to each of them), convicting them of kidnapping in the second degree, upon a jury verdict, and imposing sentences.

Ordered that the order is reversed, on the law, the defendants' separate motions pursuant to CPL 440.10 to vacate the judgments of conviction rendered against each of them are granted, the indictments are dismissed, and the matter is remitted to the Supreme Court, Kings County, for further proceedings consistent with CPL 160.50.

Just before 7:00 a.m. on January 1, 1992, the police found the body of a 16-year-old homicide victim on a street in a deserted industrial area in the East New York section of Brooklyn. The victim was only partially clothed, and had been stabbed repeatedly, strangled, and beaten. Subsequently, the police arrested the defendants, following their identification by Brunilda Capella, who was under the influence of drugs and alcohol at the time she witnessed the victim being forced into a vehicle. The defendants were both convicted by a jury of second degree kidnapping.

On direct appeal, this Court separately affirmed both judgments of conviction (*see People v Wagstaff*, 219 AD2d 690 [1995]; *People v Connor*, 219 AD2d 664 [1995]). Each defendant moved for leave to appeal to the Court of Appeals, and their respective motions were denied (*see People v Wagstaff*, 88 NY2d 996 [1996]; *People v Connor*, 88 NY2d 982 [1996]).

Subsequently, the defendants separately moved pursuant to CPL 440.10 to vacate their respective judgments of conviction. Among the various grounds raised, they contended that their convictions were obtained by fraud and misrepresentation on the part of the police (*see* CPL 440.10 [1] [b]). Specifically, they contended that certain documentary evidence establishes that two police detectives gave false testimony at the *Wade* hearing (*see United States v Wade*, 388 US 218 [1967]) and at trial, resulting in their convictions. The Supreme Court held a fact-finding hearing with respect to certain issues raised in the defendants' CPL 440.10 motions, but not as to whether the convictions were obtained by fraud and misrepresentation. Following that hearing, the Supreme Court denied the defendants' motions.

On appeal, the defendants continue to advance their arguments pursuant to CPL 440.10 (1) (b) and, in addition, contend that the People violated their disclosure obligations pursuant to *Brady v Maryland* (373 US 83 [1963]) with respect to the documents upon which the defendants rely to make the claims of misrepresentation and fraud by the investigating detectives. They contend that, therefore, CPL 440.10 (1) (h) provides an

equally viable ground for vacating their judgments of conviction, which were “obtained in violation of a right . . . under the constitution of this state or of the United States.” As the People correctly note, this contention is unpreserved for appellate review. However, it is closely tied to their contention concerning the alleged falsified testimony, and we exercise our interest of justice jurisdiction to reach it (*see* CPL 470.05 [2]).

At the outset, the Supreme Court improvidently exercised its discretion in denying those branches of the defendants’ motions which were pursuant to CPL 440.10 (1) (b) by invoking the permissive ground for denial set forth in CPL 440.10 (3) (a), and finding that the “defendants could have with due diligence placed on the record before sentencing facts to provide an adequate basis for appellate review, but unjustifiably failed to do so.” There is no indication in the record that the subject documents were disclosed to the defense in time to be used at the *Wade* hearing; rather, the prosecutor provided documents to the defense on the record at the time of jury selection. Moreover, while it is undisputed that the subject documents were included within the disclosure made during jury selection, the record reveals that the prosecutor delivered the subject documents interspersed throughout a voluminous amount of other documentation, without specifically identifying the documents at issue at the time of the delivery. As a result, the defendants were not afforded an adequate opportunity to develop a factual record for appellate review on direct appeal, and the Supreme Court should have exercised its discretion and reached this issue on the merits (*see* CPL 440.30 [2]).

The People have an obligation to disclose exculpatory evidence, known as *Brady* material, in their possession which is favorable to the defendant and material to his or her guilt or innocence (*see Brady v Maryland*, 373 US 83, 87 [1963]; *People v Fuentes*, 12 NY3d 259, 263 [2009]; *People v Scott*, 88 NY2d 888, 890 [1996]). Such evidence is to be produced regardless of whether a defendant requests the material (*see Strickler v Greene*, 527 US 263, 280-281 [1999]; *People v Garrett*, 106 AD3d 929 [2013], *revd on other grounds* 23 NY3d 878 [2014]). The prosecutor’s duty to exchange *Brady* material extends to the disclosure of evidence that can be used to impeach the credibility of a witness for the People whose testimony may be determinative of the defendant’s guilt (*see Giglio v United States*, 405 US 150, 154-155 [1972]; *People v Baxley*, 84 NY2d 208, 213 [1994]). Such material is to be turned over to the defendant in time for him or her to use it in a meaningful fashion during cross-examination or as evidence during his or her own case (*see e.g. People v Cortijo*, 70 NY2d 868, 870 [1987]).

In order to establish a *Brady* violation, a defendant must prove: (1) the evidence at issue is favorable to him or her; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued because the suppressed evidence was material (see *Strickler v Greene*, 527 US at 281-282; *People v Hayes*, 17 NY3d 46, 50 [2011]; *People v Fuentes*, 12 NY3d at 263; *People v LaValle*, 3 NY3d 88, 110 [2004]). As to the element of materiality, where there was only a general request by the defendant at the time of trial for exculpatory material, evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different (see *People v Fuentes*, 12 NY3d at 263; *People v Bryce*, 88 NY2d 124, 128 [1996]; *People v Vilardi*, 76 NY2d 67, 73-77 [1990]). Here, the manner in which the prosecution turned over the documents, during the course of jury selection, deprived the defendants of a meaningful opportunity to employ that evidence during their cross-examination of the prosecution's witnesses (compare *People v Sanchez*, 21 NY3d 216, 225 [2013]; *People v Alonso*, 91 AD3d 663, 665 [2012]).

The documents at issue—a Request for Record Check, dated January 1, 1992, concerning the defendant Reginald Connor, and New York State Police Information Network requests for records pertaining to both defendants—reveal that the defendants were being investigated by the New York City Police Department prior to the detectives' interview of Capella, a fact that was contrary to the testimony of one of the investigating detectives that the interview with Capella on January 2, 1992, led the police to the defendants. These documents clearly fell within the ambit of the prosecutor's *Brady* obligations because they constituted impeachment evidence (see *People v Fuentes*, 12 NY3d at 263; see also *Giglio v United States*, 405 US at 154-155). The failure to properly disclose such documents curtailed the defendants' ability to investigate additional avenues of exculpatory or impeaching evidence (see *United States v Gil*, 297 F3d 93, 104 [2d Cir 2002]).

Further, since the record does not reveal that the defendants made a specific request for the subject documents, materiality can only be demonstrated by showing that there is a reasonable probability that those documents, had they been properly identified and exchanged in such a manner so that they could be used in a meaningful fashion during the cross-examination of Capella and the detectives, would have changed the outcome of the proceedings (see *People v Fuentes*, 12 NY3d at 263; *People v Bryce*, 88 NY2d at 128). There was a reasonable probability

that, had the prosecution identified these documents when delivering them to the defendants, the employment of these documents would have changed the outcome of the defendants' trial, since the prosecution's case rested almost exclusively on the testimony of Capella (*see People v Hunter*, 11 NY3d 1, 6 [2008]; *People v Garrett*, 106 AD3d at 929). The documents call into question whether Capella provided the detectives with the identities of the defendants or if the detectives, without an evidentiary basis, had identified Connor and Wagstaffe prior to Capella's identification of them, thus bearing negatively upon the credibility of Capella and the investigating detectives. Given the lack of any other evidence tying the defendants to the crime, the credibility of Capella and the investigating detectives was of primary importance in this case, so that the burying of the subject documents by the prosecution during the exchange of discovery was material (*see People v Hunter*, 11 NY3d at 6; *see also Giglio v United States*, 405 US at 154-155).

In light of our determination, the defendants' remaining contentions have been rendered academic.

Under the circumstances of this case, including the passage of time and the death of the main witness, Capella, we vacate the judgments of conviction and dismiss the indictments (*see* CPL 440.10 [4]). Skelos, J.P., Dillon, Dickerson and Austin, JJ., concur.

(September 24, 2014)

1 ZHABINEZ ASSEMI, Respondent, v RAYMOND L. LEVAN et al., Appellants, et al., Defendant. [992 NYS2d 443]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Injury to Lumbar Region of Spine

In an action to recover damages for personal injuries, the defendants Raymond L. Levan and the Town of North Hempstead appeal from an order of the Supreme Court, Nassau County (Cozzens, Jr., J.), dated March 26, 2013, which denied their motion for summary judgment dismissing the complaint insofar as asserted against them on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Ordered that the order is affirmed, with costs.

The appellants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the

subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The papers submitted by the appellants failed to adequately address the plaintiff's claim, set forth in the bills of particulars, that she sustained a serious injury to the lumbar region of her spine under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (*see Staff v Yshua*, 59 AD3d 614 [2009]).

Since the appellants did not sustain their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2011]). Therefore, the Supreme Court properly denied the appellants' motion for summary judgment dismissing the complaint insofar as asserted against them. Rivera, J.P., Hall, Austin, Miller and Maltese, JJ., concur.

2 B&R CONSOLIDATED, LLC, Respondent, v ZURICH AMERICAN INSURANCE COMPANY, Doing Business as ZURICH NORTH AMERICA and Another, et al., Appellants. [993 NYS2d 121]—

Principal and Agent—Existence of Relation—Relationship between Professional Liability Insurers—Insurer's Direct Participation in Claim against Insured

Insurance—Disclaimer of Coverage—Purported Late Notice of Underlying Claim against Insured—Estoppel to Raise Issue of Late Notice

In an action, inter alia, pursuant to Insurance Law § 3420 (b) to recover the amount of an unsatisfied judgment in favor of the plaintiff and against the defendants' purported insured, the defendants appeal from (1) an order of the Supreme Court, Nassau County (McCormack, J.), dated July 17, 2012, which denied their motion for summary judgment dismissing the complaint and granted the plaintiff's cross motion for summary judgment on the complaint, and (2) a judgment of the same court entered September 12, 2012, which, upon the order, and upon a stipulation as to damages, is in favor of the plaintiff and against them in the total sum of \$706,042.46.

Ordered that the appeal from the order is dismissed; and it is further,

Ordered that the judgment is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from the order

are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

The defendants, Zurich American Insurance Company, doing business as Zurich North America, doing business as Zurich (hereinafter Zurich), and American Guarantee and Liability Insurance Company (hereinafter American Guarantee), are the professional liability insurers for Frederic Powell, an attorney who was sued by his former client, B&R Consolidated, LLC (hereinafter B&R), the plaintiff herein, in a prior action (hereinafter the underlying action). B&R alleged in the underlying action that Powell represented it in a real estate transaction in which it and Nathan Halegua loaned the sum of \$450,000 to Roland Lyons in November 2006. Lyons paid off the loan in June 2007 by sending payment to Powell in his capacity as B&R's attorney, but Powell never informed B&R or Halegua of this. Rather, Powell continued to pay installments on the loan from his attorney IOLA account, or the personal bank account that he shared with his wife. When Halegua requested that B&R buy out his interest in the loan, Powell assured B&R that the loan was secure. In 2008, after B&R bought out Halegua's interest in the loan, Powell began having difficulty making the payments on the loan. Thereafter, Powell advised B&R that the loan had been paid off in June 2007 and that he had used the money for other projects on its behalf. The amended complaint in the underlying action alleged, *inter alia*, breach of fiduciary duty and breach of the duty of loyalty. In the underlying action, the Supreme Court awarded summary judgment on the issue of liability to B&R, determining that Powell breached his fiduciary duty and duty of loyalty to B&R. A judgment in favor of B&R in the principal sum of \$585,056.18 was entered against Powell and his wife, a codefendant in the underlying action.

Powell notified the defendants of B&R's claims against him 51 days after receiving the summons and complaint in the underlying action. Counsel was assigned by the defendants to represent Powell in that action. Eighteen days after Powell provided notice to the defendants, they sent Powell a letter reserving their right to disclaim coverage based upon certain policy exclusions and his failure to give timely notice of the commencement of the action against him. However, the defendants did not disclaim coverage until approximately five months later. The disclaimer was based on Powell's alleged failure to give timely notice of the commencement of the underlying action. The defendants further advised Powell that they reserved the right to deny coverage on all other grounds set forth in their earlier letter, and that they would no longer provide a

defense or indemnify him in the underlying action. Thereafter, B&R commenced this action directly against the defendants to recover the amount of its judgment in the prior action pursuant to Insurance Law § 3420 (b). The defendants moved for summary judgment dismissing the complaint and B&R cross-moved for summary judgment on the complaint. The Supreme Court denied the defendants' motion and granted B&R's cross motion

The defendants' contention that Zurich is not a proper party to this action under Insurance Law § 3420 (b) because it did not issue the subject policy to Powell is without merit. Although the defendants made a prima facie showing that Zurich did not issue the subject policy by submitting a copy of the policy's declaration page, which stated that the issuing company was American Guarantee, B&R established in opposition to the defendants' motion and in support of its cross motion that an apparent agency relationship existed between Zurich and American Guarantee which extended potential vicarious liability to Zurich (see generally *Hallock v State of New York*, 64 NY2d 224, 231 [1984]). In addition to the presence of Zurich's logo on documents created and distributed by American Guarantee, B&R demonstrated that Zurich's claims counsel was assigned to handle Powell's case, that the assigned counsel was required to follow Zurich's guidelines and to submit bills to Zurich, and that Powell was contacted by Zurich's Customer Care Center regarding the claim and was directed to file his claim on Zurich's website (see *Fletcher v Atex, Inc.*, 68 F3d 1451, 1461-1462 [2d Cir 1995]). This evidence of Zurich's direct participation in the administration of Powell's claim is sufficient to establish, prima facie, that an agency relationship existed between Zurich and American Guarantee such that Zurich may be held liable to B&R (see *In re Parmalat Sec. Litig.*, 375 F Supp 2d 278, 295 [SD NY 2005]). In opposition to B&R's cross motion, the defendants failed to raise a triable issue of fact.

Contrary to the defendants' contention, the Supreme Court did not err in holding that American Guarantee was estopped from relying upon its late notice defense on the basis that its disclaimer to Powell was untimely. Where, as here, the matter does not involve death or bodily injury, the untimely disclaimer by an insurer does not automatically estop the insurer from disclaiming on the basis of late notice unless there has been a showing of prejudice to the insured due to the delay (see *Only Natural, Inc. v Realm Natl. Ins. Co.*, 37 AD3d 436 [2007]; *United States Fid. & Guar. Co. v Weiri*, 265 AD2d 321 [1999]; *Esseks, Hefter & Angel v Government Empls. Ins. Co.*, 215 AD2d 430 [1995]). Although the court did not make a determination that

Powell was prejudiced by the defendants' approximate five-month delay in disclaiming coverage, based upon this record, B&R made a sufficient showing of prejudice to Powell due to the defendants' late disclaimer such that the defendants are estopped from disclaiming coverage (*cf. Legum v Allstate Ins. Co.*, 33 AD3d 670 [2006]). Moreover, the purported reason for the disclaimer of coverage was evident on the face of the original complaint, and did not require any additional investigation by the insurer (*see Uptown Whole Foods v Liberty Mut. Fire Ins. Co.*, 302 AD2d 592, 593 [2003]). The defendants failed to rebut this showing.

The defendants' remaining contentions are either without merit or not properly before the Court.

Accordingly, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint and properly granted B&R's cross motion for summary judgment on the complaint. Skelos, J.P., Leventhal, Chambers and Maltese, JJ., concur.

3 BANK OF NEW YORK, Respondent, v MARGARITA SEGUI, Appellant, et al., Defendants. [993 NYS2d 330]—

Appeal—Appeal as of Right—No Appeal of Order Merely Directing Judicial Hearing to Aid in Disposition of Motion Not Affecting Substantial Right.

Appeal—Dismissal—Leave to Reargue

Process—Service of Process—Default at Hearing to Determine Validity of Process—Reasonable Excuse for Failure to Appeal

In an action to foreclose a mortgage, the defendant Margarita Segui appeals (1), as limited by her brief, from so much of an order of the Supreme Court, Kings County (Rothenberg, J.), dated January 24, 2012, as referred the matter to a Judicial Hearing Officer for a hearing to determine the validity of service of process, (2) from an order of the same court dated July 19, 2012, which granted the plaintiff's motion (a) to confirm the Judicial Hearing Officer's recommendation, in effect, that service was valid, and (b) to thereupon deny her motion to vacate her default in answering or appearing in the action on the ground that she failed to appear at the hearing to determine the validity of service of process, and denied her cross motion to vacate her default in appearing at that hearing, (3) from an order of the same court dated January 22, 2013, which denied her motion, denominated as one for leave to renew, but which was, in actuality, one for leave to reargue her cross motion to vacate her default in appearing at the hearing to determine the validity of service of process, and (4), as limited by her brief, from so much of an order of the same court dated March 22, 2013, as denied that branch of her prior motion which was to vacate the

judgment of foreclosure and sale of the same court entered July 12, 2004, upon her failure to answer or appear.

Ordered that the appeals from the orders dated January 24, 2012, and January 22, 2013, are dismissed; and it is further,

Ordered that the order dated July 19, 2012, is reversed, on the law and in the exercise of discretion, the plaintiff's motion (a) to confirm the recommendation of the Judicial Hearing Officer, in effect, that service was valid, and (b) to thereupon deny the appellant's motion to vacate her default in answering or appearing in the action on the ground that she failed to appear at the hearing to determine the validity of service of process is denied, the appellant's cross motion to vacate her default in appearing at that hearing is granted, and the matter is remitted to the Supreme Court, Kings County, for a hearing to determine the validity of service of process; and it is further,

Ordered that the order dated March 22, 2013, is reversed insofar as appealed from, on the law and in the exercise of discretion, and the matter is remitted for a new determination of that branch of the appellant's motion which was to vacate the judgment of foreclosure and sale entered July 12, 2004, following the hearing to determine the validity of service of process; and it is further,

Ordered that one bill of costs is awarded to the appellant.

The appeal from so much of the order dated January 24, 2012, as referred the matter to a Judicial Hearing Officer (hereinafter JHO) for a hearing to determine the validity of service of process must be dismissed. The challenged portion of the order merely directs a judicial hearing to aid in the disposition of a motion and does not affect a substantial right. Therefore, it is not appealable as of right (*see* CPLR 5701 [a] [2] [v]; *Youngquist v Youngquist*, 44 AD3d 1034, 1035 [2007]; *Leonard v Bishop*, 220 AD2d 723 [1995]; *Board of Mgrs. of Oaks At La Tourette II v Management Consultants Intl.*, 170 AD2d 636 [1991]), and leave to appeal has not been granted.

The appeal from the order dated January 22, 2013, must also be dismissed. The underlying motion, although denominated as one for leave to renew, was, in actuality, one for leave to reargue, the denial of which is not appealable (*see* CPLR 2221 [d] [2]; [e] [2]; *Poulard v Judkins*, 102 AD3d 665 [2013]; *Strunk v Revenge Cab Corp.*, 98 AD3d 1030 [2012]).

This action was commenced in 2003 to foreclose a mortgage encumbering the residential Brooklyn property of the defendant Margarita Segui. It has an extensive litigation history that includes three prior appeals to this Court (*see Bank of N.Y. v*

Segui, 91 AD3d 689 [2012]; *Bank of N.Y. v Segui*, 68 AD3d 908 [2009]; *Bank of N.Y. v Segui*, 42 AD3d 555 [2007]). Presently, Segui appeals, in whole or in part, from four separate orders of the Supreme Court that arise from her ongoing efforts to vacate a judgment of foreclosure and sale entered July 12, 2004, upon her failure to answer or appear (*see* CPLR 5015 [a]). Throughout the course of the litigation, Segui has maintained, as she does on this appeal, that service of the pleadings was not valid.

On January 24, 2012, the Supreme Court referred the matter to a Judicial Hearing Officer (hereinafter JHO) for a hearing to determine the issue of whether Segui was properly served with the pleadings. At that time, the Supreme Court made several significant findings. The Supreme Court correctly found that, after several years of litigation, Segui had offered evidence sufficient to substantiate her claim that she was not properly served with the pleadings. In this regard, one of the several affidavits of service indicates that service of the pleadings was made upon Segui through her husband, “Hector Villafame,” by personal delivery at the subject premises, on December 23, 2003, at 4:45 p.m. The actual spelling of her husband’s last name is “Villafane.” To rebut this affidavit of service, Segui offered an affidavit from her husband, in which he averred that he was at work, not at the premises, when the pleadings were allegedly served. To substantiate her husband’s statement, Segui offered a time sheet from her husband’s job at the New York City Department of Correction which showed that, on the date of the alleged substituted service, he signed in to work at 11:45 a.m. and signed out at 8:15 p.m. and, thus, he was not at the premises at the time he allegedly accepted the pleadings.

Additionally, the Supreme Court correctly found that Segui effectively raised doubts about other affidavits of service submitted by the process server. One of these affidavits states that, on December 23, 2003, service of the pleadings was made on Segui’s cotenant “Hector Villafame [sic].” According to Segui, that name could refer either to Segui’s husband (Hector Villafane, Jr.), or her father-in-law, Hector Villafane, Sr. Another affidavit states that, on the same date, personal service was made upon codefendant “Hector Villafame Sr.” Segui submitted evidence that although her father-in-law, Hector Villafane, Sr., had previously resided at the subject premises, he resided in Puerto Rico on the alleged date of service.

For those reasons, among others, the Supreme Court found that “equity would be best served” if it were to revisit that branch of Segui’s prior motion which was pursuant to CPLR 5015 (a) (4) to vacate the judgment of foreclosure and sale

entered upon her failure to answer or appear (*Bank of N.Y. v Segui*, 2012 WL 10441476, *3 [Sup Ct, Kings County, Jan. 24, 2012]). The Supreme Court referred the matter to the JHO to hear and to report as to whether Segui was properly served with the pleadings, to aid in its determination of, among other things, that branch of Segui's motion which was to vacate the judgment of foreclosure and sale.

The hearing was subsequently scheduled for March 16, 2012. On that date, the plaintiff's counsel and the process server appeared at the hearing, but neither Segui nor her counsel appeared. The JHO adjourned the matter for one month. On April 17, 2012, the plaintiff's counsel and the process server appeared for the hearing but, once again, Segui and her counsel failed to appear. The JHO recommended, in effect, that service was valid because Segui "twice defaulted in appearing" at the hearing.

Less than one month later, in a letter dated May 9, 2012, Segui's counsel asked the Supreme Court for a status update as to the hearing. That same day, May 9, 2012, the plaintiff moved to confirm the JHO's recommendation, and to thereupon deny Segui's motion to vacate her default in answering or appearing in the action on the ground that Segui failed to appear at the hearing. In support of its motion, the plaintiff noted that it received notice of the first hearing to determine the validity of service of process. With respect to the adjourned hearing date, the plaintiff asserted that notice was given on the eCourts case tracking system and that it received notice via that method. It further maintained that Segui's counsel should have utilized that system to monitor its cases and that, therefore, her excuse for failing to appear should be rejected. On appeal, the plaintiff reiterates that it received notice of the adjourned hearing date via eCourts, but acknowledges that the record contains no documentary proof of this notice.

Five days later, on May 14, 2012, Segui cross-moved, *inter alia*, to vacate her default in appearing at the hearing on the ground that she did not receive notice of either of the hearing dates and, thus, she had a reasonable excuse for her failure to appear at the hearing.

After reviewing the motion papers and hearing the parties' arguments in open court, the Supreme Court explained, "In light of the long and torturous [sic] history in regards to this matter and the numerous dates over the course of time that have apparently not reached defense counsel appropriately, and the defaults that had been vacated in this case continuously—or several times at least—I have a problem with vacating another default in this [action], which does nothing more than just to, it

seems to me, forestall the inevitable.” The court further noted, “What’s been allegedly served by the J.H.O. is, under the law, presumed to have been received. And I have really not heard anything that is substantial enough.” Accordingly, the court granted the plaintiff’s motion to confirm the JHO’s recommendation based on Segui’s failure to appear at the hearing, and denied Segui’s cross motion to vacate that default. The Supreme Court did not make any additional findings as to the reasonableness of Segui’s excuse for her failure to appear at the hearing.

The Supreme Court then denied that branch of Segui’s pending motion which was to vacate the judgment of foreclosure and sale entered upon her failure to answer or appear, which had been held in abeyance by the January 24, 2012, order.

Contrary to the Supreme Court’s determination, under the circumstances present here, we find that Segui provided a reasonable excuse for her failure to appear at the hearing (*see Matter of Peterson v Eagan*, 108 AD3d 772 [2013]; *Matter of Allstate Ins. Co. v Hayes*, 17 AD3d 669, 671 [2005]). Segui’s counsel offered a detailed, substantiated, and credible explanation that she never received notice of either of the hearing dates (*cf. Matter of Government Empls. Ins. Co. v Dae-Hee Lee*, 78 AD3d 944, 945 [2010]). It is undisputed that the order referring the matter for the hearing did not set the date and time for the hearing, and that neither Segui nor the buyer at the foreclosure sale appeared for the hearing. Further, the record is devoid of any proof that a written notice, other than an electronic posting via eCourts, was sent to any of the parties (*cf. Matter of Fotiades*, 38 AD3d 892, 892 [2007] [the appellant’s “assertions that she did not receive notice of the hearing and that the hearing did not even take place are clearly refuted by the evidence”]; *Matter of Aetna Life & Cas. Co. v Walker*, 255 AD2d 381, 382 [1998] [“unsubstantiated excuse by the appellant’s attorney that his office was unaware of the hearing date was insufficient to rebut the proof that the notice was properly mailed and the presumption of receipt”]).

We further note that Segui moved to vacate her default less than one month after she failed to appear on the second hearing date, and only five days after the date that she first learned of her alleged default (*cf. Matter of Aetna Life & Cas. Co. v Walker*, 255 AD2d 381 [1998]). Under these circumstances, where Segui moved expeditiously to vacate her alleged default, we find that the plaintiff suffered little or no prejudice.

Moreover, there was no new evidence to call into doubt the Supreme Court’s finding in its earlier order dated January 24,

2010, that Segui had demonstrated the existence of a potentially meritorious defense to the action, based on the plaintiff's alleged failure to properly serve the pleadings upon her (*see Kohn v Kohn*, 86 AD3d 630 [2011]).

Because Segui demonstrated, under the circumstances presented here, a reasonable excuse for her failure to appear at the hearing and a potentially meritorious defense, the Supreme Court improvidently exercised its discretion in granting the plaintiff's motion to confirm the JHO's recommendation and to thereupon deny Segui's motion to vacate her default in answering or appearing in the action, and in denying Segui's cross motion to vacate her default in appearing at the hearing. Furthermore, following the hearing to determine the validity of service of process, Segui is entitled to a determination of that branch of her motion which was to vacate the judgment of foreclosure and sale of the same court entered July 12, 2004, upon her failure to answer or appear.

Segui's remaining contentions are without merit. Skelos, J.P., Chambers, Duffy and LaSalle, JJ., concur.

4 GERMAN BEDOYA, Appellant, v ASHWANTI KUMAR et al., Respondents. [993 NYS2d 148]—In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Agate, J.), entered May 9, 2013, which granted the defendants' motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Ordered that the order is reversed, on the law, with costs, and the defendants' motion for summary judgment dismissing the complaint is denied.

In support of their motion for summary judgment dismissing the complaint, the defendants met their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyster*, 79 NY2d 955, 956-957 [1992]). The defendants submitted competent medical evidence establishing, prima facie, that the alleged injuries to the cervical region of the plaintiff's spine did not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (*see Staff v Yshua*, 59 AD3d 614 [2009]).

In opposition, however, the plaintiff raised a triable issue of fact as to whether he sustained serious injuries to the cervical

region of his spine (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Pommells v Perez*, 4 NY3d 566, 572 [2005]). Therefore, the Supreme Court should have denied the defendants' motion for summary judgment dismissing the complaint. Mastro, J.P., Chambers, Cohen and Barros, JJ., concur.

5 ANTONIO CARDUCCI, Appellant, v ROBERT RUSSELL et al., Respondents, et al., Defendants. [993 NYS2d 119]—

Process—Service of Process—Invalid Service—Law Office Failure Not Valid Excuse for Invalid Service

In an action, inter alia, to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Westchester County (Jamieson, J.), dated March 19, 2013, which granted that branch of the motion of the defendants Robert Russell and Lisa Russell which was pursuant to CPLR 3012 (b) to dismiss the action insofar as asserted against them.

Ordered that the order is affirmed, with costs.

On July 25, 2011, the plaintiff, acting pro se, commenced this action by filing a summons with notice with the New York State Courts Electronic Filing System (hereinafter NYSCEF). Simultaneously, he filed a “notice of hard copy submission—e-filed case” to exempt him from e-filing. On October 13, 2011, the plaintiff served the defendants Robert Russell and Lisa Russell (hereinafter together the Russell defendants) with the summons with notice and a “notice of hard copy submission—e-filed case.” On November 2, 2011, the Russell defendants uploaded a notice of appearance and demand for service of a complaint to the NYSCEF system. Although the Russell defendants did not execute an affidavit of service, they attached a “certificate of service,” which indicated that they mailed a copy of the same documents to the plaintiff. It is uncontested that the plaintiff did not serve the Russell defendants with a proposed complaint until on or about November 14, 2012, more than one year later. By notice of motion dated December 4, 2012, the Russell defendants moved, inter alia, pursuant to CPLR 3012 (b) to dismiss the action insofar as asserted against them. The plaintiff's affidavit submitted in opposition to the motion stated, in pertinent part, “subsequent to commencement, but prior to serving the summons on the [Russell] defendants, your deponent retained The Law Office of Brian R. Hoch, Esq. to represent me in this action.”

To avoid dismissal of the action for failure to serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a

potentially meritorious cause of action (see *Dayan v Darche*, 96 AD3d 708 [2012]; *Perez-Faringer v Heilman*, 79 AD3d 837, 838 [2010]; *Gibbons v Court Officers' Benevolent Assn. of Nassau County*, 78 AD3d 654, 654 [2010]; *Pristavec v Galligan*, 32 AD3d 834, 834 [2006]; *Maldonado v Suffolk County*, 23 AD3d 353, 353-354 [2005]).

Here, the record indicates that the plaintiff was no longer acting in a pro se capacity when the Russell defendants uploaded the notice of appearance and demand to the NYSCEF system. The plaintiff's purported reasonable excuse that the failure to serve the complaint was a "technical glitch" of the NYSCEF system is unavailing. The Russell defendants' notice of appearance and demand remained in the e-filing system for over one year, during which the plaintiff was represented by counsel, before the plaintiff served a proposed complaint on them. Contrary to the plaintiff's contentions, this is not a mere technical glitch. It is law office failure, which has been held not to constitute a reasonable excuse under CPLR 3012 (b) (see *Okun v Taners*, 11 NY3d 762 [2008]; *Grace v Follini*, 80 AD3d 560, 561 [2011]). In any event, the plaintiff's verified complaint and affidavit in opposition to the Russell defendants' motion did not set forth any facts which would demonstrate a potentially meritorious cause of action against the Russell defendants (see *Perez-Faringer v Heilman*, 79 AD3d at 838; *Balgley v Cammarata*, 299 AD2d 432 [2002]; cf. *Holton v Sprain Brook Manor Nursing Home*, 253 AD2d 852 [1998]).

Accordingly, the Supreme Court correctly granted the Russell defendants' motion to dismiss the plaintiff's action insofar as it is asserted against them (see *Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904 [1985]). Dillon, J.P., Balkin, Miller and Maltese, JJ., concur.

6 ROBERT CEGLIO et al., Respondents, v BAB NUCLEAR RADIOLOGY, P.C., et al., Appellants. [992 NYS2d 580]—

Limitation of Actions—Continuous Treatment Doctrine—Medical Malpractice—Plaintiffs' Failure to Raise Question of Fact

In an action to recover damages for medical malpractice, etc., the defendants appeal from an order of the Supreme Court, Suffolk County (Farneti, J.), dated March 29, 2013, which denied their motion pursuant to CPLR 3211 (a) (5) to dismiss, as time-barred, so much of the complaint as was based upon alleged acts of medical malpractice committed by the defendants Melissa R. Sapan and BAB Nuclear Radiology, P.C., prior to May 30, 2007.

Ordered that the order is reversed, on the law, with costs, and

the defendants' motion pursuant to CPLR 3211 (a) (5) to dismiss, as time-barred, so much of the complaint as was based upon alleged acts of medical malpractice committed by the defendants Melissa R. Sapan and BAB Nuclear Radiology, P.C., prior to May 30, 2007, is granted.

The defendants made a prima facie showing that so much of the complaint as was based upon alleged acts of medical malpractice committed by Melissa R. Sapan and BAB Nuclear Radiology, P.C. (hereinafter together the radiology defendants), prior to May 30, 2007, was time-barred, through the submission of the summons and complaint, which demonstrated that this action was commenced on November 30, 2009 (*see* CPLR 214-a; *Peykarian v Yin Chu Chien*, 109 AD3d 806, 807 [2013]; *Baptiste v Harding-Marin*, 88 AD3d 752, 753 [2011]; *Rakusin v Miano*, 84 AD3d 1051, 1052 [2011]). Thus, the burden shifted to the plaintiffs to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable (*see Peykarian v Yin Chu Chien*, 109 AD3d at 807). Here, although the plaintiffs contend that the statute of limitations was tolled by the continuous treatment doctrine, they failed to raise a question of fact in that regard.

To establish that the continuous treatment doctrine applies, a plaintiff is "required to demonstrate that there was a course of treatment, that it was continuous, and that it was in respect to the same condition or complaint underlying the claim of malpractice" (*Baptiste v Harding-Marin*, 88 AD3d 752, 753 [2011], quoting *Stewart v Cohen*, 82 AD3d 874, 876 [2011]; *see Gomez v Katz*, 61 AD3d 108, 111-112 [2009]). It is undisputed that the radiology defendants were monitoring the plaintiff Robert Ceglio (hereinafter Robert) for postsurgical changes after he had a pituitary tumor removed. The plaintiffs allege that Robert suffered injuries as a result of a colloid cyst, which the radiology defendants failed to notice on his MRI scans when they were monitoring him for postsurgical changes. However, the plaintiffs presented no evidence to suggest that the colloid cyst, which allegedly caused the injuries complained of, was in any way connected to the pituitary changes for which the radiology defendants were monitoring Robert. Consequently, the plaintiffs failed to raise a question of fact as to whether Robert received continuous treatment for the same condition underlying the claim of malpractice (*see Baptiste v Harding-Marin*, 88 AD3d at 753; *Weber v Bay Ridge Med. Group*, 220 AD2d 408 [1995]; *Werner v Kwee*, 148 AD2d 701 [1989]).

Accordingly, the defendants' motion should have been granted. Rivera, J.P., Balkin, Leventhal and Roman, JJ., concur.

7 JEAN JAMES CHARITE et al., Respondents, v DUANE READE, INC., et al., Appellants, et al., Defendants. [993 NYS2d 138]—

Civil Rights—Election of Remedies—Retaliation in Employment Claim—Prior Action

In an action, inter alia, to recover damages for unlawful retaliation in employment in violation of Administrative Code of the City of New York § 8-107, the defendants Duane Reade, Inc., Walgreen Company, Inc., and Walgreen Eastern Co., Inc., appeal from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated September 19, 2012, as denied, without prejudice, that branch of their motion pursuant to CPLR 3211 (a) which was to dismiss the first cause of action insofar as asserted against them.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendants Duane Reade, Inc., Walgreen Company, Inc., and Walgreen Eastern Co., Inc., pursuant to CPLR 3211 (a) which was to dismiss the first cause of action insofar as asserted against them is granted.

The Supreme Court should have granted that branch of the motion of the defendants Duane Reade, Inc. (hereinafter Duane Reade), Walgreen Company, Inc. (hereinafter Walgreen Company), and Walgreen Eastern Co., Inc., pursuant to CPLR 3211 (a) which was to dismiss the first cause of action, which alleges retaliation in employment against the plaintiffs in violation of Administrative Code of the City of New York § 8-107. That claim is barred by the election of remedies provision contained in Labor Law § 740 (7). Labor Law § 740 (7) provides that “the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.” The waiver applies to causes of action arising out of or relating to the same underlying claim of retaliation (*see Minogue v Good Samaritan Hosp.*, 100 AD3d 64, 73 [2012]; *Garner v China Natural Gas, Inc.*, 71 AD3d 825 [2010]; *Hayes v Staten Is. Univ. Hosp.*, 39 AD3d 593 [2007]; *Pipia v Nassau County*, 34 AD3d 664 [2006]).

The plaintiffs in this action alleged retaliation pursuant to Labor Law § 740 in a prior action against Duane Reade and Walgreen Company. The claim asserted here pursuant to Administrative Code of the City of New York § 8-107 arises out of and relates to the same underlying claim of retaliation as asserted in the prior action. It is, therefore, barred by the Labor Law § 740 (7) election of remedies provision (*see Deshpande v TJH Med. Servs., P.C.*, 52 AD3d 648 [2008]; *Hayes v Staten Is.*

Univ. Hosp., 39 AD3d at 593-594; *Pipia v Nassau County*, 34 AD3d at 667). The waiver may not be avoided by amending the complaint to withdraw the section 740 claim, as the plaintiffs did in the prior action (see *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 87-88 [2008]; *Hayes v Staten Is. Univ. Hosp.*, 39 AD3d at 593-594).

In light of our determination, we need not reach the parties' remaining contentions. Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

8 CHRISTOPHER CICOLA, Respondent, v COUNTY OF SUFFOLK et al., Appellants. [993 NYS2d 131]—

Damages—Inadequate and Excessive Damages—Excessive Damages—Back Injury Arising Out of Automobile Accident

In an action to recover damages for personal injuries, the defendants appeal, as limited by their brief, (1) from so much of an order of the Supreme Court, Suffolk County (Garguilo, J.), entered July 27, 2012, as, upon, in effect, reargument, adhered to its prior determinations (a) denying their motion pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint, and (b) denying those branches of their motion pursuant to CPLR 4404 (a) which were to set aside a jury verdict in favor of the plaintiff and against them on the issue of damages finding that the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) under the significant limitation of use and permanent consequential limitation of use categories as a result of the subject accident and awarding the plaintiff damages for past pain and suffering in the principal sum of \$325,000, and future pain and suffering in the principal sum of \$250,000, and for judgment as a matter of law or, alternatively, to set aside the jury verdict as contrary to the weight of the evidence and excessive and for a new trial on the issues of causation and damages for past and future pain and suffering, and (2) from so much of a judgment of the same court dated August 3, 2012, as, upon an order of the same court (Baisley, Jr., J.), dated September 17, 2007, granting the plaintiff's motion for summary judgment on the issue of liability, upon the jury verdict, and upon the order entered July 27, 2012, is in favor of the plaintiff and against them in the principal sums of \$325,000 for past pain and suffering and \$250,000 for future pain and suffering.

Ordered that the appeal from the order entered July 27, 2012, is dismissed; and it is further,

Ordered that the judgment is reversed insofar as appealed from, on the facts and in the exercise of discretion, with costs,

that branch of the defendants' motion pursuant to CPLR 4404 (a) which was to set aside, as excessive, the jury verdict on the issue of damages for past and future pain and suffering is granted, the order entered July 27, 2012, is modified accordingly, and the matter is remitted to the Supreme Court, Suffolk County, for a new trial on the issue of damages for past and future pain and suffering, unless, within 30 days after service upon the plaintiff of a copy of this decision and order, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Suffolk County, a written stipulation consenting to reduce the verdict as to damages for past pain and suffering from the principal sum of \$325,000 to the principal sum of \$150,000, and to reduce the verdict as to damages for future pain and suffering from the principal sum of \$250,000 to the principal sum of \$100,000, and to the entry of an appropriate amended judgment accordingly; in the event that the plaintiff so stipulates, then the judgment, as so reduced and amended, is affirmed insofar as appealed from, without costs or disbursements.

The appeal from the intermediate order entered July 27, 2012, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). The issues raised on the appeal from that order are brought up for review and have been considered on the appeal from the judgment (*see* CPLR 5501 [a] [1]).

On January 11, 2007, a vehicle owned by the defendant County of Suffolk and operated by the defendant Deputy Sheriff Glenn S. Muller, struck the plaintiff's vehicle in the rear.

The plaintiff commenced this action against the defendants claiming that he sustained a serious injury within the meaning of Insurance Law § 5102 (d) under the significant limitation of use and permanent consequential limitation of use categories as a result of the subject accident. The plaintiff alleged that, as a result of the accident, he sustained injuries to the cervical region of his spine, which required two spinal fusion surgeries and a period of physical therapy and other related medical treatment. The plaintiff's bill of particulars did not allege that the plaintiff's injuries were related to a preexisting condition that was exacerbated by the subject accident. The plaintiff was awarded summary judgment on the issue of liability, and a jury trial on the issue of damages followed.

At the damages trial, the plaintiff's treating physicians testified that any preexisting degenerative disk condition represented simple normal wear and tear for someone the plaintiff's

age, and was so minimal that it played no role in the plaintiff's injuries caused by the accident. The defendants maintained that the plaintiff's injuries were the result of aggravation of a preexisting degenerative condition. The orthopedic surgeon who examined the plaintiff on the defendants' behalf opined that while he found significant limitations in the range of motion in the cervical region of the plaintiff's spine, they were attributable to the preexisting degenerative disk disease that was present prior to the accident.

The jury found that the plaintiff's injuries were caused by the subject accident and awarded him damages for, inter alia, past and future pain and suffering. Following an order entered July 27, 2012, which, upon reargument, adhered to the prior denial of the defendants' CPLR 4401 and 4404 motions, judgment was entered in favor of the plaintiff and against the defendants, among other things, in the principal sums of \$325,000 for past pain and suffering and \$250,000 for future pain and suffering.

“To be entitled to judgment as a matter of law pursuant to CPLR 4401, a defendant has the burden of showing that there is no rational process by which the jury could find in favor of the plaintiff and against the moving defendant” (*Delaney v Delaney*, 83 AD3d 647, 648 [2011], quoting *Velez v Goldenberg*, 29 AD3d 780, 781 [2006]). In considering the motion for judgment as a matter of law, “the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant” (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]; see *Delaney v Delaney*, 83 AD3d at 648). Contrary to the defendants' contention, viewing the facts in the light most favorable to the plaintiff at the end of the plaintiff's case, there was a rational process by which the jury could find that the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) which was proximately caused by the subject accident. The plaintiff's treating physicians testified that any preexisting degenerative condition was minimal and insignificant and would have no bearing in this case, and that, in their opinions, the accident caused the herniation of the subject disks in the plaintiff's cervical spine. They noted that the minimal degenerative process seen on the plaintiff's initial X rays was asymptomatic and played no role in his injury or in their treatment. They also testified that all of the other disks depicted in the X ray showed good “heights,” and that to become clinically significant, one would expect to see worn out disks and thickened “N plates,” none of which was present.

The defendants' challenge to the Supreme Court's denial of that branch of their motion pursuant to CPLR 4404 (a), which was to set aside the jury verdict and for judgment as a matter of law, is also without merit, as there was a valid line of reasoning and permissible inferences which could lead rational people to the conclusion reached by the jury on the basis of the evidence presented at trial (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

A jury verdict is contrary to the weight of the evidence when the evidence so preponderates in favor of the movant that the verdict could not have been reached on any fair interpretation of the evidence (*see Nolan v Union Coll. Trust of Schenectady*, N.Y., 51 AD3d 1253, 1255 [2008]; *Biello v Albany Mem. Hosp.*, 49 AD3d 1036, 1037 [2008]). Where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion, and reject that of another expert (*see Liounis v New York City Tr. Auth.*, 92 AD3d 643, 644 [2012]; *Ross v Mandeville*, 45 AD3d 755, 757 [2007]). "Issues of credibility are for the jury, which had the opportunity to observe the witnesses and the evidence. Its resolution is entitled to deference" (*Lalla v Connolly*, 17 AD3d 322, 323 [2005]; *see Robinson v City of New York*, 300 AD2d 384, 385 [2002]). "[A] successful party is entitled to a presumption that the jury adopted a reasonable view of the evidence" (*see Lalla v Connolly*, 17 AD3d at 323). Here, the only testimony presented at trial that a preexisting degenerative disk disease may have caused the disk herniation or played any role in the plaintiff's claimed injuries was elicited from the defendants' examining orthopedic surgeon. The jury was entitled to reject that testimony, given that the expert failed to account for the plaintiff being asymptomatic pre-accident and disregarded his own range of motion testing, which revealed significant limitations in the movement of the plaintiff's neck. Thus, a fair interpretation of the evidence supports the jury's conclusion that, based on the evidence before it, the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Nonetheless, under the circumstances of this case, the award of damages deviated materially from what would be reasonable compensation to the extent indicated herein (*see CPLR 5501 [c]*; *see also Sanz v MTA-Long Is. Bus.*, 46 AD3d 867, 869 [2007]).

The defendants' remaining contentions are without merit. Mastro, J.P., Austin, Sgroi and Miller, JJ., concur.

9 COASTAL PURCHASING GROUP, LLC, Respondent, v JPMCC 2005-CIBC COLLINS LODGING, LLC, et al., Appellants. [993 NYS2d 128]—

Specific Performance—When Remedy Available—Option to Purchase Mortgage—Defendants Not Parties to Agreement Containing Purchase Option

In an action, inter alia, for specific performance of an option to purchase a mortgage pursuant to a lease and declaratory relief, the defendants JPMCC 2005-CIBC Collins Lodging, LLC, LNR Partners, LLC, and Wells Fargo Bank, N.A., appeal, as limited by their brief, from so much of an amended order of the Supreme Court, Nassau County (Bucaria, J.), dated March 20, 2013, as granted the plaintiff's motion for a preliminary injunction and denied their cross motion pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against them and pursuant to CPLR 327 to dismiss the complaint on the ground of forum non conveniens, and the defendant NYLIM Real Estate Mezzanine Fund II, L.P., appeals, as limited by its brief, from so much of the same amended order as denied its separate cross motion pursuant to CPLR 3211 (a) to dismiss the complaint insofar as asserted against it.

Ordered that on the Court's own motion, the defendants' respective notices of appeal from an order dated March 7, 2013, are deemed premature notices of appeal from the amended order dated March 20, 2013 (*see* CPLR 5520 [c]); and it is further,

Ordered that the appeal by the defendants JPMCC 2005-CIBC Collins Lodging, LLC, LNR Partners, LLC, and Wells Fargo Bank, N.A., from so much of the amended order as granted the plaintiff's motion for a preliminary injunction is dismissed as academic; and it is further,

Ordered that the amended order is modified, on the law, (1) by deleting the provisions thereof denying those branches of the cross motion of the defendants JPMCC 2005-CIBC Collins Lodging, LLC, LNR Partners, LLC, and Wells Fargo Bank, N.A., which were pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint insofar as asserted against them, and substituting therefor a provision granting those branches of that cross motion, and (2) by deleting the provision thereof denying the separate cross motion of the defendant NYLIM Real Estate Mezzanine Fund II, L.P., pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint insofar as asserted against it, and substituting therefor a provision granting that cross motion; as so modified, the amended order is affirmed insofar as reviewed, and the matter is remitted to the Supreme Court, Nassau County, for the entry of a judgment, inter alia, declaring that the plaintiff did not have the right to purchase the subject mortgage at fair market value and that the defendants were not obligated to sell or assign the mortgage to the plaintiff; and it is further,

Ordered that one bill of costs is awarded to the defendants appearing separately and filing separate briefs.

In this action, the plaintiff, Coastal Purchasing Group, LLC (hereinafter Coastal), sought, among other things, specific performance of an option to purchase a mortgage that encumbered a hotel in Miami Beach, Florida, known as “the Shore Club.” The mortgage agreement was entered into in November 2005, with CIBC, Inc., as the mortgagee and the Shore Club’s owner, Phillips South Beach, LLC (hereinafter PSB), as the mortgagor. The loan was evidenced by two notes, one for \$115 million and one for \$11.5 million. CIBC, Inc., assigned the mortgage and the larger note to the defendant Wells Fargo Bank, N.A. (hereinafter Wells Fargo), and the smaller note to the defendant NYLIM Real Estate Mezzanine Fund II, L.P. (hereinafter NYLIM). Subsequently, Wells Fargo assigned the mortgage and the two notes to the defendant JPMCC 2005-CIBC Collins Lodging, LLC (hereinafter JPMCC). PSB thereafter defaulted on the mortgage loan, and on or about November 29, 2010, JPMCC commenced an action, in the state of Florida, to foreclose the mortgage.

While the Florida foreclosure action was pending, PSB entered into a lease with Nobu Associates (South Beach), L.P. (hereinafter Nobu), to lease a restaurant space at the Shore Club. Philip Pilevsky is a member and the managing agent of PSB.

The lease contained a provision which stated that PSB granted Nobu the right to purchase the mortgage at fair market value. Nobu assigned its rights under that provision to Coastal. Philip Pilevsky is also a member and the managing agent of Coastal.

Thereafter, Coastal informed JPMCC that it was exercising its right to purchase the mortgage at fair market value pursuant to the provision in the lease. JPMCC refused to sell the mortgage to Coastal and proceeded with the Florida foreclosure action. Coastal then commenced the instant action seeking, inter alia, specific performance and a declaration that it had the right to purchase the mortgage at fair market value and that the defendants were obligated to sell and assign the mortgage to Coastal.

Coastal moved to preliminarily enjoin the defendants from taking any actions that would impair or extinguish its alleged right to purchase the mortgage. JPMCC, its loan servicer, the defendant LNR Partners, LLC (hereinafter LNR), and Wells Fargo (hereinafter collectively the bank defendants), inter alia, cross-moved pursuant to CPLR 3211 (a) (1), (7) and (10), to dismiss the complaint insofar as asserted against them and pur-

suant to CPLR 3211 (a) (8) to dismiss the complaint insofar as asserted against JPMCC. They also moved pursuant to CPLR 327 to dismiss the complaint on the ground of forum non conveniens. NYLIM separately cross-moved pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint insofar as asserted against it. In the amended order appealed from, the Supreme Court granted Coastal's motion and denied the cross motions.

"A motion pursuant to CPLR 3211 (a) (1) . . . may appropriately be granted 'only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law' " (*Springer v Almontaser*, 75 AD3d 539, 540 [2010], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Parkoff v Stavsky*, 109 AD3d 646, 647 [2013]). On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must "afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Atlantic Capital Realty v Cayuga Capital Mgt., LLC*, 116 AD3d 890, 891 [2014]; see *Felix v Thomas R. Stachecki Gen. Contr., LLC*, 107 AD3d 664 [2013]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2008]). "However, factual allegations which are flatly contradicted by the record are not presumed to be true and, '[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a) (7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action' " (*Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 915 [2009], quoting *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 530 [2007]; see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]).

Here, the documentary evidence conclusively established that none of the defendants was a party to PSB's and Nobu's lease and, thus, cannot be bound by the purchase option contained therein (see *Kalmon Dolgin Affiliates, Inc. v Tonacchio*, 110 AD3d 848, 850 [2013]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 797 [2011]; *Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 27 AD3d 323, 323 [2006]). Moreover, the documentary evidence relied upon by the defendants, including a subordination, nondisturbance, and attornment agreement dated January 9, 2012, refuted the allegations in the complaint that JPMCC and the other defendants assented to be bound by the purchase option (see *American Motorists Ins. Co. v Keep*

Servs., Inc., 63 AD3d 865, 867 [2009]; *Holm v C.M.P. Sheet Metal*, 89 AD2d 229, 233 [1982]). Thus, the defendants established that they were entitled to dismissal of the complaint pursuant to CPLR 3211 (a) (1) and (7).

The bank defendants' appeal from so much of the amended order as granted Coastal's motion for a preliminary injunction must be dismissed as academic, because PSB has since exercised its right of redemption and tendered full payment of the mortgage loan.

The appellants' remaining contentions either are without merit or have been rendered academic by our determination.

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Nassau County, for the entry of a judgment, inter alia, declaring that the plaintiff did not have the right to purchase the subject mortgage at fair market value and that the defendants were not obligated to sell or assign the mortgage to the plaintiff (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962]). Rivera, J.P., Balkin, Cohen and Miller, JJ., concur.

10 MICHAEL DAVIS et al., Respondents, v DUANE READE, INC., et al., Appellants, et al., Defendants. [993 NYS2d 335]—

Election of Remedies—Administrative or Judicial Relief—Claim for Illegal Placement of Video Cameras in Employee Restrooms Not Barred by Remedies Available in Collective Bargaining Agreement

In an action, inter alia, to recover damages for violation of Labor Law § 203-c, the defendants Duane Reade, Inc., and Walgreen Company appeal from so much of an order of the Supreme Court, Kings County (Bunyan, J.), dated August 3, 2012, as denied that branch of their motion pursuant to CPLR 3211 (a) (7) which was to dismiss the fifth cause of action insofar as asserted against them.

Ordered that the order is affirmed insofar as appealed from, with costs.

The Supreme Court properly denied that branch of the motion of the defendants Duane Reade, Inc. (hereinafter Duane Reade), and Walgreen Company (hereinafter Walgreen) which was to dismiss the fifth cause of action, which alleges a violation of Labor Law § 203-c, as barred by the election of remedies provision in Labor Law § 740 (7).

Labor Law § 740 (7) provides that “the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law.” However, the waiver only applies to causes of

action arising out of or relating to the same underlying claim of retaliation (*see Minogue v Good Samaritan Hosp.*, 100 AD3d 64, 73 [2012]; *Garner v China Natural Gas, Inc.*, 71 AD3d 825 [2010]; *Hayes v Staten Is. Univ. Hosp.*, 39 AD3d 593 [2007]; *Pipia v Nassau County*, 34 AD3d 664 [2006]). The Labor Law § 203-c cause of action here asserts the separate and independent claim of illegal placement of video cameras in employee restrooms. Thus, it is not barred by the Labor Law § 740 (7) election of remedies provision (*see Bordan v North Shore Univ. Hosp.*, 275 AD2d 335 [2000]; *Kraus v Brandstetter*, 185 AD2d 302 [1992]).

Walgreen further contends that the fifth cause of action should be dismissed insofar as asserted against it because it did not own Duane Reade or employ the plaintiffs or the defendant Security Officer Green at the time of the alleged conduct. However, Walgreen's evidentiary submission does not conclusively demonstrate that it did not assume complete dominion and control over Duane Reade pursuant to its April 2010 purchase (*see Mitchell v TAM Equities, Inc.*, 27 AD3d 703, 708 [2006]). As a significant dispute exists regarding this issue, dismissal of the fifth cause of action insofar as asserted against Walgreen is not warranted (*see Xia-Ping Wang v Diamond Hill Realty, LLC*, 116 AD3d 767 [2014]). Rivera, J.P., Sgroi, Cohen and Barros, JJ., concur.

11 JOHN S. DEERKOSKI, Doing Business as JOHN S. DEERKOSKI, P.E., AND ASSOCIATES, Appellant, v EAST 49TH STREET DEVELOPMENT II, LLC, et al., Respondents. (Action No. 1.) JOHN S. DEERKOSKI, Doing Business as JOHN S. DEERKOSKI, P.E., AND ASSOCIATES, Appellant, v CASTLE DEVELOPMENT GROUP, LLC, et al., Respondents. (Action No. 2.) [993 NYS2d 554]—

Contracts—Breach or Performance of Contract—Contract for Engineering Services Performed on Construction Projects—Implied-in-Fact Contract

Motion by the respondents for leave to reargue appeals from an amended judgment of the Supreme Court, Orange County, dated April 25, 2012, and a judgment of the same court dated May 16, 2012, which were determined by decision and order of this Court dated December 26, 2013, or in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court. Justice Maltese has been substituted for former Justice Angiollilo (*see* 22 NYCRR 670.1 [c]).

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

Ordered that the branch of the motion which is for leave to appeal to the Court of Appeals is denied; and it is further,

Ordered that the branch of the motion which is for leave to reargue the appeals is granted to the extent that the decision and order of this Court dated December 26, 2013 (*Deerkoski v East 49th St. Dev. II, LLC*, 112 AD3d 879 [2013]) is recalled and vacated, and the following decision and order is substituted therefor, and the motion is otherwise denied.

In two related actions, inter alia, to recover damages for breach of contract, the plaintiff appeals (1), as limited by his brief, from so much of an amended judgment of the Supreme Court, Orange County (Bartlett, J.), dated April 25, 2012, as, after a nonjury trial, is in favor of him and against the defendants in action No. 1 in the principal sum of only \$53,000, and (2) from a judgment of the same court dated May 16, 2012, which, after a nonjury trial, is in favor of him and against the defendants in action No. 2 in the principal sums of only \$5,507.87 as damages and \$3,500 as an attorney's fee, and awards prejudgment interest at the rate of only 9% per annum.

Ordered that the amended judgment is reversed insofar as appealed from, on the law, and the matter is remitted to the Supreme Court, Orange County, for the entry of an appropriate second amended judgment in favor of the plaintiff and against the defendants in action No. 1 in the principal sum of \$134,497; and it is further,

Ordered that the judgment is modified, on the law, by increasing the amount awarded to the plaintiff as damages from the principal sum of \$5,507.87 to the principal sum of \$22,924.85; as so modified, the judgment in action No. 2 is affirmed; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The plaintiff, a professional engineer and his engineering firm, performed work on two construction projects in Manhattan. These two related actions involve a dispute over payment for that work. The plaintiff commenced these actions to recover damages based upon breach of contract, quantum meruit, and an account stated. The defendants in the two actions are the developers and owners of the respective properties, and the surety, Fidelity and Deposit Company of Maryland.

The first action involves a project referred to as the East 49th Street project. The plaintiff and the owners in action No. 1 entered into an implied-in-fact contract based on evidence that the plaintiff performed services which were accepted by the owners in action No. 1 “ ‘with the understanding on both sides that there was a fee obligation’ ” (*Sivin-Tobin Assoc., LLC v Akin Gump Strauss Hauer & Feld LLP*, 68 AD3d 616, 617 [2009], quoting *Shapira v United Med. Serv.*, 15 NY2d 200, 210

[1965]). The defendants in action No. 1 argue that, under this implied contract, the plaintiff had to submit written change orders as a condition precedent to payment for work he performed. However, while the plaintiff initially submitted such orders, there was proof that the parties later dispensed with such requirement, and that the owners in action No. 1 paid for some work which was not covered by such change orders. “A contract implied in fact rests upon the conduct of the parties” (*Watts v Columbia Artists Mgt.*, 188 AD2d 799, 801 [1992]). Since the conduct of the parties, in effect, dispensed with the requirement that the plaintiff had to submit written change orders as a condition precedent to payment for the work he performed, the Supreme Court should not have limited the plaintiff’s recovery to the work performed pursuant to the written change orders (*see generally Computerized Med. Imaging Equip. v Diasonics Ultrasound*, 303 AD2d 962, 964 [2003]; *Twitshell v Town of Pittsford*, 106 AD2d 903, 904 [1984], *affd* 66 NY2d 824 [1985]; *see also National Telecom. Consultants v United Artists Theatre Circuit*, 225 AD2d 750 [1996]). Accordingly, the plaintiff is entitled to damages on his breach of contract cause of action in action No. 1 based on all of the work he performed on the East 49th Street project pursuant to the parties’ implied-in-fact contract. In this regard, the plaintiff submitted proof at trial that he was owed the sum of \$134,497 for his work on the project.

The plaintiff’s remaining contentions regarding the East 49th Street project are without merit or need not be addressed in light of this determination (*see BRK Props., Inc. v Wagner Ziv Plumbing & Heating Corp.*, 89 AD3d 883, 885 [2011]).

The second action involves a construction project located on East 46th Street in Manhattan (hereinafter the East 46th Street project). For this project, the plaintiff and the defendant Castle Development Group, LLC, entered into a written contract which provided, insofar as relevant here, that the agreement was for a \$40,000 “lump sum fee.” The contract also included a list of hourly billing rates.

“[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Here, contrary to the contention of the defendants in action No. 2, the fact that the contract for the East 46th Street project included a standard hourly billing rates provision did not render it ambiguous or contradict the lump-sum payment provision. Consequently, the Supreme Court should not have resorted to extrinsic evidence to interpret the meaning of the

contract so as to conclude that the plaintiff was only entitled to payment thereunder on the basis of “time and materials.” Instead, the plaintiff demonstrated that he was entitled to recover the full lump-sum payment set forth in the contract less the payments which were previously made by the defendants for this contract work.

However, contrary to the plaintiff’s contention, under the circumstances of this case, the Supreme Court did not err in awarding prejudgment interest based on the statutory rate (*see* CPLR 5004) rather than based on the rate set forth in the contract for the East 46th Street project (*see IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 83 AD3d 573, 575 [2011], *affd* 20 NY3d 310 [2012]; *Banque Nationale De Paris v 1567 Broadway Ownership Assoc.*, 248 AD2d 154, 155 [1998]).

The Supreme Court did not improvidently exercise its discretion with regard to the amount of the attorney’s fee awarded in action No. 2 (*see M. Sobol, Inc. v Wykagyl Pharm.*, 282 AD2d 438, 439 [2001]; *see also Miller Realty Assoc. v Amendola*, 51 AD3d 987, 990 [2008]). Dillon, J.P., Roman, Sgroi and Maltese, JJ., concur.

12 CHAYEH FLEISHER et al., Appellants, v CITY OF NEW YORK, Respondent. [993 NYS2d 112]—

Municipal Corporations—Sidewalks—Prior Notice of Defective Condition—Slip and Fall on Uneven Portion of Sidewalk

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from a judgment of the Supreme Court, Kings County (King, J.), entered May 23, 2012, which, upon the granting of the defendant’s motion pursuant to CPLR 4401 for judgment as a matter of law, made at the close of the plaintiffs’ case, is in favor of the defendant and against them dismissing the complaint.

Ordered that the judgment is reversed, on the law, with costs, the motion is denied, the complaint is reinstated, and the matter is remitted to the Supreme Court, Kings County, for a new trial.

The injured plaintiff, and her husband suing derivatively, commenced this action against the City of New York to recover damages for injuries allegedly sustained by the injured plaintiff when she fell on a sidewalk in Brooklyn. The plaintiffs alleged that the accident was caused by a raised or uneven portion of the sidewalk and that the City had notice thereof pursuant to a map provided to the City by the Big Apple Pothole & Sidewalk Protection Committee (hereinafter the Big Apple map).

Just prior to trial, the Supreme Court granted those branches of the City's in limine motion which were to preclude the plaintiffs from presenting evidence that, as a result of the accident, the injured plaintiff acquired a "C-difficile" infection, her preexisting Crohn's disease was exacerbated, and she sustained mental or emotional injury. Thereafter, during the plaintiffs' case, the Supreme Court denied the plaintiffs' application to admit the Big Apple map through the testimony of Irvin Loewenstein, a former Director of Sidewalk Management, and former Director of the Prior Notification Unit of the City's Department of Transportation (hereinafter DOT), and denied the plaintiffs' application to qualify Loewenstein as an expert in Big Apple maps. At the close of the plaintiffs' case, the City moved pursuant to CPLR 4401 for judgment as a matter of law on the ground that the plaintiffs failed to establish, *prima facie*, that the City had prior written notice of the alleged sidewalk defect, as required by Administrative Code of the City of New York § 7-201 (c) (2). The Supreme Court granted the motion and entered judgment in favor of the City and against the plaintiffs dismissing the complaint. We reverse.

Administrative Code of the City of New York § 7-201 (c) (2) "limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location" (*Katz v City of New York*, 87 NY2d 241, 243 [1995]; *Daniels v City of New York*, 91 AD3d 699, 700 [2012] [internal quotation marks omitted]). "[P]rior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City" (*Katz v City of New York*, 87 NY2d at 243). "Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the [DOT] serve as prior written notice of defective conditions depicted thereon" (*id.* at 243; see *Weinreb v City of New York*, 193 AD2d 596, 598 [1993]).

The Supreme Court erred in denying the plaintiffs' application to admit the Big Apple map into evidence. The map was relevant to the issue of whether the City had prior written notice of the claimed defect in the sidewalk that allegedly caused the injured plaintiff to fall. Moreover, the plaintiffs did not seek to admit the map for its truth, that is, whether the map accurately depicted the claimed sidewalk defect. Rather, they properly sought to admit it for the nonhearsay purpose of establishing that the City had notice of the alleged defect at least 15 days prior to the injured plaintiff's accident, as required by Administrative Code of the City of New York § 7-201 (c) (2).

Contrary to the City's contention, since the map as offered did not constitute hearsay, the plaintiffs were not required to establish that the map satisfied the requirements of CPLR 4518, the business records exception to the hearsay rule. Moreover, the testimony of Loewenstein, who worked with Big Apple maps on behalf of the DOT for many years, was sufficient to lay a proper foundation for the admission of the map. The Supreme Court also erred in denying the plaintiffs' application to qualify Loewenstein as an expert in Big Apple maps, since the plaintiffs demonstrated that he possessed the requisite "skill, training, education, knowledge or experience" from which it could be assumed that his opinion was reliable (*Schechter v 3320 Holding LLC*, 64 AD3d 446, 449 [2009], citing *Matott v Ward*, 48 NY2d 455, 459 [1979]).

Furthermore, the Supreme Court improvidently exercised its discretion in granting those branches of the City's motion in limine which were to preclude the plaintiffs from presenting evidence, including the expert testimony of Dr. Irving Friedman, that, as a result of the accident, the injured plaintiff acquired a "C-difficile" infection, her pre-existing Crohn's disease was exacerbated, and she suffered psychological injury. Contrary to the plaintiffs' contention, the motion was not an untimely motion for summary judgment, since the motion was seeking to preclude certain evidence as inadmissible (*compare Matter of Singer*, 99 AD3d 802 [2012]; *Ofman v Ginsberg*, 89 AD3d 908, 909 [2011]; *Brewi-Bijoux v City of New York*, 73 AD3d 1112 [2010]). However, the trial court's decision to exclude certain testimony by Dr. Friedman on the ground that the plaintiffs' expert disclosure pursuant to CPLR 3101 (d) failed to include "the substance of the facts and opinions upon which Dr. Friedman is expected to testify" was in error, since Dr. Friedman's report did state the basis of his opinions, albeit tersely. Moreover, the fact that Dr. Friedman is a neurologist and not a gastroenterologist or a physician with a specialty in infectious diseases goes to the weight to be accorded his opinions and not their admissibility (*see Borawski v Huang*, 34 AD3d 409, 410 [2006]; *Moon Ok Kwon v Martin*, 19 AD3d 664, 664 [2005]).

Similarly, the Supreme Court improvidently exercised its discretion in precluding the injured plaintiff from testifying about her alleged psychological injuries. The fact that the injured plaintiff failed to seek treatment for her alleged psychological injuries goes to the weight of her testimony and not to its admissibility.

The plaintiffs' remaining contention is not properly before this Court.

In light of the foregoing, we remit the matter to the Supreme Court, Kings County, for a new trial. Dillon, J.P., Hall, Austin and Duffy, JJ., concur.

13 FRANCIS FREEMAN, Appellant, v VILLAGE OF HEMPSTEAD, Respondent. [993 NYS2d 142]—

Negligence—Assumption of Risk—Fall from Slippery Diving Board

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Nassau County (Cozzens, Jr., J.), dated October 7, 2013, which granted the defendant's motion for summary judgment dismissing the complaint.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

The plaintiff allegedly was injured when, while attempting to dive off of a diving board into the defendant's pool, he slipped on the board's surface and fell off the board. The plaintiff alleged that a dangerous condition on the board's surface caused him to slip. He maintained that traction strips on the surface were worn down to such an extent that the surface was slippery.

Under the doctrine of primary assumption of risk, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). One "obvious" risk inherent in the recreational activity of diving is the risk of being injured from slipping on the diving board's surface and falling off the diving board (*Cook v Town of Oyster Bay*, 267 AD2d 192, 192 [1999]). In moving for summary judgment dismissing the complaint on the ground that this action was barred by the doctrine of primary assumption of risk, the defendant failed to establish, prima facie, that the allegedly dangerous condition, consisting of the depleted traction strips, did not unreasonably increase the abovementioned risk (see *Philippou v Baldwin Union Free Sch. Dist.*, 105 AD3d 928, 930 [2013]; *Blumstein v Half Hollow Hills Cent. School Dist.*, 96 AD3d 702, 703 [2012]; *Viola v Carmel Cent. School Dist.*, 95 AD3d 1206, 1207-1208 [2012]). The defendant's submissions, which included the transcripts of a General Municipal Law § 50-h hearing and the plaintiff's deposition, demonstrated the existence of a triable issue of fact as to whether the allegedly dangerous condition unreasonably increased that risk (see *Menter v City of Olean*, 105 AD3d 1405, 1405-1406 [2013]). In view of the defendant's failure to sustain its prima

facie burden, the sufficiency of the plaintiff's opposing papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

14 WILLIAM JENNINGS, Appellant, v HUNTINGTON CRESCENT CLUB et al., Respondents. [993 NYS2d 139]—

Labor—Hours and Wages—Recovery of Unpaid Wages—At-Will Employee

In an action, inter alia, pursuant to Labor Law § 193 to recover wages wrongfully withheld, the plaintiff appeals from so much of an order of the Supreme Court, Suffolk County (Leis III, J.), dated March 13, 2013, as granted those branches of the defendants' motion which were pursuant to CPLR 3211 (a) (7) to dismiss the second, fourth, and fifth causes of action.

Ordered that the order is affirmed insofar as appealed from, with costs.

The plaintiff contends that the Supreme Court erred in granting those branches of the defendants' motion which were to dismiss the causes of action to recover unpaid wages related to bonuses, annual raises, and security services allegedly provided by the plaintiff. Accepting as true the factual allegations set forth in the complaint in support of those causes of action, and according to the plaintiff the benefit of every possible favorable inference to be drawn therefrom (*see Minovici v Belkin BV*, 109 AD3d 520, 521 [2013]), it cannot be reasonably inferred that the defendants withheld wages to which the plaintiff was entitled. The allegations, taken as true, would establish that the plaintiff was an at-will employee (*see Horn v New York Times*, 100 NY2d 85, 90-91 [2003]). "When there is an at-will employment relationship, the employer may unilaterally alter the terms of employment, and the employee may end the employment if the new terms are unacceptable" (*Minovici v Belkin BV*, 109 AD3d at 523). Here, the plaintiff's allegations reflect that he ratified the actions of which he now complains by choosing to remain in the defendants' employ (*see Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 648-649 [2010]). Therefore, the Supreme Court properly granted those branches of the defendants' motion which were to dismiss the causes of action to recover unpaid wages related to bonuses, annual raises, and security services allegedly provided by the plaintiff. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

15 DAMIAN KENNEDY, an Infant, by His Mother and Natural Guardian, DONNA KENNEDY, et al., Respondents, v MAHOPAC

CENTRAL SCHOOL DISTRICT, Appellant, et al., Defendants. [992 NYS2d 584]—

Disclosure—Mental Examination—Psychiatric Examinations—Denial of Application to Compel Plaintiff to Submit to Psychiatric Examination Where Mental Condition Not in Controversy

In an action, inter alia, to recover damages for personal injuries, the defendant Mahopac Central School District appeals, as limited by its brief, from so much of an order of the Supreme Court, Putnam County (Lubell, J.), dated March 28, 2013, as denied its motion to compel the plaintiff Donna Kennedy and nonparty Damian Kennedy, Sr., to submit to a psychiatric examination by Harold J. Bursztajn.

Ordered that the order is affirmed insofar as appealed from, with costs.

The Supreme Court providently exercised its discretion in denying the appellant's motion to compel the plaintiff Donna Kennedy and nonparty Damian Kennedy, Sr. (hereinafter together the parents), to submit to a psychiatric examination by Harold J. Bursztajn. Damian Kennedy, Sr., is not a party to this action, nor is he "an agent, employee or person in the custody or under the legal control of a party," and his mental condition is not in controversy (CPLR 3121 [a]). As to the plaintiff Donna Kennedy, the complaint contains a claim on her behalf for the loss of services, society, and companionship of her son. The complaint does not allege that she suffered psychiatric or psychological injuries. Thus, her mental condition also is not in controversy pursuant to CPLR 3121 (a). Further, in the context of this case, the burden of subjecting the parents to psychiatric examinations, which would involve private and highly personal matters, outweighs the alleged necessity for the information sought (*see* CPLR 3101 [a]; *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 747 [2000]; *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]). Balkin, J.P., Leventhal, Maltese and Barros, JJ., concur. **[Prior Case History: 39 Misc 3d 773.]**

16 DANIEL M. LUNDON, JR., Respondent, v FILOMENA LUNDON, Appellant. [993 NYS2d 326]—

Interest—Prejudgment Interest—Denial of Prejudgment Interest Where Default Not Willful in Support Action

Parent, Child and Family—Support—Child Support Add-Ons—Validity of Qualified Domestic Relations Order to Enforce Child Support and Maintenance Obligations

In an action for a divorce and ancillary relief, the defendant appeals, as limited by her brief, from so much of an amended

order of the Supreme Court, Queens County (Jackman Brown, J.), entered December 17, 2012, as denied those branches of her motion which were for an award of prejudgment interest pursuant to Domestic Relations Law § 244 on unpaid counsel fees, child support, and maintenance, for an award of counsel fees pursuant to Domestic Relations Law § 237 (c), for a judgment for arrears of child support add-ons, and for qualified domestic relations orders directing payments from the plaintiff's retirement plan to the defendant's attorney to satisfy judgments for unpaid counsel fees, and to the defendant to satisfy judgments for unpaid child support and maintenance.

Ordered that the amended order is modified, on the law, by (1) deleting the provision thereof denying that branch of the defendant's motion which was for a judgment for arrears of child support add-ons, and substituting therefor a provision granting that branch of the motion to the extent that a hearing shall be held to determine the amount of the arrears of child support add-ons owed pursuant to a judgment dated June 17, 2009, and (2) deleting the provision thereof denying that branch of the defendant's motion which was for a qualified domestic relations order directing payments from the plaintiff's retirement plan to the defendant to satisfy judgments for unpaid child support and maintenance, and substituting therefor a provision granting that branch of the motion; as so modified, the amended order is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Queens County, for a hearing to determine the amount of arrears of child support add-ons owed by the plaintiff pursuant to the 2009 judgment, and for the entry of an appropriate qualified domestic relations order.

The parties are married and have one child. In a judgment entered June 23, 2009 (hereinafter the 2009 judgment), the Supreme Court, among other things, dismissed, in effect, the cause of action for a divorce, and awarded the defendant permanent maintenance and child support, including a portion of child support add-ons for the child's extracurricular activity expenses, school costs, and unreimbursed health care expenses. Subsequently, in a so-ordered stipulation dated February 3, 2011, the plaintiff agreed to pay certain sums for child support and maintenance arrears owed pursuant to the 2009 judgment. Further, he agreed to pay an amount to the defendant's attorney for legal fees incurred in attempting to enforce the 2009 judgment.

After the plaintiff failed to make the agreed-upon payments, the defendant moved for judgments for the unpaid counsel fees,

child support, and maintenance, for an award of prejudgment interest pursuant to Domestic Relations Law § 244 on those unpaid obligations, for qualified domestic relations orders (hereinafter QDROs) directing payments from the plaintiff's retirement plan to the defendant's attorney to satisfy judgments for unpaid counsel fees, and to the defendant to satisfy unpaid judgments for child support and maintenance, and for an award of counsel fees pursuant to Domestic Relations Law § 237 (c) incurred in connection with her motion. In the amended order appealed from, the Supreme Court granted those branches of the defendant's motion which were for judgments for the unpaid counsel fees and arrears of child support and maintenance, and denied the remaining branches of the motion.

The Supreme Court properly denied those branches of the defendant's motion which were for awards of prejudgment interest and counsel fees, since the plaintiff established that his default was not willful (*see* Domestic Relations Law §§ 237 [c]; 244; *Theophilova v Dentchev*, 117 AD3d 531 [2014]; *Miklos v Miklos*, 39 AD3d 826, 828 [2007]; *Yeager v Yeager*, 38 AD3d 534, 534-535 [2007]).

Moreover, the Supreme Court properly denied, without a hearing, that branch of the defendant's motion which was for a judgment for arrears of child support add-ons allegedly owed by the plaintiff pursuant to an order of the Family Court, Kings County, dated January 18, 2007, which the defendant failed to submit in support of her motion (*see Moskwa v Moskwa*, 232 AD2d 383 [1996]).

However, since the plaintiff did not dispute that he was required to pay a portion of child support add-ons pursuant to the 2009 judgment and failed to do so, the Supreme Court should have granted that branch of the defendant's motion which was for a judgment for the arrears of child support add-ons owed by the plaintiff pursuant to the 2009 judgment to the extent of setting the matter down for a hearing to determine the amount of such arrears (*see D'Anna v D'Anna*, 17 AD3d 400, 401 [2005]; *see also Fackelman v Fackelman*, 50 AD3d 732, 734 [2008]). Contrary to the Supreme Court's conclusion, the defendant did not waive her claim to unpaid child support add-ons in the so-ordered stipulation. In the stipulation, the defendant's agreement to withdraw any claim to such arrears was "without prejudice" and, therefore, did not bar a new claim for the same amounts (*see Matter of Kummer*, 93 AD2d 135, 170 [1983]). Moreover, the dismissal, in effect, of the cause of action for a divorce did not divest the Supreme Court of jurisdiction to award child support add-ons and entertain the defendant's mo-

tion to enforce the award (*see* Domestic Relations Law §§ 236 [B] [8] [b]; 244; *Bellizzi v Bellizzi*, 82 AD3d 1541, 1543 [2011]; *Holloway v Holloway*, 35 AD3d 1126, 1128 [2006]; *King v King*, 230 AD2d 775, 775-776 [1996]).

The Supreme Court also should have granted that branch of the defendant's motion which was for a QDRO directing payments from the plaintiff's retirement plan to the defendant to satisfy the judgments for the arrears of child support and maintenance. Defaults in child support and maintenance obligations may be enforced by QDROs against pension and retirement plans (*see* *York v York*, 300 AD2d 475, 475 [2002]; *Bumstead v Raisbeck*, 230 AD2d 759, 760 [1996]; *Adler v Adler*, 224 AD2d 282, 282-283 [1996]). The requested order in favor of the defendant met the definitional requirements for a QDRO under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code, as QDROs relate "to the provision of child support [and] alimony payments" and would assign to the defendant spouse, an "alternate payee," the right to receive benefits payable under the plaintiff's retirement plan (26 USC § 414 [p] [1] [B] [i]; [8]; 29 USC § 1056 [d] [3] [B] [ii] [I]; [K]; *see* *Renner v Blatte*, 170 Misc 2d 579, 583 [Sup Ct, NY County 1996]). Moreover, since the awards of child support and maintenance in the 2009 judgment were authorized by Domestic Relations Law § 236 (B) (8) (b) (*see* *Bellizzi v Bellizzi*, 82 AD3d at 1543; *King v King*, 230 AD2d at 775-776), the order aiding enforcement of those awards would be "made pursuant to a State domestic relations law" (26 USC § 414 [p] [1] [B] [ii]; 29 USC § 1056 [d] [3] [B] [ii] [II]; *see* *Boylan v Dodge*, 42 AD3d 632, 633 [2007]; *Adler v Adler*, 224 AD2d at 282-283). However, the Supreme Court properly denied that branch of the motion which was for a QDRO directing payments from the plaintiff's retirement account to the defendant's attorney to satisfy unpaid counsel fees, since the attorney does not qualify as an "alternate payee" (26 USC § 414 [p] [8]; 29 USC § 1056 [d] [3] [K]; *see* *J.K.C. v T.W.C.*, 39 Misc 3d 899, 913 [Sup Ct, Monroe County 2013]; *cf.* *Adler v Adler*, 224 AD2d at 282-283).

The defendant's remaining contention is without merit.

Accordingly, we remit the matter to the Supreme Court, Queens County, for a hearing to determine the amount of arrears of child support add-ons owed by the plaintiff pursuant to the 2009 judgment, and for the entry of an appropriate QDRO. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

17 JOSE MEDINA, Appellant, v CITY OF NEW YORK, Appellant, and DANIEL SCHECTER, Respondent. [993 NYS2d 141]—

Negligence—Maintenance of Premises—Liability for Snow Removal of Owner

Occupied Property Owner

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Ash, J.), dated May 10, 2013, as granted that branch of the motion of the defendant Daniel Schecter which was for summary judgment dismissing the complaint insofar as asserted against him, and the defendant City of New York separately appeals, as limited by its brief, from so much of the same order as granted that branch of the motion which was for summary judgment dismissing the cross claims against him.

Ordered that the order is reversed, on the law, with one bill of costs, and the motion of the defendant Daniel Schecter for summary judgment dismissing the complaint and all cross claims insofar as asserted against him is denied.

“Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner” (*Pevzner v 1397 E. 2nd, LLC*, 96 AD3d 921, 922 [2012]; see *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520 [2008]; *Howard v City of New York*, 95 AD3d 1276 [2012]). However, this liability shifting provision does not apply to the failure to remove snow and ice from the sidewalk of “one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes” (Administrative Code of City of NY § 7-210 [b]). The purpose of the exception is to recognize “the inappropriateness of exposing small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair” (*Howard v City of New York*, 95 AD3d at 1277, quoting *Coogan v City of New York*, 73 AD3d 613, 614 [2010]).

Here, the defendant property owner, Daniel Schecter, failed to make a prima facie showing that he is entitled to judgment as a matter of law on the theory that he is exempt from liability pursuant to Administrative Code of City of NY § 7-210 (b). Although there was evidence that the subject property was a three-family residence, Schecter’s own deposition testimony raises issues of fact as to whether the premises were “owner occupied” within the meaning of Administrative Code § 7-210 (b) (see *Howard v City of New York*, 95 AD3d at 1277; cf. *Moreno v Shanker*, 93 AD3d 829, 830 [2012]). Accordingly, the Supreme Court erred in granting Schecter’s motion for summary judgment. Rivera, J.P., Roman, Sgroi and LaSalle, JJ., concur.

18 WILLIAM REESE, Respondent, v JAHAN CONTRACTING, Appellant. [993 NYS2d 151]—

Pleading—Amendment—Palpably Insufficient Affirmative Defenses
Pleading—Amendment—Affirmative Defense—Failure to Allege Facts Suf-
ficient to Sustain Demand for Punitive Damages—Lack of Prejudice or
Surprise

In an action to recover damages for breach of contract, the defendant appeals from so much of an order of the Supreme Court, Kings County (Baynes, J.), dated June 13, 2013, as denied its cross motion pursuant to CPLR 3025 (b) for leave to amend its answer to assert proposed affirmative defenses.

Ordered that the order is modified, on the law, by deleting the provision thereof denying that branch of the defendant's cross motion which was for leave to amend its answer to assert the proposed fifteenth affirmative defense, and substituting therefor a provision granting that branch of the cross motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*see* CPLR 3025 [b]; *Bernardi v Spyrtatos*, 79 AD3d 684, 688 [2010]; *Pike v New York Life Ins. Co.*, 72 AD3d 1043, 1047 [2010]; *Malanga v Chamberlain*, 71 AD3d 644, 646 [2010]). The first 14 proposed affirmative defenses were palpably insufficient or patently devoid of merit (*see* *Marcum, LLP v Silva*, 117 AD3d 917 [2014]; *Ferriola v DiMarzio*, 83 AD3d 657, 658 [2011]; *Kuslansky v Kuslansky, Robbins, Stechel & Cunningham, LLP*, 50 AD3d 1101 [2008]; *Unger v Leviton*, 25 AD3d 689 [2006]).

However, the Supreme Court should have granted that branch of the defendant's motion which was for leave to amend the answer to assert the proposed fifteenth affirmative defense, which, in effect, asserted that the complaint failed to allege facts sufficient to sustain a demand for punitive damages (*see* *Shovak v Long Is. Commercial Bank*, 50 AD3d 1118, 1121 [2008]; *Johnson v Allstate Ins. Co.*, 33 AD3d 665, 666 [2006]). As the plaintiff would not be prejudiced or surprised by the assertion of this proposed affirmative defense, and it is not palpably insufficient or patently devoid of merit, leave to amend the answer to assert it should have been granted (*see* CPLR 3025 [b]; *Bernardi v Spyrtatos*, 79 AD3d at 688). Dillon, J.P., Dickerson, Roman and Sgroi, JJ., concur.

19 JOSEPH RIZZO, Respondent, v TRACI RIZZO, Appellant. [993 NYS2d 104]—

Husband and Wife and Other Domestic Relationships—Equitable Distribu-

**tion—Annuity Purchased Pursuant to Terms of Settlement of Personal Injury
Action Marital Property
Husband and Wife and Other Domestic Relationships—Marital Residence—
Residence Purchased Prior to Marriage Separate Property—Appreciation in
Value of Marital Property**

In an action for a divorce and ancillary relief, the defendant appeals, as limited by her brief, from so much of a judgment of the Supreme Court, Dutchess County (Sproat, J.), dated June 7, 2012, as incorporated by reference and directed the parties to comply with stated portions of an interlocutory judgment of the same court (Pagones, J.), dated May 15, 2012, which, after a nonjury trial on the issues of equitable distribution, maintenance, and attorney's fees, *inter alia*, awarded the plaintiff 100% of a certain annuity as his separate property, awarded the plaintiff 100% of his pension as his separate property, failed to award her an equitable share in the marital residence, required her to reimburse the plaintiff for certain credit card debt, and denied her application for an award of attorney's fees.

Ordered that the judgment is modified, on the law and the facts, by deleting the provisions thereof incorporating by reference and directing the parties to comply with so much of the interlocutory judgment as awarded the plaintiff 100% of the annuity and 100% of the plaintiff's pension as his separate property, and substituting therefor a provision stating that the annuity constitutes marital property, that the plaintiff's equitable share is 90% of the monthly annuity payment and the defendant's equitable share is 10% of the monthly annuity payment, and that the surviving party shall receive the entire monthly annuity payment upon the death of the former spouse; as so modified, the judgment is affirmed insofar as appealed from, without costs or disbursements, the provisions in the interlocutory judgment which awarded 100% of the annuity and the pension to the plaintiff are vacated, and the matter is remitted to the Supreme Court, Dutchess County, to determine what part, if any, of the plaintiff's pension constitutes marital property and thereafter for the entry of an appropriate amended judgment in accordance herewith.

In June 2012, the Supreme Court awarded a divorce to the plaintiff, on the defendant's consent, on the ground of constructive abandonment. The issues on this appeal concern the court's determination that certain property was the separate property of the plaintiff, the court's distribution of certain marital property and debt, and the defendant's entitlement to an award of an attorney's fee.

In reviewing a judgment rendered in a matrimonial action, this Court's power is as broad as that of the trial court (*see*

O'Brien v O'Brien, 66 NY2d 576, 590 [1985]; *Cappiello v Cappiello*, 66 NY2d 107, 110 [1985]; *Majauskas v Majauskas*, 61 NY2d 481, 493-494 [1984]), and where, as here, the determination was made after a nonjury trial, the Court “may render the judgment it finds warranted by the facts” (*Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499 [1983]; see *Baba-Ali v State of New York*, 19 NY3d 627, 640 [2012]; *Miceli v Miceli*, 78 AD3d 1023, 1024-1025 [2010]).

Under the facts of this case, the annuity at issue, which was purchased pursuant to the terms of a settlement agreement in a civil action commenced jointly by the parties, constitutes marital property. In 2001, following an on-the-job accident that rendered the plaintiff unable to work, the parties together commenced an action in the Supreme Court, New York County, entitled *Rizzo v Triborough Bridge & Tunnel Auth.*, under index No. 115962/01, to recover damages for the plaintiff’s personal injuries and for loss of consortium to the defendant. Both parties were named plaintiffs in the action, and the settlement agreement that was reached by the parties expressly provided that it was for full settlement, release, and discharge of all claims in the complaint, including loss of consortium. The settlement provided for a lump-sum payment in a certain amount and periodic monthly payments of \$3,235 guaranteed for 30 years, then continuing for the life of either or both of the parties. The settlement agreement was silent as to the allocation of funds awarded for the plaintiff’s personal injury cause of action and the defendant’s cause of action for loss of consortium. Following the assignment of the obligor’s duty under the settlement agreement, an annuity was created to effectuate the periodic monthly payments for 30 years, and thereafter for the life of either or both of the parties, as required by the settlement agreement. The annuity named the plaintiff and the defendant as joint payees with rights of survivorship.

Under the facts presented here, the Supreme Court erred in determining that the annuity constitutes the plaintiff’s separate property. Although a settlement award emanating from a personal injury action commenced by the parties is partially the separate property of each party named in such action (see *Miceli v Miceli*, 78 AD3d at 1025; Domestic Relations Law § 236 [B] [1] [d] [2]), here, the parties’ conduct converted the separate property of the settlement into marital property. Specifically, the parties’ agreement to a settlement term that allowed the obligor or its successors to purchase an annuity, which provided for a right of survivorship to each party, to effectuate the terms of the settlement, manifests the parties’ intent to transfer the

character of the property of each arising out of that settlement from separate to marital. The annuity that was purchased names both parties as joint payees and, by its terms, provides a right of survivorship to each payee upon the death of the other. In addition, the parties do not dispute that they treated past payments made to them from the annuity as marital property, that those monthly payments were direct-deposited into a joint bank account bearing both parties' names, and that those funds were thereafter immediately transferred into a joint checking account set up to pay household and living expenses (*see Crescimanno v Crescimanno*, 33 AD3d 649, 649-650 [2006]; *Garner v Garner*, 307 AD2d 510, 512 [2003]). Consequently, the annuity constitutes marital property that must be equitably distributed (*see Garner v Garner*, 307 AD2d at 512; *Geisel v Geisel*, 241 AD2d 442, 443 [1997]; *Schmidlapp v Schmidlapp*, 220 AD2d 571, 572 [1995]).

With respect to the equitable distribution of this marital asset, "it is important to note that there is no requirement that the distribution of each item of marital property be on an equal basis" (*Coffey v Coffey*, 119 AD2d 620, 622 [1986]). Here, equity dictates that the plaintiff should receive most of the annuity, as he is permanently disabled and unable to earn an income now or in the future, whereas the plaintiff is employed and has future income earning capacity. Taking into account the circumstances of this case and of each of the parties, the allocation of 90% of the monthly annuity payment to the plaintiff and 10% to the defendant would be equitable (*see Domestic Relations Law* § 236 [B] [5] [c]; *Garner v Garner*, 307 AD2d at 512). However, as the annuity provides for a right of survivorship, the parties should retain their respective proportional interests in the annuity while both are living, with the surviving party receiving increased benefits upon the death of the former spouse (*see Munson v Munson*, 250 AD2d 1004 [1998]). Accordingly, the plaintiff is entitled to 90% and the defendant is entitled to 10%, respectively, of each monthly annuity payment, and, upon the death of one of the parties, the surviving party is entitled to receive the entire monthly annuity payment, inclusive of both parties' share, and the matter must be remitted to the Supreme Court, Dutchess County, for the entry of an appropriate amended judgment providing for such allocation.

The Supreme Court also erred in finding that the plaintiff's pension payments constituted separate property not subject to equitable distribution (*cf. Domestic Relations Law* § 236 [B] [5] [b]). In New York, "pension benefits or vested rights to those benefits, except to the extent that they are earned or acquired

before marriage or after commencement of a matrimonial action, constitute marital property” (*Dolan v Dolan*, 78 NY2d 463, 466 [1991]; see *Olivo v Olivo*, 82 NY2d 202, 207 [1993]; *Majauskas v Majauskas*, 61 NY2d at 490; *Howe v Howe*, 68 AD3d 38, 40 [2009]). To the extent that a disability pension constitutes compensation for personal injuries, it is considered separate property not subject to equitable distribution (see *Dolan v Dolan*, 78 NY2d at 466; *Howe v Howe*, 68 AD3d at 41; *Mylett v Mylett*, 163 AD2d 463, 464-465 [1990]). However, to the extent that a disability pension represents deferred compensation, it is subject to equitable distribution (see *Olivo v Olivo*, 82 NY2d at 207; *Dolan v Dolan*, 78 NY2d at 466; *Howe v Howe*, 68 AD3d at 40; *Mylett v Mylett*, 163 AD2d at 465). Thus, here, the defendant is entitled to an equitable share of the marital portion of so much of the plaintiff’s pension as represents deferred compensation (see Domestic Relations Law § 236 [B] [5] [c]). Since the plaintiff failed to demonstrate that all of his pension payments constitute separate property, and since we cannot glean from this record what portion of the plaintiff’s pension, if any, represents deferred compensation, we remit the matter to the Supreme Court, Dutchess County, to determine what part of the plaintiff’s pension constitutes marital property subject to equitable distribution and for the distribution of any such property in accordance with the equitable distribution statute, and for the entry of an appropriate amended judgment thereafter.

The defendant does not dispute that the marital residence is the plaintiff’s separate property that the plaintiff acquired before the marriage. Under the equitable distribution statute, separate property is defined to include an increase in value of separate property, “except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse” (Domestic Relations Law § 236 [B] [1] [d] [3]; see *Johnson v Chapin*, 12 NY3d 461, 466 [2009]; *Jones v Jones*, 92 AD3d 845, 847 [2012]; *Bernholc v Bornstein*, 72 AD3d 625, 628 [2010]). Therefore, any appreciation in the value of separate property due to the contributions or efforts of the nontitled spouse will be considered marital property (see *Johnson v Chapin*, 12 NY3d at 466; *Price v Price*, 69 NY2d 8, 17 [1986]). “This includes any direct contributions to the appreciation, such as when the nontitled spouse makes financial contributions towards the property, as well as when the nontitled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence” (*Johnson v Chapin*, 12 NY3d at 466; see *Price v Price*, 69 NY2d at 17-18; *Jones v Jones*, 92 AD3d at 847; *Bernholc v Bornstein*, 72 AD3d at 628). Contrary to the defendant’s contention, the

Supreme Court did not err in determining that the defendant failed to provide any evidence tending to show an appreciation in the value of the marital residence due to her contributions that would entitle her to an equitable share of the increase in value of the marital property (*see* Domestic Relations Law § 236 [B] [1] [d] [3]; *Price v Price*, 69 NY2d at 17). The only evidence of the value of the marital residence was the plaintiff's net worth statement, which indicated that he purchased it for \$35,000. The defendant offered no evidence to establish the value of the home at the time of the commencement of the divorce action or whether it had appreciated in value during the marriage.

With respect to certain debt incurred during the marriage, upon determining that the cost of surgery that the defendant underwent during the marriage constitutes marital debt, the Supreme Court properly determined that the defendant was required to reimburse the plaintiff for the funds that he had paid for the defendant's share of the cost of the surgery (*see Epstein v Messner*, 73 AD3d 843, 845 [2010]; *Bogdan v Bogdan*, 260 AD2d 521 [1999]).

The Supreme Court properly denied the defendant's application for an award of an attorney's fee (*see* Domestic Relations Law § 237 [a]). Neither the defendant nor her attorney submitted any supporting documentation or other evidence that would have supported such an award (*cf. Cervone v Cervone*, 74 AD3d 1268, 1269 [2010]; *Horowitz v Horowitz*, 63 AD3d 1001, 1002 [2009]). Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

20 KAREN TREACY, Appellant, v CASTLE FUN CENTER et al., Respondents, et al., Defendants. [992 NYS2d 585]—

Negligence—Assumption of Risk—Go-Kart Accident—Slick Race Course

In an action to recover damages for personal injuries, the plaintiff appeals from a judgment of the Supreme Court, Orange County (Slobod, J.), entered April 15, 2013, which, upon the granting of the motion of the defendants Castle Fun Center and Jesters Pub and Restaurant pursuant to CPLR 4401, made at the close of the plaintiff's case at a trial on the issue of liability, in effect, for judgment as a matter of law dismissing the complaint insofar as asserted against them, is in favor of the defendants Castle Fun Center and Jesters Pub and Restaurant and against her dismissing the complaint.

Ordered that the judgment is affirmed, with costs.

On August 29, 2009, the plaintiff allegedly was injured when a go-kart being operated by a family member slid into the rear of the go-kart the plaintiff was operating on what is commonly

referred to as a slick track go-kart course on the grounds of an amusement facility owned and operated by the defendants Castle Fun Center and Jestors Pub and Restaurant (hereinafter together the defendants) in Chester, New York. A slick track course is designed to be intentionally slick in areas of the course, especially in the curves. Portions of the track were made slick via the application of various substances, including, inter alia, spray lubricants, which were on occasion mixed with water.

Under the doctrine of primary assumption of risk, “by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation” (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Contrary to the plaintiff’s contention, the Supreme Court properly granted the defendants’ motion for judgment as a matter of law dismissing the complaint insofar as asserted against them, as the plaintiff, under the facts of this case, assumed the risk of her injuries (see *Loewenthal v Catskill Funland*, 237 AD2d 262 [1997]). Eng, P.J., Leventhal, Sgroi and Maltese, JJ., concur.

21 TARA WEITZNER, Respondent, v YITZCHOK WEITZNER, Appellant. [992 NYS2d 576]—

Husband and Wife and Other Domestic Relationships—Support—Maintenance—Imputed Income—Counsel Fees and Child Care

In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from stated portions of an order of the Supreme Court, Kings County (Thomas, J.), entered July 23, 2012, which, inter alia, granted those branches of the plaintiff’s motion which were to direct the defendant to pay temporary maintenance in the sum of \$4,604 per month, interim child support in the sum of \$3,530 per month, interim counsel fees in the sum of \$30,000, and his pro rata share of playgroup fees for the youngest child.

Ordered that the order is affirmed insofar as appealed from, with costs.

“ ‘Modifications of pendente lite awards should rarely be made by an appellate court and then only under exigent circumstances, such as where a party is unable to meet his or her financial obligations, or justice otherwise requires’ ” (*Malik v Malik*, 66 AD3d 968, 968 [2009], quoting *Levakis v Levakis*, 7 AD3d 678, 678 [2004]). Here, the defendant has not demonstrated that any exigent circumstances exist, or that justice otherwise requires modification of the pendente lite award. The proper mechanism to correct an error in a temporary award is a

quick trial (see *Malik v Malik*, 66 AD3d at 968; *Levakis v Levakis*, 7 AD3d at 678).

Under the circumstances of this case, the Supreme Court providently exercised its discretion in imputing income of \$200,000 per year to the defendant for the purposes of computing pendente lite awards of maintenance and child support. In determining a party's maintenance or child support obligation, a court need not rely upon the party's own account of his or her finances (see *Khaimova v Mosheyev*, 57 AD3d 737 [2008]; *Peri v Peri*, 2 AD3d 425 [2003]). A court is justified in imputing income to a spouse when it is shown that the marital lifestyle was such that, under the circumstances, there was a basis for the court to conclude that the spouse's actual income and financial resources were greater than what he or she reported on his or her tax returns (see *Hoenig v Hoenig*, 245 AD2d 262, 263 [1997]; see also *Felton v Felton*, 175 AD2d 794 [1991]). The court may impute income to establish the party's support obligation (see Domestic Relations Law §§ 240 [1-b] [b] [5] [iv]; 236 [B] [5-a] [b] [4] [a]; *Wallach v Wallach*, 37 AD3d 707, 708 [2007]; see also *Bittner v Bittner*, 296 AD2d 516, 517 [2002]; *Wildenstein v Wildenstein*, 251 AD2d 189 [1998]). Here, the Supreme Court, in effect, found the defendant's account of his own finances was not believable, and was justified in imputing income to him that was far higher than he reported (see *Turco v Turco*, 117 AD3d 719 [2014]; *Scammacca v Scammacca*, 15 AD3d 382 [2005]; *Lilikakis v Lilikakis*, 308 AD2d 435 [2003]).

Moreover, contrary to the defendant's contention, the Supreme Court did not err in imputing income to the plaintiff equivalent to only a 10-hour work week as an accountant for the purpose of calculating maintenance and child support. The plaintiff has custody of the parties' five children, then aged 16 and under, the youngest of whom was three at the time of the court's order. In addition, the plaintiff had not worked during the parties' marriage (see *Margaret A. v Shawn B.*, 31 Misc 3d 769 [Sup Ct, Westchester County 2011]).

Contrary to the defendant's contention, the Supreme Court's award of temporary maintenance to the plaintiff in the sum of \$4,604 was appropriately supported and explained, and we decline to disturb it (see *Goncalves v Goncalves*, 105 AD3d 901, 903 [2013]; see also *Khaira v Khaira*, 93 AD3d 194, 201 [2012]). Likewise, the court properly articulated its award of child support, applying the statutory child support percentage for five children and the statutory cap of \$136,000 on combined parental income, and determining that there was no reason to award child support on the amount of income over \$136,000. The

award was supported by the record (*see Bibas v Bibas*, 58 AD3d 586, 588 [2009]; *Matter of Taraskas v Rizzuto*, 38 AD3d 910 [2007]; *Matter of De LaFontaine v Toms*, 1 AD3d 297, 297 [2003]; *Mark-Weiner v Mark*, 1 AD3d 158, 158 [2003]).

The defendant's contention that the award of playgroup fees to the plaintiff is inconsistent with the Supreme Court's determination that the plaintiff was not entitled to childcare expenses is unavailing. The Supreme Court treated the playgroup expenses as tantamount to school expenses and found that, up until the parties' separation, the defendant had willingly paid all playgroup and pre-school fees, and had never objected to the children's continued attendance at such activities.

Finally, in light of the significant disparity in the income of the parties, the award of an interim attorney's fee to the plaintiff in the sum of \$30,000 was appropriate (*see Prichep v Prichep*, 52 AD3d 61, 65 [2008]).

The defendant's remaining contentions are without merit. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

22 YEONG SUN KOO et al., Appellants, v CHENG JIN DAI, Respondent. [993 NYS2d 149]—

Insurance—No-Fault Automobile Insurance—Serious Injury—Shoulder and Back Injuries

In an action to recover damages for personal injuries, the plaintiffs appeal from an order of the Supreme Court, Queens County (Strauss, J.), entered May 28, 2013, which granted the defendant's motion for summary judgment dismissing the complaint on the ground that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident.

Ordered that the order is reversed, on the law, with costs, and the defendant's motion for summary judgment dismissing the complaint is denied.

The defendant met his prima facie burden of showing that the plaintiffs, Yeong Sun Koo and Chae Hong Chung, did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). The defendant submitted competent medical evidence establishing, prima facie, that the alleged injuries to Yeong Sun Koo's spine and left shoulder, and the alleged injuries to Chae Hong Chung's spine and right shoulder, did not constitute serious injuries under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102 (d) (*see Staff v Yshua*, 59 AD3d 614 [2009]).

In opposition, however, Yeong Sun Koo raised a triable issue of fact as to whether she sustained serious injuries to the cervical and lumbar regions of her spine and to her left shoulder, and Chae Hong Chung raised a triable issue of fact as to whether he sustained serious injuries to the cervical and lumbar regions of his spine and to his right shoulder (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]). Therefore, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint. Skelos, J.P., Leventhal, Hinds-Radix, Duffy and LaSalle, JJ., concur.

23 YOUNGSTOWN TUBE CO., Respondent, v ANTHONY J. RUSSO, Individually and Doing Business as UNIVERSAL FIRE FABRICATING & SUPPLY, Appellant. [993 NYS2d 146]—

Judgments—Default Judgment—Vacatur—Failure to Establish Lack of Proper Service—Failure to Establish Basis for Discretionary Vacatur

In an action, inter alia, to recover on an account stated, the defendant appeals from an order of the Supreme Court, Orange County (Onofry, J.), dated February 19, 2014, which denied his motion to vacate an amended judgment of the same court dated August 12, 2013, entered upon his failure to appear or answer the complaint, and, thereupon, to dismiss the complaint pursuant to CPLR 3211 (a).

Ordered that the order is affirmed, with costs.

Where, as here, a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4) and, alternatively, seeks discretionary vacatur pursuant to CPLR 5015 (a) (1), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1) (*see Canelas v Flores*, 112 AD3d 871, 871 [2013]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897 [2013]; *Roberts v Anka*, 45 AD3d 752, 753 [2007]). Here, the affidavit of the plaintiff's process server constituted prima facie evidence that the defendant was properly served pursuant to CPLR 308 (2) (*see Matter of Perskin v Bassaragh*, 73 AD3d 1073, 1073 [2010]; *Prospect Park Mgt., LLC v Beatty*, 73 AD3d 885, 886 [2010]; *Pezolano v Incorporated City of Glen Cove*, 71 AD3d 970, 971 [2010]). In the absence of detailed facts sufficient to rebut the statements in the process server's affidavit of service, the defendant's affidavit denying receipt of process was insufficient to warrant an evidentiary hearing (*see Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d at 897; *US Natl. Bank Assn. v Melton*, 90 AD3d 742, 743 [2011]; *Scarano v Scarano*, 63 AD3d 716, 716 [2009]). The defendant's other contention

regarding the propriety of service also is without merit (see *Ludmer v Hasan*, 33 AD3d 594, 594 [2006]; *Donohue v La Pierre*, 99 AD2d 570, 570 [1984]; *Brownell v Feingold*, 82 AD2d 844, 844 [1981]). Accordingly, the defendant failed to establish his entitlement to vacatur based upon lack of jurisdiction pursuant to CPLR 5015 (a) (4).

Furthermore, the defendant was not entitled to discretionary vacatur pursuant to CPLR 5015 (a) (1), as he failed to set forth any reasonable excuse for his default (see *Deutsche Bank Natl. Trust Co. v White*, 110 AD3d 759, 759 [2013]; *Wells Fargo Bank v Malave*, 107 AD3d 880, 880 [2013]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 790 [2011]).

Finally, the defendant was not entitled to relief pursuant to CPLR 317 (see *Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2012]; *Fleisher v Kaba*, 78 AD3d 1118, 1119 [2010]; *Levine v Forgotson's Cent. Auto & Elec., Inc.*, 41 AD3d 552, 553 [2007]). The defendant did not adequately rebut the presumption that he received notice of the summons in the regular course of the mail (see *Levine v Forgotson's Cent. Auto & Elec., Inc.*, 41 AD3d at 553; *Town House St., LLC v New Fellowship Full Gospel Baptist Church, Inc.*, 29 AD3d 893, 894 [2006]).

In light of our determination, we need not reach the defendant's remaining contentions. Skelos, J.P., Leventhal, Hinds-Radix, Duffy and LaSalle, JJ., concur.

24 In the Matter of ABDUL Q. AWAN, Petitioner, v RACHEL ADAMS et al., Respondents. [993 NYS2d 145]—

Proceeding against Body or Officer—Prohibition—Failure to Show Clear Legal Right to Relief

Proceeding pursuant to CPLR article 78 in the nature of prohibition, inter alia, to prohibit the respondent Rachel Adams, a Justice of the Supreme Court, Kings County, from presiding over the petitioner's matrimonial action entitled *Awan v Kazoleas-Awan*, pending in the Supreme Court, Kings County, under index No. 51662/10.

Motion by the petitioner to hold the respondents in contempt of court, and application by Attorney General Eric T. Schneiderman to preclude the petitioner from commencing any further actions or proceedings or making any further motions in the matrimonial action without leave of court.

Upon the papers filed in support of the motion and the application, and the papers filed in opposition thereto, it is

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements; and it is further,

Ordered that the motion is denied; and it is further,

Ordered that the application by Attorney General Eric T. Schneiderman to preclude the petitioner from commencing any further actions or proceedings or making any further motions in the matrimonial action without leave of court is denied without prejudice to seeking that relief in the Supreme Court, Kings County.

“Because of its extraordinary nature, prohibition is available only where there is a clear legal right, and then only when a court—in cases where judicial authority is challenged—acts or threatens to act either without jurisdiction or in excess of its authorized powers” (*Matter of Holtzman v Goldman*, 71 NY2d 564, 569 [1988]; see *Matter of Rush v Mordue*, 68 NY2d 348, 352 [1986]).

The petitioner has failed to demonstrate a clear legal right to the relief sought. Austin, J.P., Roman, Sgroi and Cohen, JJ., concur.

25 In the Matter of SHERILYN DANDRIDGE, as Administrator of the Estate of ALDO D., Deceased, an Incapacitated Person, Respondent. NEW YORK CITY HEALTH AND HOSPITALS CORPORATION-ELMHURST HOSPITAL CENTER, Respondent; ROBERT D. et al., Respondents. MAE ANN G.-D., Nonparty Appellant. [993 NYS2d 125]—

Incapacitated and Mentally Disabled Persons—Guardian for Mentally Retarded and Developmentally Disabled Persons—Capacity of Incapacitated Person to Marry

Marriage—Validity—Capacity of Incapacitated Person to Marry

Abatement and Revival—Death of Party—Incapacitated Person—Proceeding to Determine Incapacitated Person’s Capacity to Marry

In a proceeding pursuant to Mental Hygiene Law article 81 to appoint a guardian for the personal needs and property management of Aldo D., an alleged incapacitated person, the nonparty Mae Ann G.-D. appeals (1) from an order of the Supreme Court, Queens County (Cullen, J.), dated September 30, 2010, which appointed a temporary guardian for Aldo D., (2) from an order of the same court dated March 9, 2011, which directed the temporary guardian to investigate the circumstances of the marriage between Mae Ann G.-D. and Aldo D. on or about February 4, 2011, (3), as limited by her brief, from so much of an order of the same court dated April 6, 2011, as authorized the temporary guardian to provide for medical evaluation and treatment of Aldo D., (4) from an order of the same court dated May 12, 2011, which directed the temporary guardian to provide for certain of Aldo D.’s physical and medical needs, (5) from an order of the same court dated June 30, 2011, which authorized

the temporary guardian to place Aldo D. in a custodial or care facility, (6), as limited by her brief, from so much of an order and judgment (one paper) of the same court entered July 12, 2011, as adjudged Aldo D. to be an incapacitated person, appointed a permanent guardian for Aldo D., and directed the annulment of the marriage between him and Mae Ann G.-D., and (7), as limited by her brief, from so much of a judgment of the same court entered September 16, 2011, as annulled the marriage between her and Aldo D. and directed that neither she nor the alleged incapacitated person would be entitled to receive equitable distribution or maintenance from the other or be entitled to a right of election in the estate of the other.

Ordered that the appeals from the orders dated September 30, 2010, March 9, 2011, April 6, 2011, May 12, 2011, and June 30, 2011, are dismissed as academic, without costs or disbursements; and it is further,

Ordered that the order and judgment entered July 12, 2011, is modified, on the law, by deleting the provision thereof directing the annulment of the marriage between Aldo D. and Mae Ann G.-D.; as so modified, the order and judgment is affirmed insofar as appealed from, without costs or disbursements; and it is further,

Ordered that the judgment entered September 16, 2011, is reversed insofar as appealed from, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Queens County, for a hearing on the issue of the capacity of Aldo D. to enter into the marriage with Mae Ann G.-D., and a new determination thereafter on the issue of whether the marriage should be annulled.

The petitioner, New York City Health and Hospitals Corporation-Elmhurst Hospital Center, filed a petition pursuant to Mental Hygiene Law article 81 alleging that its then patient, Aldo D., was in need of a guardian in order to provide for his personal needs and property management because of his medical conditions, including Parkinson's disease and dementia. The petition was served on Aldo D.'s live-in caregiver, the nonparty appellant, Mae Ann G.-D. (hereinafter the appellant), and she appeared on each hearing date. During the initial appearance on the matter, Aldo D. agreed to the appointment of a temporary guardian for a period of four months with limited authority to arrange medical care, including his transfer to a rehabilitation facility and from there to his home. The Supreme Court issued an order to that effect on September 30, 2010. The temporary guardianship was later renewed and the temporary guardian's powers were expanded in orders dated March 9, 2011, April 6,

2011, May 12, 2011, and June 30, 2011. During the pendency of the guardianship proceeding, Aldo D. and the appellant traveled to Georgia for her brother's funeral. While in Georgia, Aldo D. and the appellant were married. Upon their return to New York, the temporary guardian informed the Supreme Court that Aldo D. and the appellant had married. The temporary guardian requested that a psychiatrist be appointed to examine Aldo D. to determine whether he had the capacity to enter into a marriage, and the Supreme Court granted that request. However, neither the temporary guardian nor anyone else ever formally moved to have the petition amended so as to include annulment of the marriage as an additional form of relief. Over the next several court dates, the Supreme Court heard testimony from Aldo D., his relatives, the appellant, and the temporary guardian. At the conclusion of the testimony, the court concluded that Aldo D. was incapacitated, lacked the capacity to enter into a marriage, and, as a result, annulled the marriage. Aldo D. died during the pendency of these appeals.

Contrary to the appellant's contention, clear and convincing evidence was presented at the hearing that Aldo D. was incapacitated (*see Matter of Joseph S.*, 25 AD3d 804, 805 [2006]). Among other things, testimony was adduced that Aldo D. suffered from Parkinson's disease, and the temporary guardian testified that he observed symptoms of dementia in Aldo D. For example, the temporary guardian related that Aldo D. did not seem to understand that he was being evicted from his apartment, and that he had married without intending to do so. The temporary guardian further testified that Aldo D. was very limited in his ability to walk and dress himself, and he could not cook for himself. He did not recognize his need for help. When questioned by the court, Aldo D. repeatedly denied marrying the appellant, said that he did not remember marrying the appellant, and did not want to be married to her. The appellant acknowledged during her testimony that they had, "to a degree," two marriage ceremonies, because, at the time of the first ceremony, Aldo D. "wasn't feeling well." The evidence before the Supreme Court was legally sufficient to establish that Aldo D. was incapacitated. Because there was legally sufficient evidence presented to the Supreme Court establishing that Aldo D. was incapacitated, it was proper to annul the marriage between him and the appellant pursuant to Mental Hygiene Law § 81.29 (d) (*see Matter of Kaminester v Foldes*, 51 AD3d 528, 529 [2008]; *Matter of Joseph S.*, 25 AD3d 804, 806 [2006]; *Matter of Dot E.W.*, 172 Misc 2d 684, 693 [1997]).

Nevertheless, a new hearing on the issue of the capacity of

Aldo D. to enter into the marriage with the appellant is warranted. As the appellant correctly contends, she was deprived of notice and an opportunity to be heard before the Supreme Court annulled the marriage between her and Aldo D. Although the temporary guardian's request to appoint a psychiatrist to evaluate Aldo D.'s capacity to enter into the marriage was granted, a formal application was never made to amend the petition to include annulment of the marriage as an additional form of relief (*see Matter of Lucille H.*, 39 AD3d 547, 549 [2007]; *cf. Matter of Joseph S.*, 25 AD3d at 805).

Generally, where, as here, the incapacitated person has since died, the guardianship proceeding abates (*see Matter of Enna D.*, 30 AD3d 518 [2006]). However, a guardian's powers and the guardianship court's supervision may continue even after the incapacitated person's death (*see Acito v Acito*, 72 AD3d 493, 494 [2010]; *Matter of Rose BB.*, 262 AD2d 805, 807 [1999]). Under the circumstances of this case, where the Supreme Court had the opportunity to observe Aldo D., and the marriage will be subject to challenge in the Surrogate's Court (*see generally Campbell v Thomas*, 73 AD3d 103 [2010]), in order to foster judicial economy, we remit the matter to the Supreme Court, Queens County, for a hearing on the issue of the capacity of Aldo D. to enter into the marriage with the appellant and, thereafter, a new determination on the issue of whether the marriage should be annulled (*see Mental Hygiene Law* § 81.29 [d]; *Matter of Lucille H.*, 39 AD3d at 549; *Matter of Burns*, 287 AD2d 862, 863 [2001]; *Matter of Burns*, 267 AD2d 755, 757 [1999]; *Matter of Kaminester*, 17 Misc 3d 1117[A], 2007 NY Slip Op 52043[U] [Sup Ct, NY County 2007], *mod* 51 AD3d 528 [2008]; *Matter of Siracusano*, 167 Misc 2d 130, 134-135 [Sup Ct, NY County 1995]).

The appellant's remaining contentions either are not properly before this Court, are without merit, or have been rendered academic in light of our determination. Rivera, J.P., Chambers, Austin and Duffy, JJ., concur.

26 In the Matter of ESTEVAN GENTIL, Petitioner, v IRA MARGULIS et al., Respondents. [993 NYS2d 115]—

Proceeding against Body or Officer—Prohibition—Retrial of Criminal Defendant

Crimes—Double Jeopardy—Mistrial Granted over Defendant's Objection—Discharge of Juror

Proceeding pursuant to CPLR article 78 in the nature of prohibition to prohibit the respondents from retrying the petitioner on counts two and three of the indictment in a criminal action entitled *People v Gentil*, pending in the Supreme Court, Queens

County, under indictment No. 623/12, on the ground that to do so would subject him to double jeopardy.

Adjudged that the petition is granted, on the law, without costs or disbursements, and the respondents are prohibited from retrying the petitioner on counts two and three in the criminal action entitled *People v Gentil*, pending under Queens County indictment No. 623/12.

The defendant was charged with two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), and these charges were tried before a jury. After approximately 1½ days of deliberations, the jury sent a note to the Trial Justice stating that it was unable to reach a verdict on counts two and three. The defendant requested that the Supreme Court accept a partial verdict on count one, but the court denied this request and instructed the jury to continue deliberating. The following day, one of the jurors informed the court that there had been an emergency in his family and that he did not feel that he was able to give the deliberations his full attention. After a colloquy between the juror and the court, and at the court's urging, the defendant moved to discharge this juror. The defendant also renewed his request that the court accept a partial verdict. The court again declined to accept a partial verdict. The court granted the motion to discharge the juror. Noting that the defendant had declined to consent to the substitution of one of the alternate jurors, the court, on its own motion, immediately declared a mistrial. Thereafter, the defendant moved to dismiss the indictment, contending that the Supreme Court erred in declining to accept a partial verdict, and that retrial of the indictment as a whole subjected him to double jeopardy. The court agreed that it erred in declining to accept a partial verdict as to count one, but dismissed only that count of the indictment, finding that, under these circumstances, retrial of counts two and three were not barred by double jeopardy principles.

The defendant commenced this proceeding pursuant to CPLR article 78 seeking relief in the nature of prohibition to prohibit the respondents from retrying him on counts two and three of the indictment on the ground that to do so would subject him to double jeopardy.

In reviewing an application for prohibition, the first question is whether the issue presented is the type for which the remedy of prohibition lies (*see Matter of Holtzman v Goldman*, 71 NY2d 564, 568 [1988]; *Matter of Brown v Blumenfeld*, 103 AD3d 45, 55 [2012]; *Matter of Brown v Blumenfeld*, 89 AD3d 94, 102

[2011]; *Matter of Vinluan v Doyle*, 60 AD3d 237, 243 [2009]). If prohibition lies, then this Court must consider whether to exercise its discretion to grant that remedy (see *Matter of Brown v Blumenfeld*, 103 AD3d at 55). Prohibition is the traditional remedy where a defendant seeks protection against double jeopardy (see *Matter of Enright v Siedlecki*, 59 NY2d 195, 198 n 1 [1983]; *Matter of Di Lorenzo v Murtagh*, 36 NY2d 306, 309-310 [1975]; *Matter of Kraemer v County Ct. of Suffolk County*, 6 NY2d 363, 365 [1959]), and the writ lies in this case.

The double jeopardy clauses of the New York and United States Constitutions protect a defendant from twice being put in jeopardy of criminal prosecution for the same offense (see US Const 5th Amend; NY Const, art I, § 6; *Matter of Davis v Brown*, 87 NY2d 626, 629-630 [1996]; *Matter of Taylor v Dowling*, 108 AD3d 566, 567 [2013]). In a jury trial, once the jury is empaneled and sworn, jeopardy attaches (see CPL 40.30 [1] [b]; *People v Ferguson*, 67 NY2d 383 [1986]), and the defendant has a valued right to have his or her trial completed by a particular tribunal (see *Matter of Taylor v Dowling*, 108 AD3d at 567; *Matter of Smith v Marrus*, 33 AD3d 708, 709 [2006]).

When a mistrial is granted over the defendant's objection or without the defendant's consent, double jeopardy will, as a general rule, bar retrial (see *Matter of Davis v Brown*, 87 NY2d at 630; *Matter of Taylor v Dowling*, 108 AD3d at 567-568; *People v Hambrick*, 96 AD3d 972, 973 [2012]). However, the right to have one's case decided by the first empaneled jury is not absolute, and a mistrial granted as the product of manifest necessity will not bar a retrial (see *Matter of Davis v Brown*, 87 NY2d at 630; *Matter of Taylor v Dowling*, 108 AD3d at 568; *Matter of Rubinfeld v Appelman*, 230 AD2d 911, 911 [1996]). " 'Manifest necessity' means 'a high degree of necessity'; 'the reasons underlying the grant of a mistrial must be necessitous, actual and substantial' " (*Matter of Taylor v Dowling*, 108 AD3d at 568, quoting *Matter of Cohen v Lotto*, 19 AD3d 485, 486 [2005]; see *Arizona v Washington*, 434 US 497, 505 [1978]; *Matter of Enright v Siedlecki*, 59 NY2d at 200). Even if the reasons for declaring a mistrial are deemed actual and substantial, the court must explore all appropriate alternatives prior to declaring a mistrial (see *Matter of Taylor v Dowling*, 108 AD3d at 568; *Matter of Cohen v Lotto*, 19 AD3d at 487).

Here, the trial court failed to explore all appropriate alternatives before declaring, on its own motion, a mistrial (see *Matter of Smith v Brown*, 105 AD3d 965, 967-968 [2013]; see generally *People v Gajadhar*, 9 NY3d 438 [2007]; *Matter of Enright v Siedlecki*, 59 NY2d at 200; *Matter of Taylor v Dowling*, 108

AD3d at 568; *Matter of Cohen v Lotto*, 19 AD3d at 487; *Matter of Robles v Bamberger*, 219 AD2d 243 [1996]). Accordingly, there was no manifest necessity for the declaration of a mistrial and, thus, retrial on counts two and three of the indictment is precluded. Balkin, J.P., Dickerson, Leventhal and Roman, JJ., concur.

27 In the Matter of YACHSKEL MICHAEL GOLDMAN, Petitioner, v GREGORY L. LASAK et al., Respondents. [992 NYS2d 440]—

Proceeding against Body or Officer—Mandamus—Failure to Show Clear Legal Right to Relief

Proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondents to “comply with CPL 190.50 (6)” in connection with the prosecution of a criminal action entitled *People v Goldman*, commenced in the Supreme Court, Queens County, under docket No. 2012QN016484.

Adjudged that the petition is denied and the proceeding is dismissed on the merits, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). The act that the petitioner seeks to compel does not involve a mere ministerial duty, nor has the petitioner demonstrated a clear legal right to the relief sought in the context of a grand jury proceeding. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

28 In the Matter of SHAWN ROHAN JUSTIN, Respondent, v YORLETT LINNETT JUSTIN, Appellant. [992 NYS2d 579]—

Parent, Child and Family—Support—Downward Modification—No Basis to Impute Income Following Father’s Decision Not to Re-enlist in Army

In a child support proceeding pursuant to Family Court Act article 4, the mother appeals from an order of the Family Court, Kings County (Turbow, J.), dated October 7, 2013, which denied her objection to an order of the same court (Fasone, S.M.), dated August 9, 2013, which, after a hearing, granted the father’s petition for a downward modification of his child support obligation.

Ordered that the order is affirmed, without costs or disbursements.

“To establish entitlement to a downward modification of a child support order, a party has the burden of showing that there has been a substantial change in circumstances” (*Matter of Gansky v Gansky*, 103 AD3d 894, 895 [2013]; *see Matter of*

Kasun v Peluso, 82 AD3d 769, 771 [2011]; *Matter of Brennan v Burger*, 63 AD3d 922, 923 [2009]). “The credibility determinations of a Family Court support magistrate, who is in the best position to hear and evaluate the credibility of the witnesses, are entitled to deference” (*Matter of Gansky v Gansky*, 103 AD3d at 895; see *Matter of Kennedy v Ventimiglia*, 73 AD3d 1066, 1067 [2010]; *Matter of Cordero v Olivera*, 40 AD3d 852, 852-853 [2007]; see also *Matter of Mongelluzzo v Sondgeroth*, 95 AD3d 1332, 1333 [2012]).

Here, the Support Magistrate properly concluded that the father satisfied his burden of demonstrating a substantial change in circumstances warranting a downward modification of his support obligation. Under the circumstances of this case, the Support Magistrate properly declined to impute income to the father based on his income while he was serving in the Army. On this record, the father’s choice not to re-enlist was not undertaken to effect a reduction in his income “in order to reduce or avoid [his] obligation for child support” (Family Ct Act § 413 [1] [b] [5] [v]). Since the Support Magistrate’s findings were based on his credibility determinations and are supported by the record, they should not be disturbed (see *Matter of Gansky v Gansky*, 103 AD3d at 895; *Matter of Kennedy v Ventimiglia*, 73 AD3d at 1066).

The mother’s remaining contentions are without merit.

Accordingly, the Family Court properly denied the mother’s objection to the Support Magistrate’s order granting the father’s petition for a downward modification of his child support obligation. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

29 In the Matter of MARK LEW, Appellant-Respondent, v GAIL SOBEL et al., Nonparty Respondents-Appellants. [992 NYS2d 574]—

Parent, Child and Family—Support—Termination—Disbursement of Funds in Escrow Account

In a child custody proceeding pursuant to Domestic Relations Law article 5, the father appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Zimmerman, J.), dated August 24, 2012, as, after a hearing, inter alia, denied that branch of his motion which was to terminate his child support obligation and, in effect, granted the application of the attorney for the subject children for the disbursement of certain monies from an escrow account for the payment of an attorney’s fee, and the subject children cross-appeal, as limited by their brief, from so much of the same order as authorized the trustee of the escrow account to pay only certain of the subject children’s expenses from that account.

Ordered that the order is modified, on the law and the facts, by deleting the provision thereof directing the disbursement of \$10,612.50 from the escrow account for fees due to the attorney for the children, and substituting therefor a provision directing the mother to pay 75% of such fees and the father to pay 25% of such fees; as so modified, the order is affirmed insofar as appealed and cross-appealed from, without costs or disbursements.

“It is fundamental public policy in New York that parents are responsible for their children’s support until age 21” (*Matter of Barlow v Barlow*, 112 AD3d 817, 818 [2013]; see *Matter of Gansky v Gansky*, 103 AD3d 894, 895 [2013]; *Schulman v Schulman*, 101 AD3d 1098, 1099 [2012]; *Matter of Glen L.S. v Deborah A.S.*, 89 AD3d 856, 857 [2011]). Contrary to the father’s contention, under the circumstances of this case, the Supreme Court providently exercised its discretion in denying that branch of his motion which was to terminate his child support obligation.

The Supreme Court properly authorized the trustee maintaining the escrow account, into which the father was to pay his child support payments (see *Matter of Lew v Sobel*, 91 AD3d 648 [2012]), only to pay certain of the subject children’s medical and educational expenses out of the account.

The Supreme Court erred in directing the disbursement of \$10,612.50 from the escrow account for payment of fees due to the attorney for the children. By prior order of this Court (see *Matter of Lew v Sobel*, 46 AD3d 893 [2007]), the father was to pay 25% of the fees for the attorney for the children, and the mother was to pay 75%. Accordingly, the Supreme Court should have directed the father and the mother to pay the amount due to the attorney for the children in accordance with this provision, rather than directing that the payment be made out of the escrow account.

The parties’ remaining contentions are without merit. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

Motion by the appellant-respondent on an appeal and cross appeal from an order of the Supreme Court, Nassau County, dated August 24, 2012, inter alia, to strike stated portions of the respondent’s appendix on the ground that they contain matter dehors the record. By decision and order on motion of this Court dated March 5, 2014, that branch of the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

Ordered that the motion is denied. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

30 In the Matter of DONNA MARIE NEWBOLD, Respondent, v JOSE GUTIERREZ, Appellant. [992 NYS2d 573]—

Parent, Child and Family—Support—Calculation of Offset for Parent's Other Child Support Obligation

In a child support proceeding pursuant to Family Court Act article 4, the father appeals from an order of the Family Court, Queens County (McGowan, J.), dated September 16, 2013, which denied his objections to so much of an order of support of the same court (Blaustein, S.M.), dated August 8, 2013, as awarded the mother child support in the sum of \$300 bi-weekly.

Ordered that the order dated September 16, 2013, is modified, on the facts, by deleting the provision thereof denying the father's objection regarding the Support Magistrate's offset of his adjusted gross income in the amount of \$4,792.58 for annual child support paid for another child, and substituting therefor a provision granting that objection; as so modified, the order dated September 16, 2013, is affirmed, without costs or disbursements, so much of the order of support dated August 8, 2013, as awarded child support to the mother in the sum of \$300 bi-weekly is vacated, and the matter is remitted to the Family Court, Queens County, to recalculate the amount of bi-weekly child support in accordance herewith and thereafter for the entry of an amended order of support.

In calculating the amount of bi-weekly child support owed by the father to the mother, the Support Magistrate took into account, as an offset, the father's obligation to pay court-ordered child support to a different woman for another child. The Support Magistrate credited the father with paying the sum of \$4,792.58 annually for this other court-ordered child support and included that amount as an offset to his adjusted gross income used in calculating his obligation to pay child support in the instant matter. The Support Magistrate erred, however, in her calculation of this offset. The order of support with respect to the other child indicates that the father is paying \$184.33 per week in child support, which amounts to \$9,585.16 in annual child support, not the lower sum of \$4,792.58, as calculated by the Support Magistrate. Since the Support Magistrate miscalculated the amount of this offset in determining the father's child support obligation, the Family Court should have granted the

father's objection pertaining to this issue and adjusted the amount of his bi-weekly child support obligation accordingly. Therefore, we remit the matter to the Family Court, Queens County, to recalculate the amount of bi-weekly child support, taking into account the amount of \$9,585.16 as an offset to the father's adjusted gross income for the father's other child support obligation, and thereafter for the entry of an amended order of support.

The father's remaining contentions are without merit. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

31 In the Matter of ALLEN ROBINSON, Petitioner, v COUNTY COURT, ROCKLAND COUNTY, Respondent. [992 NYS2d 441]—

Proceeding against Body or Officer—Mandamus—Lack of Jurisdiction over County Court

Proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the respondent to decide the petitioner's motion pursuant to CPL 440.10 in an underlying criminal action entitled *People v Robinson*, pending in the County Court, Rockland County, under indictment No. 2010-449, and application by the petitioner for leave to prosecute the proceeding as a poor person.

Ordered that the application for leave to prosecute the proceeding as a poor person is granted to the extent that the filing fee imposed by CPLR 8022 (b) is waived, and the application is otherwise denied as academic; and it is further,

Adjudged that the petition is dismissed, without costs or disbursements.

The plaintiff commenced this proceeding against the County Court, Rockland County. However, the County Court is not a body or officer over which this Court has jurisdiction (*see* CPLR 506 [b]; 7802 [a]; 7804 [b]). Dillon, J.P., Dickerson, Cohen and Duffy, JJ., concur.

32 In the Matter of JEROME S. ADMINISTRATION FOR CHILDREN'S SERVICES, Respondent; TAZINE R., Appellant. (Proceeding No. 1.) In the Matter of KYWAYNE F. ADMINISTRATION FOR CHILDREN'S SERVICES, Respondent; TAZINE R., Appellant. (Proceeding No. 2.) [993 NYS2d 136]—

Parent, Child and Family—Abused or Neglected Child—Excessive Corporal Punishment

In related child protective proceedings pursuant to Family Court Act article 10, the mother appeals, as limited by her brief, from so much of an order of disposition of the Family Court, Kings County (Mulroy, J.), dated September 27, 2013, as, upon an order of fact-finding of the same court (Danoff J.) dated December 5, 2012, made after a hearing, finding that the mother

had neglected the child Jerome S. and derivatively neglected the child Kywayne F., placed the child Jerome S. in the custody of the Commissioner of Social Services of the City of New York, to reside in foster care with New Alternatives for Children until the next permanency hearing. The appeal from the order of disposition brings up for review the order of fact-finding.

Ordered that the order of disposition is affirmed insofar as appealed from, without costs or disbursements.

In January 2010, the Administration for Children's Services (hereinafter ACS) filed petitions against Tazine R., the mother of the subject children, Jerome S. and Kywayne F., alleging that she had neglected Jerome, who was then 10 years old, by inflicting excessive corporal punishment upon him, and derivatively neglected Kywayne, who was then seven years old. After a fact-finding hearing, the Family Court found that ACS had established by a preponderance of the evidence that the mother had neglected Jerome and derivatively neglected Kywayne. After a dispositional hearing, Jerome was placed in the custody of the New York City Commissioner of Social Services to reside in foster care, and Kywayne was released to the custody of the mother.

Pursuant to Family Court Act § 1012 (f) (i) (B), a neglected child is a child less than 18 years of age whose "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment." The petitioner has the burden of proving neglect by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Anastasia L.-D. [Ronald D.]*, 113 AD3d 685, 686 [2014]). Actual injury or impairment is not required. A finding of neglect may be made when a preponderance of the evidence demonstrates that the child is in imminent danger of injury or impairment (*see Matter of Amelia W. [Gloria D.W.]*, 77 AD3d 841, 842 [2010]; *Matter of Andrew S.*, 43 AD3d 1170, 1170-1171 [2007]).

Although parents have a right to use reasonable physical force against a child in order to maintain discipline or promote the child's welfare, the use of excessive corporal punishment constitutes neglect (*see Matter of Anastasia L.-D. [Ronald D.]*, 113 AD3d at 686; *Matter of Matthew M. [Fatima M.]*, 109 AD3d 472, 473 [2013]; *Matter of Delehia J. [Tameka J.]*, 93 AD3d 668, 669 [2012]). Striking a child repeatedly with a belt can constitute excessive corporal punishment (*see Matter of Nurridin B. [Louis*

J.], 116 AD3d 770, 771 [2014]; *Matter of Jahani K. [Felicia K.]*, 111 AD3d 832, 833 [2013]; *Matter of Alysha M.*, 24 AD3d 255, 255 [2005]).

Contrary to the mother's contention, the Family Court's determination that the mother neglected Jerome by inflicting excessive corporal punishment was supported by a preponderance of the credible evidence presented at the fact-finding hearing (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Nurridin B. [Louis J.]*, 116 AD3d at 771; *Matter of Jahani K. [Felicia K.]*, 111 AD3d at 833). The Family Court's assessment of the credibility of the witnesses is entitled to considerable deference unless clearly unsupported by the record (*see Matter of Nurridin B. [Louis J.]*, 116 AD3d at 771; *Matter of Jahani K. [Felicia K.]*, 111 AD3d at 833; *Matter of Sadiq H. [Karl H.]*, 81 AD3d 647, 647 [2011]; *Matter of Steven Glenn R.*, 51 AD3d 802, 803 [2008]). Here, the Family Court's findings were supported by the record.

The derivative finding of neglect as to the child Kywayne also is supported by the evidence (*see* Family Ct Act § 1046 [a] [i]; *Matter of James S. [Kathleen S.]*, 88 AD3d 1006, 1007 [2011]; *Matter of Devontay M.*, 56 AD3d 561, 562 [2008]; *Matter of Nicholas L.*, 50 AD3d 1141, 1142 [2008]).

Accordingly, we affirm the order of disposition insofar as appealed from. Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

33 In the Matter of STATE OF NEW YORK, Respondent, v DAVID M., Appellant. [992 NYS2d 582]—

Crimes—Sex Offenders—Civil Commitment or Supervision—Mental Abnormality—Paraphilia Disorder

In a proceeding pursuant to Mental Hygiene Law article 10 for the civil management of David M., an alleged sex offender requiring civil management, David M., appeals from an order of the Supreme Court, Nassau County (Calabrese, J.), dated May 2, 2013, which, upon a finding, made after a jury trial, that he suffers from a mental abnormality as defined in Mental Hygiene Law § 10.03 (i), and upon a determination, made after a dispositional hearing, that he is currently a dangerous sex offender requiring civil confinement, in effect, granted the petition and directed that he be committed to a secure treatment facility for care, treatment, and control until such time as he no longer requires confinement.

Ordered that the order is affirmed, without costs or disbursements.

In 2004, the appellant was convicted, upon his plea of guilty,

of sexual abuse in the first degree, based upon an incident in which he allegedly forced a female victim into his car at gunpoint and drove her to his home, where they had vaginal and anal intercourse without her consent. The incident took place one month and 11 days after the appellant was released to parole supervision upon serving a portion of a sentence imposed for a prior conviction of sexual abuse in the first degree.

In March 2009, the State commenced this proceeding under article 10 of the Mental Hygiene Law, alleging that the appellant was a sex offender requiring civil management. After a trial, the jury found that the appellant suffered from a mental abnormality that predisposed him to commit sex offenses and caused him to have serious difficulty controlling his criminal sexual conduct. Subsequently, following a dispositional hearing, the Supreme Court determined that the appellant was a dangerous sex offender requiring civil confinement, and committed him to a secure treatment facility for care, treatment, and control.

A court may set aside a jury verdict as legally insufficient and enter judgment as a matter of law only when, considering the evidence in the light most favorable to the petitioner, “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial” (*Bassett v City of Rye*, 104 AD3d 889, 890 [2013] [internal quotation marks omitted]; see *Matter of State of New York v John S.*, 23 NY3d 326 [2014]). “[A] jury verdict may be set aside as against the weight of the evidence only when the evidence preponderates so greatly in the movant’s favor that the jury could not have reached its conclusion on any fair interpretation of the evidence” (*Matter of State of New York v Andre L.*, 84 AD3d 1248, 1249-1250 [2011] [internal quotation marks omitted]; see *Matter of State of New York v Edison G.*, 107 AD3d 723, 724 [2013]; *Matter of State of New York v Derrick B.*, 68 AD3d 1124, 1126 [2009]).

Here, the evidence at trial was legally sufficient to support the verdict, since there was a valid line of reasoning by which the jury could conclude that the appellant suffered from a mental abnormality, and the jury’s verdict was supported by a fair interpretation of the evidence (see Mental Hygiene Law § 10.03 [i]; *Matter of State of New York v John S.*, 23 NY3d 326 [2014]; *Matter of State of New York v Derrick B.*, 68 AD3d at 1126; see also *Matter of State of New York v Leon F.*, 84 AD3d 1098, 1100-1101 [2011]). Contrary to the appellant’s contention, the question of whether the diagnosis of “Paraphilia Disorder-

Not Otherwise Specified Nonconsent” constituted a reliable predicate for a finding of mental abnormality presented a factual issue to be resolved by the jury, and there is no basis to disturb its findings (*see Matter of State of New York v Shannon S.*, 20 NY3d 99, 106-107 [2012]; *Matter of State of New York v Raul L.*, 120 AD3d 52 [2014]; *Matter of State of New York v Robert V.*, 111 AD3d 541, 542 [2013]).

The appellant’s challenge to certain comments made by the assistant attorney general during his opening statement and summation is unpreserved for appellate review (*see Matter of State of New York v Colvin M.*, 110 AD3d 818, 818 [2013]; *Burke v Carrion*, 101 AD3d 920, 922 [2012]; *People v Scott*, 99 AD3d 817, 817 [2012]), and, in any event, is without merit (*see Matter of State of New York v Carmelo M.*, 110 AD3d 818, 819 [2013]).

Moreover, the Supreme Court properly found, after the dispositional hearing, by clear and convincing evidence, that the appellant’s level of dangerousness requires that he be confined rather than be subject to strict and intense supervision (*see Mental Hygiene Law* § 10.07 [f]; *Matter of State of New York v Edison G.*, 107 AD3d at 724; *Matter of State of New York v Leon F.*, 84 AD3d at 1101; *Matter of State of New York v Derrick B.*, 68 AD3d at 1127).

The appellant’s remaining contention is without merit. Balkin, J.P., Leventhal, Maltese and Barros, JJ., concur.

34 In the Matter of TOWN OF ISLIP, Petitioner, v NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD et al., Respondents. [993 NYS2d 143]—

Civil Service—Public Employment Relations Board—Remittal to Fashion Appropriate Remedy Following Court Decision

Proceeding pursuant to CPLR article 78 to review a determination of the New York State Public Employment Relations Board dated May 27, 2011, which affirmed a decision of an administrative law judge dated March 1, 2010, finding, after a hearing, that an improper practice charge filed by Local 237, International Brotherhood of Teamsters and United Public Service Employees Union, alleging that the petitioner, Town of Islip, violated Civil Service Law § 209-a (1) (d), was established, and directing the Town of Islip, inter alia, to “restore the vehicle assignments for commutation between home and work to those unit members who enjoyed the benefit prior to April 4, 2008,” and to “make whole unit employees for the extra expenses incurred as a result of the unilateral withdrawal of the vehicle assignments, if any, together with interest at the maximum legal rate,” and, in effect, cross petition by the New York State

Public Employment Relations Board to enforce its order. By decision and judgment dated March 13, 2013, this Court confirmed the determination of the Public Employment Relations Board, denied the petition, dismissed the proceeding, granted the cross petition, and remitted the matter to the Supreme Court, Suffolk County, for the issuance of an order compelling compliance with the decision and judgment (see *Matter of Town of Islip v New York State Pub. Empl. Relations Bd.*, 104 AD3d 778 [2013]). In an opinion dated June 5, 2014, the Court of Appeals modified the decision and judgment of this Court, and remitted the matter to this Court “with directions to remand to the New York State Public Employment Relations Board for further proceedings in accordance with the opinion” (*Matter of Town of Islip v New York State Pub. Empl. Relations Bd.*, 23 NY3d 482, 496 [2014]).

Ordered that, upon remittitur from the Court of Appeals, the matter is remitted to the New York State Public Employment Relations Board for further proceedings in accordance with the opinion of the Court of Appeals in *Matter of Town of Islip v New York State Pub. Empl. Relations Bd.* (23 NY3d 482 [2014]).

The Court of Appeals determined that the remedial order issued by the New York Public Employment Relations Board (hereinafter PERB) in this matter was “unduly burdensome under the circumstances, and d[id] not further the goal of reaching a fair negotiated result” (*Matter of Town of Islip v New York State Pub. Empl. Relations Bd.*, 23 NY3d 482, 494 [2014]). As relevant here, the Court of Appeals stated as follows: “We review the remedies imposed by PERB with deference to its expertise (see *Matter of City of Albany v Helsby*, 29 NY2d 433, 439 [1972]). Thus ‘a remedy fashioned by PERB for an improper practice should be upheld if reasonable,’ although ‘[i]t is for the courts to examine the reasonable application of PERB’s remedies’ (*Matter of Manhasset Union Free School Dist. v New York State Pub. Empl. Relations Bd.*, 61 AD3d 1231, 1234-1235 [3d Dept 2009] [citations and internal quotation marks omitted]; see Civil Service Law § 213 [d]). Here, PERB’s remedial order requires the Town to ‘[f]orthwith restore the vehicle assignments for commutation between home and work to those unit members who enjoyed the benefit prior to April 4, 2008.’ A PERB injunction was not sought to preserve the status quo ante, and the Town sold some or all of the cars formerly permanently assigned to blue- and white-collar unit employees. Forcing the Town to invest significant taxpayer dollars to replace these vehicles is unduly burdensome under the circumstances, and does not further the goal of reaching a fair negotiated result (*cf.*

Matter of Manhasset Union Free School Dist., 61 AD3d at 1235 [enforcement of a PERB order for the school district to restore the personnel and facilities of its former transportation department was unreasonable where the district had sold its buses and leased its garage, and compliance with the order might require taxpayer approval]). We therefore remit so that PERB may fashion a remedy that grants commensurate, practical relief to the employees subject to the improper practice without requiring the Town to purchase a whole new fleet of vehicles with an uncertain future” (*id.* at 494).

In light of the determination of the Court of Appeals, we remit the matter to PERB for further proceedings in accordance with that determination. Skelos, J.P., Balkin, Dickerson and Hinds-Radix, JJ., concur.

35 In the Matter of ORLANDO VEGA, Appellant, v LUZ MARTOS VEGA, Respondent, and MARVIN SUITT, Respondent. [993 NYS2d 118]—

Parent, Child and Family—Custody—Dismissal of Proceeding Brought by Husband of Mother Where Prior Paternity Proceeding Determined Husband Not Father of Subject Child

In a custody proceeding pursuant to Family Court Act article 6, the petitioner appeals from an order of the Family Court, Dutchess County (Posner, J.), dated May 28, 2013, which, without a hearing, granted the application of the respondent Marvin Suitt to dismiss the proceeding.

Ordered that the order is affirmed, without costs or disbursements.

The subject child was born to the respondent Luz Martos Vega (hereinafter the mother) while the mother was married to the petitioner. The respondent Marvin Suitt commenced a paternity proceeding alleging that he is the father, in which the petitioner had a full and fair opportunity to present evidence. In that proceeding, the petitioner failed to appear before the court and failed to submit to genetic marker testing, and the court found the petitioner to be in default. After a hearing, in which the court found that the presumption of legitimacy was rebutted, Suitt was declared to be the father of the subject child. The petitioner subsequently commenced the instant custody proceeding, seeking custody of the subject child.

The Family Court properly granted Suitt’s application to dismiss this proceeding. A nonparent may have standing to seek custody of a child in the event of extraordinary circumstances, such as abandonment, persistent neglect, or unfitness by the parents (*see Matter of Bennett v Jeffreys*, 40 NY2d 543, 545

[1976]). Here, however, the petitioner made no allegation of extraordinary circumstances, and the prior determination as to paternity precludes him from claiming that he is a parent (*see Matter of Marquis B. v Alexis H.*, 110 AD3d 790 [2013]). Accordingly, the Family Court properly dismissed the proceeding, without a hearing, for lack of standing (*see Matter of Goodale v Nash*, 36 AD3d 703 [2007]).

We have not considered materials submitted or factual allegations made by the petitioner that are dehors the record (*see Matter of Gowda v Reddy*, 105 AD3d 957 [2013]; *Mendoza v Plaza Homes, LLC*, 55 AD3d 692 [2008]).

The mother's remaining contention is without merit. Mastro, J.P., Balkin, Sgroi and LaSalle, JJ., concur.

36 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAMES ALCIDE, Appellant. [992 NYS2d 442]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated May 1, 2012 (*People v Alcide*, 95 AD3d 897 [2012]), affirming a judgment of the Supreme Court, Kings County, rendered December 12, 2006.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Rivera, J.P., Chambers, Austin and Roman, JJ., concur.

37 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RAFAEL COSME, Appellant. [992 NYS2d 442]—Appeal by the defendant from a resentence of the Supreme Court, Kings County (Tomei, J.), imposed January 23, 2013, upon his conviction of robbery in the first degree, upon a jury verdict, after remittitur from this Court for resentencing (*see People v Cosme*, 99 AD3d 940 [2012]), the resentence being a determinate prison term of 12 years, to be followed by five years of postrelease supervision.

Ordered that the resentence is affirmed.

The resentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Balkin, J.P., Leventhal, Maltese and Barros, JJ., concur.

38 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v YVONNE DEBENEDETTO, Appellant. [992 NYS2d 370]—

Crimes—Plea of Guilty—Withdrawal of Plea—Denial of Motion to Withdraw Plea—Prescription Medication Not Affecting Defendant's Decision to Plead Guilty

Appeal by the defendant from a judgment of the County

Court, Nassau County (Ricigliano, J.), rendered April 8, 2013, convicting her of grand larceny in the second degree, upon her plea of guilty, and imposing sentence.

Ordered that the judgment is affirmed.

The decision to permit a defendant to withdraw a previously entered plea of guilty, as well as the nature and extent of the fact-finding inquiry, rests largely within the sound discretion of the court and generally will not be disturbed absent an improvident exercise of discretion (*see* CPL 220.60 [3]; *People v Brown*, 14 NY3d 113, 116 [2010]; *People v Alexander*, 97 NY2d 482, 485 [2002]; *People v Bennett*, 115 AD3d 973 [2014]; *People v Howard*, 109 AD3d 487 [2013]). Here, the County Court providently exercised its discretion in denying the defendant's motion to withdraw her plea of guilty without conducting a hearing. The record establishes that the defendant's plea of guilty was knowingly, voluntarily, and intelligently entered. While the presentence report and the expert affirmation submitted in support of the defendant's motion indicated that the defendant had been diagnosed with severe depression and anxiety, and had been prescribed medication to alleviate the symptoms of those conditions, there is no basis in the record to support the conclusion that, at the time of the plea proceeding, the defendant lacked the capacity to understand the nature of the proceeding or the consequences of her plea (*see People v Brooks*, 89 AD3d 747 [2011]; *People v Miranda*, 67 AD3d 709, 710 [2009]; *People v M'Lady*, 59 AD3d 568 [2009]; *People v Ramos*, 21 AD3d 1125 [2005], *aff'd* 7 NY3d 737 [2006]). During the plea colloquy, the defendant stated that her prescription medication did not affect her ability to understand the nature of the proceedings, appropriately responded to the questions asked of her, and gave no indication that she was mentally incapacitated (*see* CPL 730.10 [1]; *People v Ramos*, 77 AD3d 773 [2010]; *People v Godfrey*, 33 AD3d 623 [2006]; *People v Ochoa*, 179 AD2d 689 [1992]). Furthermore, the defendant's postplea claim of innocence, set forth in her motion papers, did not warrant granting her motion to withdraw her plea of guilty (*see People v Dixon*, 29 NY2d 55, 57 [1971]; *People v Soria*, 99 AD3d 1027 [2012]; *People v Ochoa*, 179 AD2d at 690).

The defendant's valid waiver of her right to appeal precludes review of her contention that the sentence imposed was excessive (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Callahan*, 80 NY2d 273, 280 [1992]; *People v Seaberg*, 74 NY2d 1, 10 [1989]). Rivera, J.P., Hall, Austin, Miller and Maltese, JJ., concur.

39 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANGEL DELVILLARTRON, Appellant. [992 NYS2d 363]—

Crimes—Arrest—Probable Cause—Lack of Probable Cause to Arrest Driver of Vehicle into Which Codefendants Fled—Suppression of Subsequent Statements

Crimes—Confession—Suppression of Statements Made after Improper Arrest

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Zayas, J.), rendered June 18, 2012, convicting him of burglary in the second degree and criminal possession of stolen property in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review an order of the same court (Kohm, J.), dated March 15, 2011, which, upon reargument, adhered to a prior determination in an order of the dated January 7, 2011, denying, after a hearing (Cooperman, J.H.O.), that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials.

Ordered that the judgment is reversed, on the law and as a matter of discretion in the interest of justice, upon reargument, that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials is granted, the count of the indictment charging the defendant with criminal possession of stolen property in the third degree is dismissed, and the matter is remitted to the Supreme Court, Queens County, for further proceedings on the count of the indictment charging the defendant with burglary in the second degree.

We agree with the defendant that the evidence was legally insufficient to prove his guilt of criminal possession of stolen property in the third degree (*see People v Spencer*, 257 AD2d 638, 638 [1999]; *cf. People v Fecunda*, 150 AD2d 600, 601 [1989]). There was no evidence supporting a conclusion that the defendant ever possessed the stolen property himself or acted in concert with the codefendants Kenneth Myers and Kevin Santos in their possession of the stolen property. Although the defendant's claim as to this count is unpreserved for appellate review, we reach it in the exercise of our interest of justice jurisdiction (*see* CPL 470.15 [3] [c]; *People v Curry*, 101 AD3d 743, 744 [2012]).

The defendant's contention that the evidence was legally insufficient to prove his guilt of burglary in the second degree is unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Pitre*, 108 AD3d 643, 643 [2013]; *People v Cabrera*, 85 AD3d 942, 942 [2011]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we find that it was legally sufficient to establish the defendant's guilt of that crime (*see People v Bacote*, 107 AD3d 641, 641

[2013]; *People v Horsey*, 304 AD2d 852, 853-854 [2003]; *People v Anaya*, 206 AD2d 380, 381 [1994]; *People v Poppel*, 143 AD2d 854 [1988]; cf. *People v Taylor*, 141 AD2d 581, 581-582 [1988]). Moreover, upon our independent review pursuant to CPL 470.15 (5), we are satisfied that the verdict of guilt was not against the weight of the evidence (see *People v Delamota*, 18 NY3d 107, 116-117 [2011]; *People v Romero*, 7 NY3d 633 [2006]; *People v Medina*, 37 AD3d 240, 241 [2007]).

Despite the sufficiency of the evidence regarding the conviction of burglary in the second degree, reversal of the defendant's conviction on that count is required, because, upon reargument, the court should have granted that branch of the defendant's omnibus motion which was to suppress his statements to law enforcement officials. The hearing testimony established that at approximately 8:00 a.m. on June 10, 2009, the police received a radio transmission regarding a robbery in progress, perpetrated by two black males, at a Queens residence. The police activated their sirens and lights and went to the specified house, arriving within two minutes of receiving the transmission. When the police arrived, two of the complainants, still gagged and partially bound, were on the porch of the house. The complainants used gestures to direct the officers' attention to two men, Myers and Santos, who were walking on the sidewalk, about four houses away. Myers and Santos, who were the only civilians on the block, started running, and the officers chased them. During the chase, Santos discarded an object, which the police later recovered and found to be a gun. When Myers and Santos turned a corner several blocks from the complainants' house, the officers lost sight of them briefly. When one of the officers turned the corner, he did not see any people, but saw the rear passenger door on a sport utility vehicle being closed. The vehicle was legally parked and the engine was off. The officer ran to the vehicle and peered inside through the tinted windows. After spotting Myers and Santos in the rear passenger seat, the officer "punched" the driver's side window to alert the driver not to drive away. The officer pulled the driver's door open and saw the defendant in the driver's seat, "fumbling" with the keys and trying to put them in the ignition. The officer pulled the defendant out of the car, placed him face-down on the ground, and handcuffed him. Eventually, the defendant was placed in a police car. At some point, one of the complainants, who had arrived at the scene of the arrest, happened to look into the police car and recognized the defendant as an acquaintance of his girlfriend. The defendant was later taken to the precinct, where, after being advised of his rights, he made inculpatory statements.

The judicial hearing officer (hereinafter the JHO) recommended denial of the defendant's motion to suppress his statements under *Dunaway v New York* (442 US 200 [1979]). The JHO concluded that, under the circumstances, the police had reasonable suspicion to forcibly detain the defendant and conduct a brief investigation. Further, the JHO concluded that the police had probable cause to arrest the defendant when he was recognized by one of the complainants as an acquaintance of his girlfriend. The Supreme Court adopted the JHO's findings of fact and conclusions of law, and denied suppression. The defendant moved for leave to reargue his motion, and the Supreme Court granted reargument, but adhered to its initial determination.

The evidence at the suppression hearing established that, under the circumstances, the police had probable cause to arrest Myers and Santos when the complainants pointed at them upon the arrival of the police (see *People v Collado*, 169 AD2d 531, 531-532 [1991]). Additionally, based on the presence of Myers and Santos in the defendant's car after those two men fled, the police reasonably suspected that the defendant was involved in the crime as a getaway driver (see *People v Sanchez*, 216 AD2d 207, 207 [1995]; *People v Gianfrate*, 192 AD2d 970, 971 [1993]). Given this reasonable suspicion, the police were permitted to forcibly stop the defendant and detain him briefly for investigative purposes (see *People v Moore*, 6 NY3d 496, 498-499 [2006]), but they did not have probable cause to arrest him at that juncture (see *People v Shulman*, 6 NY3d 1, 25-26 [2005]). When the police first encountered the defendant, he was sitting in the driver's seat of a lawfully parked car with the engine off and the keys not in the ignition, a full avenue away from, and not within sight of, the complainants' house. The defendant did not resist the police in any way and there was no evidence that he attempted or intended to evade them. The fact that the defendant fumbled with his keys in trying to place them in the ignition did not elevate reasonable suspicion to probable cause, because that behavior was innocuous. Under the circumstances known to the police at that point, it was just as likely that the defendant was not complicit in Myers's and Santos's criminal activity as that he was a getaway driver (see *People v Vandover*, 20 NY3d 235, 237 [2012]; *People v Carrasquillo*, 54 NY2d 248, 254 [1981]; *People v Cash J.Y.*, 60 AD3d 1487, 1488-1489 [2009]; *People v Wade*, 143 AD2d 703, 705 [1988]; cf. *People v Bernier*, 245 AD2d 137, 137 [1997]).

The hearing record established, however, that even if the defendant was not under arrest when he was first taken out of his

car and handcuffed, he was certainly under arrest by the time the police transferred him to a police car (*see People v Brnja*, 50 NY2d 366, 372 [1980]; *People v Hairston*, 117 AD2d 618, 620 [1986]). Since that arrest was not supported by probable cause, the resulting inculpatory statements at the precinct should have been suppressed. Moreover, inasmuch as the evidence of the defendant's guilt without regard to his inculpatory statements was not overwhelming, there is no basis for consideration of the harmless error doctrine (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

The People's remaining contention is without merit.

We need not address the defendant's remaining contentions, which have been rendered academic in light of our determination. Balkin, J.P., Austin and Barros, JJ., concur.

LaSalle, J., concurs in part and dissents in part and votes to modify the judgment with the following memorandum: I agree with majority to the extent that they hold that the evidence was legally insufficient to prove the defendant's guilt of criminal possession of stolen property in the third degree. However, I respectfully dissent, and vote to modify the judgment, because I conclude that the police officer had probable cause to arrest the defendant for the crime of burglary in the second degree.

The events leading to the defendant's arrest are not in substantial dispute. On June 10, 2009, at approximately 8:00 a.m., the police received a radio transmission of an armed robbery in progress at a residence, perpetrated by two black males. Police officers arrived at the location of the home invasion within minutes of the radio transmission. Upon the officers' arrival at the residence, they observed two of the complainants on the porch, still gagged and partially bound. The complainants used gestures to direct the officers' attention to two men, later identified as Kenneth Myers and Kelvin Santos, who were walking on the sidewalk. Myers and Santos started running, and three of the police officers, including Officer Soto, chased them. During the chase, Santos discarded an object which Officer Soto observed to be a gun when he ran past it, but Officer Soto did not stop to retrieve the gun at that time. Myers and Santos turned a corner, and Officer Soto lost sight of them for two to three seconds. Upon turning the corner, Officer Soto observed no one on the street, but saw a rear door to a vehicle being closed. Officer Soto approached the vehicle, and saw Myers and Santos in the back seat. Officer Soto approached the driver's side door, and observed the defendant fumbling with the car keys and attempting to put the key in the ignition. Officer Soto opened the driver's side door, pulled the defendant out, laid him

on the ground, and handcuffed him. Myers was handcuffed by another officer. Santos started running again, but was soon apprehended and taken into custody. The defendant was placed in the police car. Later, one of the complainants arrived at the scene of arrest, observed the defendant in the police car, and indicated that he recognized him as an acquaintance of his girlfriend. The defendant was subsequently taken to the precinct where, after being advised of his rights, he made inculpatory statements.

The issue presented in this case is whether Officer Soto had probable cause to arrest the defendant. I disagree with the majority, and would hold that under the undisputed facts and circumstances of the case, probable cause existed to arrest the defendant.

“Probable cause to arrest requires the existence of facts and circumstances which, when viewed as a whole, would lead a reasonable person possessing the same expertise as the arresting officer to conclude that an offense has been or is being committed, and that the defendant committed or is committing that offense” (*People v Wright*, 8 AD3d 304, 306 [2004]; see *People v Bigelow*, 66 NY2d 417, 423 [1985]; *People v Capela*, 97 AD3d 760, 760-761 [2012]). When determining whether a police officer has probable cause for an arrest, “the emphasis should not be narrowly focused on . . . any . . . single factor, but on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer who has to confront, on a daily basis, similar incidents” (*People v Bothwell*, 261 AD2d 232, 234 [1999] [internal quotation marks omitted]; see *People v Graham*, 211 AD2d 55, 58 [1995]; *People v Cabot*, 88 AD2d 556, 557 [1982]; *People v Wright*, 8 AD3d at 307). A determination of whether probable cause existed for an arrest is to be made “after considering all of the facts and circumstances together . . . Viewed singly, these may not be persuasive, yet when viewed together the puzzle may fit and probable cause found” (*People v Bigelow*, 66 NY2d at 423).

In this case, an evaluation of the totality of the circumstances fully supports the conclusion that probable cause existed for Officer Soto to arrest the defendant. After responding to a call for an armed robbery in progress, Officer Soto and his fellow officers found two individuals bound and gagged gesturing toward Myers and Santos, who began to flee on foot. Officer Soto observed Santos discard an object, which he moments later observed to be a handgun. Myers and Santos then entered the rear of a nearby vehicle, and Officer Soto observed the defendant fumbling with the keys, attempting to put them in the ignition.

Contrary to the conclusion of the majority, in evaluating the totality of the circumstances, I do not believe the defendant's behavior can be viewed as "innocuous." Indeed, in my view, the totality of the facts and circumstances would lead a reasonable person possessing the same expertise as the arresting officer to conclude that the defendant was acting in concert with Myers and Santos, in attempting to assist them to flee the scene of the home invasion (*see People v Wright*, 8 AD3d at 307; *People v Attebery*, 223 AD2d 714, 715 [1996]). Therefore, I would hold that the hearing court properly determined that there was probable cause for the defendant's arrest, and no basis to suppress his statements to law enforcement officials.

Accordingly, because I conclude that there was probable cause for the defendant's arrest, and because I determine the defendant's remaining contentions, apart from the contention that the evidence was legally insufficient to prove his guilt of criminal possession of stolen property in the third degree, are without merit, I would vote to modify the judgment, as a matter of discretion in the interest of justice, by vacating the conviction of criminal possession of stolen property in the third degree and the sentence imposed thereon, and to dismiss that count of the indictment.

40 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v LEE ANDERSON EDWARDS, Appellant. [992 NYS2d 368]—

Crimes—Murder—Intent to Cause Death Properly Inferred from Defendant's Conduct and Surrounding Circumstances

Crimes—Trial—Mistrial—No Mistrial Where Prosecution Witness Failed to Recognize Anyone in Courtroom

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Latella, J.), rendered April 1, 2011, convicting him of murder in the second degree and criminal possession of a weapon in the second degree (three counts), upon a jury verdict, and imposing sentence.

Ordered that the judgment is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish beyond a reasonable doubt that the defendant intended to cause the death of the victim. Here, intent can be inferred from the defendant's conduct and the surrounding circumstances (*see People v Bracey*, 41 NY2d 296, 301 [1977]; *People v Bryant*, 39 AD3d 768, 769 [2007]).

Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]), we nevertheless accord

great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]).

The defendant's contention that the People's summation remarks constituted reversible error is largely unpreserved for appellate review (*see People v Tonge*, 93 NY2d 838 [1999]; *People v Gray*, 86 NY2d 10, 19-20 [1995]; *People v Heide*, 84 NY2d 943, 944 [1994]; *People v Williams*, 46 NY2d 1070, 1071 [1979]). In any event, the summation comments alleged to be inflammatory and prejudicial were either fair comment on the evidence (*see People v Ashwal*, 39 NY2d 105, 109-111 [1976]), responsive to arguments and theories presented in the defense summation (*see People v Galloway*, 54 NY2d 396 [1981]; *People v Crawford*, 54 AD3d 961 [2008]), stricken, thereby dissipating any prejudice resulting from the improper comment (*see People v Berg*, 59 NY2d 294 [1983]; *People v Arce*, 42 NY2d 179, 187 [1977]; *People v Gouveia*, 88 AD3d 814, 815-816 [2011]), or constituted harmless error (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]; *People v Persaud*, 98 AD3d 527, 529 [2012]).

The defendant's contention that the Supreme Court erred in denying his motion for a mistrial after the prosecutor called a witness who, when asked if she recognized anyone in the courtroom, responded that she could not remember, is without merit (*see People v Berg*, 59 NY2d at 298; *People v Berry*, 110 AD3d 1002, 1002 [2013]; *People v Alston*, 71 AD3d 684, 685 [2010]; *People v Torres*, 141 AD2d 682 [1988]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]).

The defendant's remaining contentions are without merit (*see People v Crimmins*, 36 NY2d at 242). Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

41 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DARNELL EPPS, Appellant. [992 NYS2d 439]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated May 27, 2003 (*People v Epps*, 305 AD2d 697 [2003]), affirming a judgment of the Supreme Court, Kings County, rendered November 15, 2000.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463

US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Rivera, J.P., Balkin, Dickerson and Sgroi, JJ., concur.

42 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DARNELL EPPS, Appellant. [992 NYS2d 440]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated March 27, 2007 (*People v Epps*, 38 AD3d 916 [2007]), affirming an order of the Supreme Court, Kings County, dated August 1, 2005.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Rivera, J.P., Balkin, Dickerson and Sgroi, JJ., concur.

43 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANDY LOPEZ, Appellant. [992 NYS2d 439]—Appeal by the defendant, as limited by his motion, from a sentence of the Supreme Court, Queens County (Holder, J.), imposed June 20, 2011, on the ground that the sentence was excessive.

Ordered that the sentence is affirmed.

The defendant's valid waiver of his right to appeal precludes review of his contention that the sentence imposed was excessive (*see People v Bradshaw*, 18 NY3d 257, 264-267 [2011]; *People v Lopez*, 6 NY3d 248, 255-256 [2006]). Eng, P.J., Mastro, Dickerson and Miller, JJ., concur.

44 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WILLIAM S. McDANIEL, Appellant. [993 NYS2d 509]—

Crimes—Right to Counsel—Effective Representation—Meaningful Representation

Appeals by the defendant (1) from a judgment of the Supreme Court, Kings County (Del Giudice, J.), rendered August 3, 2009, convicting him of rape in the second degree (two counts), rape in the third degree, and criminal sexual act in the second degree, upon a jury verdict, and imposing sentence, and (2), by permission, from an order of the same court dated December 15, 2010, which denied his motion pursuant to CPL 440.10 to vacate the judgment of conviction.

Ordered that the judgment and the order are affirmed.

The Supreme Court properly denied the defendant's motion pursuant to CPL 440.10 to vacate the judgment of conviction on the ground that he was deprived of the effective assistance of trial counsel. The evidence presented by the defendant failed to

demonstrate the absence of strategic or other legitimate explanations for counsel's allegedly deficient conduct (*see People v Caban*, 5 NY3d 143, 152 [2005]; *People v Britton*, 49 AD3d 893 [2008]; *People v Jordan*, 44 AD3d 875 [2007]). The evidence, the law, and the circumstances of the case, viewed in totality as of the time of the representation, reveal that trial counsel provided meaningful representation (*see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

The sentence imposed was not excessive (*see People v Suitte*, 90 AD2d 80 [1982]). Skelos, J.P., Dickerson, Austin and Duffy, JJ., concur.

45 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DERRICK RIFFAS, Appellant. [994 NYS2d 136]—

Crimes—Arrest—Improper Arrest of Defendant in His Home—Suppression of Subsequent Statements

Motion by the respondent for leave to reargue an appeal from a judgment of the Supreme Court, Kings County, rendered September 9, 2009, which was determined by decision and order of this Court dated February 13, 2014.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

Ordered that the motion is granted and, upon reargument, the decision and order of this Court dated February 13, 2014 (*People v Riffas*, 114 AD3d 810 [2014]), is recalled and vacated, and the following decision and order is substituted therefor:

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Firetog, J.), rendered September 9, 2009, convicting him of murder in the second degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Reichbach, J.), of those branches of the defendant's omnibus motion which were to suppress his post-arrest statements to law enforcement officials and evidence of a post-arrest lineup identification.

Ordered that the judgment is reversed, on the law, that branch of the defendant's motion which was to suppress his post-arrest statements to law enforcement officials is granted, and a new trial is ordered.

The hearing court erred in determining that the defendant's arrest did not violate his rights under *Payton v New York* (445 US 573 [1980]). Here, the police knocked on the defendant's door at approximately 6:50 a.m. When the defendant answered the door he appeared to be "half asleep," and was naked from the waist down. He only partially opened the door, was never in

full view of the police, and never crossed the threshold of his apartment. When the police directed the defendant to step fully into view, the defendant instead attempted to shut the door, trapping a detective's arm as the detective tried to keep the door from closing. After law enforcement officials successfully pushed the door open, they pulled the defendant from the area behind the door into the public hallway, where he was then arrested.

Under the discrete circumstances of this case, where the police officers crossed the threshold into the defendant's apartment, pulled him into the hallway, and arrested him without a warrant, the defendant's Fourth Amendment rights were violated (*see id.* at 590; *People v Levan*, 62 NY2d 139, 144-145 [1984]; *People v Gonzales*, 111 AD3d 147 [2013]; *People v Robert*, 156 AD2d 730 [1989]). While the Supreme Court properly denied that branch of the defendant's omnibus motion which was to suppress evidence of a post-arrest lineup identification (*see People v Jones*, 2 NY3d 235 [2004]), it should have granted that branch of the motion which was to suppress his post-arrest statements to law enforcement officials (*id.* at 242-244; *People v Harris*, 77 NY2d 434 [1991]). Since the evidence of the defendant's guilt was not overwhelming, and it cannot be said that there is no reasonable possibility that the error in admitting the defendant's post-arrest statements into evidence might have contributed to the defendant's conviction, the error was not harmless beyond a reasonable doubt (*see People v Hardy*, 4 NY3d 192, 198-199 [2005]; *People v Crimmins*, 36 NY2d 230, 240-241 [1975]; *People v Cioffi*, 105 AD3d 971, 973 [2013]).

The defendant's contentions regarding the jury charge and the verdict sheet are without merit.

Accordingly, the judgment of conviction must be reversed and a new trial ordered.

In light of our determination, the defendant's remaining contentions have been rendered academic. Dillon, J.P., Chambers, Austin and Roman, JJ., concur.

46 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v FRANKLYN SOLEYN, Appellant. [992 NYS2d 441]—Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, a decision and order of this Court dated June 6, 2012 (*People v Soleyn*, 96 AD3d 787 [2012]), affirming a judgment of the Supreme Court, Kings County, rendered May 1, 2008.

Ordered that the application is denied.

The appellant has failed to establish that he was denied the

effective assistance of appellate counsel (*see Jones v Barnes*, 463 US 745 [1983]; *People v Stultz*, 2 NY3d 277 [2004]). Dillon, J.P., Dickerson, Austin and Miller, JJ., concur.

47 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MAURICE STATON, Appellant. [992 NYS2d 443]—Appeal by the defendant from a judgment of the Supreme Court, Kings County (Chun, J.), rendered September 13, 2012, convicting him of attempted criminal possession of a weapon in the second degree, upon his plea of guilty, and imposing sentence. Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), in which she moves for leave to withdraw as counsel for the appellant.

Ordered that the judgment is affirmed.

We are satisfied with the sufficiency of the brief filed by the defendant's assigned counsel pursuant to *Anders v California* (386 US 738 [1967]), and, upon an independent review of the record, we conclude that there are no nonfrivolous issues which could be raised on appeal. Counsel's application for leave to withdraw as counsel is, therefore, granted (*see Anders v California*, 386 US 738 [1967]; *Matter of Giovanni S. [Jasmin A.]*, 89 AD3d 252 [2011]; *People v Paige*, 54 AD2d 631 [1976]; *cf. People v Gonzalez*, 47 NY2d 606 [1979]). Mastro, J.P., Chambers, Cohen and Barros, JJ., concur.

48 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v O'NEIL WARD, Appellant. [992 NYS2d 571]—

Crimes—Assault—Attempted Criminal Obstruction of Breathing or Blood Circulation and Related Crimes—Deference to Jury's Conclusion

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Morgenstern, J.), rendered March 7, 2012, convicting him of attempted assault in the third degree, menacing in the third degree, attempted criminal obstruction of breathing or blood circulation, and harassment in the second degree, after a nonjury trial, and imposing sentence.

Ordered that the judgment is affirmed.

The defendant's challenge to the legal sufficiency of the evidence is unpreserved for appellate review, since he failed to move for a trial order of dismissal based on the error he now claims (*see CPL 470.05* [2]; *People v Hawkins*, 11 NY3d 484, 492 [2008]; *People v Gumbs*, 58 AD3d 641, 641 [2009]; *People v Crawford*, 38 AD3d 680, 681 [2007]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620 [1983]), we find that it was legally sufficient to establish beyond a reasonable doubt the defend-

ant's guilt of attempted assault in the third degree (*see Matter of Tiffany D.*, 29 AD3d 693 [2006]; *Matter of Eric C.*, 281 AD2d 543, 544 [2001]), menacing in the third degree (*see People v Bracey*, 41 NY2d 296 [1977]; *Matter of Monay W.*, 33 AD3d 809 [2006]), attempted criminal obstruction of breathing or blood circulation (*see People v Wertman*, 114 AD3d 1279 [2014]; *People v Carte*, 113 AD3d 191 [2013]), and harassment in the second degree (*People v Rodriguez*, 111 AD3d 856 [2013]; *People v Mollai*, 81 AD3d 1448 [2011]).

In fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15 [5]; *People v Danielson*, 9 NY3d 342 [2007]), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383, 410 [2004]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633 [2006]). Skelos, J.P., Hall, Duffy and Barros, JJ., concur.

49 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BERNARD WASHINGTON, Appellant. [992 NYS2d 435]—Appeals by the defendant from two judgments of the Supreme Court, Westchester County (Molea, J.), both rendered May 3, 2012, convicting him of criminal sale of a controlled substance in the third degree under indictment No. 11-01415, and robbery in the third degree under superior court information No. 12-00248, upon his pleas of guilty, and imposing sentences.

Ordered that the judgments are affirmed.

Contrary to the defendant's contention, the superior court information pursuant to which he entered his plea of guilty was not jurisdictionally defective (*cf. People v Zanghi*, 79 NY2d 815 [1991]; *People v Boston*, 75 NY2d 585 [1990]).

The defendant's arguments regarding the judgment of conviction of criminal sale of a controlled substance in the third degree under indictment No. 11-01415 are without merit. Dillon, J.P., Hall, Roman and Cohen, JJ., concur.

50 THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v CHARLES WILLIAMS, Respondent. [992 NYS2d 438]—

Crimes—Unlawful Search and Seizure—Well-Founded Suspicion of Criminal Activity—Discarded Gun during Flight Improperly Suppressed

Appeal by the People from so much of an order of the Supreme Court, Queens County (Paynter, J.), dated September 7, 2012, as, after a hearing, granted that branch of the defendant's omnibus motion which was to suppress physical evidence.

Ordered that the order is reversed insofar as appealed from, on the law, and that branch of the defendant's omnibus motion which was to suppress physical evidence is denied.

The evidence admitted at the suppression hearing established that police officers had a founded suspicion that the defendant was engaged in criminal activity, warranting a common-law right of inquiry, which, because of the defendant's flight, escalated into reasonable suspicion to pursue (*see People v Sierra*, 83 NY2d 928, 929 [1994]; *People v Riley*, 290 AD2d 568, 569 [2002]). Since the pursuit of the defendant was justified, the gun he discarded during the pursuit was not subject to suppression as the product of unlawful police conduct (*see People v Britt*, 67 AD3d 1023, 1024 [2009]; *People v Riley*, 290 AD2d at 569). Dickerson, J.P., Chambers, Austin and Sgroi, JJ., concur.

THIRD DEPARTMENT, SEPTEMBER, 2014

(September 4, 2014)

1 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANTHONY A. LAROSE II, Appellant. [993 NYS2d 390]—

Crimes—Sentence—Defendant's Request to Defer Mandatory Surcharge and Fees—No Showing of Unreasonable Hardship

McCarthy, J.P. Appeals (1) from a judgment of the County Court of St. Lawrence County (Richards, J.), rendered December 12, 2011, convicting defendant upon his plea of guilty of the crimes of criminal contempt in the first degree and attempted assault in the second degree, and (2) from a judgment of said court, rendered May 21, 2012, which resentenced defendant.

Defendant was charged in an indictment with aggravated criminal contempt, criminal contempt in the first degree and strangulation in the second degree. While being held on those charges, defendant was arrested for assaulting a fellow inmate. Defendant agreed to waive indictment and be charged by superior court information with assault in the second degree for that crime. Under the terms of a plea agreement, defendant pleaded guilty to criminal contempt in the first degree in full satisfaction of the indictment and pleaded guilty to attempted assault in the second degree in satisfaction of the superior court information.* The pleas also satisfied several other pending

* Although the plea agreement included an appeal waiver, the People concede, and we agree, that defendant did not knowingly, intelligently and voluntarily waive the right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]).

charges. County Court thereafter sentenced defendant, as a second felony offender, to two consecutive sentences of 2 to 4 years in prison, with the recommendation that he be placed in the shock incarceration program.

After it was discovered that defendant was ineligible for shock incarceration, defendant appeared before County Court for resentencing. Defendant sought to have the payment of the mandatory surcharge, the DNA data bank fee and the crime victims' assistance fee deferred until after he served his sentence. County Court denied the request and resentenced defendant, as a second felony offender, to two concurrent 2-to-4-year prison terms. Defendant now appeals.

We affirm. County Court did not err in denying defendant's request to defer payment of the mandatory surcharge and various fees, inasmuch as he did not establish that the payments "would work an unreasonable hardship on defendant over and above the ordinary hardship suffered by other indigent inmates" (*People v Flanders*, 110 AD3d 1112, 1112 [2013] [internal quotation marks and citations omitted]; see CPL 420.40 [2]). Nor do we find merit to defendant's contention that the resentence is harsh and excessive, given his extensive criminal history (see *People v Howard*, 111 AD3d 1021, 1021-1022 [2013], *lv denied* 22 NY3d 1199 [2014]; *People v Alexander*, 110 AD3d 1111, 1112 [2013], *lv denied* 22 NY3d 1154 [2014]).

Garry, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the judgments are affirmed.

2 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAMEL CARLTON, Appellant. [991 NYS2d 806]—

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal—Right to Testify before Grand Jury

Crimes—Right to Counsel—Effective Representation—Failure to Effectuate Defendant's Appearance before Grand Jury

Garry, J. Appeal from a judgment of the County Court of Ulster County (Williams, J.), rendered November 17, 2011, convicting defendant upon his plea of guilty of the crime of criminal possession of stolen property in the fourth degree.

After a traffic stop around 12:30 a.m. on May 10, 2011, defendant was arrested for unlawful possession of marijuana and aggravated unlicensed operation of a motor vehicle, and on an outstanding warrant for unrelated charges. After it was determined that items found in a purse recovered from defendant's vehicle during the traffic stop had been taken from their owner by defendant and others during a gun-point robbery, he was charged by felony complaint with three counts of criminal

possession of stolen property in the fourth degree. Following a preliminary hearing on the felony complaint, County Court determined that there was reasonable cause to believe that defendant had committed the felony of criminal possession of stolen property in the fourth degree and held the matter over for grand jury action. An Ulster County grand jury thereafter charged defendant with three counts of criminal possession of stolen property in the fourth degree, and his motion to dismiss the indictment for failure to afford him an opportunity to testify before the grand jury was denied. Defendant thereafter entered a guilty plea to one count of criminal possession of stolen property in the fourth degree in satisfaction of all charges in the indictment, and received the agreed-upon prison sentence, as a second felony offender, of 2 to 4 years, with restitution. Defendant now appeals.

By pleading guilty, defendant forfeited the claims that he was entitled to notice of the grand jury proceedings and denied his statutory right to testify (*see* CPL 190.50 [5] [a]; *People v Steed*, 17 AD3d 928, 929 [2005], *lv denied* 5 NY3d 770 [2005]; *People v Harris*, 293 AD2d 818, 819 [2002], *lv denied* 98 NY2d 676 [2002]; *People v Grey*, 135 AD2d 1031, 1031 [1987]; *see also* *People v Taylor*, 65 NY2d 1, 5 [1985]). Defendant's "appearance before the Grand Jury would have been for the purpose of giving testimony relating to his guilt or innocence" (*People v Grey*, 135 AD2d at 1032), and "his plea of guilty removed this issue from the case" (*People v Harris*, 293 AD2d at 819). Moreover, the record reflects that, after the preliminary hearing, the felony complaint was "disposed of" and defendant was held for grand jury action (CPL 180.70 [1]) and, as such, he was no longer subject to an "undisposed of felony complaint" in a local criminal court so as to entitle him to notice of grand jury proceedings under CPL 190.50 (5) (a) (*see* *People v Boodrow*, 42 AD3d 582, 584 [2007]; *People v Brooks*, 26 AD3d 739, 740 [2006], *lvs denied* 6 NY3d 846, 7 NY3d 810 [2006]).

Next, defendant's insistence that he would not have pleaded guilty but for counsel's alleged deficiencies is undermined by the fact that, while he complained about the representation at sentencing, he declined County Court's invitation to withdraw his guilty plea. Even assuming that defense counsel failed to facilitate defendant's appearance at the grand jury, which is not established in the record, this would be insufficient to constitute ineffective assistance of counsel; defendant has not shown that he was prejudiced by that failure, nor made any showing that the outcome would have been different had he testified (*see* *People v Simmons*, 10 NY3d 946, 949 [2008]; *People v Lasher*,

74 AD3d 1474, 1475-1476 [2010], *lv denied* 15 NY3d 894 [2010]). Moreover, counsel vigorously represented defendant at the preliminary hearing, timely moved to dismiss the indictment pursuant to CPL 190.50 (5) (a) based upon the one-day notice provided of the grand jury proceedings, and obtained a favorable plea deal, and the record as a whole reflects that counsel provided meaningful representation (*see People v Henry*, 95 NY2d 563, 565 [2000]). To the extent that defendant raises claims regarding what counsel advised him or investigated, they concern matters outside the record on appeal, which are more properly addressed in a motion to vacate the judgment pursuant to CPL article 440 (*see People v Haffiz*, 19 NY3d 883, 885 [2012]; *People v Morey*, 110 AD3d 1378, 1379-1380 [2013], *lv denied* 23 NY3d 965 [2014]), and his contentions that he was not apprised of his potential sentencing exposure or the parameters of the plea agreement are belied by the record.

McCarthy, J.P., Egan Jr., Lynch and Clark, JJ., concur. Ordered that the judgment is affirmed.

3 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ELLEN COONEY, Appellant. [991 NYS2d 676]—

**Crimes—Appeal—Preservation of Issue for Review—Denial of Due Process—Lack of Representation at Judicial Diversion Program Status Conferences
Crimes—Sentence—Judicial Diversion Program—Termination from Program for Subsequent Arrest**

Lynch, J. Appeal from a judgment of the County Court of St. Lawrence County (Richards, J.), rendered August 9, 2012, convicting defendant upon her plea of guilty of the crime of attempted burglary in the second degree.

In full satisfaction of several pending charges, defendant pleaded guilty to a superior court information charging her with attempted burglary in the second degree, with the understanding that, if she completed a judicial diversion program (hereinafter JDP) (*see* CPL 216.05), she would be sentenced to five years of probation. County Court placed defendant on interim probation and informed her that if she was unsuccessful in the JDP, she would be sentenced to the maximum sentence of seven years in prison plus five years of postrelease supervision. Approximately one year later, defendant was arrested. She waived her right to a hearing and admitted to committing criminal trespass in the second degree, and was discharged from the JDP. She was then sentenced, as a second violent felony offender, to 6½ years in prison, to be followed by five years of postrelease supervision. Defendant now appeals, and the People concede that her purported waiver of the right to appeal was invalid. Nevertheless, her arguments lack merit, as the People argue.

Initially, we note that defendant failed to preserve, by appropriate postallocation motion, her argument that she was denied due process because she was not represented by counsel during JDP status conferences (*see* CPL 216.05 [8]) and at the meeting of the treatment court team in which it was concluded that she should be terminated from the JDP. Moreover, the record reveals that in her JDP contract—which was signed by defendant and her counsel and discussed in open court—defendant waived the right to have her attorney present during any JDP sanction proceeding except termination, and counsel was present and actively participated in the termination hearing. Under these circumstances, were this issue properly before us, we would find that defendant received the process she was due (*see* CPL 216.05 [9] [b]; *People v Dawley*, 96 AD3d 1108, 1109 [2012], *lv denied* 19 NY3d 1025 [2012]; *see also People v Fiammegta*, 14 NY3d 90, 96-98 [2010]).

Furthermore, County Court did not abuse its discretion in terminating her from the JDP, and her sentence was not harsh or excessive. Defendant was presumptively ineligible for the JDP, given that she was currently charged with, and had previously been convicted of, a violent felony offense (*see* CPL 216.00 [1]). Although the People consented to her participation in the JDP, defendant was arrested for conduct that bore great similarity to the circumstances surrounding her prior crimes. Given defendant's extensive criminal history relating to her drug use, which resulted in a prior six-year prison sentence, as well as the similar nature of her latest crime, County Court did not abuse its discretion in either terminating her from the JDP or imposing the concededly lawful 6½-year prison sentence against her (*see People v Secore*, 102 AD3d 1059, 1060 [2013], *lv denied* 21 NY3d 1019 [2013]; *People v Dawley*, 96 AD3d at 1109).

McCarthy, J.P., Garry, Egan Jr. and Clark, JJ., concur. Ordered that the judgment is affirmed.

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAMES WAITE JR., Appellant. [994 NYS2d 201]—

Crimes—Appeal—Waiver of Right to Appeal—Validity
 Crimes—Appeal—Preservation of Issue for Review—Sufficiency of Plea Allocation

Egan Jr., J. Appeal from a judgment of the County Court of St. Lawrence County (Richards, J.), rendered September 24, 2012, convicting defendant upon his plea of guilty of the crime of criminal possession of marihuana in the second degree.

In full satisfaction of an indictment and other uncharged crimes, defendant pleaded guilty to criminal possession of

marihuana in the second degree and waived his right to appeal. County Court thereafter sentenced defendant to two years in prison, followed by one year of postrelease supervision, to be served concurrently with the sentence defendant already was serving. Defendant now appeals.

We affirm. Defendant's challenge to the validity of his appeal waiver is without merit. Our review of the plea colloquy and the written waiver executed by defendant reveals that he was apprised of and understood the rights he was relinquishing, including the right to appeal his sentence. Accordingly, we conclude that defendant's waiver was knowing, intelligent and voluntary (*see People v Newton*, 113 AD3d 1000, 1000-1001 [2014], *lv denied* 23 NY3d 1041 [2014], *People v Smith*, 112 AD3d 1232, 1232 [2013], *lv denied* 22 NY3d 1203 [2014]). Although defendant's challenge to the voluntariness of his plea survives his appeal waiver, it is unpreserved for our review, inasmuch as the record does not reflect that defendant made an appropriate postallocation motion (*see People v Trombley*, 115 AD3d 1114, 1114 [2014]). Further, the narrow exception to the preservation rule was not implicated, as defendant did not make any statements during the plea colloquy that cast doubt upon his guilt or otherwise called into question the voluntariness of his plea (*see People v Bressard*, 112 AD3d 988, 989 [2013], *lv denied* 22 NY3d 1137 [2014]; *People v Osgood*, 111 AD3d 1029, 1030 [2013], *lv denied* 22 NY3d 1089 [2014]). Finally, defendant's contention that his sentence is harsh and excessive is precluded by his valid appeal waiver (*see People v Campbell*, 114 AD3d 996, 997 [2014]; *People v Graves*, 113 AD3d 998, 999 [2014], *lv denied* 23 NY3d 1037 [2014]).

McCarthy, J.P., Garry, Lynch and Clark, JJ., concur. Ordered that the judgment is affirmed.

5 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANDREW J. YAW, Appellant. [991 NYS2d 677]—

Crimes—Appeal—Waiver of Right to Appeal—Validity

Lynch, J. Appeal from a judgment of the County Court of Schuyler County (Morris, J.), rendered February 14, 2013, convicting defendant upon his plea of guilty of the crimes of assault in the first degree and assault in the second degree.

During an argument on February 1, 2012, defendant struck his father in the head with a metal tool causing life threatening injuries, and was thereafter indicted for, among other crimes, attempted murder in the second degree. In satisfaction of those charges and any future charges related thereto, defendant ac-

cepted a plea agreement pursuant to which he pleaded guilty to assault in the first degree and waived his right to appeal. As part of the same plea agreement, defendant simultaneously pleaded guilty to assault in the second degree under another two-count indictment stemming from assaults he committed while in jail on the murder charge. As relevant here, he was sentenced, as agreed, to a 20-year prison term on the first degree assault conviction with five years of postrelease supervision. He now appeals, challenging only the assault in the first degree conviction.

Defendant argues that an appeal waiver concerning the sentence was not part of the plea agreement, that the waiver was not valid and did not encompass his right to challenge the sentence as harsh and excessive, and that the oral and written waivers were contradictory. Contrary to his contentions, the plea proceedings reflect that defendant was repeatedly advised, without qualification, that an appeal waiver was part of the agreement, and defense counsel confirmed that he reviewed the plea terms with him, including the negotiated sentence and the appeal waiver; County Court explained the meaning of an appeal waiver and made clear that it was not automatic but, rather, was separate and distinct from the other plea terms and that he would be required to sign a written waiver at sentencing. Defendant indicated that he understood this right and freely agreed to “give up [his] right to appeal in exchange for the plea and sentence promised to [him].” At sentencing, defense counsel stated that he had “gone over the waiver of the right to appeal” with defendant, answered his questions and that he understood it, which defendant confirmed. Defendant signed the written waiver in open court, confirming that he had agreed to it and had discussed it with his attorney. Thus, the record reflects that defendant was fully advised that the combined oral and written appeal waivers were part of the plea agreement and that they were agreed to knowingly, voluntarily and intelligently (see *People v Bradshaw*, 18 NY3d 257, 264-265 [2011]; *People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Further, there is no support in the record for the conclusion that the appeal waiver was limited so as to permit an appeal of the sentence. Defendant explicitly waived his appeal rights without qualification during the allocution, and his written appeal waiver clearly stated that it covered “all rights to appeal from the judgment of conviction . . . and the sentence imposed” (see *People v Maracle*, 19 NY3d 925, 926-928 [2012]; *People v Hidalgo*, 91 NY2d 733, 735-737 [1998]; *People v Fling*, 112 AD3d 1001, 1002 [2013], *lv denied* 23 NY3d 1020 [2014]). Likewise,

while the written appeal waiver was more detailed, it did not contradict the oral colloquy and, in any event, this claim is unpreserved as it was not raised at sentencing (*see* CPL 470.05 [2]). Defendant's valid waiver of the right to appeal his conviction and sentence "precludes any claim that we should exercise our interest of justice jurisdiction and reduce the [agreed-upon] sentence" (*People v Boone*, 101 AD3d 1358, 1359 [2012], *lv denied* 20 NY3d 1096 [2013]; *see People v Foote*, 102 AD3d 1056, 1057 [2013], *lv denied* 20 NY3d 1098 [2013]).

McCarthy, J.P., Garry, Egan Jr. and Clark, J.J., concur. Ordered that the judgment is affirmed.

6 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WILLIAM J. MINER, Appellant. [991 NYS2d 679]—

Crimes—Plea of Guilty—Sufficiency of Allocution

Crimes—Appeal—Waiver of Right to Appeal—Validity

Clark, J. Appeal from a judgment of the County Court of Saratoga County (Scarano, J.), rendered April 2, 2013, convicting defendant upon his plea of guilty of the crime of failing to register under the Sex Offender Registration Act.

In January 2013, defendant, a registered sex offender, waived indictment and agreed to be prosecuted by a superior court information charging him with the reduced crime of failing to report an address change within 10 days as a first offense, under the Sex Offender Registration Act (hereinafter SORA) (*see* Correction Law §§ 168-f [4]; 168-t). Pursuant to the plea agreement, which included an appeal waiver, defendant pleaded guilty as charged and, after his pro se oral motion to withdraw his guilty plea was denied, he was sentenced, as agreed, to 1¹/₃ to 4 years in prison, to be served concurrently to another sentence he was then serving for failing to comply with SORA verification requirements. Defendant now appeals, contending that his plea and appeal waiver were invalid and that the sentence is harsh and excessive.

Defendant's challenge to his guilty plea as involuntary survives an appeal waiver (*see People v Seaberg*, 74 NY2d 1, 10 [1989]; *People v Swindell*, 72 AD3d 1340, 1341 [2010], *lv denied* 15 NY3d 778 [2010]) and was preserved by his motion to withdraw his plea (*see People v Lopez*, 71 NY2d 662, 665 [1988]; *People v Morey*, 110 AD3d 1378, 1379 [2013], *lv denied* 23 NY3d 965 [2014]). However, the record reflects that his guilty plea was knowing, voluntary and intelligent (*see People v Tyrell*, 22 NY3d 359, 361, 365-366 [2013]; *People v Fiumefreddo*, 82 NY2d 536, 543 [1993]; *People v Shovah*, 67 AD3d 1257, 1258 [2009], *lv*

denied 14 NY3d 773 [2010]; *People v Kennedy*, 46 AD3d 1099, 1100 [2007], *lv denied* 10 NY3d 841 [2008]). During the plea allocution, defendant was advised of and indicated that he understood his rights and the terms and consequences of the plea agreement and wished to enter a guilty plea. His sentencing-related question was answered, and his claim of feeling pressured to accept the plea amounts to the type of “situational coercion” faced by many defendants, which does not undermine the voluntariness of the validly entered guilty plea (*People v Seaberg*, 74 NY2d at 8; *see People v Morey*, 110 AD3d at 1379). His contentions regarding what counsel advised him or investigated are outside the record on appeal and are more properly raised in a motion to vacate the judgment pursuant to CPL article 440 (*see People v Haffiz*, 19 NY3d 883, 885 [2012]; *People v Moyer*, 75 AD3d 1004, 1006-1007 [2010]).

Likewise, defendant indicated during the plea allocution that his attorney had explained the appeal waiver to him, which he understood, and acknowledged in open court that it was his signature on the written waiver of appeal, which had been signed out of court. County Court made clear that the appeal waiver was “separate and distinct from those rights automatically forfeited upon a plea of guilty” (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Bradshaw*, 18 NY3d 257, 264 [2011]). We find that the combined affirmation of the written appeal waiver and the oral colloquy related thereto sufficiently demonstrated defendant’s understanding of the appeal waiver, which was entered knowingly, voluntarily and intelligently (*see People v Lopez*, 6 NY3d at 256; *People v Callahan*, 80 NY2d 273, 280 [1992]; *People v Wolz*, 112 AD3d 1150, 1151-1152 [2013]; *compare People v Elmer*, 19 NY3d 501, 510 [2012]). Given the valid appeal waiver, defendant is precluded from challenging his negotiated sentence as harsh and excessive (*see People v Lopez*, 6 NY3d at 256). Defendant’s remaining claims, to the extent not expressly discussed, have been reviewed and determined to be without merit.

McCarthy, J.P., Garry, Egan Jr. and Lynch, JJ., concur. Ordered that the judgment is affirmed.

7 In the Matter of the Claim of AMARA B. SCHWARTZ, Appellant, v STATE INSURANCE FUND, Respondent. WORKERS’ COMPENSATION BOARD, Respondent. [993 NYS2d 189]—

Workers’ Compensation—Causal Relation—Cardiac Conditions

Workers’ Compensation—Disability Benefits—Intermittent Lost Time Benefits for Sick Leave Charged for Weekly Psychologist Appointments—Time off Based upon Convenience Rather than Inability to Work

McCarthy, J.P. Appeals (1) from a decision of the Workers’

Compensation Board, filed April 25, 2012, which ruled that claimant's alleged cardiac conditions were not causally related to her established claim, and (2) from a decision of said Board, filed May 2, 2012, which, among other things, ruled that claimant was not entitled to payment for intermittent lost time.

In 2007, claimant was awarded workers' compensation benefits based upon her claim that work-related stress caused her to develop an adjustment disorder with mixed depressed mood and anxiety and chronic emotional stress. In 2008, claimant sought to amend her claim to include causally-related cardiac conditions of hypertension, mitral and tricuspid heart valve insufficiency and an enlarged left atrium. Following hearings, the Workers' Compensation Law Judge concluded, among other things, that claimant had failed to demonstrate a further causally-related disability. Upon review, in a decision filed April 25, 2012, the Workers' Compensation Board affirmed. In a subsequent decision, filed May 2, 2012, the Board found, among other things, that claimant was not entitled to payment for intermittent lost time. Claimant appeals both decisions.

We affirm. Initially, contrary to claimant's contention, the record demonstrates that the independent medical examiner retained by the employer complied with the requirement of Workers' Compensation Law § 137 in submitting a copy of the request for information to the Board within 10 days of its receipt (*see* Workers' Compensation Law § 137 [1] [b]; *see also* 12 NYCRR 300.2 [d] [5]). Accordingly, the Board properly considered his report.

Regarding claimant's request to amend her claim to include alleged cardiac conditions, "the Board is vested with discretion to resolve conflicting medical opinions" (*Matter of Benjamin v Sprint/Nextel*, 67 AD3d 1277, 1278 [2009]; *see Matter of Pengal v Chloe Foods Corp.*, 111 AD3d 1030, 1031 [2013]). Here, the independent medical examiner opined, based upon an examination of claimant and a review of her medical records, including the results of a 24-hour halter blood pressure monitor test administered to claimant, that she does not suffer from hypertension. He further opined that the minimal mitral and tricuspid valve insufficiency levels evidenced in claimant's echocardiogram report were normal, as such trace conditions are commonly found in most people. Finally, he opined that claimant's enlarged left atrium could not have been caused by stress or psychological factors, based upon the results of the echocardiogram. Accordingly, the Board's April 25, 2012 decision, that claimant has not demonstrated a further causally-related disability, is supported by substantial evidence and will

not be disturbed, despite the existence of evidence that would have supported a contrary result (*see Matter of Cuffe v Supercuts*, 83 AD3d 1344, 1345 [2011], *lv denied* 17 NY3d 705 [2011]; *Matter of Ancrum v New York City Bd. of Educ.*, 66 AD3d 1094, 1095 [2009]).

Regarding the Board's May 2, 2012 decision, claimant had sought intermittent lost time benefits for certain time off that had been charged as sick leave. The record reflects that claimant was working full time Monday through Thursday. She has a weekly appointment with her psychologist, related to her established claim, every Friday from 2:30 p.m. to 3:00 p.m. Despite this half-hour afternoon appointment, claimant was taking the whole day off every Friday. Claimant's psychologist testified, however, that there was no psychological reason for claimant to take the entire day off and that her disorder would not prevent her from functioning at the same level on a Friday as she would on the other days of the week. He further testified that he could schedule claimant's appointments later in the afternoon. In light of this testimony, substantial evidence supports the Board's determination that claimant took every Friday entirely off from work based upon convenience and not due to her inability to work because of her disability. Therefore, we will not disturb the Board's decision that claimant is not entitled to intermittent lost time benefits for the full days charged against her sick leave.

Garry, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the decisions are affirmed, without costs.

8 In the Matter of JOSEPH MULLER, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [993 NYS2d 388]—

Prisons and Prisoners—Discipline of Inmates—Improper Admission of Hearsay Evidence—Inadequate Basis for Hearing Officer to Independently Assess Credibility and Reliability of Confidential Information—Determination Annulled

Garry, J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

During the course of an investigation, correction officials obtained confidential information that petitioner used threats and intimidation to pressure other inmates to refrain from participating in the process to elect members of the inmate liaison committee (hereinafter ILC). As a result, he was charged in a misbehavior report with engaging in conduct involving the threat of violence (rule 104.11) and organizing inmates to

engage in actions detrimental to the facility (rule 104.12). During a rehearing on these disciplinary charges,* various witnesses testified on behalf of petitioner, and the Hearing Officer also received confidential information through his in camera interview with two correction officials involved in the investigation. The Hearing Officer relied heavily upon this confidential information in finding petitioner guilty of the charges. The determination of guilt was later affirmed on administrative appeal with a modified penalty. Petitioner then commenced this CPLR article 78 proceeding.

Petitioner contends that the determination is not supported by substantial evidence. “While hearsay evidence in the form of confidential information may provide substantial evidence to support a determination of guilt, the information must be sufficiently detailed to allow the Hearing Officer to make an independent assessment to determine its reliability and credibility” (*Matter of Torres v Fischer*, 101 AD3d 1281, 1282 [2012] [citations omitted]; see *Matter of Colon v Goord*, 23 AD3d 933, 934 [2005]). Notably, where the Hearing Officer obtains such information through the testimony of a correction officer who has interviewed a confidential informant, the questioning must be thorough and specific, to allow an adequate basis to gauge the informant’s knowledge and reliability (see *Matter of Williams v Fischer*, 18 NY3d 888, 890 [2012]). The Hearing Officer may not base his or her conclusion solely upon the correction officer’s assessment of the confidential informant’s truthfulness (see *Matter of Rosa v Fischer*, 112 AD3d 1009, 1011 [2013], *lv denied* 22 NY3d 864 [2014]; *Matter of Torres v Fischer*, 101 AD3d at 1282).

Here, the captain who prepared the misbehavior report stated that an inmate he spoke with identified petitioner as the individual who told other inmates in the mosque not to participate in the ILC election process. He stated that another inmate, who he apparently did not interview, gave a note to another correction official that similarly implicated petitioner. The correction official who received the note testified that he received several confidential letters from inmates indicating that petitioner was a major participant in the scheme to force inmates to boycott the ILC election process. He stated that he personally interviewed three inmates and, without revealing their identities to the Hearing Officer, related the information that they disclosed to him.

* The rehearing was apparently ordered because a potentially relevant witness was denied at the initial tier III disciplinary hearing.

A number of deficiencies with the in camera interview lead us to conclude that it did not provide an adequate basis for the Hearing Officer to independently assess the credibility and reliability of the confidential information. First, the captain did not provide any testimony to establish whether the inmate he interviewed had previously provided credible information to him or other officials, and he admitted that he did not even know the inmate who gave the note to the other correction official. Similarly, the correction official who interviewed the three unidentified inmates did not articulate the bases for finding their statements to be believable. Significantly, none of the letters or notes written by inmates allegedly implicating petitioner were admitted into evidence (*see Matter of Torres v Fischer*, 101 AD3d at 1282). Further, the statements of the inmates interviewed by the two officials lacked adequate specificity to establish petitioner's status as a leader of the boycott, or his act of threatening violence (*see Matter of Colon v Goord*, 23 AD3d at 934). Given these deficiencies, and as the confidential information was instrumental to the finding of guilt, we conclude that the determination is not supported by substantial evidence and must be annulled (*see Matter of Eugenio v Fischer*, 112 AD3d 1017, 1017-1018 [2013], *lv denied* 22 NY3d 863 [2014]; *Matter of Rosa v Fischer*, 112 AD3d at 1010-1011; *Matter of Daise v Giambruno*, 279 AD2d 911, 911-912 [2001]; *compare Matter of Sheppard v Goord*, 292 AD2d 694, 695 [2002]). In view of our disposition, we need not address petitioner's remaining claim.

McCarthy, J.P., Egan Jr., Lynch and Clark, JJ., concur. Adjudged that the determination is annulled, without costs, petition granted and respondent is directed to expunge all references to this matter from petitioner's institutional record and restore any loss of good time taken as a result thereof.

9 In the Matter of DARNELL CUMMINGS, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [991 NYS2d 808]—

Prisons and Prisoners—Discipline of Inmates—Fair and Impartial Hearing

Egan Jr., J. Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review two determinations of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner, a prison inmate, received three misbehavior reports on April 25, 2012. The first misbehavior report charged petitioner with refusing a direct order, and the second misbehavior report charged him with making threats, creating a distur-

bance, refusing a direct order, interfering with an employee, harassment and delaying the count. These charges arose out of an incident in which petitioner refused to knock on the wall of the neighboring cell when asked to do so by a correction officer and his subsequent conduct and statements directed at the correction officer. Following a combined tier III hearing, petitioner was found guilty of all charges contained in the second misbehavior report, but not guilty of the single charge contained in the first misbehavior report. Upon administrative review, respondent upheld the determination.

The third misbehavior report charged petitioner with attempted assault on staff, violating frisk procedure, refusing a direct order and violent conduct. This misbehavior report stemmed from an incident that occurred when petitioner was being removed from his cell to be taken to the secure housing unit. Following a tier III hearing, petitioner was found guilty of all charges contained in this misbehavior report. Upon administrative appeal, respondent upheld the determination of guilt, but reduced the penalty. Petitioner thereafter commenced this proceeding challenging both determinations of respondent.

Preliminarily, we note that petitioner has specifically abandoned his argument that the respective determinations were not supported by substantial evidence. Turning to his procedural claims, we disagree with petitioner's contention that he was denied the right to call witnesses. In both hearings, petitioner requested the testimony of numerous witnesses. Ultimately, the respective Hearing Officers permitted relevant witnesses to testify and denied the testimony of those witnesses who were not present during the specific events giving rise to the misbehavior reports (*see Matter of Hines v Prack*, 109 AD3d 1031, 1032 [2013]; *Matter of Moreno v Fischer*, 100 AD3d 1167, 1168 [2012]). Nor are we persuaded that the determinations of guilt were the result of alleged hearing officer bias rather than the evidence presented (*see Matter of Smith v Rock*, 108 AD3d 889, 890 [2013], *lv denied* 22 NY3d 854 [2013]; *Matter of Mayo v Fischer*, 82 AD3d 1421, 1422 [2011], *lv denied* 17 NY3d 702 [2011]). Finally, with regard to the hearing conducted on the third misbehavior report, we reject petitioner's contention that he was improperly denied the final unusual incident report. Petitioner was provided with the preliminary report, the final report is substantially the same and neither version of the report contains information tending to exonerate petitioner. Thus, petitioner's ability to present his defense was not prejudiced by the failure to provide him with the final unusual incident report (*see Matter of Phelps v Fischer*, 108 AD3d 1003,

1004 [2013], *appeal dismissed* 22 NY3d 1046 [2014]; *Matter of Justice v Fischer*, 67 AD3d 1286, 1286-1287 [2009], *lv denied* 14 NY3d 709 [2010]).

McCarthy, J.P., Garry, Lynch and Clark, JJ., concur. Adjudged that the determinations are confirmed, without costs, and petition dismissed.

10 In the Matter of SHERRI WAIT, Respondent, v HUDSON VALLEY COMMUNITY COLLEGE et al., Appellants. WORKERS' COMPENSATION BOARD, Respondent. [991 NYS2d 681]—

Workers' Compensation—Injuries Arising out of and in Course of Employment—Fall while Entering Workplace—Substantial Evidence Supporting Finding of Compensable Injuries

Lynch, J. Appeal from a decision of the Workers' Compensation Board, filed October 25, 2012, which, among other things, ruled that claimant sustained a compensable injury.

Claimant, a secretary, fell while she was entering her workplace and purportedly sustained injuries. The self-insured employer and its third-party administrator (hereinafter collectively referred to as the employer) controverted her ensuing claim for workers' compensation benefits, asserting that she had staged the fall. A Workers' Compensation Law Judge conducted hearings and reviewed video footage of the incident, after which he established the claim for injuries to claimant's right wrist, right shoulder, right knee and right ankle. The Workers' Compensation Board affirmed, and the employer appeals.

We affirm. "Whether a compensable accident has occurred presents a question of fact for resolution by the Board and its decision will be upheld when supported by substantial evidence" (*Matter of Roller v Mastic Beach Ambulance Co., Inc.*, 106 AD3d 1292, 1292 [2013], *lv denied* 21 NY3d 865 [2013] [citations omitted]; *accord Matter of Dixon v Almar Plumbing*, 111 AD3d 1230, 1231 [2013]). Claimant was on crutches due to an unrelated surgical procedure, and testified that she pressed a handicap button that opened the door to her workplace. The door began closing abruptly and, as she hurried to cross the threshold, she tripped or slipped and fell backwards onto her right arm. While claimant's account of her fall varied somewhat over time, the emergency room physician who treated claimant causally linked her injuries to the fall and testified that victims of acute trauma such as claimant often "don't remember exactly how it happened." The Board credited that proof and, in so doing, rejected the employer's contention that a video of the incident established that claimant staged the event. Claimant's inconsistent

explanations as to how the accident occurred created a credibility issue for the Board to resolve (*see Matter of Poulton v Griffin Mfg. Co.*, 102 AD3d 1071, 1072 [2013]). According deference to the Board's assessment of credibility, substantial evidence thus supports its finding that claimant had sustained compensable injuries (*see Matter of McCluskey v Certified Moving & Stor.*, 106 AD3d 1349, 1349-1350 [2013]; *Matter of Conyers v Van Rensselaer Manor*, 80 AD3d 914, 915-916 [2011]). The above proof similarly constitutes substantial evidence to support the Board's finding that claimant did not violate Workers' Compensation Law § 114-a (*see Matter of Eccles v Truck-Lite, Inc.*, 92 AD3d 1175, 1175-1176 [2012]; *Matter of Monzon v Sam Bernardi Constr., Inc.*, 60 AD3d 1261, 1262-1263 [2009]).

McCarthy, J.P., Garry, Egan Jr. and Clark, J.J., concur. Ordered that the decision is affirmed, with costs to claimant.

11 In the Matter of RONALD VAN ETEN, Respondent, v MOHAWK VALLEY COMMUNITY COLLEGE et al., Appellants. WORKERS' COMPENSATION BOARD, Respondent. [991 NYS2d 810]—

Workers' Compensation—Disqualification for False Representation—Effect of Medication on Mobility Following Injury—Penalty of Disqualification Not Warranted

Clark, J. Appeal from a decision of the Workers' Compensation Board, filed December 7, 2012, which, among other things, ruled that claimant violated Workers' Compensation Law § 114-a.

Claimant obtained workers' compensation benefits for a right inguinal hernia and lower back injury that he sustained in 2008. The self-insured employer and its third-party administrator (hereinafter collectively referred to as the employer) alleged in 2010 that claimant had violated Workers' Compensation Law § 114-a by knowingly misrepresenting the degree of his disability. The Workers' Compensation Board ultimately determined that claimant had violated section 114-a, but found the discretionary penalty of disqualifying him from receiving future wage replacement benefits to be unwarranted. The employer now appeals.

We affirm. The parties do not dispute that claimant violated Workers' Compensation Law § 114-a (1); rather, the employer contends that the Board erred in failing to disqualify claimant from receiving future wage replacement benefits. The refusal to impose that discretionary penalty will only be disturbed, however, if the Board abused its discretion as a matter of law (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]; *Matter of Liguori v Beloten*, 76 AD3d 1156, 1157 [2010], *lv denied* 16

NY3d 702 [2011]; *Matter of Peguero v Halo's Rest.*, 24 AD3d 986, 987 [2005]). Surveillance footage in this case demonstrated that claimant was capable of walking normally and performing other tasks in a manner that was inconsistent with his behavior in the presence of physicians. Claimant testified that his ability to perform those tasks was dependent upon when he had taken his pain medication and the dosage used. His family physician concurred that "the medication could help him be more mobile." The Board elected not to impose the discretionary penalty because of this evidence that claimant's varying degrees of mobility did not entirely stem from an intent to mislead and, inasmuch as the Board's leniency is not "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," we decline to disturb the penalty (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974] [internal quotation marks and citation omitted]; see *Matter of Losurdo v Asbestos Free*, 1 NY3d 258, 267 [2003]).

As a final matter, the cases cited by the employer are "sufficiently distinguishable from the [present matter] to warrant a different result" (*Matter of Malone v Bernhardt Paving*, 2 NY3d 756, 757 [2004]).

McCarthy, J.P., Garry, Egan Jr. and Lynch, JJ., concur. Ordered that the decision is affirmed, without costs.

12 In the Matter of the Claim of EFREN CEDENO, Appellant, v PACOA et al., Respondents. WORKERS' COMPENSATION BOARD, Respondent. [993 NYS2d 186]—

Workers' Compensation—Disqualification for False Representation—Sanction against Attorney—Request to Change Venue without Reasonable Basis

McCarthy, J.P. Appeal from a decision of the Workers' Compensation Board, filed June 25, 2013, which, among other things, assessed a monetary penalty against claimant's counsel pursuant to Workers' Compensation Law § 114-a (3) (ii).

Claimant resides in Queens and, after he was purportedly injured while working in Nassau County, applied for workers' compensation benefits. With that application, claimant submitted a form on counsel's letterhead in which he requested that all hearings in his case be handled at a hearing site in the City of White Plains, Westchester County. The Workers' Compensation Law Judge found that no basis existed for a change of venue and assessed counsel fees of \$250 against claimant's counsel pursuant to Workers' Compensation Law § 114-a (3) (ii). Upon review, the Workers' Compensation Board modified by increas-

ing the assessment of counsel fees to \$500. Claimant now appeals.*

We affirm. The Chair of the Board generally sets “the times and places for the hearing of claims” by venuing them in the district in which a claimant resides if he or she lives in New York (Workers’ Compensation Law § 141; *see* 12 NYCRR 300.7 [b]). A claimant may submit a written request for change of venue that articulates the reasons for his or her request, and a written decision must be issued thereon. Claimant’s challenges to that policy are unpreserved for our review given that he failed to raise them before the Board (*see Matter of Mejia v Camabo Indus., Inc.*, 117 AD3d 1362, 1362 [2014]; *Matter of Toledo v Administration for Children Servs.*, 112 AD3d 1209, 1210 [2013]). Moreover, claimant’s request for a change of venue was a procedural motion that necessitated a response, and the Board properly determined that it was a “proceeding[] in respect of [a claim for compensation]” within the meaning of Workers’ Compensation Law § 114-a (3) (*see Matter of Banton v New York City Dept. of Corr.*, 112 AD3d 1195, 1196 [2013]).

Turning to the merits, claimant’s unsubstantiated assertion that it would be “most convenient” for him to attend hearings in a district with no connection to either his residence or the accident site did not warrant a change in venue. Counsel for claimant was well aware that such groundless requests for a venue change would be rejected and, thus, substantial evidence supports the Board’s assessment of counsel fees pursuant to Workers’ Compensation Law § 114-a (3) (ii) (*see Matter of Difilippo v Con Edison*, 117 AD3d 1363, 1364 [2014]; *Matter of Wolfe v New York City Dept. of Corr.*, 112 AD3d 1197, 1198 [2013]). Lastly, we are unpersuaded that the Board lacked authority to modify the decision of the Workers’ Compensation Law Judge and increase the amount of that assessment (*see* Workers’ Compensation Law § 23).

Garry, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

13 In the Matter of the Claim of TATIANA KHOMITCH, Respondent, v CROTCHED MOUNTAIN COMMUNITY et al., Appellants.

* Given that the only issues on this appeal relate to the assessment of counsel fees, “counsel is the party in interest pursuant to Workers’ Compensation Law § 23 and ‘should have filed the notice of appeal on [his] own behalf’ ” (*Matter of Wolfe v New York City Dept. of Corr.*, 112 AD3d 1197, 1198 [2013], quoting *Matter of Banton v New York City Dept. of Corr.*, 112 AD3d 1195, 1196 n [2013]). No allegation of prejudice has been made, however, and we will disregard that defect and treat the appeal as having been taken by counsel (*see* CPLR 2001; *Matter of Wolfe v New York City Dept. of Corr.*, 112 AD3d at 1198).

SPECIAL FUND FOR REOPENED CASES, Respondent. WORKERS' COMPENSATION BOARD, Respondent. [994 NYS2d 197]—

Workers' Compensation—Special Funds—Special Fund for Reopened Cases—Standing to Litigate Underlying Claim

Garry, J. Appeal from a decision of a panel of the Workers' Compensation Board, filed April 26, 2013 which, upon remittal from the full Board, rescinded the transfer of liability to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a, without prejudice.

Claimant was injured in 2004 and, after her case was established, she was paid compensation through February 2007. In 2011, claimant requested reimbursement for unpaid medical bills totaling approximately \$130 and compensation for seven months of lost time in 2010. The parties entered into a stipulation on September 21, 2011, agreeing to resolve all outstanding issues, with the workers' compensation carrier paying \$4,750 to claimant as reimbursement for medical and transportation expenses (hereinafter M & T)* and a finding of no compensable lost time after 2007. The carrier then sought to transfer liability for the claim to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a.

The Special Fund asserted in response that the payment for M & T was, in actuality, compensation for lost time, but was labeled "M & T" in an attempt to create an improper basis for transfer of liability under Workers' Compensation Law § 25-a. A Workers' Compensation Law Judge directed the parties to produce information to explain the basis for the payment, and a panel of the Workers' Compensation Board initially reversed, determining that a payment of M & T does not constitute compensation and, thus, liability transferred to the Special Fund. The Board panel further concluded that the Special Fund has no standing to challenge M & T reimbursement. The full Board later rescinded that decision, and returned the matter to the Board panel for further consideration. Upon further review, the Board panel concluded that, although M & T reimbursement is not a payment of compensation within the meaning of Workers' Compensation Law § 25-a, the Special Fund has standing to litigate whether the payment made to claimant herein was, in fact, an advance payment of compensation that would preclude transfer of liability. The Board panel also determined that questions of fact exist in that regard, and rescinded the transfer of liability to the Special Fund, without prejudice, pend-

* References in the parties' briefs and the records to *mileage* and transportation are apparently erroneous.

ing production of evidence demonstrating that the payment to claimant was for medical or travel expenses. The employer and carrier appeal from this decision.

The transfer of liability to the Special Fund “is appropriate when an application to reopen a closed case is made more than seven years from the date of injury and more than three years after the last payment of compensation” (*Matter of Thurston v Consolidated Edison Co. of N.Y., Inc.*, 115 AD3d 1143, 1144 [2014] [internal quotation marks and citations omitted]; see Workers’ Compensation Law § 25-a [1]). Voluntary payments that are made during the relevant time frame and in recognition of the employer’s liability constitute advance compensation that will prevent transfer of liability to the Special Fund (see *Matter of Thurston v Consolidated Edison Co. of N.Y., Inc.*, 115 AD3d at 1144; *Matter of Schroeder v US Foodservice*, 107 AD3d 1135, 1136 [2013]). Moreover, while the Special Fund does not have standing “to litigate the primary issues of compensability of the underlying claim for benefits” or “to reopen a claimant’s case and contest the compensability of the claim,” it does have standing with respect to proceedings involving claims against such fund (*Matter of Ruffino v Rosen & Sons*, 142 AD2d 177, 180 [1988], *affd on op below* 74 NY2d 861 [1989] [citation omitted]; see *Matter of McDonald v Water Tunnel Contrs.*, 51 AD3d 1151, 1152-1153 [2008]).

Here, it is undisputed that a true payment of M & T would not preclude transfer of liability to the Special Fund because M & T does not constitute compensation within the meaning of the statute. The Special Fund argues, however, that the record is unclear regarding whether the \$4,750 M & T payment was a reimbursement for out-of-pocket medical expenses, or a disguised payment of indemnity benefits that would preclude transfer of liability. As the Special Fund is challenging whether an advance payment was made for the purposes of Workers’ Compensation Law § 25-a—an issue involving a claim against the Special Fund—the Board properly concluded that the Special Fund has standing (see e.g. *Matter of Iannaci v Independent Cement Corp.*, 66 AD3d 1194, 1195-1196 [2009]). Contrary to arguments of the employer, carrier and claimant, the Board adequately distinguished its prior precedent holding that a payment of M & T does not constitute compensation, explaining that this was not the basis of the argument by the Special Fund. Finally, we note that because the Board’s decision “reach[ed] a potentially dispositive threshold legal issue”—i.e., standing—it is appealable despite the Board’s remittal to the Workers’ Compensation Law Judge for further development of the record

(*Matter of Hosler v Smallman*, 106 AD3d 1218, 1219 [2013] [internal quotation marks and citations omitted]).

McCarthy, J.P., Egan Jr., Lynch and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

14 In the Matter of ROGER L. PAUL, Attorney, Respondent. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner. [991 NYS2d 778]—

Attorney and Client—Disciplinary Proceedings—Termination of Conditionally Stayed Suspension

Per Curiam. Respondent was admitted to practice by this Court in 1978. He maintains an office for the practice of law in the Village of Northville, Fulton County.

By decision dated May 31, 2012, this Court suspended respondent from the practice of law for two years, which suspension was conditionally stayed (*Matter of Paul*, 95 AD3d 1647 [2012]). Respondent moves for termination of the stayed suspension and provides a supporting affidavit indicating that he has fully complied with the conditions of the stay. Petitioner does not oppose the motion, which we now grant.

McCarthy, J.P., Garry, Egan Jr., Lynch and Devine, JJ., concur. Ordered that respondent's motion is granted, and the stayed suspension imposed by this Court's decision dated May 31, 2012 is terminated, effective immediately.

(September 11, 2014)

1 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v REBECCA A. CLOUTIER, Appellant. [991 NYS2d 904]—

Crimes—Sentence—Failure to Comply with Terms of Interim Probation

Egan Jr., J. Appeal from a judgment of the County Court of St. Lawrence County (Richards, J.), rendered January 18, 2012, convicting defendant upon her plea of guilty of the crime of criminal possession of a forged instrument in the second degree.

Defendant pleaded guilty to a single-count indictment charging her with criminal possession of a forged instrument in the second degree. Pursuant to the underlying plea agreement, defendant was to be sentenced to a one-year term of interim probation with the understanding that she avoid the consumption of alcohol and the use of controlled substances. If successful, defendant's felony plea would be vacated and she would be allowed to plead guilty to a misdemeanor and sentenced to probation. Defendant also was advised that if she failed to abide by

the terms of her interim probation, she could be sentenced to seven years in prison. After failing to comply with various treatment programs both prior to her initial sentencing hearing and during her interim probation, defendant was found to be in violation of the terms of her interim probation, and County Court imposed a sentence of $1\frac{2}{3}$ to 5 years in prison. This appeal ensued.

Although the subject plea agreement contained a waiver of defendant's right to appeal, the People concede—and we agree—that defendant did not knowingly, intelligently and voluntarily waive her right to appeal her conviction and sentence. Hence, defendant's challenge to the severity of the sentence imposed is properly before us (*see People v Middleton*, 72 AD3d 1336, 1337 [2010]). That said, the record reflects that defendant was unable to abstain from consuming alcohol and using controlled substances and that she repeatedly violated the terms of her interim probation. Simply put, “self-induced alcohol and substance abuse problems are not extraordinary circumstances meriting reduction of [a] sentence” (*People v Potter*, 54 AD3d 444, 445 [2008]; *accord People v Bice*, 100 AD3d 1107, 1107-1108 [2012]). We therefore perceive no abuse of discretion or extraordinary circumstances warranting a modification of the sentence imposed in the interest of justice (*see People v Riley*, 97 AD3d 982, 983 [2012], *lv denied* 20 NY3d 935 [2012]; *People v Potter*, 54 AD3d at 445).

McCarthy, J.P., Garry, Lynch and Clark, JJ., concur. Ordered that the judgment is affirmed.

2 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ALAN OCASIO-ROSARIO, Appellant. [991 NYS2d 905]—

Crimes—Plea of Guilty—Sufficiency of Allocation—Waiver of Constitutional Rights

Clark, J. Appeal from a judgment of the Supreme Court (Breslin, J.), rendered August 3, 2012 in Ulster County, convicting defendant upon his plea of guilty of the crime of criminal contempt in the first degree.

In satisfaction of a four-count indictment and pursuant to a negotiated plea agreement, defendant pleaded guilty to criminal contempt in the first degree and waived his right to appeal. Defendant admitted that on or about January 10, 2011, he violated an order of protection of which he had actual knowledge, and did so with the intent to harass, annoy, threaten or alarm the person for whose protection the order had been issued, namely, his child's mother, by attempting to shove her. He was sentenced, as agreed, to a prison term of $1\frac{1}{2}$ to 3 years as an admitted second felony offender and now appeals.

Defendant contends that his guilty plea was not knowing, voluntary and intelligent. However, courts are not required to recite any particular litany of rights or otherwise engage in a formalistic approach to guilty pleas (see *People v Harris*, 61 NY2d 9, 16 [1983]; *People v Nixon*, 21 NY2d 338, 355 [1967], *cert denied* 393 US 1067 [1969]), and a plea will not be invalidated on appeal where it can be established that the defendant “consulted with his [or her] attorney about the constitutional consequences of a guilty plea” (*People v Tyrell*, 22 NY3d 359, 365 [2013]; see *North Carolina v Alford*, 400 US 25, 29 n 3 [1970]; *People v Harris*, 61 NY2d at 16). Here, in a detailed series of questions, Supreme Court clearly advised defendant of the various rights he was forfeiting in entering a plea, but only referenced defendant’s right to a trial without specifying his right to a *jury* trial. When questioned in open court during the course of the allocution, however, defendant stated that his attorney had “explained everything” to him. Thus, the record before us establishes that defendant knowingly, intelligently and voluntarily waived his rights when entering his guilty plea (see *People v Fiumefreddo*, 82 NY2d 536, 543 [1993]; see also *Boykin v Alabama*, 395 US 238, 242 [1969]; *People v Harris*, 61 NY2d at 17). The issue now raised was not preserved by a motion to withdraw the plea (see CPL 220.60 [3]; 470.05 [2]), which deprived “the trial court [of] the opportunity to address the perceived error and to take corrective measures, if needed” (*People v Lopez*, 71 NY2d 662, 665-666 [1988]), and we discern no reason to take corrective action in the interest of justice (see CPL 470.15 [3] [c]; [6] [a]; *People v Tyrell*, 22 NY3d at 365). Accordingly, we affirm.

McCarthy, J.P., Garry, Egan Jr. and Lynch, JJ., concur. Ordered that the judgment is affirmed.

3 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAYSON McCASTER, Appellant. [991 NYS2d 906]—

Crimes—Sentence—Second Felony Offender—Right to Challenge Constitutionality of Prior Conviction

Appeal from a judgment of the County Court of Ulster County (Williams, J.), rendered January 30, 2013, convicting defendant upon his plea of guilty of the crime of criminal sale of a controlled substance in the third degree.

In satisfaction of an eight-count indictment, defendant pleaded guilty to criminal sale of a controlled substance in the third degree and was sentenced as a prior felony offender to a prison term of five years, followed by three years of postrelease supervision. Defendant appeals, contending that he was illegally sentenced as a second felony offender.

We affirm. Contrary to defendant's contention, "County Court was not obligated to expressly advise defendant of his right to contest the constitutionality of the prior conviction" (*People v Wilkins*, 118 AD3d 1038, 1039 [2014] [internal quotation marks and citations omitted]). Here, the record demonstrates that defendant was provided with the prior felony information at sentencing and, after a discussion with his counsel, affirmed that he did not contest the prior felony statement and admitted that he previously was convicted of that felony. Under these circumstances, County Court substantially complied with the requirements of CPL 400.21 (3) and properly sentenced defendant as a second felony offender (*see id.* at 1039; *People v Wood*, 108 AD3d 932, 933 [2013]).

Peters, P.J., Lahtinen, Stein, Garry and Lynch, JJ., concur. Ordered that the judgment is affirmed.

4 In the Matter of JAMES STEVENSON, Appellant, v ALBERT PRACK, as Director of Special Housing and Inmate Disciplinary Programs, Respondent. [991 NYS2d 907]—

Limitation of Actions—Four-Month Statute of Limitations—Challenge to Prison Disciplinary Determination

Appeal from a judgment of the Supreme Court (Gilpatric, J.), entered June 11, 2013 in Ulster County, which, in a proceeding pursuant to CPLR article 78, granted respondent's motion to dismiss the petition.

Petitioner, a prison inmate, commenced this CPLR article 78 proceeding to challenge a prison disciplinary determination rendered against him. While he was notified that the determination had been affirmed upon administrative appeal on October 18, 2012, he did not commence the present proceeding until February 26, 2013. Supreme Court granted respondent's motion to dismiss the petition as time-barred, and petitioner now appeals.

We affirm. The evidence in the record demonstrates that the petition was filed after the expiration of the applicable four-month statute of limitations (*see* CPLR 217 [1]; 304 [a]), and the unsworn allegations by petitioner that he attempted to file the petition earlier did not constitute "admissible evidentiary proof of the date of filing" sufficient to defeat respondent's motion to dismiss (*Matter of Ali v Goord*, 15 AD3d 699, 700 [2005]). Likewise, we are unable to consider the additional evidence "attached to petitioner's reply brief on appeal because such evidence is de hors the record" (*id.*). Instead, because those submissions are "documents outside the record," petitioner's remedy would be to submit them before Supreme Court as part of a mo-

tion to renew (*Gagen v Kipany Prods.*, 289 AD2d 844, 845 [2001]; see CPLR 2221 [e]). Supreme Court thus properly dismissed the petition as untimely based on the papers that were before it and, as a result, the merits of the underlying determination are not before us (see *Matter of Fayette v Fischer*, 108 AD3d 961, 962 [2013], *lv denied* 22 NY3d 854 [2013]; *Matter of Blanche v Selsky*, 13 AD3d 681, 682 [2004], *appeal dismissed and lv denied* 4 NY3d 844 [2005]).

McCarthy, J.P., Egan Jr., Lynch, Devine and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

5 In the Matter of NATHANIEL JAY, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, et al., Respondents. [991 NYS2d 908]—

Prisons and Prisoners—Discipline of Inmates—Possession of Gang-Related Materials

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Rensselaer County) to review a determination of respondent Commissioner of Corrections and Community Supervision which found petitioner guilty of violating a prison disciplinary rule.

Petitioner was charged in a misbehavior report with violating various prison disciplinary rules after a search of his prison cell disclosed, among other things, gang-related items. He was found guilty of possessing gang-related material following a tier III disciplinary hearing, and the determination was affirmed on administrative appeal. This CPLR article 78 proceeding ensued.

We confirm. The misbehavior report and hearing testimony, including that of a prison official with experience in identifying gang-related materials, provide substantial evidence to support the determination of guilt (see *Matter of Doyle v Prack*, 115 AD3d 1110, 1111 [2014], *lv denied* 23 NY3d 907 [2014]; *Matter of Boyd v Fischer*, 108 AD3d 995, 995 [2013]). Petitioner contends that several confiscated items had been reviewed by the mail room at his previous facility without incident but, even if true, “this would not alter the fact that ‘the material is nonetheless prohibited by the prison disciplinary rule’ ” (*Matter of Madison v Fischer*, 108 AD3d 959, 960 [2013], quoting *Matter of Smith v Fischer*, 100 AD3d 1314, 1314 [2012]). The record further establishes that the hearing was commenced and completed in a timely manner and that proper extensions were obtained (see *Matter of Shepherd v Fischer*, 111 AD3d 1213, 1214 [2013], *lv denied* 22 NY3d 864 [2014]). We have considered petitioner’s remaining contentions, including that the Hearing Officer was biased and that all of an offending pamphlet had previously

been approved through the media review process, and find them to lack merit.

Stein, J.P., McCarthy, Garry, Lynch and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

6 In the Matter of JOHN MARTINEZ, Petitioner, v ALBERT PRACK, as Director of Special Housing and Inmate Disciplinary Programs, Respondent. [991 NYS2d 909]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Commissioner of Corrections and Community Supervision finding petitioner guilty of violating a prison disciplinary rule.

Petitioner, a prison inmate, commenced this CPLR article 78 proceeding to challenge a disciplinary determination finding him guilty of drug use. The Attorney General has advised this Court that the determination at issue has been administratively reversed, all references thereto expunged from petitioner's institutional record and the mandatory surcharge refunded to his inmate account. Petitioner has thus received all the relief to which he is entitled and, as such, the petition is dismissed as moot (*see Matter of Herring v Prack*, 118 AD3d 1200 [2014]; *Matter of Hughes v Venettozzi*, 117 AD3d 1248, 1248-1249 [2014]).

Peters, P.J., Lahtinen, Garry, Egan Jr. and Clark, JJ., concur. Adjudged that the petition is dismissed, as moot, without costs.

7 In the Matter of CHARLES L. WYNN SR., Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [991 NYS2d 909]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner commenced this CPLR article 78 proceeding to challenge a determination finding him guilty of violating various prison disciplinary rules. The Attorney General has advised this Court that the determination at issue has been administratively reversed, all references thereto have been expunged from petitioner's institutional record and the mandatory \$5 surcharge has been refunded to petitioner's inmate account. With respect to petitioner's request that he be restored to the status he

enjoyed prior to the disciplinary determination, “inmates have no constitutional or statutory right to their prior housing or programming status” (*Matter of Hamilton v Bezio*, 93 AD3d 1049, 1050 [2012]; see *Matter of Sykes v Fischer*, 98 AD3d 769, 769 [2012]). Accordingly, petitioner has received all the relief to which he is entitled and this proceeding must be dismissed as moot (see *Matter of Toliver v Fischer*, 114 AD3d 984, 984 [2014]).

Peters, P.J., Stein, McCarthy, Rose and Clark, JJ., concur. Adjudged that the petition is dismissed, as moot, without costs.

8 In the Matter of JOSEPH DEXTER, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [991 NYS2d 910]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating a certain prison disciplinary rule.

Petitioner commenced this CPLR article 78 proceeding to challenge a prison disciplinary determination. The Attorney General has advised this Court that said determination has been administratively reversed, all references thereto expunged from petitioner’s institutional record and the mandatory surcharge refunded to petitioner’s account. Accordingly, petitioner has received all the relief to which he is entitled and the petition must be dismissed as moot (see *Matter of Hughes v Venetozzi*, 117 AD3d 1248, 1248-1249 [2014]; *Matter of Rafi v Prack*, 116 AD3d 1324, 1325 [2014]).

Peters, P.J., McCarthy, Garry, Lynch and Clark, JJ., concur. Adjudged that the petition is dismissed, as moot, without costs.

9 In the Matter of WILLIAM J. CLARK, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [991 NYS2d 911]—

Prisons and Prisoners—Discipline of Inmates—Making Threat
Prisons and Prisoners—Discipline of Inmates—Fair Hearing

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner, a prison inmate, was charged in a misbehavior report with making threats, violent conduct and creating a disturbance. The charges arose from an incident in the prison law library on July 13, 2012 in which petitioner tried to confirm the name of the father of a correction officer assigned to the library and where his family lived, and petitioner threatened that if

that officer did not approve all of his requests for special access to the library, when he got out, he would “burn your house down with you and all your family in it.” Following a tier III disciplinary hearing, petitioner was found guilty of the charges, and that determination was affirmed on administrative appeal. This CPLR article 78 proceeding ensued.

We confirm. The misbehavior report and the testimony of its author, at whom petitioner’s conduct was directed, provided substantial evidence supporting the determination of guilt (*see Matter of Guillory v Fischer*, 111 AD3d 1005, 1005 [2013]; *Matter of Blocker v Fischer*, 107 AD3d 1285, 1286 [2013]). Petitioner’s denial that the incident occurred as described and claims of retaliation created credibility issues for the Hearing Officer to resolve (*see Matter of Spikes v Fischer*, 100 AD3d 1231, 1231 [2012], *lv denied* 20 NY3d 862 [2013]). Contrary to his arguments, the Hearing Officer properly denied petitioner’s request to call certain correction officers, inmates and his mother based upon the fact that they were not present for the incident and their testimony would have been irrelevant to the charges (*see Matter of Gaston v Fischer*, 109 AD3d 1063, 1064 [2013]). Petitioner was not deprived of the right to call certain other inmates as witnesses, including those present during the incident; all of them signed witness refusal forms indicting that they were not present and/or did not see or hear anything, which were read into the record (*see Matter of McFadden v Venettozzi*, 65 AD3d 1401, 1402 [2009]; *Matter of Martinez v Selsky*, 53 AD3d 989, 989 [2008]). Although not required (*see Matter of McGriff v Fischer*, 62 AD3d 1058, 1058 [2009]), the Hearing Officer interviewed the inmates identified as present, who confirmed their refusal to testify for the reasons stated. Finally, the record contains no support for petitioner’s allegation of hearing officer bias (*see Matter of Guillory v Fischer*, 111 AD3d at 1005-1006) or for his remaining claims.

Lahtinen, J.P., Garry, Rose, Devine and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

10 THE PEOPLE OF THE STATE OF NEW YORK ex rel. CURTIS WHITE, Appellant, v BRANDON J. SMITH, as Superintendent of Greene Correctional Facility, et al., Respondents. [991 NYS2d 912]—

Habeas Corpus—When Remedy Available

Appeal from a judgment of the Supreme Court (Elliott, J.), entered October 17, 2013 in Greene County, which dismissed petitioner’s application, in a proceeding pursuant to CPLR article 70, without a hearing.

In 1991, petitioner was convicted of rape in the first degree and sentenced to $8\frac{1}{3}$ to 25 years in prison (*People v White*, 185 AD2d 472 [1992], *lv denied* 80 NY2d 935 [1992]). He was released to parole supervision in September 2011 and charged with violating his parole in February 2012. At the final revocation hearing, petitioner pleaded guilty to two charges of violating his parole—failing to abstain from alcoholic beverages and failing to keep a log truthfully detailing his daily events—and a delinquency time assessment of 14 months was imposed. Respondents concede that the Board of Parole did not respond to petitioner’s administrative appeal within four months and, thus, his administrative remedies were deemed exhausted. Petitioner commenced this proceeding for a writ of habeas corpus, seeking immediate release, challenging the sufficiency of both his plea allocution and the evidence of his guilt and asserting that he received ineffective assistance of counsel in the plea proceeding. Supreme Court dismissed petitioner’s application and this appeal ensued.

We affirm. As Supreme Court concluded, petitioner would not be entitled to immediate release from prison even if his claims had merit; at most, he would be entitled to vacatur of his plea and a new final parole revocation hearing (*see People ex rel. Amato v Perez*, 107 AD3d 1259, 1259-1260 [2013]; *see also People ex rel. D’Adamo v Artus*, 85 AD3d 1459, 1459 [2011], *lv denied* 17 NY3d 714 [2011]). Accordingly, habeas corpus relief is unavailable. Moreover, under the circumstances of this case, conversion of this proceeding to a CPLR article 78 proceeding is unwarranted (*compare People ex rel. Brown v New York State Div. of Parole*, 70 NY2d 391, 398 [1987]).

Lahtinen, J.P., McCarthy, Egan Jr., Lynch and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

11 In the Matter of the Claim of MARIA K. PHILIP, Respondent. JULES BRODY, Doing Business as STULL STULL & BRODY, Appellant; COMMISSIONER OF LABOR, Respondent. [992 NYS2d 372]—

Unemployment Insurance—Benefits—Failure of Administrative Law Judge to Issue Subpoena to Compel Claimant’s Attendance at Hearing

Appeal from a decision of the Unemployment Insurance Appeal Board, filed May 17, 2013, which, among other things, ruled that Jules Brody was liable for additional unemployment insurance contributions based on remuneration paid to claimant and others similarly situated.

Claimant was retained to perform document review services for Jules Brody. She successfully applied for unemployment in-

surance benefits in 2011, after which the Department of Labor determined that Brody was claimant's employer and was responsible for additional unemployment insurance contributions. Brody objected to that determination but, upon his failure to appear at the ensuing hearing, was found to be in default. Brody then sought to reopen the proceeding and further requested that the Administrative Law Judge (hereinafter ALJ) subpoena claimant if she did not voluntarily appear at the reopened hearing. Claimant refused to appear, but the ALJ declined to issue the requested subpoena. The ALJ then granted the application to reopen the proceeding and upheld the initial determination. The Unemployment Insurance Appeal Board affirmed, and Brody appeals.

We reverse. Brody was entitled to call claimant as a witness and, moreover, had the right to request that the ALJ issue a subpoena to compel her attendance (*see* Labor Law § 622 [1]; 12 NYCRR 461.4 [c]; *Matter of Mintzer [Sheft—Commissioner of Labor]*, 256 AD2d 965, 966 [1998]). Claimant plainly had relevant testimony to offer as to whether an employer-employee relationship existed between her and Brody. The ALJ nevertheless declined to issue the requested subpoena, pointing out that counsel for Brody could have subpoenaed claimant directly. The failure to either issue a subpoena or to adjourn the proceedings so that counsel could do so constituted an abuse of discretion under the circumstances of this case and, thus, “we believe that the proper course is to reverse the Board’s decision and remit this matter for further proceedings” (*Matter of Mintzer [Sheft—Commissioner of Labor]*, 256 AD2d at 966; *see Matter of Moseley [Commissioner of Labor]*, 61 AD3d 1133, 1134 [2009]; *Matter of Box [Commissioner of Labor]*, 249 AD2d 608, 608 [1998]). In light of the foregoing, we need not address the remaining arguments advanced by Brody.

Peters, P.J., Stein, McCarthy, Rose and Egan Jr., JJ., concur. Ordered that the decision is reversed, without costs, and matter remitted to the Unemployment Insurance Appeal Board for further proceedings not inconsistent with this Court’s decision.

12 In the Matter of EARL BUSSEY, Petitioner, v COMMISSIONER OF CORRECTIONS AND COMMUNITY SUPERVISION, Respondent. [991 NYS2d 913]—

Prisons and Prisoners—Discipline of Inmates—Drug Use—Positive Urinalysis Test Results—Chain of Custody of Urine Sample Properly Established

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating a prison disciplinary rule.

When all inmates in a section of the prison were subjected to drug testing, petitioner submitted a urine sample that appeared to be water. A second urine sample was accordingly collected from him (*see* 7 NYCRR 1020.4 [a] [1]), which twice tested positive for marihuana. Petitioner was charged in a misbehavior report with drug use and, following a tier III disciplinary hearing, was found guilty as charged. The determination was affirmed upon administrative review, prompting this CPLR article 78 proceeding.

We confirm. The hearing testimony, misbehavior report and positive drug test results provide substantial evidence to support the determination of guilt (*see Matter of Creamer v Venetozzi*, 117 AD3d 1254, 1254-1255 [2014]; *Matter of Mateos v Fischer*, 110 AD3d 1127, 1128 [2013]). The request for urinalysis form and testimony of the correction officers involved established that there was an unbroken chain of custody over the sample and that, contrary to petitioner's contention, the sample could not have been mistaken for another inmate's or tampered with (*see Matter of Roman v Selsky*, 253 AD2d 975, 975-976 [1998]). The sample was further refrigerated as required, and the record demonstrates that the failure to freeze it as "recommended" did not increase the possibility of a false positive result (7 NYCRR 1020.4 [f] [1] [ii]; *see Matter of Hyzer v Fischer*, 104 AD3d 983, 983 [2013]). Petitioner's remaining claims, including that the Hearing Officer was biased against him, have been examined and found to lack merit.

Lahtinen, J.P., McCarthy, Garry, Rose and Lynch, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

13 In the Matter of STUART DIZAK, Petitioner, v ALBERT PRACK, as Director of Special Housing and Inmate Disciplinary Programs, Respondent. [992 NYS2d 373]—

Prisons and Prisoners—Discipline of Inmates—Violent Conduct—Finding of Guilt Not Supported by Substantial Evidence—Remittal for Redetermination of Penalty Imposed

Prisons and Prisoners—Discipline of Inmates—Fair Hearing

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Commissioner of Corrections and Community Supervision which found petitioner guilty of violating certain prison disciplinary rules.

As a group of inmates was lining up to proceed to the mess hall, a correction officer noted that petitioner was walking in the opposite direction and attempting to conceal items under

his coat. The officer discovered that the items were an envelope and notepad, and he ordered petitioner to turn them over for inspection. Petitioner refused and thereafter attempted to flee, requiring that he be restrained. As a result, petitioner was charged in a misbehavior report with engaging in violent conduct, refusing a direct order, refusing to comply with frisk procedures and employee interference. He was found guilty as charged following a tier III disciplinary hearing. The determination was affirmed upon administrative appeal, and this CPLR article 78 proceeding ensued.

Upon review of the misbehavior report and supporting documentation, as well as the testimony of the correction officer who authored the report and petitioner himself, we find substantial evidence in the record to support that part of the determination finding petitioner guilty of refusing a direct order, refusing to comply with frisk procedures and employee interference (see *Matter of Fragosa v Moore*, 93 AD3d 979, 979-980 [2012]; *Matter of Irwin v Fischer*, 85 AD3d 1336, 1337 [2011], *lv denied* 17 NY3d 712 [2011]). The charge of engaging in violent conduct, however, is not similarly supported. Although the misbehavior report and documentary evidence indicate that petitioner was resistant in some way when he was forced to the ground and restrained, the record is silent as to the nature of that noncompliance and the officer testified to nothing beyond the fact that he grabbed petitioner's arm and pushed him to the ground. Thus, the finding that petitioner engaged in violent conduct cannot be sustained, and this matter must be remitted for a redetermination of the penalty given that the penalty included a recommended loss of good time (see *Matter of Reynolds v Selsky*, 270 AD2d 743, 744 [2000]; cf. *Matter of Hodge v Selsky*, 53 AD3d 953, 954 [2008]).

Contrary to petitioner's further argument, the record demonstrates that he was not deprived of his right to call relevant witnesses (see *Matter of Moreno v Fischer*, 100 AD3d 1167, 1168 [2012]). Petitioner's contention that the hearing was not conducted in a timely fashion is unpreserved due to his failure to raise that objection at the hearing itself (see *Matter of Creamer v Venettozzi*, 117 AD3d 1254, 1255 [2014]). His remaining contentions, to the extent they are properly before us, have been examined and rejected.

Peters, P.J., Stein, McCarthy, Lynch and Devine, JJ., concur. Adjudged that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of engaging in violent conduct; petition granted to that extent, the Commissioner of Corrections and Community Supervision is directed

to expunge all references to this charge from petitioner's institutional record, and matter remitted to the Commissioner for an administrative redetermination of the penalty imposed upon the remaining violations; and, as so modified, confirmed.

14 In the Matter of DAVID MORRISHILL, Petitioner, v ALBERT PRACK, as Director of Special Housing and Inmate Disciplinary Programs, Respondent. [991 NYS2d 913]—

Prisons and Prisoners—Discipline of Inmates—Fair Hearing

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Commissioner of Corrections and Community Supervision which found petitioner guilty of violating a prison disciplinary rule.

After petitioner's urine twice tested positive for marihuana, he was charged in a misbehavior report with drug use. He was found guilty following a tier III disciplinary hearing, and that determination was affirmed on administrative appeal. This CPLR article 78 proceeding ensued.*

We confirm. Petitioner signed a document waiving his right to employee assistance and, when he requested assistance at the hearing, the Hearing Officer appropriately acted “by offering to provide him with whatever he would have requested from an assistant” (*Matter of Truman v Fischer*, 75 AD3d 1019, 1020 [2010]; see *Matter of Alvarez v Fischer*, 94 AD3d 1404, 1405 [2012], *lv denied* 96 AD3d 1703 [2012]). The Hearing Officer properly denied petitioner's ensuing request for the testimony of a correction officer as irrelevant (see *Matter of Henderson v Fischer*, 98 AD3d 1162, 1163 [2012]). Likewise, petitioner was not entitled to a copy of the operator's manual for the testing equipment (see *Matter of Anderson v Prack*, 111 AD3d 1214, 1214 [2013]; *Matter of Kussius v Walker*, 247 AD2d 911, 912 [1998]; but see *Matter of Marshall v Fischer*, 103 AD3d 726, 728 [2013]). The Hearing Officer also appropriately denied petitioner's request for unredacted log book entries that would have identified other inmates who had been tested on the day in question (see *Matter of Lindo v Fischer*, 72 AD3d 1295, 1296 [2010]). Petitioner's remaining claims have been examined and found to be meritless.

Stein, J.P., Rose, Egan Jr., Devine and Clark, JJ., concur.

* While we agree with petitioner that the petition appears to raise only procedural issues and should not have been transferred to this Court, we will retain jurisdiction in the interest of judicial economy (see *Matter of Hernandez v Fischer*, 111 AD3d 1042, 1043 n [2013]).

Adjudged that the determination is confirmed, without costs, and petition dismissed.

15 In the Matter of JAMES R. MOORE, Appellant, v NEW YORK STATE DIVISION OF PAROLE, Respondent. [991 NYS2d 914]—

Habeas Corpus—When Remedy Available

Appeal from a judgment of the Supreme Court (Elliott III, J.), entered October 16, 2013 in Greene County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Board of Parole denying petitioner's request for parole release.

Petitioner commenced this CPLR article 78 proceeding to challenge a July 2012 determination of the Board of Parole that denied his request for parole release. The Attorney General has advised this Court that petitioner reappeared before the Board in July 2014 and was again denied parole release. Thus, the appeal is now moot (*see Matter of Jackson v New York State Div. of Parole*, 116 AD3d 1308, 1308 [2014]). Petitioner urges us to treat this matter as a habeas corpus proceeding and nevertheless reach the merits, but “the denial of parole may not be challenged by way of a writ of habeas corpus” (*People ex rel. Borrell v New York State Bd. of Parole*, 85 AD3d 1515, 1515-1516 [2011], *lv denied* 17 NY3d 718 [2011]). To the extent that petitioner additionally attacks the legality of his sentence, his failure to name as respondent the “person having custody of” him renders any request for a writ of habeas corpus procedurally defective (CPLR 7004 [b]; *see Matter of Wisniewski v Michalski*, 114 AD3d 1188, 1190 [2014]; *People ex rel. Backus v Broome County Dept. of Social Servs.*, 240 AD2d 786, 787 [1997]; *see also* Executive Law § 259-b [1]).

Peters, P.J., Lahtinen, McCarthy, Garry and Rose, JJ., concur. Ordered that the appeal is dismissed, as moot, without costs.

16 In the Matter of DONTIE S. MITCHELL, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [991 NYS2d 915]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner commenced this proceeding challenging a tier III prison disciplinary determination finding him guilty of possession of contraband, smuggling and possession of an item in an unauthorized area. The Attorney General has informed this Court that the determination at issue has been administratively

reversed, all references thereto have been expunged from petitioner's institutional record and the mandatory surcharge has been returned to his inmate account; thus, this proceeding is dismissed as moot (*see Matter of Ames v Gutwein*, 76 AD3d 1163 [2010]).

Lahtinen, J.P., McCarthy, Egan Jr., Lynch and Clark, JJ., concur. Adjudged that the petition is dismissed, as moot, without costs.

17 In the Matter of JAMES LEWIS, Appellant, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [993 NYS2d 522]—Appeal from a judgment of the Supreme Court (Muller, J.), entered November 22, 2013 in Essex County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review two determinations of respondent finding petitioner guilty of violating certain prison disciplinary rules.

Judgment affirmed. No opinion.

Lahtinen, J.P., McCarthy, Garry, Devine and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

18 In the Matter of ALTON C. HUTCHINSON, Appellant, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [992 NYS2d 375]—

Crimes—Office of Victim Services—Notification When Award from Civil Rights Action Received by Inmate

Appeal from an amended judgment of the Supreme Court (Lynch, J.), entered July 3, 2013 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Central Office Review Committee denying petitioner's grievance.

The facts underlying this proceeding are more fully set forth in a prior decision of this Court (*Matter of Hutchinson v Fischer*, 112 AD3d 1245, 1245 [2013], *lv denied* 23 NY3d 903 [2014]). Briefly, petitioner is a prison inmate who settled a federal civil rights action for \$7,500, and the Office of Victim Services was notified by the Department of Corrections and Community Supervision of that fact. Petitioner filed two inmate grievances alleging that the notification was improper, and we found that the denial of the first grievance was rational (*id.* at 1245-1246). This CPLR article 78 proceeding deals with the second grievance, in which petitioner pointed out that notification was only required for "the imminent payment of a federal civil rights compensatory damages award" and argued that a settlement did not constitute such an award (Dept of Corr & Community

Supervision Directive No. 4036 § IV [A]; *see* Pub L 104-134, tit VIII, § 808, 110 US Stat 1321 [104th Cong, 2d Sess, Apr. 26, 1996] [termed the “Prison Litigation Reform Act of 1995”]). The Central Office Review Committee (hereinafter CORC) denied that grievance, and Supreme Court dismissed the present challenge to its determination. Petitioner now appeals.

We affirm. Contrary to petitioner’s assertion, CORC rejected his argument that his settlement fell outside the scope of the reporting requirement set forth by Department of Corrections and Community Supervision Directive No. 4036. To the extent that the merits of that argument are properly before us, the directive is based in relevant part upon a federal law requiring that reasonable efforts be made to give notice to victims whenever compensatory damages are “awarded to a prisoner in connection with a civil action brought against” correction officials (Pub L 104-134, tit VIII, § 808, 110 US Stat 1321 [104th Cong, 2d Sess, Apr. 26, 1996] [termed the “Prison Litigation Reform Act of 1995”]). The settlement here was recovered in connection with such an action and, thus, CORC rationally determined that it constituted the “payment of a federal civil rights compensatory damages award” such as to trigger the reporting requirements of the directive (Dept of Corr & Community Supervision Directive No. 4036 § IV [A]; *see Matter of Hutchinson v Fischer*, 112 AD3d at 1246). CORC further noted, correctly, that denial of the grievance was warranted because “there is nothing in the law that prohibits the reporting of any monetary settlement” (*see Matter of Hutchinson v Fischer*, 112 AD3d at 1246).

Stein, J.P., McCarthy, Garry, Rose and Clark, JJ., concur. Ordered that the amended judgment is affirmed, without costs.

19 In the Matter of MICHAEL L. WILSON, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [991 NYS2d 916]—

Prisons and Prisoners—Discipline of Inmates—Misbehavior Report Provided Sufficient Notice of Charge

Prisons and Prisoners—Discipline of Inmates—Threatening Another Inmate

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating a prison disciplinary rule.

Following a tier III disciplinary hearing, petitioner was found guilty of threatening another inmate. The determination was affirmed upon administrative appeal with a modified penalty, and this CPLR article 78 proceeding ensued.

We confirm. Initially, we reject petitioner's contention that the misbehavior report failed to provide him with sufficient notice of the charge against him due to a lack of specific times, dates and places of the alleged conduct. Inasmuch as the charge resulted from an investigation involving several contacts between petitioner and the victim, we conclude that the misbehavior report contained sufficient information to adequately apprise petitioner of the charge against him in order to enable him to prepare a defense (see *Matter of Williams v Fischer*, 114 AD3d 977, 977 [2014], *lv denied* 23 NY3d 903 [2014]; *Matter of Eugenio v Fischer*, 112 AD3d 1017, 1017 [2013], *lv denied* 22 NY3d 863 [2014]). We also reject petitioner's contention that he impermissibly was denied the right to call a certain witness, as the requested witness was not present during the incidents that gave rise to the charge and, therefore, could not provide relevant testimony (see *Matter of Boyd v Fischer*, 108 AD3d 995, 996 [2013]; *Matter of Blackwell v Fischer*, 106 AD3d 1346, 1346 [2013]).

Turning to the merits, the misbehavior report, the hearing testimony of the victim and both the in camera and hearing testimony of the correction officer who investigated the incident and authored the misbehavior report provide substantial evidence supporting the determination of guilt (see *Matter of Hardy v Smith*, 87 AD3d 779, 780 [2011]; *Matter of France v Bezio*, 78 AD3d 1357, 1357 [2010]). Petitioner's denial of the charge presented a credibility issue for the Hearing Officer to resolve (see *Matter of Ford v Prack*, 101 AD3d 1276, 1277 [2012]). Petitioner's remaining claims have been considered and found to be without merit.

Peters, P.J., Stein, Rose, Egan Jr. and Lynch, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

20 In the Matter of KEVIN LEUNG, Appellant, v ANDREA W. EVANS, as Chair of the Division of Parole, Respondent. [991 NYS2d 917]—

Parole—Denial—Proper Consideration of Relevant Statutory Factors

Appeal from a judgment of the Supreme Court (McNamara, J.), entered December 11, 2013 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Board of Parole denying petitioner's request for parole release.

Petitioner was convicted in 1991 of two counts of first degree rape and one count of first degree robbery, and he is currently serving an aggregate prison term of 16²/₃ to 40 years. In 2012,

petitioner made his fourth appearance before the Board of Parole, which again denied his request for parole release and ordered him held for an additional 24 months. Following an unsuccessful administrative appeal, petitioner commenced this proceeding pursuant to CPLR article 78 challenging the Board's determination. Supreme Court dismissed the petition and petitioner appeals.

We are unpersuaded by petitioner's contention that the hearing was unlawful due to the Board's failure to promulgate new written procedures pursuant to the 2011 amendments to Executive Law § 259-c (4) (see *Matter of Singh v Evans*, 118 AD3d 1209, 1209 [2014]; compare *Matter of Garfield v Evans*, 108 AD3d 830, 830-831 [2013]). Turning to the merits, the record discloses that the Board considered the relevant statutory factors in evaluating petitioner's request for parole release, including not only the serious nature of his crimes, but also his program participation, positive prison disciplinary record, post-release plans and, significantly, the statutorily-required COMPAS Risk and Needs Assessment instrument (see Executive Law §§ 259-c [4]; 259-i [2] [c] [A]; see also *Matter of Singh v Evans*, 118 AD3d at 1209). Furthermore, "[t]he Board need not enumerate, give equal weight or explicitly discuss every factor considered and was entitled, as it did here, to place a greater emphasis on the gravity of his crime" (*Matter of Montane v Evans*, 116 AD3d 197, 203 [2014], *lv granted* 23 NY3d 903 [2014] [internal quotation marks and citation omitted]). Given that the Board's determination herein complies with the 2011 statutory amendment and does not reflect "irrationality bordering on impropriety" (*Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000] [internal quotation marks and citation omitted]), it will not be disturbed.

To the extent that they have been preserved for our review, petitioner's remaining contentions have been reviewed and found to be without merit.

Lahtinen, J.P., Stein, McCarthy, Lynch and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

21 In the Matter of CHARLES WILLIAMS, Petitioner, v ANTHONY ANNUCCI, as Acting Commissioner of Corrections and Community Supervision, Respondent. [991 NYS2d 918]—

Prisons and Prisoners—Discipline of Inmates—Possession of Controlled Substance

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Clinton County) to review a determination of respondent which found petitioner guilty of violating a prison disciplinary rule.

Petitioner, a prison inmate, was charged in a misbehavior report with possession of a controlled substance after a cell frisk revealed a playing card that had been rolled into a tube and contained a black burnt substance that later tested positive for marihuana. Following a tier III disciplinary hearing, he was found guilty, and that determination was affirmed upon administrative appeal. Petitioner thereafter commenced this CPLR article 78 proceeding.

We confirm. The detailed misbehavior report, positive drug test results and testimony of the correction officer who performed the cell frisk provide substantial evidence to support the determination of guilt (*see Matter of Clark v Fischer*, 111 AD3d 1045, 1045-1046 [2013]; *Matter of Fero v Prack*, 108 AD3d 1004, 1005 [2013]). Notably, a reasonable inference of possession arose by virtue of the fact that the contraband was found inside a boot in petitioner's cell, an area within his control (*see Matter of Fisher v Fischer*, 105 AD3d 1286, 1286 [2013]; *Matter of Alache v Fischer*, 91 AD3d 1240, 1241 [2012]). Petitioner's protestations of innocence and the testimony of his inmate witness, who claimed to have been the owner of the rolled card, raised credibility issues for the Hearing Officer to resolve (*see Matter of White v State of New York*, 117 AD3d 1250, 1250 [2014]; *Matter of Basbus v Prack*, 112 AD3d 1088, 1089 [2013]).

With regard to petitioner's claim that he was denied certain documents, the record demonstrates that he received the drug test results, he stated unequivocally that he was not requesting the unusual incident report and the documents pertaining to his urinalysis test were irrelevant to the question of his guilt with regard to the possession of a controlled substance (*see Matter of Macedonio v Fischer*, 116 AD3d 1313, 1313 [2014]; *Matter of Toliver v New York State Commr. of Corr. & Community Supervision*, 114 AD3d 987, 987 [2014]). Petitioner's remaining claims have been examined and found to be either unpreserved or without merit.

Stein, J.P., Rose, Egan Jr., Lynch and Devine, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

22 In the Matter of the Claim of FAYLENE N. FAISON, Appellant. COMMISSIONER OF LABOR, Respondent. [991 NYS2d 812]—

Unemployment Insurance—Benefits—Disqualification—Voluntarily Leaving Employment without Good Cause

Appeal from a decision of the Unemployment Insurance Appeal Board, filed April 19, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits because she voluntarily left her employment without good cause.

Claimant was employed in the childcare field by the employer, a temporary agency. Although claimant initially held a position that allowed her to work directly with children, she was later assigned to a position that was administrative in nature and included data entry. After approximately five months, claimant requested to be returned to childcare work but no positions were available, and claimant was given a position as a receptionist and an administrative assistant. Claimant informed the employer that she would not continue to work at an administrative position and, after the employer requested at least two weeks notice, it was agreed that claimant's last day of work would be May 25, 2012. The Unemployment Insurance Appeal Board ultimately determined that claimant had voluntarily separated from her employment without good cause, and she now appeals.

We affirm. "Whether a claimant has voluntarily left employment [without good cause] is a factual issue to be resolved by the Board, and its determination will not be disturbed so long as it is supported by substantial evidence" (*Matter of Georgatos [Commissioner of Labor]*, 100 AD3d 1130, 1130 [2012] [internal quotation marks and citations omitted]; see *Matter of Esposito [Commissioner of Labor]*, 62 AD3d 1202, 1202 [2009]). Although claimant conceded at the hearing that continuing work was available, she asserts that she had good cause to resign because the employer unilaterally changed the terms and conditions of her employment when the employer assigned her administrative work in a childcare setting rather than a position working directly with children. The employer testified, however, that claimant was informed that the nature of the assignments would vary at the time she was hired. Moreover, even assuming that the employer had changed the terms and conditions of her employment, claimant continued to work for approximately five months under the alleged change. Under these circumstances, substantial evidence supports the Board's determination that claimant voluntarily left her employment without good cause (see *Matter of Esposito [Commissioner of Labor]*, 62 AD3d at 1202; *Matter of Fox [Commissioner of Labor]*, 16 AD3d 758, 759 [2005]; see also *Matter of Georgatos [Commissioner of Labor]*, 100 AD3d at 1130-1131).

Peters, P.J., Lahtinen, Rose, Devine and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

23 In the Matter of SANTUNU RAFI, Appellant, v D. VENETOZZI, as Acting Director of Special Housing and Inmate Disciplinary Programs, Respondent. [991 NYS2d 919]—

Appeal from a judgment of the Supreme Court (Mercure, J.), entered August 27, 2013 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Commissioner of Corrections and Community Supervision finding petitioner guilty of violating a prison disciplinary rule.

While waiting to enter the prison mess hall, petitioner told a female cook that he loved her and that he was going to use his "connections" to ensure that an inmate who had "disrespected [her] pays for it." The cook found this conversation to be threatening and, as such, petitioner was charged in a misbehavior report with stalking, harassment and making threats. Following a tier III disciplinary hearing, petitioner was found guilty of stalking and harassment. The harassment charge was upheld upon administrative appeal, and this CPLR article 78 proceeding ensued. Petitioner now appeals from the dismissal of the petition by Supreme Court.

We affirm. Petitioner sought the testimony of a correction captain solely to corroborate his claim of retaliation but, inasmuch as the captain had no knowledge of the actual incident and petitioner had already provided detailed testimony as to his retaliation claim, the request was properly denied as redundant (see *Matter of Cahill v Prack*, 106 AD3d 1310, 1311 [2013]; *Matter of Rosales v Pratt*, 98 AD3d 764, 765 [2012], *lv denied* 19 NY3d 816 [2012]). The further contention that petitioner was denied the right to call certain inmate witnesses who executed witness refusal forms is unpreserved given his "fail[ure] to object or request that the Hearing Officer make further inquiry" (*Matter of Taylor v Fischer*, 89 AD3d 1298, 1299 [2011]; see *Matter of Toro v Fischer*, 104 AD3d 1036, 1037 [2013]). Petitioner was similarly made aware that the cook no longer worked at the facility when he sought to recall her for additional testimony, and did not request that any effort be made to secure her testimony (see *Matter of Garcia v Coughlin*, 194 AD2d 896, 897 [1993]). There is no support in the record for petitioner's remaining argument that the Hearing Officer was biased against him (see *Matter of Fero v Prack*, 110 AD3d 1128, 1129 [2013]).

Garry, J.P., Rose, Egan Jr., Lynch and Devine, JJ., concur. Ordered that the judgment is affirmed, without costs.

24 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; WILLIAM HAYMORE BRAMMER JR., Respondent. [991 NYS2d 920]—

Attorney and Client—Disciplinary Proceedings—Reinstatement Following Compliance with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 2001, was suspended by this Court's order dated January 30, 2014 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (113 AD3d 1020 [2014]).

Respondent now requests reinstatement on the ground that he has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and he is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

25 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; JOHN ANDREW GELETY, Respondent. [991 NYS2d 920]—

Attorney and Client—Disciplinary Proceedings—Reinstatement Following Compliance with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 2000, was suspended by this Court's order dated January 30, 2014 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (113 AD3d 1020 [2014]).

Respondent now requests reinstatement on the ground that he has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and he is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

26 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; RAFAEL ANDRES DIAZ-GRANADOS, Respondent. [991 NYS2d 921]—

Attorney and Client—Disciplinary Proceedings—Reinstatement Following

Compliance with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by the First Department in 1997, was suspended by this Court's order dated January 30, 2014 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (113 AD3d 1020 [2014]).

Respondent now requests reinstatement on the ground that he has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and he is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

27 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; LAURIE JANE MADZIAR, Respondent. [991 NYS2d 921]—

Attorney and Client—Disciplinary Proceedings—Reinstatement Following Compliance with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 2004, was suspended by this Court's order dated January 30, 2014 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (113 AD3d 1020 [2014]).

Respondent now requests reinstatement on the ground that she has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and she is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

28 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; MICHAEL ANTHONY MATTESSICH, Respondent. [991 NYS2d 922]—

Attorney and Client—Disciplinary Proceedings—Reinstatement Following Compliance with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 2001, was suspended by this Court's order dated January 30, 2014 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (113 AD3d 1020 [2014]).

Respondent now requests reinstatement on the ground that he has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and he is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

29 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; LARS-UWE PERA, Respondent. [991 NYS2d 923]—

Attorney and Client—Disciplinary Proceedings—Reinstatement Following Compliance with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 1994, was suspended by this Court's order dated January 30, 2014 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (113 AD3d 1020 [2014]).

Respondent now requests reinstatement on the ground that he has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and he is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

30 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; MARGARET SKARBEK STEFANDL, Respondent. [991 NYS2d 923]—

Attorney and Client—Disciplinary Proceedings—Reinstatement Following Compliance with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 2004, was suspended by this Court's order dated January 30, 2014 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (113 AD3d 1020 [2014]).

Respondent now requests reinstatement on the ground that she has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and she is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

31 In the Matter of ATTORNEYS IN VIOLATION OF JUDICIARY LAW § 468-A. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner; AMY ELIZABETH THOMPSON, Respondent. [991 NYS2d 924]—

Attorney and Client—Disciplinary Proceedings—Reinstatement Following Compliance with Attorney Registration Requirements

Per Curiam. Respondent, who was admitted to practice by this Court in 1992, was suspended by this Court's order dated September 24, 2009 for failure to comply with the attorney registration requirements of Judiciary Law § 468-a (65 AD3d 1447 [2009]).

Respondent now requests reinstatement on the ground that she has complied with the attorney registration requirements of Judiciary Law § 468-a and the Rules of the Chief Administrator of the Courts (*see* 22 NYCRR part 118). Petitioner does not object to respondent's application.

Respondent's application is granted and she is ordered reinstated, effective immediately.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that respondent's application is granted; and it is further ordered that respondent is reinstated as an attorney and counselor-at-law in the State of New York, effective immediately.

32 In the Matter of THOMAS W. PLIMPTON, a Suspended Attorney, Respondent. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner. [991 NYS2d 924]—

Attorney and Client—Disciplinary Proceedings—Disbarment—Converting Client Funds for Personal Use

Per Curiam. Respondent was admitted to practice by this Court in 1997. He formerly maintained an office for the practice of law in the City of Plattsburgh, Clinton County.

By decision and order dated April 17, 2014, this Court found respondent guilty of professional misconduct immediately threatening the public interest and suspended him from the practice of law pending consideration of the disciplinary charges filed against him (*Matter of Plimpton*, 116 AD3d 1297 [2014]). We then granted petitioner's motion for an order declaring that no factual issues were raised by the pleadings (*see* 22 NYCRR 806.5). We now find respondent guilty of the two charges of professional misconduct set forth in the petition and supplementary petition alleging that, between June 2009 and June 2013, he converted over \$29,000 in funds that he received from, among other things, billing clients for fraudulent expenses, and then using those funds for personal purposes. Consequently, respondent is guilty of violating Rules of Professional Conduct (22 NYCRR 1200.0) rule 8.4 (b), (c), (d) and (h) by having engaged in conduct that was illegal, involved dishonesty, fraud, deceit or misrepresentation, was prejudicial to the administration of justice, and adversely reflected on respondent's fitness as a lawyer.

We have now heard respondent in mitigation and conclude that, under all of the circumstances presented and in order to protect the public, deter similar professional misconduct and preserve the reputation of the bar, respondent's fraudulent and deceptive misconduct warrants his disbarment (*see Matter of Chamblee*, 96 AD3d 1343, 1344 [2012]; *Matter of Kahn*, 37 AD3d 949, 950 [2007]; *Matter of Van De Loo*, 240 AD2d 940, 944-945 [1997], *lv denied* 90 NY2d 811 [1997]). As previously noted by this Court, "conversion of client funds [is] a most serious violation of an attorney's ethical obligations," and it is viewed accordingly (*Matter of Balok*, 2 AD3d 887, 887 [2003]).

McCarthy, J.P., Garry, Rose, Egan Jr. and Clark, JJ., concur. Ordered that respondent is found guilty of professional misconduct as charged in the petition and supplemental petition; and it is further ordered that respondent is disbarred and his name is stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately; and it is further ordered that respondent is commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another; and respondent is hereby forbidden to appear as an attorney or counselor-at-law

before any court, judge, justice, board, commission or other public authority or give to another an opinion as to the law or its application, or any advice in relation thereto; and it is further ordered that respondent shall comply with the provisions of this Court's rules regulating the conduct of disbarred attorneys (*see* 22 NYCRR 806.9).

(September 18, 2014)

1 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RYAN PROVENZANO, Appellant. [992 NYS2d 444]—

Crimes—Sentence—Probation—Revocation

Appeal from a judgment of the County Court of Columbia County (Nichols, J.), rendered July 24, 2012, which revoked defendant's probation and imposed a sentence of imprisonment.

In 2011, defendant pleaded guilty to grand larceny in the fourth degree and was sentenced to five years of probation. He thereafter admitted to violating certain terms of his probation and County Court revoked his probation and sentenced him to a prison term of 1 to 4 years. Defendant now appeals, contending that the sentence is harsh and excessive. We disagree. Despite being given more than one opportunity, defendant repeatedly failed to abide by the terms of his probation, requiring that he refrain from the use of drugs and complete any recommended treatment plan. Under the circumstances, we find no abuse of discretion or extraordinary circumstances warranting a reduction of the sentence in the interest of justice (*see People v Miller*, 113 AD3d 935, 936 [2014], *lv denied* 22 NY3d 1201 [2014]; *People v Aljerari*, 109 AD3d 1049 [2013], *lv denied* 22 NY3d 1038 [2013]; *People v Regan*, 108 AD3d 983, 984 [2013]).

McCarthy, J.P., Rose, Egan Jr., Lynch and Devine, JJ., concur. Ordered that the judgment is affirmed.

2 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANTHONY R. BOTTE, JR., Appellant. [992 NYS2d 445]—

Crimes—Sentence—Enhancement of Sentence Following Violation of Condition of Furlough

Appeal from a judgment of the County Court of Chenango County (Sullivan, J.), rendered October 14, 2011, convicting defendant upon his plea of guilty of the crime of robbery in the first degree.

In satisfaction of a three-count indictment, defendant pleaded guilty to robbery in the first degree. Under the terms of the

plea agreement, he was to be sentenced to five years in prison to be followed by five years of postrelease supervision and was to waive his right to appeal. During the plea proceedings, County Court agreed to release defendant on a one-week furlough so that he could spend time with his children before sentencing, but admonished him that a condition of his release was that he not consume alcohol or drugs. When he reappeared for sentencing, it was disclosed that defendant had tested positive for THC. As a result, County Court imposed an enhanced sentence of six years in prison to be followed by five years of postrelease supervision. Defendant now appeals.

Defendant argues that County Court erred in imposing an enhanced sentence without first conducting a hearing to determine if he, in fact, violated the conditions of his release by smoking marihuana while he was on furlough. We note that this issue has not been preserved due to defendant's failure to object to the enhanced sentence on this basis or to move to withdraw his plea on this ground (*see People v Wachtel*, 117 AD3d 1203 [2014], *lv denied* 23 NY3d 1044 [2014]; *People v Bucknor*, 116 AD3d 1233, 1234 [2014]). In any event, County Court afforded defendant an opportunity to respond and, given the positive test results and defendant's admission to smoking marihuana, assured itself that the enhanced sentence was based upon reliable and accurate information (*see People v Kocher*, 116 AD3d 1301, 1302 [2014]; *People v Paneto*, 112 AD3d 1230, 1231 [2013], *lv denied* 23 NY3d 1023 [2014]; *People v Saucier*, 69 AD3d 1125, 1126 [2010]). Defendant's claim that he smoked marihuana while in jail does not compel a contrary conclusion under the circumstances presented here. Therefore, we find no basis to disturb the sentence imposed.

Peters, P.J., McCarthy, Rose, Egan Jr. and Lynch, JJ., concur. Ordered that the judgment is affirmed.

3 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHANE DUNHAM, Also Known as BREEZY, Appellant. [992 NYS2d 446]—

Crimes—Sentence—Trial Court Mistakenly Indicated Defendant Pleaded Guilty to Different Crime

Appeal from a judgment of the County Court of Ulster County (Williams, J.), rendered December 19, 2012, convicting defendant upon his plea of guilty of the crime of assault in the second degree.

Defendant pleaded guilty to assault in the second degree in satisfaction of a two-count indictment arising out of an incident

in which he allegedly fired a sawed-off shotgun into a group of 10 people, causing injury to several individuals. He was sentenced to seven years in prison to be followed by three years of postrelease supervision in accord with the plea agreement. Defendant now appeals, arguing that the sentence was illegal because County Court incorrectly stated at the time of sentencing that defendant was convicted of attempted assault in the first degree—the top charge in the indictment—as opposed to the charge to which defendant pleaded guilty, assault in the second degree.

In our view, the record reflects that County Court simply mis-spoke when it indicated that defendant had pleaded guilty to attempted assault in the first degree. During the plea allocution, County Court accepted defendant's plea to assault in the second degree and properly enumerated the elements of that crime (see Penal Law § 120.05 [2]). Indeed, the record establishes that the court and the parties understood that defendant was pleading guilty to assault in the second degree and would be sentenced to the maximum of seven years on that conviction. That understanding is further reflected on the uniform sentence and commitment order, which indicates that defendant was convicted of the crime to which he pleaded guilty. Accordingly, defendant's challenge to the legality of his sentence is unavailing (see *People v Kaetzel*, 117 AD3d 1187, 1189-1190 [2014]; *People v Leszczynski*, 96 AD3d 1162, 1163 n 2 [2012], *lv denied* 19 NY3d 998 [2012]; see also *People v Neal*, 41 AD3d 971, 972 [2007]). Finally, given the favorable plea resolution and defendant's criminal history, we reject his claim that his sentence was harsh and excessive.

McCarthy, J.P., Garry, Rose, Devine and Clark, JJ., concur. Ordered that the judgment is affirmed.

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MELVIN D. ANDERSON, Also Known as AK, Appellant. [992 NYS2d 447]—

Crimes—Right to Counsel—Withdrawal of Counsel—Nonfrivolous Appeal—Arguable Issue

Appeal from a judgment of the County Court of Clinton County (Ryan, J.), rendered August 27, 2012, convicting defendant upon his plea of guilty of the crime of criminal possession of a controlled substance in the fourth degree (two counts).

In satisfaction of a four-count indictment, defendant pleaded guilty to two counts of criminal possession of a controlled substance in the fourth degree and purportedly waived his right to appeal. County Court thereafter sentenced defendant, as

agreed, to an aggregate prison term of seven years to be followed by two years of postrelease supervision. Defendant now appeals.

Defense counsel argues that no nonfrivolous issues exist to be raised upon appeal and seeks to be relieved of her assignment. We disagree. Our review of the record discloses an issue of arguable merit regarding the validity of defendant's appeal waiver that may, in turn, implicate other potential appellate issues (*see People v Slavin*, 114 AD3d 1082, 1082 [2014]; *People v Whitted*, 106 AD3d 1286, 1287 [2013]). We thus grant counsel's request for leave to withdraw and assign new counsel to address that issue and any others that the record may disclose (*see People v Stokes*, 95 NY2d 633 [2001]; *People v Cruwys*, 113 AD2d 979, 980 [1985], *lv denied* 67 NY2d 650 [1986]).

Peters, P.J., Lahtinen, Rose, Devine and Clark, JJ., concur. Ordered that the decision is withheld, application to be relieved of assignment granted and new counsel to be assigned.

5 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRIAN AMELL, Appellant. [992 NYS2d 447]—Appeal from a judgment of the County Court of Ulster County (McGinty, J.), rendered April 23, 2013, convicting defendant upon his plea of guilty of the crime of criminal possession of a weapon in the second degree.

In satisfaction of a two-count indictment, defendant pleaded guilty to criminal possession of a weapon in the second degree and waived his right to appeal. Defendant thereafter was sentenced as a second felony offender to the agreed-upon prison term of seven years followed by five years of postrelease supervision. Defendant now appeals.

Appellate counsel seeks to be relieved of his assignment of representing defendant upon the ground that there are no nonfrivolous issues to be raised on appeal. Based upon our review of the record, counsel's brief and defendant's pro se submission, we agree. Accordingly, the judgment is affirmed and counsel's request for leave to withdraw is granted (*see People v Jennings*, 117 AD3d 1281 [2014]; *People v Cruwys*, 113 AD2d 979 [1985], *lv denied* 67 NY2d 650 [1986]).

We note, however, that although defendant was properly sentenced as a second violent felony offender, the uniform sentence and commitment form incorrectly contains a notation indicating that he was sentenced as a second felony offender. "While this error does not require that an otherwise legal sentence be vacated, the uniform sentence and commitment form must be amended accordingly" (*People v Washington*, 117 AD3d 1279, 1280 [2014] [citations omitted]).

Peters, P.J., Stein, Garry, Egan Jr. and Lynch, JJ., concur. Ordered that the judgment is affirmed, application to be relieved of assignment granted, and matter remitted for entry of an amended uniform sentence and commitment form.

6 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v EMMA J. MAXWELL, Appellant. [992 NYS2d 448]—Appeal from a judgment of the County Court of Schoharie County (Bartlett III, J.), rendered April 17, 2013, convicting defendant upon her plea of guilty of the crime of grand larceny in the second degree.

Defendant pleaded guilty to grand larceny in the second degree and waived her right to appeal. County Court thereafter sentenced her to $1\frac{2}{3}$ to 5 years in prison. Defendant now appeals.

Defendant's sole contention on appeal is that her sentence is harsh and excessive. This argument is foreclosed, however, by her valid waiver of the right to appeal her conviction and sentence, which she has not challenged (*see People v Maughan*, 112 AD3d 1233, 1233 [2013]; *People v Ball*, 108 AD3d 871, 872 [2013]). Accordingly, we affirm the judgment of conviction.

Peters, P.J., Lahtinen, Rose, Egan Jr. and Devine, JJ., concur. Ordered that the judgment is affirmed.

7 In the Matter of JESSIE J. BARNES, Appellant, v DR. SCHROYER, as Medical Director of Upstate Correctional Facility, et al., Respondents. [992 NYS2d 449]—

Appeal—Appeal as of Right—No Right of Appeal from Ex-Parte Order

Appeal from an order of the Supreme Court (Feldstein, J.), entered May 25, 2012 in Franklin County, which, in a proceeding pursuant to CPLR article 78, denied petitioner's motion for leave to serve an amended petition.

Petitioner commenced this CPLR article 78 proceeding to challenge actions by prison officials that are related in various ways to his medical treatment, and he requested that Supreme Court issue an order to show cause that would direct service upon respondents (*see* CPLR 403 [d]). Supreme Court declined to do so and, upon its own motion, dismissed the petition without prejudice, finding the petition to be “grossly substandard” in that its opaque language would leave Supreme Court and respondents at a loss as to the relevant facts and issues (*see* CPLR 3013, 3014). Petitioner did not seek review of that judgment. He did, however, move ex parte for leave to file an amended petition. Because a judgment of dismissal had been entered, however, Supreme Court denied the motion. Petitioner now appeals.

An appeal does not lie from an ex parte order such as the one at issue here (*see* CPLR 5701 [a] [2]; *Sholes v Meagher*, 100 NY2d 333, 335 [2003]). Under the circumstances presented, we decline to treat petitioner's notice of appeal as an application for leave to appeal (*see* CPLR 5701 [c]; *Blam v Netcher*, 17 AD3d 495, 496 [2005]).

Peters, P.J., Stein, Rose, Lynch and Devine, JJ., concur. Ordered that the appeal is dismissed, without costs.

8 In the Matter of BIENVENIDO CASTILLO, Appellant, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [992 NYS2d 449]—

Prisons and Prisoners—Discipline of Inmates—Timeliness of Hearing
Prisons and Prisoners—Discipline of Inmates—Employee Assistance

Appeal from a judgment of the Supreme Court (Connolly, J.), entered January 24, 2013 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent finding petitioner guilty of violating a prison disciplinary rule.

Petitioner commenced this CPLR article 78 proceeding to challenge a determination finding him guilty of violating the prison disciplinary rule prohibiting weapons possession. Supreme Court dismissed the petition, and we affirm. Contrary to petitioner's assertion, his disciplinary hearing was commenced within the time period established by a valid extension (*see Matter of Pooler v Fischer*, 107 AD3d 1256, 1257 [2013], *lv denied* 22 NY3d 855 [2013]; *Matter of Lashway v Kuhlmann*, 282 AD2d 850, 850 [2001]). Although petitioner further contends that he was denied adequate employee assistance, the Hearing Officer remedied any deficiencies in this regard, and petitioner did not demonstrate any prejudice (*see Matter of Espinal v Fischer*, 114 AD3d 978, 979 [2014]; *Matter of Pooler v Fischer*, 107 AD3d at 1257). Finally, petitioner did not argue that he received inadequate notice of the charges against him at the hearing and, as such, Supreme Court appropriately found that issue to be unpreserved for review (*see Matter of Valdez v Fischer*, 74 AD3d 1596, 1597 [2010]).

Peters, P.J., Stein, Garry, Egan Jr. and Devine, JJ., concur. Ordered that the judgment is affirmed, without costs.

9 In the Matter of AMOS E. MACKEY, Respondent. PROMETRIC INC., Appellant; COMMISSIONER OF LABOR, Respondent. [992 NYS2d 376]—

Unemployment Insurance—Employee or Independent Contractor—Liability
for Additional Contributions Based upon Remuneration Paid to Nurse Aide

Evaluators—Existence of Employer-Employee Relationship Notwithstanding Written Agreement Labeling Evaluators as Independent Contractors—Employer’s Overall Control over Work of Evaluators

Appeals from two decisions of the Unemployment Insurance Appeal Board, filed January 15, 2013, which ruled, among other things, that Prometric Inc. is liable for additional unemployment insurance contributions based on remuneration paid to claimant and others similarly situated.

Prometric Inc. is a provider of testing and assessment services, and had a contract with New York to evaluate candidates wishing to become certified nursing assistants. Prometric entered into consulting and service agreements with individuals known as nurse aide evaluators (hereinafter NAEs) to proctor the written tests and administer the practical skills examinations given to these candidates. NAEs were required to be registered nurses in good standing in New York with at least two years of experience and one year of experience in long-term care. Claimant was retained by Prometric for this purpose. When he ceased working for Prometric, he applied for unemployment insurance benefits. Following extended proceedings, the Unemployment Insurance Appeal Board ruled that claimant and other similarly situated NAEs were employees of Prometric and that it is liable for additional unemployment insurance contributions based on remuneration paid to these individuals. It further ruled that claimant was entitled to receive benefits. Prometric appeals from both of these decisions.

The sole issue is whether there is an employment relationship between Prometric and claimant, and the other similarly situated NAEs. It is well settled that the existence of an employment relationship is a factual issue for the Board to decide and its determination will be upheld if supported by substantial evidence (see *Matter of Concourse Ophthalmology Assoc. [Roberts]*, 60 NY2d 734, 736 [1983]; *Matter of Crahan [Progress Rail Servs. Corp.—Commissioner of Labor]*, 116 AD3d 1277, 1277-1278 [2014]). Significantly, where, as here, the work of medical professionals is involved, the pertinent inquiry is whether the purported employer retained overall control over the work performed (see *Matter of Goddard [Summit Health, Inc.—Commissioner of Labor]*, 118 AD3d 1200, 1201 [2014]; *Matter of Scinta [ExamOne World Wide Inc.—Commissioner of Labor]*, 113 AD3d 959, 960 [2014]; *Matter of Guidici Pietro [Hariton & D’Angelo, LLP—Commissioner of Labor]*, 24 AD3d 1159, 1160 [2005]).

Here, Prometric developed an assessment tool to be used to evaluate the skills that a test candidate needed to perform and

conducted annual training sessions with claimant and other NAEs to ensure consistency in testing. Prometric interviewed individuals that it wished to retain as NAEs and reimbursed them for mileage and travel expenses. It established an hourly rate of pay for specific work activities, but other rates were sometimes negotiated depending upon the circumstances. The work of the NAEs was performed off site either at nursing homes or training facilities and the NAEs chose their work assignments from a computer-generated list. Although the NAEs had flexibility in scheduling their assignments and did not have set hours, if an NAE was unable to show, Prometric was responsible for finding a replacement or canceling the test. Notably, Prometric provided claimant with all testing materials and other equipment needed to evaluate the candidates, had him wear an identification badge and required him to maintain strict confidentiality. Furthermore, Prometric had a senior nurse evaluator conduct an annual review of claimant's work who assisted him in correcting any deficiencies. The foregoing indicates that Prometric retained sufficient overall control over the work of claimant and other similarly situated NAEs to be considered their employer (*see Matter of Goddard [Summit Health, Inc.—Commissioner of Labor]*, 118 AD3d at 1201-1202). Accordingly, notwithstanding the written agreement labeling claimant an independent contractor (*see Matter of Professional Career Ctr., Inc. [Commissioner of Labor]*, 105 AD3d 1219, 1220 [2013]), substantial evidence supports the Board's decisions.

Lahtinen, J.P., McCarthy, Lynch, Devine and Clark, JJ., concur. Ordered that the decisions are affirmed, without costs.

10 In the Matter of FAHIMA MANZOOR, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed October 31, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits because her employment was terminated due to misconduct.

Decision affirmed. No opinion.

Peters, P.J., Stein, McCarthy, Garry and Rose, JJ., concur. Ordered that the decision is affirmed, without costs.

11 In the Matter of SHAWN M. RIGGINS, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—

Unemployment Insurance—Appeal Board—Reopening Default Decision—Claimant's Failure to Demonstrate Good Cause for Not Applying to Reopen Decision within Reasonable Time

Appeal from a decision of the Unemployment Insurance Appeal Board, filed February 11, 2013, which denied claimant's application to reopen a prior decision.

In August 2011, the Department of Labor issued an initial determination which found, among other things, that claimant was ineligible to receive unemployment insurance benefits because his employment was terminated due to misconduct following a positive result of a drug test. After claimant failed to attend a September 2011 hearing on the matter, the Administrative Law Judge (hereinafter ALJ) rendered a default decision against him, but granted him leave to move to reopen the decision within a reasonable time. In August 2012, claimant applied to reopen the decision. At the subsequent hearing, claimant stated that it took him 11 months to apply to reopen the decision because he believed that the drug test was fraudulent and he was waiting for the results of an investigation by the Inspector General's office into the circumstances surrounding the test. Claimant submitted no results from said investigation at the hearing, and, thereafter, the ALJ concluded that claimant had failed to apply to reopen the decision within a reasonable period of time without good cause. The Unemployment Insurance Appeal Board affirmed the ALJ's decision and claimant now appeals.

Under these circumstances, we find no reason to disturb the Board's determination that claimant failed to demonstrate good cause for not applying to reopen the default decision within a reasonable time (see 12 NYCRR 461.8; *Matter of Stich [Commissioner of Labor]*, 265 AD2d 792, 792-793 [1999]; *Matter of Peters [Sweeney]*, 223 AD2d 919, 919 [1996]). Accordingly, claimant's arguments relating to the underlying merits of the denial of his application for unemployment insurance benefits are not properly before this Court (see *Matter of Popescu [Commissioner of Labor]*, 16 AD3d 757, 758 [2005]).

Lahtinen, J.P., Stein, McCarthy, Garry and Lynch, JJ., concur. Ordered that the decision is affirmed, without costs.

12 In the Matter of KEVIN REESE, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [992 NYS2d 450]—

Prisons and Prisoners—Discipline of Inmates—Possession and Smuggling of Drugs

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner was charged in a misbehavior report with possession of drugs, smuggling and violating facility package procedures after a package addressed to him was found to contain

marihuana concealed in 19 candy bars. Following a tier III disciplinary hearing, petitioner was found guilty as charged. Petitioner's administrative appeal was unsuccessful, prompting this CPLR article 78 proceeding.

We confirm. The misbehavior report and related documentation, together with the testimony from the sergeant, correction officer and investigator involved in the discovery and investigation of the incident, provide substantial evidence to support the determination of guilt (*see Matter of Harrison v Fischer*, 104 AD3d 1032, 1032 [2013]; *Matter of Booker v Fischer*, 102 AD3d 1045, 1046 [2013]; *Matter of Boggs v Martuscello*, 84 AD3d 1667, 1668 [2011]). Petitioner's testimony to the contrary, as well as any alleged inconsistencies in the hearing testimony, presented credibility issues for the Hearing Officer to resolve (*see Matter of Rodriguez v Fischer*, 111 AD3d 998, 999 [2013]; *Matter of Harrison v Fischer*, 104 AD3d at 1032). Furthermore, petitioner's contention that he was never in possession of the package containing the drugs does not negate his guilt inasmuch as "attempts or conspiracies to violate institutional rules of conduct, or as accessories to rule violations will be punishable to the same degree as violators of such rules" (7 NYCRR 270.3 [b]). Petitioner's remaining contentions are either without merit or unpreserved for this Court's review.

Peters, P.J., McCarthy, Rose, Egan Jr. and Lynch, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

13 In the Matter of MICHAEL LEE, Petitioner, v DEPARTMENT OF CORRECTIONAL SERVICES et al., Respondents. [992 NYS2d 451]—

Prisons and Prisoners—Discipline of Inmates—Possession of Material Concerning Construction or Use of Explosive Device

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Commissioner of Corrections and Community Supervision which found petitioner guilty of violating certain prison disciplinary rules.

As petitioner was returning to his cell from the academic school area of the prison, he was found to be carrying a handwritten description of how to build an explosive device. He was accordingly charged in a misbehavior report with possessing both contraband and material concerning the construction or use of a explosive device, as well as smuggling. After a subsequent search of his cell disclosed additional documents pertaining to bombs and bomb making, as well as an item that resembled an explosive device, petitioner was charged in a

second misbehavior report with possessing an apparently dangerous instrument, contraband and material concerning the construction or use of an explosive device. Following a tier III disciplinary hearing on both reports, petitioner was found guilty as charged. The determination was affirmed in relevant part upon administrative appeal, prompting this CPLR article 78 proceeding.

Contrary to petitioner's contention, the documents that formed the basis for several of the charges against him were included in the record before the Hearing Officer. Those documents and other confidential correspondence, as well as the detailed misbehavior reports and hearing testimony, provide substantial evidence to support the determination of guilt (see *Matter of Towles v Selsky*, 12 AD3d 737, 738 [2004], *lv denied* 4 NY3d 706 [2005]; *Matter of Knickerbocker v Goord*, 276 AD2d 1008, 1009 [2000]). We are unpersuaded by petitioner's additional contention that, in imposing a penalty, the Hearing Officer improperly considered the heightened impact that the discovery of bomb-related materials could have upon the atmosphere in the facility given that the Boston Marathon bombing had recently occurred (see 7 NYCRR 250.2 [b] [3]; see e.g. *Arteaga v State of New York*, 72 NY2d 212, 217-218 [1988]).

Lahtinen, J.P., Stein, Rose, Egan Jr. and Devine, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

14 In the Matter of the Claim of DOREEN M. SALCIDO, Respondent. NICE N EASY GROCERY SHOPPES, INC., Appellant; COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed March 14, 2013, which ruled that claimant was entitled to receive unemployment insurance benefits.

Decision affirmed. No opinion.

Garry, J.P., Egan Jr., Lynch, Devine and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

15 In the Matter of JOSEPH LAVALLEY, Respondent. THE WEST FIRM, PLLC, Appellant; COMMISSIONER OF LABOR, Respondent. [992 NYS2d 378]—

Unemployment Insurance—Employee or Independent Contractor—Liability for Contributions on Remuneration Paid to Contract Attorneys—Employer's Overall Control over Important Aspects of Services Performed

Appeal from a decision of Unemployment Insurance Appeal Board, filed April 16, 2013, which ruled that the West Firm, PLLC is liable for unemployment insurance contributions on remuneration paid to claimant and others similarly situated.

The West Firm, PLLC hired claimant as a “contract attorney” to prepare a legal memorandum on a time-sensitive matter. Upon reviewing claimant’s written memorandum analyzing the legal responsibilities of a client with respect to certain property, West declined to pay claimant for all of the hours that he worked on the project, gave claimant an opportunity to revise his memorandum and, upon completion of the project, declined to continue working with him. The Unemployment Insurance Appeal Board determined that claimant was West’s employee and that it was liable for additional unemployment insurance contributions based on the remuneration paid to him and others similarly situated. West now appeals.

“[I]t is well settled that the existence of an employer-employee relationship is a factual issue for the Board to decide and its determination will not be disturbed if supported by substantial evidence” (*Matter of Parisi [Commissioner of Labor]*, 54 AD3d 456, 456-457 [2008]; see *Matter of Empire State Towing & Recovery Assn., Inc. [Commissioner of Labor]*, 15 NY3d 433, 437 [2010]). Inasmuch as the work at issue here involved professional services that generally do not lend themselves to close supervision or control of the details of the work, the pertinent inquiry is whether the employer has retained “overall control,” and “substantial evidence of control over important aspects of the services performed other than results or means is sufficient to establish an employer-employee relationship” (*Matter of Empire State Towing & Recovery Assn., Inc. [Commissioner of Labor]*, 15 NY3d at 437 [internal quotation marks and citation omitted]). In that regard, West hired claimant after an interview and based upon his analytical expertise acquired during a federal clerkship. West set his rate of pay at \$100 an hour or on a per project basis, and provided him with a parking pass, office, desk, computer, receptionist, a firm email address and information technology support. Two attorneys supervised him, gave him instructions on how to perform his tasks, told him to ask permission before pursuing new legal issues, reviewed his work and made revisions. He was also covered under West’s malpractice insurance. In our view, the foregoing constitutes substantial evidence to support the Board’s decision that claimant was an employee of West, even if evidence exists to support a contrary conclusion (see *Matter of Parisi [Commissioner of Labor]*, 54 AD3d at 456; *Matter of Spinnell [Commissioner of Labor]*, 300 AD2d 770, 771 [2002]; see also *Matter of Goddard [Summit Health, Inc.—Commissioner of Labor]*, 118 AD3d 1200, 1201-1202 [2014]). West’s remaining arguments have been considered and, to the extent they are preserved, have been found to be lacking in merit.

Peters, P.J., Lahtinen, Garry, Devine and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

16 In the Matter of the Claim of MATTHEW R. CERICK, Appellant. COMMISSIONER OF LABOR, Respondent. [992 NYS2d 380]—

Unemployment Insurance—Appeal Board—Reopening Decision—Good Cause for Default—Good Faith Belief Appearance Not Required Due to Adjournment Request in Light of Tentative Settlement

Appeal from a decision of the Unemployment Insurance Appeal Board, filed April 5, 2013, which, among other things, denied claimant's application to reopen a prior decision.

The Department of Labor issued an initial determination finding that, effective May 5, 2011, claimant was ineligible to receive unemployment insurance benefits because he voluntarily left his employment without good cause. After claimant submitted a hearing request, a hearing was scheduled for August 11, 2011. However, neither claimant nor the employer appeared for the hearing and a default decision was issued by the Administrative Law Judge (hereinafter ALJ).¹ On administrative appeal, the Unemployment Insurance Appeal Board dismissed the appeal and remitted the matter to the ALJ to treat the appeal as an application to reopen the default decisions. On remittal, the ALJ conducted a hearing and, among other things, denied claimant's application to reopen the August 2011 default decision and sustained the initial determination.² The Board upheld the ALJ's decision and this appeal by claimant ensued.

We reverse. It is axiomatic that the party seeking to reopen a decision must demonstrate good cause for the default (*see* 12 NYCRR 461.8; *Matter of Tavares [Commissioner of Labor]*, 118 AD3d 1243, 1244 [2014]), and the determination whether to grant such an application will not be disturbed absent an abuse of the Board's sound discretion (*see Matter of Lee [Commissioner of Labor]*, 84 AD3d 1652, 1653 [2011]; *Matter of Childs [Kaleida Health—Commissioner of Labor]*, 69 AD3d 1070, 1071 [2010], *lv dismissed* 18 NY3d 837 [2011]). Under the circumstances here, we are of the view that the Board abused its discretion in finding that claimant did not demonstrate good cause for his failure to appear at the August 2011 hearing and, therefore,

1. Two subsequent hearings were scheduled in November 2011 and January 2012. Additional default decisions were issued upon claimant's failure to appear at either of those hearings.

2. The ALJ determined that claimant had good cause for failing to appear at the second and third hearings, and granted claimant's applications to reopen those default decisions.

in denying claimant's application to reopen the default decision rendered as a result thereof (*see generally Matter of Romano [Buffalo Bd. of Educ.—Commissioner of Labor]*, 256 AD2d 845, 845 [1998]).

Sometime prior to the scheduled commencement of the August 2011 hearing, counsel for claimant and the employer jointly—through a letter faxed by the employer's counsel to the ALJ at the hearing site—requested an adjournment in light of the fact that they had reached a tentative settlement.³ While we agree with the Board that the granting of the adjournment should have been verified before a decision was made not to appear at the hearing, it is evident that all parties assumed in good faith that their appearance was not required, as neither claimant's counsel nor the employer appeared for the hearing. Indeed, it is questionable whether the hearing would have proceeded in their absence even if claimant had appeared. In light of these circumstances, we find that the August 2011 default decision should have been reopened and, therefore, the decision is reversed and the matter remitted for consideration on the merits (*compare Matter of Cedeño [Commissioner of Labor]*, 83 AD3d 1350, 1351 [2011]).

Lahtinen, J.P., Stein, Garry, Rose and Devine, JJ., concur. Ordered that the decision is reversed, without costs, and matter remitted to the Unemployment Insurance Appeal Board for further proceedings not inconsistent with this Court's decision.

17 In the Matter of the Claim of RUBEN ABREU, Appellant. E. ARMATA, INC., Respondent; COMMISSIONER OF LABOR, Respondent. [992 NYS2d 452]—

Unemployment Insurance—Appeal Board—Reopening Decision—Application to Reopen Based upon Evidence Already Placed before Board

Appeal from a decision of the Unemployment Insurance Appeal Board, filed October 28, 2013, which denied claimant's application for reopening and reconsideration of a prior decision.

Claimant, a driver who delivered wholesale produce, was discharged by the employer after evidence suggested that he had stolen 40 boxes of tomatoes by delivering them to the wrong address. The employer challenged the initial determination of the Department of Labor that claimant was entitled to unemployment insurance benefits and, following a hearing at which claimant did not appear, the Administrative Law Judge found that claimant had lost his employment due to disqualifying

3. We note that the employer advises that it does not object to claimant's receipt of unemployment benefits and has not opposed the relief requested in the instant appeal.

misconduct and was ineligible for benefits. The Administrative Law Judge refused to reopen the hearing upon claimant's application, and the Unemployment Insurance Appeal Board affirmed. Claimant then moved for the Board to reopen and reconsider its decision, and he now appeals from the denial of that motion.

We affirm. Claimant argues that the Board erred in denying his application for reopening and reconsideration, a decision that "will not be disturbed absent a showing that the Board abused its discretion" (*Matter of Lambrecht [Commissioner of Labor]*, 102 AD3d 1050, 1051 [2013]). Here, claimant premised his motion upon "new evidence" that had, in fact, already been placed before the Board. Suffice it to say, we perceive no abuse of discretion in the Board's refusal to reconsider the matter under these circumstances (*see Matter of Higgins [Hudacs]*, 201 AD2d 810, 810 [1994]).

Stein, J.P., Garry, Lynch, Devine and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

18 In the Matter of the Claim of SARAH E. GAYLORD, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed May 13, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits because her employment was terminated due to misconduct.

Decision affirmed. No opinion.

Peters, P.J., Stein, McCarthy, Egan Jr. and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

19 In the Matter of LEON IRVING, Appellant, v ANDREA EVANS, as Chair of the Division of Parole, Respondent. [992 NYS2d 452]—Appeal from a judgment of the Supreme Court (Elliott III, J.), entered April 4, 2014 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Board of Parole denying petitioner's request for parole release.

Petitioner commenced this CPLR article 78 proceeding challenging an August 2012 determination of the Board of Parole that denied his request for parole release and ordered his next appearance in 24 months. He now appeals from Supreme Court's dismissal of the petition. In August 2014, petitioner reappeared before the Board, at which time he was granted an open release date. As a result, the appeal is moot and must be dismissed (*see Matter of Clark v Evans*, 113 AD3d 973, 973 [2014]; *Matter of Beltran v New York State Bd. of Parole*, 105 AD3d 1224, 1224-1225 [2013]).

Stein, J.P., McCarthy, Rose, Egan Jr. and Devine, JJ., concur. Ordered that the appeal is dismissed, as moot, without costs.

20 In the Matter of the Claim of ASHLEY JACKSON, Appellant. COMMISSIONER OF LABOR, Respondent. [992 NYS2d 382]—

Unemployment Insurance—Benefits—Disqualification—Probationary Teacher's Refusal to Sign Agreement Extending Probationary Period Did Not Constitute Insubordination or Misconduct—Legitimate Reason Not to Sign

Appeal from a decision of the Unemployment Insurance Appeal Board, filed December 6, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits because her employment was terminated due to misconduct.

Claimant was employed as a probationary math teacher for three years. The employer chose not to grant claimant tenure, but did offer to extend her probationary term for one year if she executed an agreement requiring her to “waive[] any rights, claims or causes of action” related to tenure or the extension of her probationary period. Claimant was concerned that those provisions would cause her to waive her rights to argue that the denial of tenure and proffered extension were retaliation for her pursuing a sexual harassment claim. Despite being aware that she could lose her job if she did not sign the agreement, she refused to do so. The employer then informed her that, in accordance with Education Law § 2573 (1), it was not certifying completion of her probationary period, so her employment was terminated. The Unemployment Insurance Appeal Board ruled that claimant’s refusal to sign the “agreement constituted insubordination that rose to the level of misconduct” so as to disqualify her from receiving benefits.

We disagree. Refusing to comply with an employer’s reasonable directive to sign a document can constitute insubordination and, thus, disqualifying misconduct (*see Matter of Lambert [Commissioner of Labor]*, 34 AD3d 948, 948 [2006]; *Matter of Guagliardo [Commissioner of Labor]*, 27 AD3d 866, 867 [2006]; *see also Matter of Vacchio [Astoria Rubbish Removal Co.—Commissioner of Labor]*, 104 AD3d 989, 989 [2013], *lv denied* 21 NY3d 859 [2013]). This is not a situation, however, in which claimant was asked, and refused, to sign a document that was necessary to the operation of the employer’s business (*compare Matter of Lambert [Commissioner of Labor]*, 34 AD3d at 948). Under the Education Law, where a teacher has been on probationary status for three years, the employer must either grant the teacher tenure, terminate the employment or agree to an extension of the probationary term (*see Education Law*

§ 2573 [1]; *Matter of Juul v Board of Educ. of Hempstead School Dist. No. 1, Hempstead*, 76 AD2d 837, 838 [1980], *affd* 55 NY2d 648 [1981]; *see also* Education Law §§ 2509 [1]; 3012 [1]; 3014 [1]). Here, the employer chose not to grant claimant tenure and, instead, offered her an extension of probation. As opposed to refusing to perform a job duty, claimant merely declined to enter into a new contract with the employer on its proffered terms (*see Matter of Borlang [B & M Sports—Commissioner of Labor]*, 254 AD2d 632, 632 [1998]). Although claimant's refusal to sign the extension agreement could possibly be classified as her voluntarily leaving employment without good cause while the employer was offering continuing work, which would be a basis for denying unemployment insurance benefits (*see Matter of Rubscha [Commissioner of Labor]*, 105 AD3d 1217, 1218 [2013]; *Matter of Borlang [B & M Sports—Commissioner of Labor]*, 254 AD2d at 632; *Matter of Hargrove [Hudacs]*, 192 AD2d 948, 948-949 [1993]), the employer did not assert that claimant quit. The employer's principal testified that claimant was terminated by the employer. The Board also did not rely on the ground of voluntarily leaving employment, but on misconduct as evidenced through insubordination, when denying benefits. The Board was factually incorrect because, under the circumstances and as reflected in the employer's termination letter, the employer terminated claimant's employment based on the operation of law (*see* Education Law § 2573 [1], [5]), not based on insubordination. Refusing to renew a contract does not constitute insubordination or misconduct in employment (*compare Matter of Borlang [B & M Sports—Commissioner of Labor]*, 254 AD2d at 632; *Matter of Hargrove [Hudacs]*, 192 AD2d at 948).

Even if the employer would have been warranted in firing claimant for not signing the extension agreement, her refusal to sign would not constitute disqualifying misconduct if she had a legitimate reason to refuse (*see Matter of Waszkiewicz [Sulzer Meco, Inc.—Commissioner of Labor]*, 257 AD2d 882, 883 [1999]). Where an employer fired an employee who refused to sign a conflict of interest and confidentiality agreement, after the employee was advised by an attorney not to sign the agreement as written, this Court found that the employee had not committed disqualifying misconduct (*see id.*). Here, the Board tried to distinguish that case because the record does not reflect whether claimant consulted with anyone before refusing to sign or tried to negotiate the terms of the agreement. Although claimant may not have consulted with an attorney prior to that time, her current attorney—who apparently also represents her in a federal action against the employer related to sexual harassment and retaliation—supports her contention that the agree-

ment would have waived important rights. This implies that he would have advised her not to sign it had she consulted him earlier. Despite not having received this advice from an attorney prior to her refusal, claimant had a legitimate reason not to sign (*compare Matter of Vacchio [Astoria Rubbish Removal Co.—Commissioner of Labor]*, 104 AD3d at 989; *see also Matter of Singleton [Ross]*, 82 AD2d 952, 953 [1981]). While the Board attempts to distinguish the prior case by stating that perhaps claimant here could have negotiated the terms of the agreement, that case notes that an attorney had advised the claimant “not to sign the agreement as written,” and does not mention negotiation (*Matter of Waszkiewicz [Sulzer Meco, Inc.—Commissioner of Labor]*, 257 AD2d at 883). Because claimant did not engage in any act of insubordination and, therefore, did not commit disqualifying misconduct, the Board’s decision cannot stand.

Peters, P.J., Lahtinen, Stein, McCarthy and Garry, JJ., concur. Ordered that the decision is reversed, without costs, and matter remitted to the Unemployment Insurance Appeal Board for further proceedings not inconsistent with this Court’s decision.

(September 25, 2014)

1 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JERRY FERNANDEZ, Appellant. [992 NYS2d 453]—Appeal from a judgment of the County Court of Albany County (Breslin, J.), rendered June 21, 2011, convicting defendant upon his plea of guilty of the crime of enterprise corruption.

Defendant and numerous codefendants were charged in a 195-count indictment with various crimes resulting from their activities in furtherance of a drug trafficking operation. In satisfaction of the charges lodged specifically against him, defendant pleaded guilty to enterprise corruption and waived his right to appeal. In accordance with the plea agreement, he was sentenced as a second felony offender to 6 to 12 years in prison. Defendant appeals.

Appellate counsel seeks to be relieved of her assignment of representing defendant on the ground that there are no nonfrivolous issues to be raised on appeal. Based upon our review of the record and counsel’s brief, we agree. Therefore, the judgment is affirmed and counsel’s request for leave to withdraw is granted (*see People v Cruwys*, 113 AD2d 979 [1985], *lv denied* 67 NY2d 650 [1986]; *see generally People v Stokes*, 95 NY2d 633 [2001]).

Peters, P.J., Stein, Garry, Devine and Clark, JJ., concur. Ordered that the judgment is affirmed, and application to be relieved of assignment granted.

2 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOHN ROACH, Appellant. [992 NYS2d 454]—

Crimes—Sentence—Harsh and Excessive—Violation of Probation Conditions—Consumption of Alcohol and Marihuana

Appeal from a judgment of the County Court of Franklin County (Main Jr., J.), rendered November 13, 2012, which revoked defendant's probation and imposed a sentence of imprisonment.

Following defendant's plea of guilty to the crime of driving while intoxicated as a felony, he was sentenced to five years of probation. Thereafter, defendant pleaded guilty to violating multiple conditions of his probation. County Court revoked defendant's probation and sentenced him to 1 $\frac{1}{3}$ to 4 years in prison. Defendant appeals.

We affirm. Defendant's sole contention on appeal is that his sentence is harsh and excessive. The record demonstrates, however, that, despite multiple opportunities, defendant was unable to abide by the conditions of his probation, admitting to, among other things, consuming alcohol and marihuana during his period of probation and twice removing an alcohol monitoring program bracelet. In view of the foregoing, we find no abuse of discretion or extraordinary circumstances warranting a reduction of the sentence in the interest of justice (*see People v Egloff*, 107 AD3d 1242 [2013]; *People v Brand*, 100 AD3d 1154 [2012]).

Lahtinen, J.P., Stein, McCarthy, Garry and Clark, JJ., concur. Ordered that the judgment is affirmed.

3 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v REGINALD W. NOBLE, Appellant. [992 NYS2d 454]—Appeal from a judgment of the County Court of Clinton County (McGill, J.), rendered November 8, 2012, convicting defendant upon his plea of guilty of the crime of burglary in the third degree.

Defendant pleaded guilty to a superior court information charging him with burglary in the third degree and waived his right to appeal. The plea agreement contemplated that, if defendant failed to enter the drug court program, he could receive a prison sentence of up to 2 $\frac{1}{3}$ to 7 years. Defendant's application for the drug court program was rejected and, accordingly, he was sentenced to a prison term of 2 $\frac{1}{3}$ to 7 years. He now appeals.

Appellate counsel seeks to be relieved of his assignment of

representing defendant, asserting that there are no nonfrivolous issues to be raised on appeal. Based upon our review of the record and counsel's brief, we agree. Thus, the judgment is affirmed and counsel's request for leave to withdraw is granted (*see People v Cruwys*, 113 AD2d 979, 980 [1985], *lv denied* 67 NY2d 650 [1986]; *see generally People v Stokes*, 95 NY2d 633 [2001]).

Lahtinen, J.P., Stein, McCarthy, Garry and Lynch, JJ., concur. Ordered that the judgment is affirmed, and application to be relieved of assignment granted.

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANTHONY M. BURKHART JR., Appellant. [992 NYS2d 455]—

Crimes—Sentence—Harsh and Excessive—Immediate Violation of Probation Conditions

Appeal from a judgment of the Supreme Court (Lawliss, J.), rendered February 4, 2013 in Clinton County, which revoked defendant's probation and imposed a sentence of imprisonment.

Defendant was convicted in October 2012 of criminal possession of a weapon in the third degree and rape in the third degree and was sentenced to lengthy terms of probation for both crimes. He was charged with violating the terms of his probation in November 2012 by failing to notify his probation officer that he had been ordered to move out of his approved residence and that he had been in contact with the police, by using the Internet to view pornography, and by failing to participate in substance abuse treatment. Defendant admitted to the violations, after which Supreme Court revoked his probation and resentenced him to an aggregate prison term of six years, to be followed by postrelease supervision of 10 years (*see* Penal Law § 70.30 [1] [d]). He now appeals, contending solely that the sentence imposed was harsh and excessive.

We disagree and affirm. Defendant's conviction arose from an incident wherein he forced himself upon a woman and then, brandishing a box cutter, prevented her from leaving. Supreme Court noted in resentencing defendant that it had initially been willing to show leniency, notwithstanding the serious nature of his crimes, because of his extremely difficult upbringing, mental health challenges and substance abuse issues. Defendant's immediate disregard of the terms of his probation led Supreme Court to the conclusion, however, that a lengthy prison term was necessary in order to protect the general public. Under these circumstances, we discern neither an abuse of discretion by Supreme Court nor the existence of any extraordinary circumstances that would warrant a reduction of the sentence in

the interest of justice (*see People v Long*, 47 AD3d 1130, 1130 [2008]; *People v Gurrola*, 43 AD3d 1230, 1231 [2007]).

Lahtinen, J.P., McCarthy, Egan Jr., Devine and Clark, JJ., concur. Ordered that the judgment is affirmed.

5 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MICHAEL J. COLSTEN, Appellant. [992 NYS2d 456]—

Crimes—Sentence—Harsh and Excessive—Violation of Probation Conditions

Appeal from a judgment of the County Court of Broome County (Cawley, J.), rendered January 2, 2013, which revoked defendant's probation and imposed a sentence of imprisonment.

In 2011, defendant pleaded guilty to criminal sexual act in the second degree as a result of his engaging in sexual activity with a 13-year-old girl, and he was sentenced to 10 years of probation. Defendant pleaded guilty in 2012 to violating the terms of that probation by, among other things, using drugs, failing to report to his probation officer, failing to find employment and having unsupervised contact with a teenage girl. County Court indicated that it was inclined to resentence defendant to two years in prison to be followed by postrelease supervision of four years and, after considering defendant's arguments for leniency, did so. Defendant now appeals, arguing solely that the resentence was harsh and excessive. Defendant twice violated the terms of his probation in the brief time that he was on probation, and notably continued to have unsupervised contact with children under the age of 18 notwithstanding that such contact was prohibited. Under these circumstances, we perceive neither an abuse of discretion by County Court nor the existence of extraordinary circumstances that would warrant a reduction of the resentence in the interest of justice (*see People v Fitzgerald*, 100 AD3d 1268, 1269 [2012], *lv denied* 20 NY3d 1011 [2013]; *People v Baker*, 92 AD3d 967 [2012]).

Lahtinen, J.P., Stein, McCarthy, Rose and Clark, JJ., concur. Ordered that the judgment is affirmed.

6 In the Matter of RONNIE LAMOUNTAIN, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [992 NYS2d 456]—

Prisons and Prisoners—Discipline of Inmates—Unhygienic Act—Providing False Statement

Prisons and Prisoners—Discipline of Inmates—Fair Hearing

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner, a prison inmate, was charged in misbehavior report with committing an unhygienic act, providing a false statement and violating urinalysis testing procedures after a correction officer observed him urinating into a plastic bottle and then stated, upon the officer's inquiry, that the bottle contained water. Following a tier III disciplinary hearing, he was found guilty of committing an unhygienic act and providing a false statement, and that determination was affirmed administratively. Petitioner thereafter commenced this CPLR article 78 proceeding.

We confirm. The misbehavior report, along with the testimony of the correction officer who authored the report and the photograph of the bottle, provide substantial evidence to support the determination (*see Matter of Byrd v Fischer*, 117 AD3d 1263, 1263 [2014]; *Matter of Kalonji v Fischer*, 102 AD3d 1041, 1042 [2013]). The alleged inconsistencies in the misbehavior report and the contrary testimony of petitioner's witnesses raised credibility issues to be resolved by the Hearing Officer (*see Matter of Howard v Fischer*, 117 AD3d 1253, 1254 [2014], *lv denied* 24 NY3d 903 [2014]; *Matter of Aguirre v Fischer*, 111 AD3d 1219, 1220 [2013]).

Turning to petitioner's procedural contentions, the detailed misbehavior report was sufficient to put him on notice of the charges and enable him to prepare a defense (*see Matter of Adams v Fischer*, 116 AD3d 1269, 1270 [2014]; *Matter of Quezada v Fischer*, 113 AD3d 1004, 1004 [2014]). Further, the record demonstrates that any alleged defects in his prehearing assistance was remedied by the Hearing Officer (*see Matter of Scott v Prack*, 117 AD3d 1300, 1300-1301 [2014]; *Matter of Huggins v Noeth*, 106 AD3d 1351, 1352 [2013]). Finally, the finding of guilt was based upon the evidence presented at the hearing, rather than any alleged hearing officer bias (*see Matter of Williams v Fischer*, 111 AD3d 1001, 1001 [2013]; *Matter of Fero v Prack*, 110 AD3d 1128, 1129 [2013]). Petitioner's remaining contentions are either unpreserved or without merit.

Peters, P.J., Stein, Egan Jr., Lynch and Devine, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

7 In the Matter of DWIGHT SMITH, Petitioner, v DONALD QUINN, as Deputy Superintendent for Security at Great Meadow Correctional Facility, Respondent. [992 NYS2d 457]—

Prisons and Prisoners—Discipline of Inmates—Refusing Direct Order

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Washington

County) to review a determination of the Superintendent of Great Meadow Correctional Facility which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner disregarded several directives to proceed from the prison yard to the visiting room and, accordingly, was charged in an inmate misbehavior report with refusing a direct order and a movement regulation violation. Petitioner was found guilty of the charges following a tier II disciplinary hearing, and the determination was affirmed upon administrative appeal. This CPLR article 78 proceeding ensued.

Although the Attorney General did not submit a complete certified hearing transcript with the answer (*see* CPLR 7804 [e]), he has subsequently done so. Petitioner has since reviewed the complete certified transcript and alleges no prejudice. Accordingly, we will disregard any procedural defect (*see* CPLR 2001; *Matter of Cliff v Kingsley*, 293 AD2d 954, 955 [2002]).

Turning to the merits, the detailed misbehavior report provides substantial evidence to support the determination of guilt (*see Matter of Walker v Bezio*, 96 AD3d 1268 [2012]; *Matter of Joseph v LaClair*, 89 AD3d 1298 [2011], *lv denied* 18 NY3d 809 [2012]). The Hearing Officer was free to, and plainly did, reject the testimony of petitioner and an inmate witness that the loudspeakers in the yard were not functioning and that petitioner could not have heard the orders as a result (*see Matter of Walker v Bezio*, 96 AD3d at 1268). Any error in the denial of petitioner's request for work orders related to the loudspeakers was harmless in light of the documents provided to us by petitioner himself reflecting the lack of any such orders (*see Matter of Proctor v Fischer*, 107 AD3d 1267, 1268 [2013], *lv denied* 22 NY3d 853 [2013]; *Matter of Carter v Goord*, 266 AD2d 623, 624 [1999]). Petitioner's remaining contentions have been considered and determined to be without merit.

Peters, P.J., Lahtinen, Stein, Garry and Rose, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

8 In the Matter of THOMAS FIELDS, Petitioner, v ALBERT PRACK, as Director of Special Housing and Inmate Disciplinary Programs, Respondent. [992 NYS2d 458]—

Prisons and Prisoners—Discipline of Inmates—Challenge to Drug Possession Charge Precluded by Guilty Plea

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of the Commissioner of Corrections and Community Supervision finding petitioner guilty of violating certain prison disciplinary rules.

Petitioner became unresponsive in his cell and, when officials responded, was found to be holding packages containing an unknown substance. The substance tested positive for heroin. Petitioner was accordingly charged in a misbehavior report with possessing a controlled substance, being under the influence of an intoxicant and smuggling. At the tier III disciplinary hearing, petitioner pleaded guilty to possessing a controlled substance, but argued that the testing procedures employed were inadequate to identify the substance as heroin, and pleaded not guilty to the remaining charges. Petitioner was found guilty of all charges and the determination was affirmed in relevant part upon administrative appeal. This CPLR article 78 proceeding ensued.

Respondent concedes that substantial evidence in the record does not support the determination of guilt as to the charges of being under the influence of an intoxicant and smuggling. We accordingly annul that part of the determination, although remittal is not required given that petitioner has already served the penalty imposed and no loss of good time was involved (see *Matter of Brown v New York State Dept. of Corrections & Community Supervision*, 119 AD3d 1205, 1206 [2014]; *Matter of Flournoy v Bezio*, 84 AD3d 1636, 1637 [2011]). In light of the foregoing, we need not address petitioner's challenge to the adequacy of the misbehavior report with regard to those charges.

Petitioner is precluded from challenging the sufficiency of the evidence supporting the determination with regard to the drug possession charge because he pleaded guilty to that charge (see *Matter of Tingling v Fischer*, 108 AD3d 989, 990 [2013]; *Matter of Ayrhart v Fischer*, 94 AD3d 1310, 1311 [2012]). In any case, the misbehavior report, positive NIK test result for heroin and hearing testimony support the determination of guilt, and we decline petitioner's invitation to revisit the well-settled proposition that a second test to confirm the positive test result was not required (see *Matter of Staine v Fischer*, 111 AD3d 999, 1000 [2013]; *Matter of Fero v Prack*, 108 AD3d 1004, 1005 [2013]).

Stein, J.P., Egan Jr., Lynch, Devine and Clark, JJ., concur. Adjudged that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of being under the influence of an intoxicant and smuggling; petition granted to that extent and the Commissioner of Corrections and Community Supervision is directed to expunge all references to those charges from petitioner's institutional record; and, as so modified, confirmed.

9 In the Matter of ECHO WESTLEY DIXON, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community

Supervision, Respondent. [992 NYS2d 459]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating a prison disciplinary rule.

Petitioner, a prison inmate, commenced this proceeding to challenge a disciplinary determination finding him guilty of drug use. The Attorney General has informed this Court that the determination at issue has been administratively reversed, all references thereto expunged from petitioner's institutional record and the mandatory surcharge refunded to his inmate account. Contrary to petitioner's contention, he has received all the relief to which he is entitled and, thus, the petition is dismissed as moot (*see Matter of Benitez v Fischer*, 118 AD3d 1237, 1237 [2014]; *Matter of Hodges v Jones*, 195 AD2d 647, 648 [1993]).

Peters, P.J., Garry, Rose, Egan Jr. and Devine, JJ., concur. Adjudged that the petition is dismissed, as moot, without costs.

10 In the Matter of the Claim of THOMAS J. DUNO, Respondent. ANTHONY STONE INVESTIGATIVE & SECURITY SERVICES, INC., Appellant; COMMISSIONER OF LABOR, Respondent. [992 NYS2d 385]—

Unemployment Insurance—Employee or Independent Contractor—Liability for Additional Contributions Based upon Remuneration Paid to Security Guards—Employer's Control over Claimant's Work

Appeal from two decisions of the Unemployment Insurance Appeal Board, filed April 3, 2013, which ruled that Anthony Stone Investigative & Security Services, Inc. is liable for additional unemployment insurance contributions on remuneration paid to claimant and others similarly situated.

Claimant worked as a security guard for Anthony Stone Investigative & Security Services, Inc. (hereinafter ASISS) for approximately 10 months, after which he applied for unemployment insurance benefits. Following a hearing, an Administrative Law Judge determined claimant to be an employee of ASISS and found it liable for additional unemployment insurance contributions on remuneration paid to claimant and other similarly situated security guards. The Unemployment Insurance Appeal Board affirmed that determination and ASISS now appeals.

We affirm. Whether there exists an employment relationship is a factual issue for resolution by the Board and its decision will not be disturbed when supported by substantial evidence (*see Matter of Cohen [Just Energy Mktg. Corp.—Commissioner*

of Labor], 117 AD3d 1112, 1112 [2014], *lv dismissed* 24 NY3d 928 [2014]; *Matter of Crahan [Progress Rail Servs. Corp.—Commissioner of Labor]*, 116 AD3d 1277, 1277-1278 [2014]). In making such a determination, the Board considers whether the putative employer exercised control over the results produced or the means used to achieve those results, with the means being the more important consideration (see *Matter of McCollum [Fire Is. Union Free Sch. Dist.—Commissioner of Labor]*, 118 AD3d 1203, 1204 [2014]; *Matter of Joyce [Coface N. Am. Ins. Co.—Commissioner of Labor]*, 116 AD3d 1132, 1134 [2014]). Here, the testimony of both claimant and Anthony Stone, the principal of ASISS, established that claimant completed an application for employment and was hired at a rate of pay established exclusively by Stone. ASISS assigned claimant to a specific location, established his hours of work and covered him under its workers' compensation insurance. Furthermore, it provided him with an employee code of conduct and required him to call in to an automated system at the beginning and end of each shift, to sign a time sheet and to submit incident reports. The client was not informed that claimant was an independent contractor; claimant was required to request time off two weeks in advance and ASISS would find a replacement if claimant was unavailable for his shift. Claimant was required to adhere to the company dress code by wearing a dark suit and tie, as well as a company lapel pin, while on duty. Furthermore, any complaints about claimant's performance would be handled by ASISS and claimant would receive his pay even if the client did not pay ASISS. Accordingly, while there was other evidence in the record suggestive of an independent contractor relationship, we find that substantial evidence supports the Board's determination that claimant was an employee (see *Matter of Anwer [Exclusive Fragrance & Cosmetics, Inc.—Commissioner of Labor]*, 114 AD3d 1114, 1115 [2014]; *Matter of Lamar [Eden Tech., Inc.—Commissioner of Labor]*, 109 AD3d 1038, 1039 [2013]).

McCarthy, J.P., Garry, Rose, Egan Jr. and Lynch, JJ., concur. Ordered that the decisions are affirmed, without costs.

11 In the Matter of the Claim of MARIE C. LAHENS, Appellant. COMMISSIONER OF LABOR, Respondent. [992 NYS2d 460]—

Unemployment Insurance—Benefits—Disqualification—Voluntarily Leaving Employment without Good Cause—Relocating to Care for Ill Spouse—No Proof of Compelling Medical Necessity for Move

Appeal from a decision of the Unemployment Insurance Appeal Board, filed September 12, 2012, which ruled that claimant was disqualified from receiving unemployment insurance

benefits because she voluntarily left her employment without good cause.

Claimant worked as a certified nurse's aide for the employer, a nursing home facility. After having previously taken a 3¹/₂-month leave of absence due to an injury, claimant was granted two weeks of leave in March 2009 to care for her husband, who had end-stage renal disease. The letter granting claimant's request for leave indicated that if a further extension of leave was necessary, claimant would need to submit medical documentation along with her request. The employer's vice-president of human resources testified that the employer permitted leaves of absence of up to two years and that if claimant had requested an extension of her leave of absence, it would have been granted. In addition, the employer offered claimant the opportunity to work part time on weekends. Nevertheless, claimant did not request a leave of absence; rather, she resigned and relocated to Florida five months later to join her husband, who had moved to Florida in 2008 with the intention of retiring there and because the wait for a kidney transplant was shorter in duration there. He received a kidney transplant six months after claimant resigned. The Unemployment Insurance Appeal Board ultimately determined that claimant had voluntarily separated from her employment without good cause, and she now appeals.

We affirm. "Relocating to retire with and care for one's spouse does not constitute good cause for leaving employment absent proof of a compelling medical necessity for the move" (*Matter of Bastien [Commissioner of Labor]*, 87 AD3d 784, 785 [2011] [citations omitted]; see *Matter of Tetlow [Commissioner of Labor]*, 47 AD3d 1042, 1042-1043 [2008]). Claimant provided no medical documentation indicating that she had received medical advice to join her husband in Florida (see *Matter of Moshier [Commissioner of Labor]*, 79 AD3d 1557, 1558 [2010]; *Matter of Tetlow [Commissioner of Labor]*, 47 AD3d at 1043), nor did she explain the five-month delay in relocating to Florida after she resigned. In any event, claimant's husband received a kidney transplant six months after she resigned, and the employer indicated both that it would have granted her an additional leave of absence and that continuing work was available to her. Under these circumstances, substantial evidence supports the Board's determination that claimant voluntarily left her employment without good cause.

Peters, P.J., Lahtinen, Rose, Egan Jr. and Devine, J.J., concur. Ordered that the decision is affirmed, without costs.

12 In the *Matter of TIMOTHY BUSH*, Petitioner, v *BRIAN FISCHER*, as Commissioner of Corrections and Community Supervision, Respondent. [992 NYS2d 461]—

Prisons and Prisoners—Discipline of Inmates—Violation of Sex Offender Counseling and Treatment Program Agreement—Possession of Pornographic Material

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner, a prison inmate who was a participant in the sex offender counseling and treatment program, signed an agreement to refrain from possessing pornographic materials. After a search of petitioner's cube revealed drawings depicting cartoon characters engaging in various sexual acts, he was charged with refusing to obey a direct order and possession of an article in an area where possession is prohibited. Following a tier III disciplinary hearing, he was found guilty of both charges and that determination was upheld on administrative appeal. Petitioner thereafter commenced this CPLR article 78 proceeding.

Initially, we agree with petitioner that substantial evidence does not support that part of the determination that found him guilty of refusing to obey a direct order (*see Matter of Newman v Department of Corr. Servs.*, 110 AD3d 1309, 1310 [2013]; *Matter of Sierra v Fischer*, 82 AD3d 1436, 1437 [2011]). As such, that part of the determination is annulled. However, inasmuch as petitioner has served the penalty imposed and no loss of good time was recommended, the matter need not be remitted for a redetermination of the penalty (*see Matter of Rivera v Fischer*, 110 AD3d 1277, 1278 [2013]; *Matter of Pulecio v Fischer*, 109 AD3d 1068, 1069 [2013], *lv denied* 22 NY3d 858 [2014]).

Turning to the remaining charge, the detailed misbehavior report and petitioner's admissions that he had agreed not to possess pornographic materials and that the drawings were in his possession provide substantial evidence to support the determination of guilt (*see Matter of Newman v Department of Corr. Servs.*, 110 AD3d at 1309-1310; *Matter of Sierra v Fischer*, 82 AD3d at 1437). Our review of the record reveals that the finding of guilt was based upon the evidence in the record rather than any alleged hearing officer bias (*see Matter of Fero v Prack*, 110 AD3d 1128, 1129 [2013]; *Matter of Abrams v Fischer*, 109 AD3d 1030, 1031 [2013]). His remaining claims have been reviewed and determined to be unpreserved or without merit.

Stein, J.P., McCarthy, Rose, Egan Jr. and Lynch, JJ., concur. Adjudged that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of refusing to obey a direct order; petition granted to that extent and re-

spondent is directed to expunge all references to this charge from petitioner's institutional record; and, as so modified, confirmed.

13 In the Matter of the Claim of KAREN A. GIBBONS, Respondent. THE ANIMATION PROJECT, Appellant; COMMISSIONER OF LABOR, Respondent. [992 NYS2d 462]—

Unemployment Insurance—Benefits—Offer of Employment Following Layoff—Claimant Not Given Bona Fide Offer of Suitable Employment

Appeal from a decision of the Unemployment Insurance Appeal Board, filed April 1, 2013, which ruled that claimant was entitled to receive unemployment insurance benefits.

From September 2010 until December 2011, claimant worked as an art therapist for an organization that provides therapeutic and skills-based services to at-risk youth. She worked approximately 40 hours per week and was paid an annual salary of \$40,000 with benefits. She was laid off and began collecting unemployment insurance benefits. Shortly after her layoff, the employer sent claimant an email inquiring about her interest in working on an upcoming project, the details of which had not been finalized. The employer indicated that the project would likely entail working with three groups, for roughly six to eight hours per week. It would pay \$50 per hour without benefits, which was less than her customary \$100 hourly rate, and would run for 12 weeks, ending on March 31, 2012. Claimant responded that she was not interested in the project. Thereafter, the Department of Labor issued an initial determination finding that claimant was not entitled to receive benefits because she refused an offer of suitable employment without good cause, and imposed a recoverable overpayment and forfeiture penalty. Following a hearing, the Administrative Law Judge sustained the determination. The Unemployment Insurance Appeal Board, however, reversed this decision and concluded that claimant was eligible to receive benefits. This appeal by the employer ensued.

Initially, it is for the Board to decide whether a claimant has refused an offer of suitable employment for which he or she is reasonably fitted by training and experience (*see* Labor Law § 593 [2]), and its decision in this regard will be upheld if supported by substantial evidence (*see Matter of McKeon [Community Health & Home Care—Commissioner of Labor]*, 306 AD2d 792, 792 [2003]; *Matter of Gibbs [Commissioner of Labor]*, 273 AD2d 672, 672 [2000]). Here, evidence was presented that the details of the project were not finally established at the time the employer made its inquiry, and the time frame and required

hours were also not definitive (*compare Matter of Turner [Commissioner of Labor]*, 6 AD3d 915, 916 [2004]). In view of this, substantial evidence supports the Board's finding that claimant was not given a bona fide offer of suitable employment which she refused. Moreover, even if we were to conclude that she was given a bona fide offer of employment, the terms were substantially less favorable than the terms of her employment prior to her lay off and, consequently, she was not compelled to accept it (*see Matter of Knoblauch [Mark Custom Recording—Sweeney]*, 239 AD2d 761, 763 [1997]). Accordingly, we find no reason to disturb the Board's decision.

Peters, P.J., Lahtinen, McCarthy, Devine and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

14 In the Matter of the Claim of ABE SHABTAI, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed October 18, 2013, which charged claimant with a recoverable overpayment of unemployment insurance benefits.

Decision affirmed. No opinion.

Peters, P.J., Lahtinen, Lynch, Devine and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

15 In the Matter of DAVID A. BROWN, Petitioner, v BRIAN FISCHER, as Commissioner of Corrections and Community Supervision, Respondent. [992 NYS2d 463]—

Prisons and Prisoners—Discipline of Inmates—Making False Statements—Harassment

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner commenced this CPLR article 78 proceeding challenging a tier III disciplinary determination finding him guilty of harassment and making false statements. The charges stemmed from an investigation into two grievances, which revealed that petitioner, who submitted a grievance against a correction officer, also wrote a second grievance against that same officer on behalf of another inmate—apparently in retaliation for that correction officer issuing a misbehavior report against petitioner. The misbehavior report, supporting documents and hearing testimony provide substantial evidence to support the determination of guilt (*see Matter of Logan v Fischer*, 109 AD3d 1043, 1043 [2013], *lv denied* 22 NY3d 856 [2013]; *Matter of Kalonji v Fischer*, 102 AD3d 1041, 1042 [2013]). To the extent

that petitioner alleges bias on the part of the Hearing Officer, the record does not support this contention, nor does it indicate that the determination flowed from any alleged bias (*see Matter of Hines v Prack*, 109 AD3d 1031, 1032 [2013]). Furthermore, any challenge to procedural irregularities in connection with any loss of good time is rendered moot by petitioner's conditional release (*see Matter of Walker v Senkowski*, 260 AD2d 830, 831 [1999]; *see also Matter of Demarta v Prack*, 85 AD3d 1475, 1476 [2011]). Any additional arguments that petitioner attempts to advance on this appeal fail to comply with the mandates set forth in CPLR 5528 and, therefore, escape any meaningful appellate review (*see Matter of Rizzuto v Goord*, 35 AD3d 1075, 1076 [2006]).

Lahtinen, J.P., Garry, Rose, Egan Jr. and Lynch, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

16 In the Matter of SHAUN THOMPSON, Appellant, v NEW YORK STATE BOARD OF PAROLE, Respondent. [992 NYS2d 464]—

Parole—Denial—Proper Consideration of Relevant Statutory Factors and Severity of Crimes

Appeal from a judgment of the Supreme Court (McNamara, J.), entered December 20, 2013 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of respondent denying petitioner's request for parole release.

Petitioner is currently serving an aggregate term of 15 years to life in prison upon his conviction of the crimes of murder in the second degree and attempted murder in the second degree. In February 2013, he made his second appearance before respondent seeking to be released to parole supervision. Following a hearing, respondent denied his request and ordered him held for an additional 24 months. Petitioner filed an administrative appeal and, when it was not decided within four months, he commenced this CPLR article 78 proceeding. Following service of respondent's answer, Supreme Court dismissed the petition and this appeal by petitioner ensued.

We affirm. As Supreme Court recognized, and contrary to petitioner's argument, respondent considered the relevant statutory factors in denying parole release (*see* Executive Law §§ 259-c [4]; 259-i [2] [c] [A]). During the interview, respondent reviewed petitioner's disciplinary record, which has been without incident since 2003, his program accomplishments, including obtaining a GED, community support available through his family, the available sentencing minutes from the

attempted murder conviction, and the COMPAS Risk and Needs Assessment instrument. The Board also considered the fact that petitioner was on parole supervision at the time that he committed the offenses for which he stands incarcerated—each involving the use of a handgun. Respondent was required to consider petitioner’s prior criminal history and the severity of these convictions (*see Matter of Williams v New York State Div. of Parole*, 114 AD3d 992, 992 [2014]).

Moreover, in light of our recent decision in *Matter of Montane v Evans* (116 AD3d 197 [2014], *lv granted* 23 NY3d 903 [2014]), we find no merit to petitioner’s claim that respondent failed to comply with recent amendments to Executive Law § 259-c (4) by not establishing written procedures for evaluating parole requests. Furthermore, we do not find that respondent’s imposition of a 24-month hold was excessive under the circumstances presented (*see Matter of Shark v New York State Div. of Parole Chair*, 110 AD3d 1134, 1135 [2013], *lv dismissed* 23 NY3d 933 [2014]). Accordingly, given that respondent’s decision does not exhibit “ ‘irrationality bordering on impropriety’ ” (*Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000], quoting *Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77 [1980]), we find no reason to disturb it.

Peters, P.J., Lahtinen, Lynch, Devine and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

17 In the Matter of the Claim of GIOVANNI D. GIACALONE, Appellant. COMMISSIONER OF LABOR, Respondent. [992 NYS2d 465]—

**Unemployment Insurance—Benefits—Disqualification—Voluntarily Leaving Employment without Good Cause—Resignation in Anticipation of Discharge
Unemployment Insurance—Benefits—Recovery of Overpayments—Willful Misrepresentation**

Appeal from a decision of the Unemployment Insurance Appeal Board, filed April 22, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits because he voluntarily left his employment without good cause.

Claimant worked as a pet sales associate for the employer for a short time during 2010, and resigned after the employer told him that he was not selling enough puppies. Upon filing for unemployment benefits, claimant neglected to indicate that he had worked for the employer and, thereafter, he received regular unemployment insurance benefits, emergency unemployment compensation benefits (*see* Pub L 110-252, tit IV, § 4001 *et seq.*, 122 US Stat 2323) and federal additional compensation benefits (*see* 26 USC § 3304). The Unemployment Insurance

Appeal Board ultimately determined that claimant voluntarily separated from employment without good cause, made willful misrepresentations to obtain benefits and was disqualified from receiving benefits. The Board further charged claimant with a recoverable overpayment of \$6,630. Claimant appeals, and we affirm.

Substantial evidence supports the determination that claimant left his employment without good cause inasmuch as quitting a job in anticipation of discharge does not constitute good cause for resignation, and continuing work was available to claimant (see e.g. *Matter of Jackson [Tect Utica —Commissioner of Labor]*, 107 AD3d 1183 [2013]). “[W]hether a claimant ha[s] made a willful misrepresentation to obtain benefits is a factual issue for the Board to resolve and [such decision] will be upheld if supported by substantial evidence” (*Matter of Smith [Commissioner of Labor]*, 107 AD3d 1287, 1288 [2013] [internal quotation marks and citation omitted]). Although claimant asserts that he was confused and made an honest mistake in not listing the employer when certifying for benefits, “a willful misrepresentation may be found even where the false statement was not made intentionally or was the result of confusion” (*Matter of Crist [Commissioner of Labor]*, 113 AD3d 1016, 1017 [2014]). In any event, as the Board determined, claimant’s assertion that he could not remember the basic facts surrounding his employment when he certified for benefits approximately one month after quitting lacks credibility, and substantial evidence supports the Board’s finding that claimant made willful misrepresentations (see *id.* at 1017-1018; *Matter of Smith [Commissioner of Labor]*, 107 AD3d at 1288).

Claimant’s remaining arguments have been considered and are either unpreserved, contrary to the record or otherwise lacking in merit.

Lahtinen, J.P., Stein, McCarthy, Garry and Devine, JJ., concur. Ordered that the decision is affirmed, without costs.

18 In the Matter of the Claim of KAI NICHOLS, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed May 13, 2013, which, among other things, ruled that claimant was disqualified from receiving unemployment insurance benefits because her employment was terminated due to misconduct.

Decision affirmed. No opinion.

Peters, P.J., McCarthy, Garry, Egan Jr. and Lynch, JJ., concur. Ordered that the decision is affirmed, without costs.

19 In the Matter of ALEXANDER WILLIAMS, Petitioner, v DOCCS COMMISSIONER, J. ANNUCCI, et al., Respondents. [993 NYS2d 523]—Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent Commissioner of the Department of Corrections and Community Supervision which found petitioner guilty of violating certain prison disciplinary rules.

Determination confirmed. No opinion.

Peters, P.J., Stein, McCarthy, Lynch and Clark, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.

20 In the Matter of the Claim of ADINA C. WISE, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed July 9, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits because she voluntarily left her employment without good cause.

Decision affirmed. No opinion.

Peters, P.J., Lahtinen, Stein, McCarthy and Rose, JJ., concur. Ordered that the decision is affirmed, without costs.

21 In the Matter of DAVID MERCADO, Appellant, v ANDREA EVANS, as Chair of the Division of Parole, Respondent. [992 NYS2d 466]—

Parole—Denial—Proper Consideration of Relevant Statutory Factors and Seriousness of Crime

Appeal from a judgment of the Supreme Court (LaBuda, J.), entered February 20, 2014 in Sullivan County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review a determination of the Board of Parole denying petitioner's request for parole release.

Petitioner is serving a sentence of 22 years to life upon his conviction of murder in the second degree. The conviction arose from a March 1991 incident in which petitioner, who had consumed a significant amount of alcohol and cocaine, killed a taxi driver by shooting him in the back, neck and shoulders as the taxi drove away. In December 2012, petitioner made his initial appearance before the Board of Parole, which denied his request for release and ordered him held for an additional 24 months. After he did not receive a timely response to his administrative appeal, petitioner commenced this CPLR article 78 proceeding. Supreme Court dismissed the petition, prompting this appeal.

We affirm. Where the Board has complied with the statutes

governing parole procedures, “[j]udicial intervention is warranted only when there is a showing of irrationality bordering on impropriety” (*Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000] [internal quotation marks and citations omitted]; accord *Matter of Hamilton v New York State Div. of Parole*, 119 AD3d 1268, 1269 [2014]). Contrary to petitioner’s argument, the Board considered the relevant statutory factors, including petitioner’s criminal history and the nature of the crime, vocational and educational accomplishments, prison disciplinary record, COMPAS Risk and Needs Assessment instrument, and his postrelease plans (see Executive Law § 259-i [2] [c] [A]; *Matter of Partee v Evans*, 117 AD3d 1258, 1259 [2014], *lv denied* 24 NY3d 901 [2014]; *Matter of Lashway v Evans*, 110 AD3d 1417, 1418 [2013]). The “Board need not expressly discuss each of these guidelines in its determination” (*Matter of King v New York State Div. of Parole*, 83 NY2d 788, 791 [1994]), and it is entitled to place a greater emphasis on the serious nature of the crime (see *Matter of Hamilton v New York State Div. of Parole*, 119 AD3d at 1271; *Matter of Partee v Evans*, 117 AD3d at 1259; *Matter of Lashway v Evans*, 110 AD3d at 1418), as it did here. Although the Board’s decision contained a factual misstatement regarding whether the fatal shot struck petitioner’s victim in the head rather than the neck, there is no suggestion that its determination was affected by the discrepancy to any meaningful extent (see *Matter of Singh v Evans*, 107 AD3d 1274, 1275 [2013]). Inasmuch as the Board’s decision does not evince irrationality bordering on impropriety, it must be affirmed.

Petitioner’s remaining arguments have been considered and found to be lacking in merit.

Garry, J.P., Egan Jr., Lynch, Devine and Clark, JJ., concur. Ordered that the judgment is affirmed, without costs.

22 In the Matter of the Claim of LAUREN P. BRIGGS, Appellant. COMMISSIONER OF LABOR, Respondent. [993 NYS2d 522]—Appeal from a decision of the Unemployment Insurance Appeal Board, filed July 9, 2013, which ruled that claimant was disqualified from receiving unemployment insurance benefits because she voluntarily left her employment without good cause.

Decision affirmed. No opinion.

Lahtinen, J.P., Garry, Rose, Egan Jr. and Clark, JJ., concur. Ordered that the decision is affirmed, without costs.

23 In the Matter of EMERSON V. BRIGGS III, a Suspended Attorney, Respondent. COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner. [992 NYS2d 467]—

Conviction

Per Curiam. Respondent was admitted to practice by this Court in 1995. He was suspended from the practice of law, effective March 3, 2014, due to his failure to comply with the attorney registration requirements (*see Matter of Attorneys in Violation of Judiciary Law § 468-a*, 113 AD3d 1020, 1022 [2014]). Respondent currently resides in Maryland.

By subsequent decision dated March 27, 2014, this Court suspended respondent from the practice of law until such time as a final disciplinary order was entered (*Matter of Briggs*, 115 AD3d 1149 [2014]). This order was based upon respondent's 2008 conviction in the United States District Court for the District of Columbia of one count of receipt of child pornography in violation of 18 USC § 2252A (a) (2) (A), a federal felony, which this Court determined to be a serious crime (*see Judiciary Law § 90 [4] [d]*). We further directed in this order that respondent show cause why a final order of suspension, censure or removal from office should not be made pursuant to Judiciary Law § 90 (4) (g). Respondent submitted a response to the order to show cause and, at his request, we have heard respondent in mitigation.

Upon consideration of the facts and circumstances, especially the nature of respondent's conviction, his failure to file within 30 days following that conviction a copy of the record thereof with this Court (*see Judiciary Law § 90 [4] [c]*) and the underlying misconduct, we conclude that respondent should be disbarred (*see e.g. Matter of Burks*, 53 AD3d 774 [2008]).

Stein, J.P., McCarthy, Garry, Rose and Lynch, JJ., concur. Ordered that respondent is disbarred and his name is stricken from the roll of attorneys and counselors-at-law of the State of New York, effective immediately; and it is further ordered that respondent is commanded to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another; and respondent is hereby forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto; and it is further ordered that respondent shall comply with the provisions of this Court's rules regulating the conduct of disbarred attorneys (*see 22 NYCRR 806.9*).

FOURTH DEPARTMENT, SEPTEMBER, 2014

(September 26, 2014)

1 PEGGY ANN ROSE, as Executrix of JOYCE PRZYTULA, Deceased, et al., Respondents, v BROOKS MEMORIAL HOSPITAL et al., Respondents, and REENA BOSE, M.D., et al., Appellants. [992 NYS2d 651]—Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered March 22, 2013. The order, insofar as appealed from, denied in part the motion of defendants Reena Bose, M.D., and Razvan Balotescu, M.D., to preclude certain testimony of plaintiffs' expert and granted the motion of plaintiffs to direct Marylou K. Roshia to accept service of subpoenas for Reena Bose, M.D. and Razvan Balotescu, M.D., out-of-state residents.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 14, 2014, and filed in the Chautauqua County Clerk's Office on February 12, 2014,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Smith, J.P., Fahey, Carni, Valentino and Whalen, JJ.

2 JUSTIN BROWN, Appellant, v VALERIE ALEXANDER, Also Known as VALERIE J. LAYMON, Appellant. [993 NYS2d 522]—Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered March 4, 2013. The order denied in part plaintiff's motion seeking, inter alia, summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 24 and March 31, 2014, and filed in the Oneida County Clerk's Office on April 3, 2014,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ.

3 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JEREMY L. FINCH, Appellant. [992 NYS2d 651]—

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal—Failure to Make Minimal Perfunctory Inquiry

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered June 10, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and criminal trespass in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal

Law § 120.05 [3]) and criminal trespass in the second degree (§ 140.15 [1]), defendant contends that his waiver of the right to appeal is not valid and that his sentence is unduly harsh and severe. Although we conclude that defendant's waiver of the right to appeal is invalid inasmuch as the minimal perfunctory inquiry made by County Court was insufficient to "establish that [he] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]), we nevertheless conclude that the sentence is not unduly harsh or severe. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

4 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
JOHNNIE COLOME-RODRIGUEZ, Appellant. [992 NYS2d 652]—

**Crimes—Sentence—Denial of Motion to Resentence Absconding Re-Offending
Drug Offender**

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered February 28, 2011. The order denied the motion of defendant for resentencing pursuant to CPL 440.46.

It is hereby ordered that the order so appealed from is unanimously affirmed.

Memorandum: On appeal from an order denying his motion for resentencing pursuant to the 2009 Drug Law Reform Act (CPL 440.46), defendant contends that County Court failed to apprehend that it had discretion to resentence him. That contention is belied by the record, which establishes that the People conceded that defendant was eligible for resentencing but the court concluded that "substantial justice" required denial of defendant's motion.

Contrary to defendant's further contention, "[t]he court properly exercised its discretion in determining that substantial justice dictated that defendant's resentencing application should be denied" (*People v Perez*, 110 AD3d 528, 528 [2013], *lv denied* 22 NY3d 1043 [2013]; *see People v Sosa*, 18 NY3d 436, 443 [2012]). In denying the application, the court considered the facts that defendant absconded prior to trial in this case and was sentenced in absentia, that he remained at large for 17 years, and that he possessed a large quantity of drugs that was inconsistent with street-level sales (*see Perez*, 110 AD3d at 528). Defendant did not contest the information in the presentence report that he had been arrested on new drug charges in New York City while he was at large, nor did he object to the court's statement that he possessed a handgun at the time of the initial arrest on this matter. Thus, inasmuch "[a]s defendant failed to object at the time of sentencing, the claim that the court

considered improper factors in imposing the sentence is unpreserved for [our] review” (*People v Rosado*, 300 AD2d 838, 840-841 [2002], *lv denied* 99 NY2d 619 [2003]; see *People v Harrison*, 82 NY2d 693, 694 [1993]; *People v Mathieu*, 83 AD3d 735, 737 [2011], *lv denied* 17 NY3d 798 [2011]), and we decline to exercise our power to review that claim as a matter of discretion in the interest of justice. The information that defendant submitted on appeal regarding that claim is de hors the record. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

5 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHERRELL WILLIAMS, Appellant. (Appeal No. 1.) [993 NYS2d 196]—

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal—Voluntary, Intelligent Written Waiver of Right to Appeal
Crimes—Right to Speedy Trial—Due Process Not Denied by Delay in Executing Search Warrant—Ongoing Investigation

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 15, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of forgery devices.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of forgery devices (Penal Law § 170.40 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of identity theft in the first degree (§ 190.80 [1]). Both pleas were entered during one plea proceeding, during which defendant waived his right to appeal. We reject defendant’s challenge in both appeals to the validity of the waiver of the right to appeal (see *People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Callahan*, 80 NY2d 273, 283 [1992]). “The written waiver of the right to appeal, together with defendant’s responses during the plea proceeding, establish that the waiver was voluntarily, knowingly, and intelligently entered” (*People v Griner*, 50 AD3d 1557, 1558 [2008], *lv denied* 11 NY3d 737 [2008]; see *People v Ramos*, 7 NY3d 737, 738 [2006]). The valid waiver of the right to appeal encompasses defendant’s contention in appeal No. 1 with respect to County Court’s suppression ruling (see *People v Kemp*, 94 NY2d 831, 833 [1999]).

Defendant’s constitutional speedy trial claim raised with respect to both appeals survives the plea and the valid waiver of the right to appeal (see *People v Chinn*, 104 AD3d 1167, 1169 [2013], *lv denied* 21 NY3d 1014 [2013]; see also *Lopez*, 6 NY3d at 255), but it is unpreserved for our review with respect to ap-

peal No. 2 because defendant never moved to dismiss the superior court information (*see Chinn*, 104 AD3d at 1169; *People v Kwiatkowski*, 263 AD2d 552, 552 [1999], *lv denied* 93 NY2d 1021 [1999]). We decline to exercise our power to review the contention with respect to appeal No. 2 as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). With respect to appeal No. 1, defendant contends that the 14-month delay from the time the search warrant was executed until he was indicted deprived him of his right to due process. In determining whether there has been an unconstitutional delay in commencing a prosecution, we must examine “(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay” (*People v Taranovich*, 37 NY2d 442, 445 [1975]; *see People v Pulvino*, 115 AD3d 1220, 1222 [2014], *lv denied* 23 NY3d 1024 [2014]). Upon considering the *Taranovich* factors, we conclude that the delay did not deprive defendant of his right to due process (*see People v White*, 108 AD3d 1236, 1237 [2013], *lv denied* 22 NY3d 1044 [2013]). We note in particular that the indictment encompassed charges that occurred several months after the warrant was executed. In addition, the People established that the investigation was ongoing during the relevant time period, and it included attempting to locate a primary witness who disappeared after being arrested and released on an appearance ticket, and conducting photo array identification procedures and forensic analysis of the seized computer. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

6 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
GLENN T. ENDERLIN, Appellant. [992 NYS2d 650]—

Crimes—Sentence—Illegal Sentence

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered July 1, 2010. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree and endangering the welfare of a child (two counts).

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by vacating the sentences imposed on the two counts of endangering the welfare of a child and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing on those counts.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree

(Penal Law § 130.65 [3]) and two counts of endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in refusing to permit defendant to withdraw the plea (*see generally People v Watkins*, 107 AD3d 1416, 1416-1417 [2013], *lv denied* 22 NY3d 959 [2013]; *People v Tracy*, 77 AD3d 1402, 1403 [2010], *lv denied* 16 NY3d 746 [2011]). We note, however, that the sentencing minutes reflect that the court sentenced defendant to time served plus a 10-year term of probation on each count of endangering the welfare of a child, and that term of probation is illegal (*see* Penal Law § 65.00 [3] [b] [i]; *see also* § 65.00 [3]). Defendant's failure to preserve that issue for our review or, indeed, to raise it on appeal "is of no moment, inasmuch as we cannot permit an illegal sentence to stand" (*People v Terry*, 90 AD3d 1571, 1572 [2011]; *see People v Moore* [appeal No. 1], 78 AD3d 1658, 1658 [2010], *lv denied* 17 NY3d 798 [2011]). We therefore modify the judgment by vacating the sentences imposed on the counts of endangering the welfare of a child, and we remit the matter to County Court for resentencing on those counts. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

7 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MARK A. LORENZ, Appellant. [992 NYS2d 653]—

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal—Adequacy of Colloquy—Failure to Preserve Issue for Appellate Review

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered September 22, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject defendant's contention that the waiver of the right to appeal is invalid. The record establishes that County Court " 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Ripley*, 94 AD3d 1554, 1554 [2012], *lv denied* 19 NY3d 976 [2012]), and that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *Ripley*, 94 AD3d at 1554; *People v Korber*, 89 AD3d 1543, 1543 [2011], *lv denied* 19 NY3d 864

[2012]). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 256; *People v Raynor*, 107 AD3d 1567, 1568 [2013], *lv denied* 22 NY3d 1090 [2014]).

Although defendant's contention that his guilty plea was not knowing, voluntary and intelligent survives his waiver of the right to appeal, defendant failed to preserve that contention for our review inasmuch as he withdrew his motion to withdraw his plea and did not thereafter move to vacate the judgment of conviction (*see People v Jones*, 114 AD3d 1080, 1081 [2014]; *People v Hodge*, 85 AD3d 1680, 1680 [2011], *lv denied* 18 NY3d 883 [2012]). This case does not fall within the rare exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666 [1988]), "inasmuch as nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea" (*People v Lewandowski*, 82 AD3d 1602, 1602 [2011]). Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

8 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DAVON GRIFFIN, Appellant. [993 NYS2d 198]—

Crimes—Sentence—Resentence—Lack of Updated Presentence Report No Bar to Resentence

Crimes—Right to Counsel—Effective Representation—Advantageous Resentence

Appeal from a resentence of the Onondaga County Court (William D. Walsh, J.), rendered June 10, 2010. Defendant was resentenced upon his conviction of manslaughter in the first degree.

It is hereby ordered that the resentence so appealed from is unanimously affirmed.

Memorandum: Defendant was convicted upon a plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). On a prior appeal, we affirmed the judgment of conviction (*People v Griffin*, 24 AD3d 1316 [2005], *lv denied* 6 NY3d 813 [2006]), but we subsequently granted defendant's motion for a writ of error coram nobis (*People v Griffin*, 59 AD3d 1106 [2009]). Upon reviewing the appeal de novo, we agreed with defendant that County Court erred in sentencing him as a first felony offender after "it became apparent at sentencing that defendant had a prior felony conviction" (*People v Griffin*, 72 AD3d 1496, 1497 [2010]). Inasmuch as "[i]t is illegal to sentence a known predicate felon as a first offender," we modified the judgment by vacating the sentence, and we remitted the matter for resentencing pursuant to CPL 400.21 (*id.*). On remittal, the court sentenced defendant as a second felony offender to a determinate

term of incarceration of 10 years, with a period of postrelease supervision of five years.

As defendant correctly concedes, his contention that County Court erred in failing to order an updated presentence report is unpreserved for our review “inasmuch as he never requested such an update, objected to the presentence report at the resentencing, or moved to vacate the resentencing on that ground” (*People v Lard*, 71 AD3d 1464, 1465 [2010], *lv denied* 14 NY3d 889 [2010]; *see People v Campbell*, 111 AD3d 1253, 1253 [2013], *lv denied* 23 NY3d 1018 [2014]; *People v Stachnik*, 101 AD3d 1590, 1591-1592 [2012], *lv denied* 20 NY3d 1104 [2013]). In any event, “the decision whether to obtain an updated [presentence] report at resentencing is a matter resting in the sound discretion of the sentencing [court]” (*People v Kuey*, 83 NY2d 278, 282 [1994]). “Where, as here, [the] defendant has been continually incarcerated between the time of the initial sentencing and resentencing, to require an update . . . does not advance the purpose of CPL 390.20 (1)” (*Lard*, 71 AD3d at 1465 [internal quotation marks omitted]; *see Campbell*, 111 AD3d at 1253-1254).

Finally, we reject defendant’s contention that he was denied effective assistance of counsel at the resentencing, inasmuch as defense counsel was able to secure an advantageous resentence for defendant (*see People v Cobado*, 104 AD3d 1322, 1323 [2013]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Although the period of postrelease supervision was increased from 2½ years to five years, the period of incarceration was reduced from 15 years to 10 years. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

9 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ANTONIO R. DAVIS, Appellant. [992 NYS2d 654]—

Crimes—Appeal—Preservation of Issue for Review—Challenge to Voluntariness of Plea Survives Waiver of Right to Appeal

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal—Inadequacy of Colloquy—Failure to Advise Defendant of Postrelease Supervision

Appeal from a judgment of the Erie County Court (Michael L. D’Amico, J.), rendered June 15, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him

upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his plea was not knowingly, voluntarily and intelligently entered because, inter alia, County Court failed to advise him that he was subject to a period of postrelease supervision as a condition of the plea. Initially, although we reject defendant's contention that his waiver of the right to appeal is invalid (*cf. People v Brown*, 296 AD2d 860, 860 [2002], *lv denied* 98 NY2d 767 [2002]), his challenge to the voluntariness of the plea survives his waiver of the right to appeal (*see People v Cullen*, 62 AD3d 1155, 1156 [2009], *lv denied* 13 NY3d 795 [2009]).

As the People correctly concede, defendant's contention requires reversal. Where, as here, “ ‘a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion’ ” raising that contention (*People v Boyd*, 12 NY3d 390, 393 [2009], quoting *People v Louree*, 8 NY3d 541, 545-546 [2007]). We therefore reverse the judgment, vacate the plea and remit the matter to County Court for further proceedings on the indictment.

In light of our determination, we do not address defendant's remaining contentions. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

10 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHERRELL WILLIAMS, Appellant. (Appeal No. 2.) [992 NYS2d 655]—Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 15, 2008. The judgment convicted defendant, upon his plea of guilty, of identity theft in the first degree.

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

Same memorandum as in *People v Williams* ([appeal No. 1] 120 AD3d 1526 [2014]). Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

11 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CHARLES K. WILSON, Appellant. [993 NYS2d 200]—

Crimes—Attempt—Attempted Murder Charge Rendered Duplicious by Trial Testimony—Review of Unpreserved Contention

Crimes—Identification of Defendant—Photographic Array—Multiple Arrays

Crimes—Confession—Voluntary Nature of Statements

Crimes—Consolidation and Severance—No Basis to Conclude Defendants Antagonistic to Each Other

Crimes—Right to Counsel—Effective Representation—Failure to Request Missing Witness Charge

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered September 17, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, robbery in the first degree (two counts), burglary in the first degree (three counts), assault in the first degree (two counts) and assault in the second degree.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of attempted murder in the second degree and dismissing the ninth count of the amended indictment and by directing that the sentences on the remaining counts shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [2]), arising from a home invasion, defendant contends that the attempted murder count was rendered duplicitous by the testimony at trial. We agree with defendant, as we agreed with his codefendant on a prior appeal, that the conviction of attempted murder in the second degree must be reversed because, based on the evidence presented at trial, “ ‘the jury may have convicted defendant of an unindicted [attempted murder], resulting in the usurpation by the prosecutor of the exclusive power of the [g]rand [j]ury to determine the charges’ ” (*People v Boykins*, 85 AD3d 1554, 1555 [2011], *lv denied* 17 NY3d 814 [2011]). We reach this issue despite defendant’s failure to preserve it (*see People v Lane*, 106 AD3d 1478, 1481 [2013], *lv denied* 21 NY3d 1043 [2013]; *People v Filer*, 97 AD3d 1095, 1096 [2012], *lv denied* 19 NY3d 1025 [2012]). We therefore modify the judgment by reversing that part convicting defendant of attempted murder in the second degree and dismissing the ninth count of the amended indictment. We further agree with defendant that the sentences imposed on the remaining counts must run concurrently with respect to each other, and we therefore further modify the judgment accordingly (*see Boykins*, 85 AD3d at 1555).

Contrary to defendant’s further contention, Supreme Court did not err in refusing to suppress identification evidence. “ ‘Multiple photo identification procedures are not inherently suggestive’ ” (*People v Dickerson*, 66 AD3d 1371, 1372 [2009], *lv denied* 13 NY3d 859 [2009]). “ ‘While ‘the inclusion of a single suspect’s photograph in successive arrays is not a practice to be encouraged, it does not per se invalidate the identification

procedures’ ” (*People v Beaty*, 89 AD3d 1414, 1415 [2011], *aff’d* 22 NY3d 918 [2013]; *see Dickerson*, 66 AD3d at 1372). Here, although there was not a significant lapse of time between the presentation of the arrays (*see Beaty*, 89 AD3d at 1415; *cf. Dickerson*, 66 AD3d at 1372), the record establishes that different photographs of defendant were used, that the photographs of defendant appeared in a different location in each photo array (*see Dickerson*, 66 AD3d at 1372), and that the fillers were very similar in appearance to defendant (*see generally People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). We also conclude that the court did not err in determining that defendant’s statements to the police during a brief exchange, made by defendant after he refused to waive his *Miranda* rights, were voluntary and thus were admissible for impeachment purposes (*see People v Maerling*, 64 NY2d 134, 140 [1984]; *People v Stephanski*, 286 AD2d 859, 860 [2001]). Here, the People met their initial “burden at the *Huntley* hearing of establishing that defendant’s . . . statements were not the product of ‘improper police conduct’ ” (*People v Rapley* [appeal No. 1], 59 AD3d 927, 927 [2009], *lv denied* 12 NY3d 858 [2009]), and “[d]efendant presented no bona fide factual predicate in support of his conclusory speculation that his statement[s were] coerced” (*id.* [internal quotation marks omitted]).

Contrary to defendant’s further contention, the court did not abuse its discretion in denying his motion to sever his trial from that of his codefendant (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]). Where counts are properly joined pursuant to CPL 200.40 (1), a defendant may nevertheless seek severance for “‘good cause shown’ ” (*id.*). “Good cause . . . includes, but is not limited to, a finding that a defendant ‘will be unduly prejudiced by a joint trial’ ” (*id.*, quoting CPL 200.40 [1]). “Upon such a finding of prejudice, the court may order counts to be tried separately, grant a severance of defendants or provide whatever other relief justice requires” (CPL 200.40 [1]). Here, defendant contends that, if he had testified at trial, he would have been prejudiced by the admission in evidence of a statement of his codefendant indicating that the codefendant had merely “heard” of defendant’s involvement in this home invasion. We reject that contention, and we note that the statement is not incriminating and thus does not implicate *Bruton v United States* (391 US 123 [1968]), wherein “the Supreme Court held that a defendant is deprived of his rights under the Confrontation Clause when his codefendant’s incriminating confession is introduced at their joint trial, even if the jury is specifically instructed to consider the confession only against the codefendant” (*People v Eastman*, 85 NY2d 265, 271 n 2 [1995]). Defend-

ant further contends that, if he had testified at trial, he and his codefendant would have been placed in antagonistic positions inasmuch as the codefendant would not have been bound by the court's *Sandoval* ruling in cross-examining defendant. Defendant is correct that the codefendant would not have been bound by the court's *Sandoval* ruling (see *People v McGee*, 68 NY2d 328, 333 [1986]; *People v Padilla*, 181 AD2d 1051, 1052 [1992], *lv denied* 79 NY2d 1052 [1992]). Nevertheless, inasmuch as both defendants were charged with principal and accomplice liability for the same crimes, both defendants noticed alibi defenses, and both defendants were familiar to the eyewitnesses prior to the shooting, we see no basis for concluding that defendants would have "antagonized" each other at trial. Had one defendant attacked the other, the "attacking" defendant essentially would have taken the position that the eyewitnesses correctly identified only the "other" defendant.

Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation, we conclude that defendant received meaningful representation (see generally *People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant's contention that defense counsel was ineffective in failing to request a missing witness charge has no merit because there was no basis for such a charge (see *People v Hicks*, 110 AD3d 1488, 1489 [2013], *lv denied* 22 NY3d 1156 [2014]), and an attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152 [2005], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Viewing the evidence in light of the crimes as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we also conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457 [2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]), and "the jury was entitled to reject certain portions of the victim's testimony while crediting other portions" (*People v McCray*, 96 AD3d 1480, 1480 [2012], *lv denied* 19 NY3d 1104 [2012]). It cannot be said that the testimony of the eyewitnesses was " 'incredible and unbelievable, that is, impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Mohamed*, 94 AD3d 1462, 1463-1464 [2012], *lv denied* 19 NY3d 999 [2012], *reconsideration denied* 20 NY3d 934 [2012]).

Finally, we have reviewed defendant's remaining contention, and we conclude that it has been rendered academic as a result of our decision herein. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

12 In the Matter of STATE OF NEW YORK, Respondent, v ROY CASTLEBERRY, Appellant. [992 NYS2d 589]—

Crimes—Sex Offenders—Civil Commitment or Supervision—Reliability of Expert Witnesses

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 13, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Respondent contends that the admission of “hearsay basis evidence” from petitioner’s experts deprived him of a fair trial and violated his constitutional right to due process (*Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109 [2013]). Inasmuch as respondent did not object to any of the allegedly improper evidence, we conclude that he failed to preserve his contention for our review (*see Matter of State of New York v Muench*, 85 AD3d 1581, 1582 [2011]; *Matter of State of New York v Wilkes* [appeal No. 2], 77 AD3d 1451, 1452 [2010]). We decline to exercise our power to review that contention in the interest of justice (*see Muench*, 85 AD3d at 1582).

Respondent’s challenge to the reliability of the actuarial assessment instruments used by petitioner’s expert is actually a challenge “to the weight of that evidence rather than its admissibility” (*Matter of State of New York v Timothy EE.*, 97 AD3d 996, 998 [2012]; *see Matter of State of New York v High*, 83 AD3d 1403, 1403-1404 [2011], *lv denied* 17 NY3d 704 [2011]). “Supreme Court was in the best position to evaluate the weight and credibility of the conflicting [psychological and] psychiatric testimony presented . . . After independently reviewing the evidence presented at the dispositional hearing and according appropriate deference to the court’s decision to credit the opinion of [petitioner’s expert] over that of [respondent’s expert] . . . , we find no basis to disturb [the court’s] determination that respondent was a dangerous sex offender requiring confinement” (*Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144-1145 [2010]; *see Matter of State of New York v Trombley*, 98

AD3d 1300, 1301 [2012], *lv denied* 20 NY3d 856 [2013]; *Timothy EE.*, 97 AD3d at 999). Present— Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

13 RONALD C. VANYO, Respondent, v ANN M. VANYO, Appellant. [993 NYS2d 204]—

Husband and Wife and Other Domestic Relationships—Divorce—Sanctions for Failure to Comply with Court Order Concerning Sale of Marital Residence

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 5, 2012. The order and judgment imposed monetary sanctions on defendant.

It is hereby ordered that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: In this postjudgment proceeding to enforce the terms of a judgment of divorce, defendant contends that Supreme Court erred in directing her to pay plaintiff's counsel fees and in imposing other sanctions. We previously decided defendant's appeal from the judgment of divorce (*Vanyo v Vanyo*, 79 AD3d 1751, 1751 [2010]), which judgment, inter alia, directed that the former marital residence be sold and the proceeds divided between the parties. Plaintiff, by several orders to show cause, sought and obtained orders requiring defendant to cooperate with various phases of the process of selling the property. Those orders required defendant, among other things, to sign documents allowing the property to be listed for sale, provide a key to the residence to the realtor with whom the property was listed, permit prospective purchasers and their agents access to the property, and properly maintain the property. There were numerous court appearances with respect to those orders to show cause and the relief requested, at which the court and the parties discussed the events at issue on appeal. In response to one such order to show cause, the court issued an order directing defendant to "execute a listing contract prepared by" the listing agent by the close of business on March 8th. The order further provided that, if defendant failed to do so, she was to pay a fine of \$250 per day to plaintiff "until a proper listing contract, as determined by th[e] [c]ourt, has been executed by" defendant, and the court granted plaintiff's request for counsel fees. Another interim order appointed a receiver to sell the property on behalf of defendant, and that receiver eventually prepared the necessary papers permitting the property to be listed for sale.

Contrary to defendant's contention, the court properly calculated the fines and counsel fees without first holding a

hearing. Defendant's contention that she provided a key by mail in June is belied by her submission of emails establishing that no key was received until July 10th. Those emails also belie her contention that a key was hand-delivered on July 3rd, and in any event she failed to submit an affidavit from the unidentified person who allegedly hand-delivered the key. Under these circumstances, the court's determination that defendant had failed to comply with the earlier order, "without a hearing, was a provident exercise of discretion, especially in light of defendant's failure to submit competent . . . evidence in support of her assertion[s], and that [determination] was consistent with the court's own observations and familiarity with the history of the action" (*Roach v Benjamin*, 78 AD3d 468, 469 [2010]; see *Skidelsky v Skidelsky*, 279 AD2d 356, 356 [2001]).

Finally, the evidence in the record establishes that there were several interim court appearances at which counsel for the parties discussed the key and access to the property, the state of repair of the property, and the execution of documents required to list the property. The court, after hearing from counsel, made determinations at those appearances concerning the issues that are now raised on appeal, but we do not consider those determinations because defendant failed to include the transcripts of those appearances in the record on appeal. Defendant, "as the appellant[], must suffer the consequences of having submitted an incomplete record" (*Gaiter v City of Buffalo Bd. of Educ.*, 118 AD3d 1507, 1508 [2014]; see *Matter of Lopez v Lugo*, 115 AD3d 1237, 1237 [2014]). Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

14 RED BARN COUNTRY, LLC, Plaintiff, and GARY HAFNER, Appellant, v LINDA TROMBLEY, Respondent. [993 NYS2d 206]—

Abatement and Revival—Another Action Pending—Action to Recover Money Paid to Discharge Mortgage Not Similar to Action to Set Aside Conveyance

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 29, 2012. The order, insofar as appealed from, granted that part of defendant's motion seeking to dismiss the plaintiffs' amended complaint.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety and the amended complaint is reinstated.

Memorandum: Plaintiffs commenced this action seeking to recover money paid by Gary Hafner (plaintiff) to discharge a mortgage on property owned by defendant, his sister. Plaintiff and his father (hereafter, decedent) each owned various parcels

of land that comprised the family farm and obtained a single note and mortgage encumbering those parcels. Plaintiff and decedent thereafter defaulted on the mortgage, and the bank commenced a foreclosure action, at which time decedent conveyed certain parcels that were subject to the mortgage to defendant, his daughter. Decedent conveyed his remaining parcels that were subject to the mortgage to plaintiff, who in turn sold them to Red Barn Country, LLC (Red Barn). As part of the transaction with Red Barn, plaintiff was required to pay off the mortgage. Decedent commenced an action seeking to set aside the transfer of the property to defendant and, after his death, the action was dismissed by Supreme Court on the ground that it was duplicative of a proceeding pending in Surrogate's Court "surrounding the distribution of the assets of [decedent's] Estate." Defendant moved, *inter alia*, to dismiss the instant action on the ground that the issues raised herein likewise should be resolved in the action in Surrogate's Court, and plaintiff appeals from an order granting that part of defendant's motion. We reverse the order insofar as appealed from.

Pursuant to CPLR 3211 (a) (4), "[a] party may move for judgment dismissing one or more causes of action . . . on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States." "In determining whether two causes of action are the same, we consider '(1) [whether] both suits arise out of the same actionable wrong or series of wrongs[] and (2) as a practical matter, [whether] there [is] any good reason for two actions rather than one being brought in seeking the remedy' " (*Rinzler v Rinzler*, 97 AD3d 215, 217 [2012]; *see Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]; *JC Mfg. v NPI Elec.*, 178 AD2d 505, 506 [1991]; *Mullins v Saul*, 130 AD2d 634, 636 [1987]). We conclude that CPLR 3211 (a) (4) is not applicable here inasmuch as the parties are not the same nor are the causes of action or the relief sought the same. The " 'actionable wrong' " in the action in Surrogate's Court was the transfer of the disputed property to defendant, whereas the " 'actionable wrong' " in this action was defendant's failure to pay the mortgage on the disputed property (*Rinzler*, 97 AD3d at 217). The court therefore erred in dismissing the amended complaint because "neither the parties nor the causes of action in the two [actions] are the same or even substantially similar" (*Zabel v Karasik*, 184 AD2d 436, 436 [1992]; *see Ramsey v Ramsey*, 69 AD3d 829, 832 [2010]). Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

15 SANTINA MURINE, Respondent, v CITY OF UTICA, Appellant. [993 NYS2d 522]—Appeal from a judgment of the Supreme

Court, Oneida County (Patrick F. MacRae, J.), entered November 19, 2013. The judgment determined, upon a jury verdict, that defendant is 100% liable for plaintiff's damages.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

16 In the Matter of FFT SENIOR COMMUNITIES, INC., Respondent, v TOWN OF CANANDAIGUA et al., Appellants. [992 NYS2d 655]—Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered June 17, 2013 in a proceeding pursuant to RPTL article 7. The order, among other things, granted petitioner's motion seeking to establish the value of its property for three assessment dates.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

17 BENJAMIN L. JOLLEY, Respondent, v AGOSTINHA R. LANDO, Appellant. [993 NYS2d 523]—Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered September 4, 2013 in a divorce action. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

18 CSMC 2007-C1 OSWEGO ROAD, LLC, Respondent, v KIMBROOK ROUTE 31, LLC, et al., Appellants, et al., Defendants. (Appeal No. 1.) [993 NYS2d 394]—

Judgments—Summary Judgment—Motion for Summary Judgment in Foreclosure Action Not Premature

Mortgages—Foreclosure—Commercial Property—Failure to Pay Note—Wrongful Refusal to Release Escrow Funds—Nonbinding Negotiations

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 10, 2013. The order, inter alia, granted those parts of the motion of plaintiff seeking partial summary judgment, and seeking to sever the counterclaim, and denied the cross motion of defendants-appellants to compel the disclosure of documents.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this commercial foreclosure action against Kimbrook Route 31, LLC (Kimbrook) and

Philip J. Simao (collectively, defendants) after they defaulted on payment of a loan and guarantee, respectively. In appeal No. 1, defendants contend that Supreme Court erred in granting those parts of plaintiff's motion for partial summary judgment and to sever defendants' counterclaim, and in denying their cross motion to compel the disclosure of documents. In appeal No. 2, defendants contend that the court erred in granting plaintiff's motion for a judgment of foreclosure and sale.

The court properly granted that part of plaintiff's motion for partial summary judgment in appeal No. 1. We note at the outset that the court properly rejected defendants' contention that plaintiff's motion was premature insofar as plaintiff sought partial summary judgment. "Although a motion for summary judgment may be opposed on the ground 'that facts essential to justify opposition may exist but cannot then be stated' (CPLR 3212 [f]), 'the opposing party must make an evidentiary showing supporting this conclusion, mere speculation or conjecture being insufficient' " (*Preferred Capital v PBK, Inc.*, 309 AD2d 1168, 1169 [2003]), and defendants failed to make that showing.

On the merits, we conclude that plaintiff met its initial burden of establishing its "entitlement to judgment as a matter of law by submitting the mortgage, unpaid note, and proof of defendant's default" (*Cassara v Wynn* [appeal No. 2], 55 AD3d 1356, 1356 [2008], *lv dismissed* 11 NY3d 919 [2009]). Defendants contend that plaintiff was not entitled to partial summary judgment because defendants raised a meritorious defense (*see Lawler v KST Holdings Corp.*, 115 AD3d 1196, 1198-1199 [2014]), i.e., plaintiff's wrongful refusal to release certain escrow funds that allegedly precipitated the foreclosure action, and plaintiff's misconduct in misleading defendants during subsequent negotiations to modify the loan. We reject that contention. With respect to plaintiff's failure to release the escrow funds, the record establishes that defendants were in default on the mortgage for failing to make a March 1, 2010 payment, and defendants did not request the escrow funds until March 25, 2010. The loan agreement provided that the escrow funds would not be returned to defendants if they were in default under the loan agreement, and defendants therefore have failed to establish that plaintiff's conduct in not releasing the funds caused the default (*see generally Trustco Bank, Natl. Assn. v Allison Assoc.*, 249 AD2d 911, 912 [1998]). With respect to plaintiff's conduct during the negotiations to modify the loan, we note that the negotiation letter agreement provides that any negotiations were not binding on the parties in the absence of a written modification of the loan agreement, which never occurred.

There is thus no estoppel defense here because there was no binding promise or conduct by plaintiff indicating that it would not seek to foreclose on the property (*see Massachusetts Mut. Life Ins. Co. v Gramercy Twins Assoc.*, 199 AD2d 214, 217 [1993]).

Next, we reject defendants' contention in appeal No. 1 that the court erred in granting that part of plaintiff's motion to sever their counterclaim. Where, as here, the "counterclaim seeks damages and does not affect the validity of the mortgage, the appropriate remedy is to sever it from the foreclosure action" (*First Union Mtge. Corp. v Fern*, 298 AD2d 490, 491 [2002]). We further reject defendants' contention in appeal No. 1 that the court erred in denying their cross motion to compel disclosure of documents. Plaintiff established that it turned over all documents in its possession, thereby warranting the denial of the cross motion (*see Hawley v Hasgo Power Equip. Sales*, 269 AD2d 804, 804 [2000]).

We have reviewed defendants' remaining contentions with respect to appeal Nos. 1 and 2 and conclude that they are without merit. Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

19 CSMC 2007-C1 OSWEGO ROAD, LLC, Respondent, v KIMBROOK ROUTE 31, LLC, et al., Appellants, et al., Defendants. (Appeal No. 2.) [992 NYS2d 656]—Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 28, 2014. The judgment ratified and confirmed a report of a referee and ordered a foreclosure sale.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Same memorandum as in *CSMC 2007-C1 Oswego Rd., LLC v Kimbrook Rte. 31, LLC* ([appeal No. 1] 120 AD3d 1539 [2014]). Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

20 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DESTINY BELLAUS, Appellant. [992 NYS2d 656]—Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered July 9, 2012. The appeal was held by this Court by order entered January 3, 2014, the decision was reserved and the matter was remitted to Cattaraugus County Court for further proceedings (113 AD3d 1113 [2014]).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on March 17, 2014, and the attorneys for the parties on March 25 and April 2, 2014,

It is hereby ordered that said appeal is unanimously dismissed

upon stipulation. Present—Scudder, P.J., Fahey, Peradotto, Carni and Valentino, JJ.

21 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ALVIN JOHNSON, Appellant. [993 NYS2d 208]—

Crimes—Sex Offenders—Sex Offender Registration Act—Downward Departure Not Warranted

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered May 22, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends, inter alia, that County Court erred in refusing to grant him a downward departure from the presumptive risk level. We reject that contention.

While a court has the discretion to grant a downward departure, it may do so “only after a defendant makes a twofold showing. First, a defendant must identify, as a matter of law, an appropriate mitigating factor, namely, a factor which ‘tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines’ . . . Second, a defendant must prove by a preponderance of the evidence the facts necessary to support that mitigating factor . . . In the absence of that twofold showing, the court lacks discretion to depart from the presumptive risk level” (*People v Henry*, 106 AD3d 796, 796 [2013], *lv denied* 21 NY3d 863 [2013]; see *People v Wyatt*, 89 AD3d 112, 128 [2011], *lv denied* 18 NY3d 803 [2012]; see generally *People v Gillotti*, 23 NY3d 841, 860-861 [2014]). Defendant contended during the SORA hearing that his age, lengthy incarceration, and maturation were factors that tended to reduce his risk of reoffending, but he failed to submit any evidence to support that contention. We thus conclude that he failed to meet the requisite burden of proof.

We have reviewed defendant’s remaining contention and conclude that it lacks merit. Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

22 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CHAZ K. DAVIS, Appellant. [993 NYS2d 209]—

Extradition—Agreement on Detainers—Agreement Not Applicable Where De-

Defendant Produced Pursuant to Writ of Habeas Corpus Ad Prosequendum

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 12, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of criminal sale of a controlled substance in the first degree (Penal Law § 220.43 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]). We reject defendant's contention that the verdict is against the weight of the evidence because one of the People's witnesses, a confidential informant who testified pursuant to a cooperation agreement, was not credible. " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422 [2012]; see *People v Hollins*, 278 AD2d 932, 932 [2000], *lv denied* 96 NY2d 759 [2001]). Here, viewing the evidence in light of the elements of the crimes in this nonjury trial (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to the further contention of defendant, we conclude that County Court properly denied defendant's motion to dismiss the indictment based upon New York State's alleged violation of the Interstate Agreement on Detainers (IAD or Agreement) (see CPL 580.20). The IAD is a compact entered into by, inter alia, the United States and New York State and which, as relevant here, "prescribes procedures by which a member State may obtain for trial a prisoner incarcerated in another member jurisdiction" (*United States v Mauro*, 436 US 340, 343 [1978]; see *New York v Hill*, 528 US 110, 111 [2000]; *People v Reilly*, 136 AD2d 355, 359 [1988], *lv denied* 72 NY2d 865 [1988]). It is well established that "the provisions of the Agreement are triggered only when a 'detainer' is filed with the custodial (sending) State by another State (receiving) having untried charges pending against the prisoner" (*Mauro*, 436 US at 343; see CPL 580.20, art IV [a]). Here, defendant's attendance in state court was secured pursuant to a writ of habeas corpus ad prosequendum, and not pursuant to the IAD (see CPL 580.30). Because New York "never filed a detainer against [de-

fendant], the Agreement never became applicable and [New York] was never bound by its provisions” (*Mauro*, 436 US at 361).

We further conclude that there is no merit to defendant’s contention that he was improperly sentenced as a second felony drug offender (*see* Penal Law § 70.71 [1] [b]). Defendant’s conviction of 21 USC § 841 (a) for possession with intent to distribute more than five grams of cocaine base is equivalent to a conviction of criminal possession of a controlled substance in the third degree, a class B felony (*see* Penal Law § 220.16), and thus he was properly adjudicated a second felony drug offender (*see People v Reilly*, 273 AD2d 143, 143 [2000], *lv denied* 95 NY2d 937 [2000]; *see also People v Yensi*, 251 AD2d 262, 263 [1998], *lv denied* 92 NY2d 932 [1998]; *see generally People v Muniz*, 74 NY2d 464, 467-468 [1989]).

Finally, the sentence is not unduly harsh or severe. Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

23 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KALVIN M. SMITH, Appellant. [993 NYS2d 211]—

Crimes—Right to Counsel—Effective Representation—Conceding Issue Likely Decided against Defendant

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered December 18, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that he was denied effective assistance of counsel on the ground that defense counsel, during the *Sandoval* hearing, conceded that defendant could be cross-examined, should he testify at trial, with respect to a 2004 conviction of criminal possession of stolen property in the fourth degree, a class E felony. We reject that contention. “To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations” for defense counsel’s allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712-713 [1998]). Here, defense counsel conceded an issue that, in any event, would likely have been decided against defendant (*see generally People v Williams*, 98 AD3d 1234, 1235 [2012], *lv denied* 21 NY3d 947 [2013]; *People v Robles*, 38 AD3d 1294, 1295 [2007], *lv denied* 8 NY3d 990

[2007]), while at the same time arguing that the People should be precluded from using on cross-examination various other criminal convictions to impeach defendant's credibility. Supreme Court agreed in part with defense counsel and precluded cross-examination of defendant with respect to three other criminal convictions. Under the circumstances, we conclude that defendant failed to meet the requisite burden in support of his claim of ineffective assistance of counsel (*see Rivera*, 71 NY2d at 709).

Even assuming, *arguendo*, that defense counsel erred in making the limited *Sandoval* concession, we conclude that the single error was not so egregious as to deprive defendant of his right to a fair trial (*see generally People v Turner*, 5 NY3d 476, 480 [2005]; *People v Cosby*, 82 AD3d 63, 67 [2011], *lv denied* 16 NY3d 857 [2011]). Viewed as a whole, the record establishes that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]; *People v Long*, 96 AD3d 1492, 1494 [2012], *lv denied* 19 NY3d 1027 [2012]). Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

24 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ERNEST BROWN, Appellant. [992 NYS2d 591]—

Crimes—Right to Counsel—Effective Representation—Failure to Object to Allegedly Improper Prosecutorial Misconduct

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 11, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct during the cross-examination of defendant and on summation is not preserved for our review. Defendant failed to object to most of the allegedly improper conduct (*see People v Gonzalez*, 81 AD3d 1374, 1374 [2011]; *see also* CPL 470.05 [2]) and, when he objected, his objections were sustained, the court gave curative instructions to the jury and no further remedy was requested by defendant (*see People v Ennis*, 107 AD3d 1617, 1619-1620 [2013], *lv denied* 22 NY3d 1040 [2013], *reconsideration denied* 23 NY3d 1036 [2014]). Defendant also failed to preserve for our review his contention that he was denied a fair trial by judicial misconduct arising from the questioning of a prosecution witness by County

Court. Defendant did not object to the court's questioning of that witness, and we reject defendant's contention that the alleged judicial misconduct constitutes a mode of proceedings error for which preservation is not required (*see generally People v Alcide*, 21 NY3d 687, 695 [2013]; *People v Becoats*, 17 NY3d 643, 651 [2011]). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Sterina*, 108 AD3d 1088, 1089 [2013]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Lugo*, 87 AD3d 1403, 1404 [2011], *lv denied* 18 NY3d 860 [2011]). Defendant's sentence is not unduly harsh or severe.

We reject the contentions in the main and pro se supplemental briefs that defendant was not provided effective assistance of counsel. Viewing the evidence, the law and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]). To the extent that the contentions in the pro se supplemental brief involve matters outside the record on appeal, those contentions must be raised by way of a motion pursuant to CPL 440.10 (*see People v Reed*, 115 AD3d 1334, 1337 [2014], *lv denied* 23 NY3d 1024 [2014]). Finally, we reject the contention in defendant's pro se supplemental brief that cumulative errors deprived him of a fair trial (*see People v Wurthmann*, 26 AD3d 830, 831 [2006], *lv denied* 7 NY3d 765 [2006]). Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

25 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MICHAEL CONTI, Appellant. [993 NYS2d 213]—

Crimes—Sentence—Probation—Extension of Probationary Term—Revocation of Probation and Imposition of Period of Incarceration and Restitution
 Crimes—Sentence—Restitution—Payment of Extradition Expenses

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered October 22, 2012. The judgment revoked a sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking a sentence of probation and imposing a period of incarceration and restitution. Defendant contends, inter alia, that County Court lacked jurisdiction to preside over the violation proceeding because his term of probation had expired before the declaration of delinquency was filed. We reject that contention.

Several months before his term of probation was set to expire, a declaration of delinquency was filed, and defendant admitted to an initial violation of probation as part of a plea agreement. The court sentenced defendant to “time served” and stated that it would “continue [his] Probation under 65.00 Subdivision 4 of the Penal Law and extend [probation] for a period of one year from this date.” Penal Law § 65.00 (4) provides that, in any case where a court revokes probation and sentences a defendant to imprisonment and probation, the period of probation shall be either “the remaining period of the original probation sentence or one year whichever is greater.” Because the court stated that it would “continue,” as opposed to “revoke,” defendant’s probation, defendant contends that the court could extend his probation for only 75 days, representing the period of time between the filing of the declaration of delinquency and the final determination with respect to that delinquency (*compare* § 65.00 [4] *with* § 65.15 [2]). Defendant thus contends that his probationary period expired before the declaration of delinquency was filed, and that the court therefore lacked jurisdiction to preside over the violation proceeding.

Defendant concedes that he failed to raise his contention with respect to jurisdiction before the court, but we nevertheless agree with him that it may be raised for the first time on appeal (*see People v Correa*, 15 NY3d 213, 222 [2010]; *People v Wilson*, 14 NY3d 895, 897 [2010]; *People v Nicometi*, 12 NY2d 428, 431 [1963]). We conclude, however, that his contention lacks merit. Although the court, following the initial violation of probation proceeding, stated that it would “continue” rather than “revoke” his probation, it also stated that it was imposing a period of imprisonment, i.e., “time served,” and, furthermore, the court cited Penal Law § 65.00 (4) as the basis for the period of incarceration and extension of probation. We thus conclude that, pursuant to section 65.00 (4), defendant’s probation was lawfully extended for one year and that, because defendant was still subject to that period of probation when the declaration of delinquency was filed, the court had jurisdiction to preside over the violation proceeding and to impose a period of incarceration on defendant.

We reject defendant’s further contention that the court erred

in ordering him to pay restitution to the County of Yates (County) to cover the expenses related to his extradition. Following the filing of the declaration of delinquency, defendant left New York State and was ultimately apprehended in Tennessee. Pursuant to the terms and conditions of his probation, which had been modified in May 2010 to incorporate the terms and conditions of a Drug Treatment Court contract that he had executed in order to participate in the Yates County Drug Treatment Court Program, defendant was required to reimburse the County for all expenses related to his extradition. Moreover, as part of his plea agreement with respect to the violation of probation herein, defendant agreed to reimburse the County for the extradition expenses in exchange for a sentence of incarceration that was less than the maximum sentence authorized by law. Inasmuch as defendant agreed to reimburse the County as a condition of probation and “committed to such payment as part of his plea agreement,” we see no basis upon which to vacate the order of restitution (*People v Carter*, 64 AD3d 1089, 1091 [2009], *lv denied* 13 NY3d 835 [2009]; *see People v Burke*, 47 AD3d 1161, 1161 [2008]; *People v Perry*, 261 AD2d 650, 650-651 [1999], *lv denied* 93 NY2d 1024 [1999]; *cf. People v Monroe*, 82 AD3d 1674, 1675 [2011], *lv denied* 17 NY3d 808 [2011]; *People v Pelkey*, 63 AD3d 1188, 1190-1191 [2009], *lv denied* 13 NY3d 748 [2009]). We acknowledge our prior decisions in *People v Watson* (197 AD2d 880, 880-881 [1993]) and *People v Dulanski* (175 AD2d 672, 672 [1991]), but we note that those decisions preceded the amendment to CPL 570.56, which permits a county to seek reimbursement for extradition expenses “from the person who was extradited” (*see* L 1995, ch 193, § 1). Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

26 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CLIFFORD C. ANDERSON, Appellant. [993 NYS2d 215]—

Crimes—Proof of Other Crimes—Development of Narrative in Contempt Prosecution

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 19, 2012. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [c]). Contrary to defendant’s contention, County Court properly admitted uncharged crimes as *Molineux*

evidence on the People's direct case because that evidence was relevant to defendant's intent to violate the order of protection and was admissible " 'to develop the necessary background and [to] complete the victim's narrative' " (*People v Erle*, 83 AD3d 1442, 1444 [2011], *lv denied* 17 NY3d 794 [2011]; *see People v Alvino*, 71 NY2d 233, 242 [1987]; *People v Ray*, 63 AD3d 1705, 1706 [2009], *lv denied* 13 NY3d 838 [2009]). We further conclude that the probative value of such evidence outweighed any prejudice (*see People v Carson*, 4 AD3d 805, 806 [2004], *lv denied* 2 NY3d 797 [2004]; *see also Ray*, 63 AD3d at 1706).

Even assuming, arguendo, that the court erred in admitting such evidence, we conclude that the error is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Laws*, 27 AD3d 1116, 1117 [2006], *lv denied* 7 NY3d 758 [2006]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Finally, the sentence is not unduly harsh or severe. Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

27 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DERRICK ANDERSON, Appellant. [993 NYS2d 216]—

Crimes—Right to Counsel—Effective Representation—Failure to Request Accomplice Charge

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 1, 2012. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]). We reject defendant's contention that he was denied effective assistance of counsel. Defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to request an accomplice charge with respect to two of the People's witnesses (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Walker*, 50 AD3d 1452, 1454 [2008], *lv denied* 11 NY3d 795 [2008]; *see also People v Smith-Merced*, 50 AD3d 259, 259 [2008], *lv denied* 10 NY3d 939 [2008]).

Defendant failed to preserve for our review his contention that the testimony of the accomplices was not sufficiently corroborated and thus that the conviction is not supported by legally sufficient evidence (*see People v Matt*, 78 AD3d 1616,

1617 [2010], *lv denied* 15 NY3d 954 [2010]). In any event, we conclude that defendant's statement to the police and the victim's trial testimony constitute "sufficient evidence connecting defendant to the crime[], thereby satisfying the corroboration requirement" (*id.*; see CPL 60.22 [1]; *People v Reome*, 15 NY3d 188, 191-192 [2010]). Viewing the evidence in light of the elements of the crime as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the jury did not fail to give the evidence the weight it should be accorded (see *People v Howard*, 101 AD3d 1749, 1750 [2012], *lv denied* 21 NY3d 944 [2013]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant also failed to preserve for our review his contention that Supreme Court's handling of a jury note denied him due process inasmuch as there was no objection or request with respect to the manner in which the court responded to the note (see *People v Kalb*, 91 AD3d 1359, 1359 [2012], *lv denied* 19 NY3d 963 [2012]). In any event, that contention lacks merit inasmuch as the court's response to the note constituted " 'a meaningful response to the jury's request for information' " (*People v Jones*, 52 AD3d 1252, 1252 [2008], *lv denied* 11 NY3d 738 [2008]; see generally CPL 310.30; *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]). Finally, the sentence is not unduly harsh or severe. Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

28 TOWN OF AMHERST, Appellant, v PAUL D. WEISS, Esq., et al., Respondents. [993 NYS2d 396]—

Limitation of Actions—Continuous Relationship Doctrine—Legal Malpractice Claim—Failure to Give Municipality Proper Advice Regarding Selection of Hearing Officer—Privity of Contract

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 8, 2013. The order granted the motions of defendants for summary judgment and dismissed the amended complaint.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs, the motions are denied and the amended complaint is reinstated.

Memorandum: Plaintiff, Town of Amherst (Town), commenced this legal malpractice action alleging that defendants Paul D. Weiss, Esq., and Wayne R. Gradl, Esq., attorneys in defendant law firms, were negligent in failing to advise the Town of the appropriate method for appointing a hearing officer for a Civil Service Law § 75 (hereafter, section 75) proceeding that the Town had commenced against one of its employees. Follow-

ing the section 75 hearing and a town resolution terminating the employee, the resolution had to be annulled because the Hearing Officer had not been properly appointed by the Town Board and, therefore, the first hearing was a nullity. The Town seeks to recover the fees, costs and expenses related to the first hearing.

Weiss, and his law firm, defendant Bartlo, Hettler & Weiss (collectively, Weiss defendants), moved for summary judgment dismissing the amended complaint against them contending, inter alia, that the action was time-barred. Gradl, and his law firm, defendant Polowitz & Schwach, LLP (collectively, Gradl defendants), also moved for summary judgment dismissing the amended complaint against them, contending, inter alia, that the action was time-barred, and that the Town could not maintain an action against them because the Town lacked privity of contract with them. We conclude that Supreme Court erred in granting defendants' respective motions, and we therefore reverse the order, deny the motions and reinstate the amended complaint.

It is well settled that a cause of action for legal malpractice accrues on the date when the malpractice was committed, regardless of the date on which the malpractice is actually discovered (*see Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]; *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]; *Glaum v Allen*, 57 NY2d 87, 94 [1982]). The parties agree that the alleged malpractice was committed on June 26, 2001, the date the hearing began before the improperly appointed Hearing Officer. The statute of limitations for legal malpractice is three years (*see* CPLR 214 [6]) and, therefore, the statute expired on June 26, 2004 unless it was tolled. We conclude that defendants met their initial burden of establishing that the action was commenced after the statute of limitations had expired (*see International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1512 [2010]). "The burden then shifted to [the Town] to raise a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine" (*id.*; *see Priola v Fallon*, 117 AD3d 1489, 1489-1490 [2014]; *but see 730 J & J, LLC v Polizzotto & Polizzotto, Esqs.*, 69 AD3d 704, 705 [2010]).

We conclude that the Town raised a triable issue of fact whether there were "clear indicia of an ongoing, continuous, developing, and depend[e]nt relationship between the [Town] and [defendants,] which . . . include[d] an attempt by [defendants] to rectify an alleged act of malpractice" (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506-507 [1990];

see *International Electron Devices [USA] LLC*, 71 AD3d at 1512-1513). Contrary to defendants' contentions, the Town raised triable issues of fact whether the continuing representation "pertain[ed] specifically to the matter in which [defendants] committed the alleged malpractice" (*Shumsky*, 96 NY2d at 168; see *International Electron Devices [USA] LLC*, 71 AD3d at 1512-1513), and whether there was "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]).

The Town first hired Weiss in early 2001 to investigate the possibility of section 75 charges against one of the Town's employees. Weiss hired Gradl to assist him. From that point on, Weiss and Gradl performed legal work on behalf of the Town related to the section 75 proceeding. They drafted the section 75 charges and amended charges, presented evidence at the improperly commenced section 75 hearing, prepared the resolution of the Town Board terminating the employee, and responded to the employee's legal challenge to the termination. When it appeared that a second hearing was required, the Town Board resolved to appoint Weiss "and associates . . . to prosecute" the section 75 charges and amended charges against the employee, i.e., to correct the legal error resulting in the need to nullify the first hearing and the initial determination terminating the employee. Defendants performed legal work on behalf of the Town by prosecuting the section 75 charges and amended charges at a second hearing and by preparing the second resolution of the Town Board terminating the employee. When the employee challenged that termination, the Town Board resolved to retain Weiss's firm to represent the Town at a potential hearing pursuant to General Municipal Law § 50-h and "to defend the Town Board's decision" in an anticipated CPLR article 78 proceeding to be brought by the terminated employee.

Although defendants contended that their representation was not continuous, as evidenced by the fact that there were three separate and distinct actions by the Town to retain them and numerous gaps in their representation of the Town, we conclude that the Town nevertheless raised triable issues of fact concerning continuous representation. It is well established that "[a]n attorney-client relationship may exist in the absence of a formal retainer agreement" (*Swalg Dev. Corp. v Gaines*, 274 AD2d 385, 386 [2000]; see *Terio v Spodek*, 63 AD3d 719, 721 [2009]). Instead, such a relationship is formed by "an explicit undertaking to perform a specific task" (*Terio*, 63 AD3d at 721). Here, while there were three separate and distinct retainer agree-

ments, we conclude that there are triable issues of fact whether defendants were retained for separate and distinct legal proceedings or, rather, “ongoing and developing phases of the [same] litigation” (*Muller v Sturman*, 79 AD2d 482, 485 [1981], citing *Siegel v Kranis*, 29 AD2d 477, 480-481 [1968]). We cannot say as a matter of law that all of defendants’ acts “were not inter-related so that representation on [the second section 75 hearing and the subsequent CPLR article 78 proceeding were] not part of a continuing, interconnected representation” to perform the specific task of terminating a town employee (*Deep v Boies*, 53 AD3d 948, 952 [2008]). Inasmuch as “[a] question of fact exists on this issue, . . . summary judgment is inappropriate” (*id.*).

We further conclude that there are triable issues of fact whether the gaps in the legal services that defendants performed for the Town were “merely . . . period[s] absent expectations, rather than . . . period[s] when representation formally ended” (*Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 45 Misc 3d 672, —, 2013 NY Slip Op 23468, *8 [2013], *affd* 118 AD3d 581, 582 [2014]). Here, as in *Red Zone*, the Town “immediately return[ed] to [defendants] . . . once an issue arising from [the alleged] malpractice [was] detected” (*id.*; see *N&S Supply v Simmons*, 305 AD2d 648, 649-650 [2003]).

Although defendants correctly contend that the continuous representation doctrine requires that there be “‘continuing trust and confidence in the relationship between the parties’” (*Kanter v Pieri*, 11 AD3d 912, 913 [2004]), there are triable issues of fact whether the Town ever lost such trust and confidence in defendants. There is no dispute that the Town received an unsolicited letter from an attorney suggesting that defendants had committed legal error and offering to represent the Town in recovering the money spent as a result of that error. There is likewise no dispute that the Town Board discussed that letter. The Town, however, neither consulted with that attorney nor instituted any legal malpractice action during the pendency of defendants’ representation (*cf. Lazzaro v Kelly*, 87 AD2d 975, 976 [1982], *affd* 57 NY2d 630 [1982]; *Schloss v Albany Med. Ctr.*, 278 AD2d 614, 615 [2000]). While the Town solicited a proposal from a second law firm for representation in a subsequent phase of the section 75 proceeding, consultation with a second attorney for representation on the same legal matter does not terminate the first attorney-client relationship (see *Red Zone LLC*, 45 Misc 3d 672). The Town, after discussing other legal options, opted against retaining other counsel, thereby “evidenc[ing] a desire to continue the relationship [with defendants] and to continue with [its] case” (*Bucaro v Keegan, Hecker & Tully*, 126 Misc 2d 590, 593 [1984]).

Additionally, we agree with the Town that there are triable issues of fact whether there was “actual privity of contract between the [Town and Gradl] or a relationship so close as to approach that of privity” (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382 [1992], *rearg denied* 81 NY2d 955 [1993]). “Viewed as a whole, we conclude that the evidence submitted in opposition to the [Gradl defendants’] motion raises a triable issue of fact whether there was an attorney-client relationship between [the Town] and [Gradl]” (*Bloom v Hensel*, 59 AD3d 1026, 1027 [2009]; *see Shanley v Welch*, 31 AD3d 1127, 1128 [2006]; *see generally Prudential Ins. Co. of Am.*, 80 NY2d at 382). Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

29 TREMAIN CASON, Respondent, v KIRBY SY SMITH, III, et al., Appellants. [993 NYS2d 218]—

Disclosure—Penalty for Failure to Disclose—Failure to Appear for Court-Ordered Deposition—Abuse of Discretion to Strike Answer Following Reasonable Excuse for Failure to Appear

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), entered March 22, 2013. The order affirmed orders of the Buffalo City Court entered June 12, 2007, April 11, 2008, and April 28, 2011, and affirmed an order and judgment (one paper) of the Buffalo City Court entered January 5, 2011.

It is hereby ordered that the order so appealed from is unanimously modified on the law by denying in part plaintiff’s motion to strike defendants’ answer and reinstating the answer insofar as interposed by defendant Werner Enterprises, Inc., resolving the issue of negligence in favor of plaintiff, and directing defendant Werner Enterprises, Inc. to pay \$1,500 to plaintiff’s counsel, and as modified the order is affirmed without costs and the matter is remitted to Buffalo City Court for further proceedings in accordance with the following memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained when the bus he was operating collided with a tractor-trailer owned by defendant Werner Enterprises, Inc. (Werner) and operated by defendant Kirby Sy Smith, III (Smith). The matter was transferred to Buffalo City Court for disposition. As defendants implicitly concede, City Court did not abuse its discretion in granting plaintiff’s motion to strike the answer insofar as interposed by Smith based upon Smith’s failure to appear for a court-ordered deposition (*see Carabello v Luna*, 49 AD3d 679, 679-680 [2008]; *Moriates v*

Powertest Petroleum Co., 114 AD2d 888, 889-890 [1985], *lv dismissed* 67 NY2d 603, 757 [1986]). We agree with defendants, however, that the court abused its discretion in striking the answer insofar as interposed by Werner. Initially, we note that there was no basis for the court to sanction Werner for failing to produce Smith inasmuch as Smith left Werner's employ prior to commencement of the action, and plaintiff "proffered no evidence that [Werner] exercised control over [Smith] and thus was responsible for [Smith]'s failure to appear for his deposition" (*Carabello*, 49 AD3d at 680; *see Moriates*, 114 AD2d at 890; *see generally Hann v Black*, 96 AD3d 1503, 1503 [2012]). With respect to Werner's failure to comply with a prior order to produce a corporate representative for deposition, it is well established that "[a]lthough the nature and degree of a sanction for a party's failure to comply with discovery generally is a matter reserved to the sound discretion of the trial court, the drastic remedy of striking an answer is inappropriate absent a showing that the failure to comply is willful, contumacious, or in bad faith" (*Green v Kingdom Garage Corp.*, 34 AD3d 1373, 1374 [2006]; *see Mosey v County of Erie*, 117 AD3d 1381, 1384 [2014]). "Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse" (*WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1619 [2011]). Here, plaintiff met that initial burden, "thereby shifting the burden to defendant[s] to offer a reasonable excuse" (*Hill v Oberoi*, 13 AD3d 1095, 1096 [2004]). We agree with Werner, however, that it offered a reasonable excuse for its failure to comply with the prior order. Plaintiff sought to depose a Werner representative solely in connection with his cause of action involving negligent hiring, training, and supervision, and such discovery was no longer relevant after Werner conceded the facts necessary to establish liability as a matter of law based on respondeat superior (*see generally Ruiz v Cope*, 119 AD3d 1333, 1335 [2014]; *Leftenant v City of New York*, 70 AD3d 596, 597 [2010]; *Ashley v City of New York*, 7 AD3d 742, 743 [2004]). We thus conclude that the court abused its discretion in granting that part of plaintiff's motion to strike the answer insofar as asserted by Werner. Instead, we impose the lesser sanction of resolving the issue of negligence in plaintiff's favor (*see CPLR 3126 [1]*; *Beatty v First Atl. Hous. Corp.*, 209 AD2d 658, 660 [1994]), and directing Werner to pay the sum of \$1,500 to plaintiff's counsel (*see L&L Auto Distribs. & Suppliers Inc. v Auto Collection, Inc.*, 85 AD3d 734, 736 [2011]; *Adzer v Rudin Mgt. Co., Inc.*, 50 AD3d 1070, 1072 [2008]). We therefore modify the order accordingly, and we re-

mit the matter to City Court for a trial on serious injury and proximate cause (*see Ruzyski v Baker*, 301 AD2d 48, 51 [2002]) and, if necessary, a new trial on damages. Based upon our determination, we do not address defendants' remaining contentions. Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

30 GLORY FOLMSBEE et al., Respondents, v THE GOODYEAR TIRE & RUBBER COMPANY, Doing Business as GOODYEAR AUTO SERVICE CENTERS, Appellant, and BENDERSON PROPERTIES, INC., Formerly Known as BENDERSON DEVELOPMENT COMPANY, LLC, Respondent. [994 NYS2d 317]—Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered November 15, 2013. The order, among other things, denied the motion of defendant the Goodyear Tire & Rubber Company, doing business as Goodyear Auto Service Centers, for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on April 16, 2014,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

31 In the Matter of ANDREA GERVAIS et al., Respondents, v BOARD OF EDUCATION OF EAST AURORA UNION FREE SCHOOL DISTRICT et al., Appellants. [992 NYS2d 593]—

Limitation of Actions—When Cause of Action Accrues—Teachers' Claim to be Put on Preferred Eligibility List

Schools—Teachers—Claim to be Put on Preferred Eligibility List — Rejection of Offer for Part-Time Employment

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 3, 2013 in a CPLR article 78 proceeding. The judgment, inter alia, determined that the denial of petitioners' rights of placement on the preferred eligibility list was arbitrary and capricious, and reinstated petitioners to the preferred eligibility list.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioners, former teachers in respondent East Aurora Union Free School District (School District), commenced this CPLR article 78 proceeding seeking, inter alia, a judgment requiring the School District to place them on the preferred eligibility list for their respective areas of tenure. Respondents—the School District and its Board of Education (Board)—asserted that the petition should be dismissed as untimely and that, in any event, petitioners are not entitled to

be placed on the preferred eligibility list inasmuch as they had refused to accept the part-time teaching positions offered to them. Supreme Court ruled in favor of petitioners and ordered that they be placed on the preferred eligibility list, retroactive to September 12, 2012. We now affirm.

Shortly before the start of the 2011-2012 school year, petitioners were hired by the School District as full-time teachers. On June 6, 2012, the Board, owing to budget constraints, reduced multiple full-time teaching positions to part-time positions. The Board's resolution states that "[a]s a result of the reduction of the positions, the individuals affected, as determined through seniority and applicable contract language, will be excessed and placed on the Preferred Eligibility List in accordance with applicable law and regulation." Because petitioners had the least seniority among teachers in their subject areas, their jobs were selected for reduction. Petitioner Andrea Gervais's job was reduced from "1.0 FTE" (a full-time position) to ".4 FTE" (40% of a full-time position), while petitioner Stephanie Parobek's job was reduced from "1.0 FTE" to ".2 FTE" (20% of a full-time position). Petitioners thereafter declined to accept those respective part-time positions, whereupon the Board, by resolution passed on September 12, 2012, terminated their employment and, by letters dated October 2, 2012, informed them that their names "have not been placed on the District's preferred eligibility list" because they had rejected the part-time positions offered to them. Petitioners filed separate notices of claim pursuant to Education Law § 3813 on December 10 and 11, 2012, and then jointly commenced this proceeding on January 10, 2013.

We initially conclude that, contrary to respondents' contention, the court properly determined that the proceeding was timely commenced. "A claim accrues for purposes of Education Law § 3813 when it matures and damages become ascertainable" (*Pope v Hempstead Union Free School Dist. Bd. of Educ.*, 194 AD2d 654, 655 [1993], *lv dismissed* 82 NY2d 846 [1993]; see *Blaze v New York City Dept. of Educ.*, 112 AD3d 428, 428-429 [2013]). Here, petitioners' claims accrued, at the earliest, on September 12, 2012 when the Board terminated their employment with the School District and then determined that they would not be placed on the preferred eligibility list. Although the Board reduced petitioners' positions to part time on June 6, 2012 and notified them of such decision by letters dated June 20, 2012, petitioners are not challenging that action by the School District. Instead, petitioners are challenging the determination of respondents not to place them on the preferred eligibility list, and the June resolution did not state that

petitioners would not be placed on the preferred eligibility list if they failed to accept the part-time positions offered to them. Although the June 20, 2012 letters to petitioners from the School District's superintendent stated that petitioners would be placed on the preferred eligibility list if they accepted the part-time positions, petitioners were not then informed that accepting the part-time positions was a requirement for being placed on the preferred eligibility list. Thus, as the court determined, petitioners' claims accrued no earlier than September 12, 2012. This proceeding was commenced on January 10, 2013, which is within the four-month statute of limitations applicable to CPLR article 78 proceedings (see CPLR 217 [1]).

With respect to the substantive merits of the case, we conclude that, contrary to respondents' further contention, the court properly ordered respondents to place petitioners on the preferred eligibility list. Education Law § 2510 (3) (a) provides that, if a teaching position "is *abolished* or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he [or she] has filled" (emphasis added). The statute further provides that the persons "on such preferred list shall be reinstated or appointed to such vacancies . . . in the order of their length of service in the system at any time within seven years from the date of abolition or consolidation of such office or position" (*id.*).

We agree with petitioners that respondents, by reducing their full-time teaching positions to part-time positions, "effectively abolished the full-time position[s] and created[] new part-time position[s]," thereby triggering petitioners' rights under Education Law § 2510 to be placed on the preferred eligibility list for possible reemployment in a full-time position (*Wild v Board of Educ. of Forestville Cent. School Dist.*, 166 AD2d 901, 901 [1990], *lv denied* 77 NY2d 802 [1991]; *see also Seney v Board of Educ. of the E. Greenbush Cent. Sch. Dist.*, 103 AD3d 1022, 1023 [2013]). We further conclude that petitioners' rejection of the part-time positions, which resulted in the termination of their employment with the School District, did not render them ineligible for placement on the preferred eligibility list (*see generally Matter of Girard v Board of Educ. of City School Dist. of City of Buffalo*, 168 AD2d 183, 186 [1991]; *Matter of Lewis v*

Cleveland Hill Union Free School Dist., 119 AD2d 263, 266-267 [1986]).

Finally, we note that, to the extent that respondents contend that petitioners were not entitled to placement on the preferred eligibility list because they did not have tenure, that contention is not properly before us inasmuch as it is raised for the first time on appeal (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [1994]). Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

32 GAIL A. ANDERSON, NOW KNOWN AS GAIL A. HALIM, Also Known as GAIL A. DECKER, Respondent, v JOSEPH M. ANDERSON, Appellant. [993 NYS2d 220]—

Husband and Wife and Other Domestic Relationships—Divorce—Termination of Consultation Fees Paid to Wife upon Termination of Business Relationship with Husband Following Wife's Opening of Competing Business

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 12, 2013 in a divorce action. The order, insofar as appealed from, denied that part of the motion of defendant seeking to terminate consultation fees payable to plaintiff.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking to terminate the consultation fees is granted.

Memorandum: Defendant former husband appeals from an order that denied his request to terminate the consultation fees that were being paid to plaintiff former wife pursuant to a provision of the parties' separation and property settlement agreement (agreement), which had been incorporated but not merged into their judgment of divorce. According to defendant, the provision created an employment relationship, permitting defendant to terminate the payments for good cause. We agree.

The consultation fee provision is found in the "Support" section of the agreement and is entitled, "Additional Support." According to the terms of the provision, if defendant's maintenance obligation to plaintiff terminates because of, inter alia, her remarriage, defendant will cause his business "to employ [plaintiff] as a consultant" for a certain weekly salary. The terms of the provision further provide that such "employment" shall continue until defendant's child support obligations under the agreement terminate. Although the agreement does not require plaintiff "to work any particular number of hours," it requires her to "be available at reasonable times and from time to time to consult, as needed by [defendant], with respect to [his] various business interests."

After plaintiff opened a competing business, defendant moved by order to show cause, *inter alia*, to terminate the consultation fees on the ground that plaintiff, as his employee, had breached her duty of loyalty. Supreme Court denied the motion, concluding in relevant part that “the employment provision is not a contract for employment, but rather . . . is a support provision which allow[ed] the defendant’s business to make payments to plaintiff instead of the defendant himself.” We conclude, however, that the provision constitutes an employment contract, thereby permitting defendant to terminate the payments upon plaintiff’s breach of her duty of loyalty to him as her employer (*see Western Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977]), and we therefore reverse.

It is well established that a separation agreement that is incorporated but not merged into a judgment of divorce “is a contract subject to the principles of contract construction and interpretation” (*Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990], *rearg denied* 76 NY2d 889 [1990]; *see Rainbow v Swisher*, 72 NY2d 106, 109 [1988]; *Gurbacki v Gurbacki*, 270 AD2d 807, 807 [2000]), and “a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *see Thompson v McQueeney*, 56 AD3d 1254, 1257 [2008]). By entering into the agreement, defendant agreed to employ plaintiff in the event his maintenance obligation terminated during the period of time in which he was still obligated to pay child support. Inasmuch as the language of the agreement is clear and unambiguous on its face, “the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence” (*Rainbow*, 72 NY2d at 109; *see Von Buren v Von Buren*, 252 AD2d 950, 950 [1998]).

While we agree with plaintiff and the court that the clear and unambiguous intent of the agreement was to provide a substitute source of monetary support for plaintiff after defendant’s maintenance obligation terminated, we conclude that the *reason* defendant agreed to employ plaintiff does not change the fact that the agreement established an employment relationship with corresponding rights and obligations for both parties.

As we have previously stated, “[a]n employee may not compete with his [or her] employer’s business during the time of his [or her] employment” (*Hercules Packing Corp. v Steinbruckner*, 28 AD2d 635, 635 [1967], *appeal dismissed* 20 NY2d 757 [1967]; *see Bon Temps Agency v Greenfield*, 184 AD2d 280, 281 [1992], *lv dismissed* 81 NY2d 759 [1992]; *Maritime Fish*

Prods. v World-Wide Fish Prods., 100 AD2d 81, 88 [1984], *appeal dismissed* 63 NY2d 675 [1984]). When plaintiff opened a business in direct competition with defendant's business, plaintiff breached her duty of loyalty to her employer (*see Western Elec. Co.*, 41 NY2d at 295), thereby permitting defendant to terminate the consultation fees and the employment relationship.

To the extent that plaintiff contends that defendant's delay in seeking her termination constitutes a waiver of his right to seek her termination, we note that the agreement specifically provides that a party's failure to seek strict performance of the agreement or to exercise any option thereunder will not be construed as a waiver of the right to do so at a later date. Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

33 BONNIE YOUNG et al., Respondents, v BARBARA LACY, Appellant. (Appeal No. 1.) [992 NYS2d 657]—Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 23, 2013. The order and judgment awarded money damages to plaintiff Bonnie Young.

It is hereby ordered that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051 [1990]). Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

34 BONNIE YOUNG et al., Respondents, v BARBARA LACY, Appellant. (Appeal No. 2.) [993 NYS2d 222]—

Witnesses—Expert Witness—Improperly Precluding Questions Concerning Accuracy of Prior Tax Returns—Determination of Credibility of Witness

Appeal from an amended order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 16, 2013. The amended order and judgment, insofar as appealed from, awarded money damages to plaintiff Bonnie Young.

It is hereby ordered that the amended order and judgment insofar as appealed from is unanimously reversed on the law without costs and a new trial is granted on the first cause of action.

Memorandum: Bonnie Young (plaintiff) and her husband commenced this action seeking, inter alia, damages for injuries that plaintiff sustained in a motor vehicle accident with defendant. The case proceeded to trial, and the jury rendered a verdict in favor of plaintiff and awarded her damages of \$329,517, including \$200,000 for past pain and suffering and \$127,387 for past

lost earnings. We note that no damages were awarded on the derivative cause of action, and no cross appeal was taken. On appeal, defendant contends that Supreme Court erred in refusing to allow her attorney to cross-examine plaintiff with respect to information in her federal tax returns. We agree with defendant, and we therefore reverse the amended order and judgment insofar as appealed from and grant a new trial on plaintiff's cause of action.

At trial, defendant's attorney sought to question plaintiff about information in her federal tax returns that he believed to be inaccurate. Specifically, he wanted to ask plaintiff why she had filed as head of household for four consecutive years when she had been married and living with her husband during that period. He also sought to ask plaintiff how many of her children she had claimed as dependency exemptions. According to defendant's attorney, plaintiff, as a result of her improper filing as head of household, had received a tax credit to which she would not otherwise have been entitled. The court precluded defendant's attorney from asking plaintiff any questions about information in her federal tax returns, explaining that, because plaintiff had not been asked about such issues at her deposition, defendant's attorney was improperly attempting to "ambush" her at trial. Defendant's attorney objected to the court's ruling, thereby preserving the issue for our review.

"It is, of course, the general rule that a witness may be cross-examined with respect to specific immoral, vicious or criminal acts which have a bearing on the witness's credibility . . . While the nature and extent of such cross-examination is discretionary with the trial court . . . , the inquiry must have some tendency to show moral turpitude to be relevant on the credibility issue" (*Badr v Hogan*, 75 NY2d 629, 634 [1990]). Furthermore, "'cross-examination aimed at establishing a possible reason to fabricate must proceed upon some good-faith basis'" (*Matter of Michael U. [Marcus U.]*, 110 AD3d 821, 822 [2013]).

Here, based on his reading of IRS Publication 51 and plaintiff's federal tax returns, defendant's attorney had a good faith basis to ask plaintiff about the propriety of her filing status. Moreover, if plaintiff had improperly filed federal tax returns as head of household in order to receive a tax credit to which she was not entitled, it raises the possibility that she may have committed tax fraud. We conclude that evidence that plaintiff may have committed tax fraud has "some tendency to show moral turpitude to be relevant on the credibility issue" (*Badr*, 75 NY2d at 634; see generally *Delgado v Murray*, 115 AD3d 417, 418 [2014]). Although it is true, as plaintiff points

out, that, because of the collateral evidence rule, defendant's attorney would have been bound by plaintiff's answers concerning her federal tax returns without "refut[ing] [those] answers . . . by calling other witnesses or by producing extrinsic evidence" (Prince, Richardson on Evidence § 6-305 [Farrell 11th ed]; see also *People v Schwartzman*, 24 NY2d 241, 245 [1969], *cert denied* 396 US 846 [1969]; *Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 924 [2010]), we nevertheless conclude that defendant's attorney should have been allowed to ask the questions (see *McNeill v LaSalle Partners*, 52 AD3d 407, 410 [2008]).

Plaintiff's reliance on *Badr* (75 NY2d 629) is misplaced. In that case, the plaintiff in a personal injury action was asked on cross-examination whether she had committed welfare fraud. After plaintiff answered "[n]o" (*id.* at 632), the defendant's attorney marked as an exhibit a confession of judgment wherein plaintiff had admitted that she had improperly received money from the Department of Social Services and had agreed to pay it back. Over plaintiff's objection, the court allowed defendant's attorney to use the confession of judgment to impeach plaintiff's testimony that she had not committed welfare fraud. The Court of Appeals determined that it was reversible error for the trial court to have allowed the defendant's attorney to use *extrinsic evidence*, i.e., the confession of judgment, to impeach plaintiff's credibility (*id.* at 634-636).

The question presented in the case before us is not whether the court should have allowed defendant's attorney to impeach plaintiff's credibility with extrinsic evidence; rather, the question is whether the court should have allowed defendant's attorney to question plaintiff about information in plaintiff's federal tax returns that he believed to be inaccurate. Notably, the Court of Appeals in *Badr* did not suggest that it was error for the defendant's attorney to ask the plaintiff whether she had committed welfare fraud; the error occurred in allowing the defendant's attorney to use extrinsic evidence to show that the plaintiff's answer to the fraud question was false. Here, defendant's attorney was not permitted even to ask plaintiff his questions, and thus the facts of this case do not come within the holding of *Badr*. Finally, because plaintiff's credibility was central to several close issues at trial—including proximate cause, serious injury, and damages—it cannot be said that the error is harmless.

In light of our determination, we do not address defendant's remaining contentions. Present—Scudder, P.J., Peradotto, Carni and Lindley, JJ.

35 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v NORMAN KOONCE, Appellant. [993 NYS2d 401]—

Grand Jury—Defective Proceeding—Proper Number of Jurors Voting for Indictment

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered October 31, 2011. The appeal was held by this Court by order entered November 8, 2013, decision was reserved and the matter was remitted to Erie County Court for further proceedings (111 AD3d 1277 [2013]). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to County Court to rule on defendant's renewed motion to “ ‘rule on whether the jurors who voted this indictment were present for all the testimony presented on this case’ ” (*People v Koonce*, 111 AD3d 1277, 1279 [2013]). We determined in our prior decision that defendant's remaining contentions on the appeal from the judgment of conviction after a jury trial lacked merit (*id.* at 1278-1279). Upon remittal, the court denied the renewed motion, and we now affirm.

Defendant contends that the grand jury proceeding was not properly conducted in accordance with CPL 190.25 (1) inasmuch as the summary sheet from the proceeding shows that 20 votes were cast to indict him, while the attendance sheet lists only 19 grand jurors present. We reject that contention. The attendance sheet shows, in fact, that there were 21 grand jurors present on the day that defendant was indicted. We therefore conclude from the two sheets that one grand juror simply did not vote. Thus, contrary to defendant's contention, the record establishes that “at least 12 [grand] jurors who . . . heard all of the ‘essential and critical evidence’ vote[d] to indict” (*People v Perry*, 199 AD2d 889, 891 [1993], *lv denied* 83 NY2d 856 [1994]; see *People v Collier*, 72 NY2d 298, 301-302 [1988]). Present—Scudder, P.J., Centra, Carni and Lindley, JJ.

36 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MAURICE COTTON, Appellant. [993 NYS2d 225]—

Grand Jury—Right to Appear before Grand Jury—Improper Shackling of Defendant Not Basis for Reversal of Conviction

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 10, 2010. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). In his main brief, defendant contends that the verdict is contrary to the weight of the evidence, primarily based upon his contention that the victim was not credible, and he also asks us to review the legal sufficiency of the evidence as part of our weight of the evidence review. In his pro se supplemental brief, defendant contends that the evidence is legally insufficient to support the conviction. Defendant failed to renew his motion for a trial order of dismissal after presenting evidence, and thus failed to preserve his sufficiency challenge for our review (*see People v Lane*, 7 NY3d 888, 889 [2006]; *People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). In any event, viewing the evidence in the light most favorable to the People (*see People v Williams*, 84 NY2d 925, 926 [1994]), we conclude that it is legally sufficient to support the conviction of the crimes charged (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we also conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). “[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury” (*People v Witherspoon*, 66 AD3d 1456, 1457 [2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]; *see People v Mulligan*, 118 AD3d 1372, 1375 [2014]), and, based upon our independent review of the evidence and the credibility of the witnesses, we see no reason to disturb the jury’s determination.

We agree with defendant’s further contention in his pro se supplemental brief that he should not have been shackled when he testified before the grand jury, but we conclude that reversal based on that error is not warranted. “As the People correctly contend, the prosecutor’s cautionary instructions to the grand jurors, which forbade them from drawing any negative inferences from the shackling, ‘were sufficient to dispel any potential prejudice’ to defendant” (*People v Burroughs*, 108 AD3d 1103, 1106 [2013], *lv denied* 22 NY3d 995 [2013]; *see People v Gilmore*, 12 AD3d 1155, 1155 [2004]). Insofar as defendant’s pro se supplemental brief may be read to challenge the sufficiency of the evidence before the grand jury, we note that such challenge is not properly before us. “It is well established that ‘[t]he validity of an order denying any motion [to dismiss an indictment

for legal insufficiency of the grand jury evidence] is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence’ ” (*People v Afrika*, 79 AD3d 1678, 1679 [2010], *lv denied* 17 NY3d 791 [2011], quoting CPL 210.30 [6]; see *People v Lane*, 106 AD3d 1478, 1481 [2013], *lv denied* 21 NY3d 1043 [2013]). Similarly, “[b]ecause his convictions are supported by legally sufficient trial evidence, defendant’s challenges to . . . the instructions given during [the grand jury] proceeding are precluded” (*People v Medeiros*, 116 AD3d 1096, 1099 n [2014]).

Also in his pro se supplemental brief, defendant contends that Supreme Court committed reversible error in permitting two witnesses to bolster the victim’s prior identification of defendant. That contention is not preserved for our review because, “[a]lthough a [hearsay objection] was raised against this testimony, defendant at no time objected to this testimony on the specific ground that it constituted improper bolstering” (*People v West*, 56 NY2d 662, 663 [1982]; see *People v Comerford*, 70 AD3d 1305, 1306 [2010]; see also *People v Jacque*, 2 AD3d 1362 [2003], *lv denied* 2 NY3d 741 [2004]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]).

We reject defendant’s further contention in his pro se supplemental brief that he was denied effective assistance of counsel, inasmuch as he failed to “ ‘demonstrate the absence of strategic or other legitimate explanations’ for counsel’s allegedly deficient conduct” (*People v Caban*, 5 NY3d 143, 152 [2005]; see *People v Coleman*, 37 AD3d 489, 490 [2007], *lv denied* 9 NY3d 864 [2007]; see generally *People v Benevento*, 91 NY2d 708, 712 [1998]).

The sentence is not unduly harsh or severe. Finally, we have considered the remaining contentions in defendant’s pro se supplemental brief and conclude that they are without merit. Present—Smith, J.P., Fahey, Lindley, Whalen and DeJoseph, JJ.

37 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RONALD P. MCGUAY, Appellant. [993 NYS2d 228]—

Crimes—Confession—Noncustodial Statements—Defendant Advised That He was Free to Leave

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered October 3, 2011. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]), defendant contends that he was deprived of his constitutional right to present a defense because County Court denied his request to serve a late notice of intent to present psychiatric evidence (see CPL 250.10 [2]). By pleading guilty, however, defendant forfeited his right to challenge the court's denial of his motion (see *People v Di Donato*, 87 NY2d 992, 993 [1996]). For the same reason, defendant also forfeited his right to challenge the court's denial of his request for the appointment of a special prosecutor (see generally *People v Taylor*, 65 NY2d 1, 5 [1985]).

We reject defendant's contention that the court erred in denying his motion to suppress incriminating statements he made to law enforcement officials. As the court properly determined, defendant was not in custody when he made the statements, and thus the police were not required to advise defendant of his *Miranda* rights (see generally *People v Paulman*, 5 NY3d 122, 129 [2005]; *People v Berg*, 92 NY2d 701, 704 [1999]; *People v Beard*, 1 AD3d 886, 886 [2003], *lv denied* 1 NY3d 624 [2004]). The evidence at the *Huntley* hearing establishes that defendant voluntarily accompanied the police to the station for both interviews, he was not restrained in any way during either interview, and he was allowed to go home at the conclusion of the interviews. Moreover, defendant was specifically advised by one of the investigators that he was free to leave at anytime. In our view, a reasonable person in defendant's position who was innocent of any crime would not have believed that he or she was in custody (see *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]; *People v Lunderman*, 19 AD3d 1067, 1068 [2005], *lv denied* 5 NY3d 830 [2005]).

Although defendant contends that his plea was involuntarily entered, he failed to preserve his contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (see *People v Cubi*, 104 AD3d 1225, 1226 [2013], *lv denied* 21 NY3d 1003 [2013]), and the narrow exception to the preservation rule does not apply because defendant said nothing during the plea colloquy that "clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]; see *People v Hall*, 119 AD3d 1349, 1349 [2014]).

We have reviewed defendant's remaining contentions and conclude that they lack merit. Present—Smith, J.P., Fahey, Lindley, Whalen and DeJoseph, JJ.

38 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
DEAN TUSZYNSKI, Appellant. [993 NYS2d 402]—

Motor Vehicles—Aggravated Unlicensed Operation of Motor Vehicle—Proof of Impairment

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloï, J.), rendered June 1, 2011. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony, aggravated unlicensed operation of a motor vehicle in the first degree and leaving the scene of an incident without reporting.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), defendant contends that the verdict with respect to those counts is contrary to the weight of the evidence with respect to the issue of intoxication. We reject that contention.

We note at the outset that the conviction of aggravated unlicensed operation of a motor vehicle in the first degree does not require proof of intoxication, and we thus reject defendant's contention with respect to that crime. Unlike the driving while intoxicated count, which requires proof that defendant was intoxicated (*see* Vehicle and Traffic Law § 1192 [3]), the aggravated unlicensed operation of a motor vehicle in the first degree count may be sustained upon proof that defendant was driving while his ability to operate a motor vehicle was impaired pursuant to Vehicle and Traffic Law § 1192 (1) (*see People v Gelster*, 256 AD2d 1133, 1133 [1998]; *see e.g. People v Kaminski*, 109 AD3d 1186, 1186 [2013], *lv denied* 22 NY3d 1088 [2014]; *People v DeCarlís*, 37 AD3d 1040, 1040 [2007], *lv denied* 8 NY3d 945 [2007]), and it is well settled that a “[c]onviction of [that] offense [does] not require proof of intoxication, but only [requires proof] that defendant’s driving ability was impaired to any extent’ ” by the consumption of alcohol (*People v McDonald*, 27 AD3d 949, 950 [2006]). Here, defendant concedes in his brief that the weight of the evidence supports a finding that his driving ability was impaired by his consumption of alcohol.

In any event, we conclude that the verdict is not against the weight of the evidence on the issue of intoxication. “Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference

to the jury, given its opportunity to view the witnesses and observe their demeanor” (*People v Streeter*, 118 AD3d 1287, 1288 [2014] [internal quotation marks omitted]; see *People v Roman*, 107 AD3d 1441, 1442-1443 [2013], *lv denied* 21 NY3d 1045 [2013]; *People v Scott*, 107 AD3d 1635, 1636 [2013], *lv denied* 21 NY3d 1077 [2013]). “Viewing the evidence in a neutral light and weighing the probative value of the conflicting testimony and the conflicting inferences that could be drawn, while deferring to the jurors’ ability to observe the witnesses and assess their credibility, aided by the video recording, we find that it was not contrary to the weight of the credible evidence for the jury to find that defendant” was intoxicated (*People v Purvis*, 90 AD3d 1339, 1341 [2011], *lv denied* 18 NY3d 997 [2012]; see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that the persistent felony offender statutory scheme is unconstitutional in light of the rule in *Apprendi v New Jersey* (530 US 466 [2000]). To the contrary, it is well settled that Penal Law § 70.10 and CPL 400.20 are constitutional (see *People v Battles*, 16 NY3d 54, 59 [2010], *cert denied* 565 US —, 132 S Ct 123 [2011]; *People v Quinones*, 12 NY3d 116, 122-131 [2009], *cert denied* 558 US 821 [2009]). Finally, the sentence is not unduly harsh or severe. Present—Smith, J.P., Fahey, Lindley, Whalen and DeJoseph, JJ.

39 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CHAZ J. GRIFFIN, Also Known as JOHN DOE, Also Known as CHIZZLE, Appellant. [993 NYS2d 404]—

Crimes—Plea of Guilty—Forfeiture of Right to Raise Issues on Appeal—Fear of Harsher Sentence Not Coercion

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 3, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant’s contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (see generally *People v Lopez*, 6 NY3d 248, 256 [2006]). “‘Although County Court’s colloquy was brief, defendant signed a detailed written waiver of the right to appeal . . . , and he acknowledged to the court that he understood that he was foregoing the right to appeal’ ” (*People*

v Bridenbaker, 112 AD3d 1379, 1380 [2013]). Defendant's valid waiver of the right to appeal encompasses his challenge to the factual sufficiency of the plea allocution (see *People v Gardner*, 101 AD3d 1634, 1634 [2012]). In any event, defendant failed to preserve that challenge for our review, and this case does not fall within the narrow exception to the preservation requirement (see *People v Thomas*, 72 AD3d 1483, 1483 [2010]).

Defendant's further contention that the court abused its discretion in denying his motion to withdraw his plea on the ground that it was coerced survives his valid waiver of the right to appeal (see *People v Jackson*, 85 AD3d 1697, 1698 [2011], *lv denied* 17 NY3d 817 [2011]; *People v Sparcino*, 78 AD3d 1508, 1509 [2010], *lv denied* 16 NY3d 746 [2011]). We nevertheless reject that contention. "The unsupported allegations of defendant that [defense counsel] pressured him into accepting the plea bargain [did] not warrant vacatur of his plea" (*People v James*, 71 AD3d 1465, 1465 [2010]). Defendant asserted that he accepted the plea offer based on defense counsel's advice that he was unlikely to prevail at trial and that he would likely receive a harsher sentence if convicted after trial. That advice does not constitute coercion (see *People v Elting*, 18 AD3d 770, 771 [2005], *lv denied* 5 NY3d 788 [2005]). Furthermore, defendant admitted at sentencing that he pleaded guilty based on his fear that he would not succeed at trial and would receive a harsher sentence, and it is well settled that "'defendant's fear that a harsher sentence would be imposed if defendant were convicted after trial does not constitute coercion'" (*People v Zimmerman*, 100 AD3d 1360, 1362 [2012], *lv denied* 20 NY3d 1015 [2013]; see *People v Jackson*, 90 AD3d 1692, 1693 [2011], *lv denied* 18 NY3d 958 [2012]).

Finally, although defendant's contention that defense counsel was ineffective for coercing him into accepting the plea agreement also survives his valid waiver of the right to appeal (see *People v Neil*, 112 AD3d 1335, 1336 [2013]), that contention is without merit. Present—Smith, J.P., Fahey, Lindley, Whalen and DeJoseph, JJ.

40 LLOYD RIFENBURG, Respondent, v WESTERN NEW YORK AND PENNSYLVANIA RAILROAD, Appellant. [992 NYS2d 657]—Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered July 17, 2013. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on June 13 and 28, 2014, and filed in the Allegany County Clerk's Office on July 2, 2014,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Smith, J.P., Fahey, Lindley, Whalen and DeJoseph, JJ.

41 In the Matter of KAREN A. WHITAKER, as Proposed Guardian of JOSEPH L. MARTIN, JR., Respondent, v KENNEDY/TOWN OF POLAND et al., Appellant, et al., Respondents. [992 NYS2d 658]—Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered September 12, 2013. The order granted the application of claimant for leave to serve a late notice of claim on respondents Kennedy/Town of Poland and Town of Poland Highway Department.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs (*see McBee v County of Onondaga*, 34 AD3d 1360, 1360 [2006]). Present—Smith, J.P., Fahey, Lindley, Whalen and DeJoseph, JJ.

42 ALI R. ABDULNABI, Appellant, v ALLSTATE INSURANCE COMPANY, Respondent. [993 NYS2d 229]—

Insurance—Fire Insurance—Intentionally Set Fire Basis for Denying Claim

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered November 25, 2013. The order, among other things, denied the motion of plaintiff for summary judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages based on defendant's alleged breach of an insurance policy issued by defendant to plaintiff covering real property owned by plaintiff. Plaintiff submitted a claim to defendant for fire loss, and defendant refused to pay the claim on the ground that, *inter alia*, plaintiff's intentional conduct caused the fire.

We conclude that Supreme Court properly denied plaintiff's motion for summary judgment. An insurer denying coverage based on the intentional ignition or procurement of a fire by the insured must establish "either that the fire was intentionally set *or* that [the insured] had a financial motive to destroy his [or her] property for the insurance proceeds" (*Van Nevius v Preferred Mut. Ins. Co.* [appeal No. 1], 280 AD2d 947, 947 [2001] [emphasis added]). Here, in the context of plaintiff's motion for summary judgment, if the evidence " 'indicates that plaintiff[s] premises *may* have been damaged by arson and that plaintiff[] *may* have had a motive to see the[] property destroyed by fire,' " a plaintiff-insured's motion for summary judgment should be denied (*Benjaminov v Republic Ins. Group*, 241 AD2d

473, 474 [1997]; see *R.C.S. Farmers Mkts. Corp. v Great Am. Ins. Co.*, 56 NY2d 918, 920 [1982]). Viewing the evidence in the light most favorable to the nonmoving party, as we must (see *Esposito v Wright*, 28 AD3d 1142, 1143 [2006]), we conclude that plaintiff failed to meet his initial burden of establishing that the fire was not intentionally set (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We further conclude that, although plaintiff met his initial burden of establishing that he did not have a financial motive to destroy the property for the insurance proceeds, defendant raised a triable issue of fact in that respect (see generally *id.*). Present—Smith, J.P., Fahey, Lindley, Whalen and DeJoseph, JJ.

43 In the Matter of BRENDA BERNIER, Petitioner, v NIRAV R. SHAH, Commissioner, New York State Department of Health, Respondent. [993 NYS2d 405]—

Social Services—Medical Assistance—Denial of Request for Modular Wheelchair Ramp—Wheelchair Ramp Not Durable Medical Equipment

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Henry J. Nowak, Jr., J.], entered January 22, 2014) to review a determination of respondent. The determination denied petitioner's request for a modular wheelchair ramp.

It is hereby ordered that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to review respondent's determination made after a fair hearing denying her a modular wheelchair ramp. Respondent determined that the ramp did not meet the definition of durable medical equipment (DME) pursuant to 18 NYCRR 505.5 (a) (1). Contrary to petitioner's contention, respondent's determination is supported by substantial evidence (see generally *Matter of Coffey v D'Elia*, 61 NY2d 645, 648 [1983]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978]). In addition, "[a]n agency's interpretation of its regulations must be upheld unless the determination is irrational and unreasonable" (*Matter of Taher v Novello*, 278 AD2d 809, 810 [2000], *lv denied* 96 NY2d 712 [2001] [internal quotation marks omitted]; see *Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 280 [2003]; *Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]), and we conclude that respondent's determination that ramps do not fit within the definition of DME is rational. DME is equipment that is "primarily and customarily

used for medical purposes” and that is “generally not useful to a person in the absence of an illness or injury” (18 NYCRR 505.5 [a] [1] [ii], [iii]). We agree with respondent that ramps may be useful to people, generally, even in the absence of an illness or injury. We have considered petitioner’s remaining contentions and conclude that they are without merit. Present—Centra, J.P., Carni, Valentino and Whalen, JJ.

44 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JOHNNY B. BIVINS, SR., Appellant. [992 NYS2d 658]—Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 18, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on July 23, 2014 and by the attorneys for the parties on August 1 and 5, 2014,

It is hereby ordered that said appeal is unanimously dismissed upon stipulation. Present—Centra, J.P., Carni, Sconiers and Whalen, JJ.

45 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DAVELL SCOTT, Appellant. [993 NYS2d 231]—

Crimes—Lesser Included Offense—Controlled Substance Offenses—Weight of Controlled Substances

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 16, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). We reject defendant’s contention that Supreme Court erred in refusing to charge the jury with the lesser included offense of criminal possession of a controlled substance in the seventh degree (§ 220.03). “A lesser included offense may not be submitted unless there appears on the whole record ‘some identifiable, rational basis’ for the jury to reject evidence supportive of the greater crime yet accept so much of the evidence as would establish the lesser” (*People v Palmer*, 216 AD2d 883, 884 [1995], *lv denied* 86 NY2d 799 [1995], quoting *People v Scarborough*, 49 NY2d 364, 369 [1980]). Here, the People presented expert testimony that the cocaine recovered from defendant weighed in

excess of 1,400 milligrams, which is nearly triple the weight requirement for a conviction of criminal possession of a controlled substance in the fifth degree (see § 220.06 [5]). Viewing the evidence in the light most favorable to defendant (see *People v Rivera*, 23 NY3d 112, 120-121 [2014], citing *People v Martin*, 59 NY2d 704, 705 [1983]; *People v Moultrie*, 100 AD3d 401, 402 [2012], *lv denied* 20 NY3d 1102 [2013]), we conclude that “[t]here was no basis, other than sheer speculation, for the jury to find that the chemist inaccurately weighed the drugs, or to otherwise reject the portion of [her] testimony concerning the weight of the substance, while at the same time accepting the portion of [her] testimony identifying the substance” (*People v Johnson*, 66 AD3d 537, 538 [2009]; see *Moultrie*, 100 AD3d at 402; *Palmer*, 216 AD2d at 884). We therefore conclude that there is no reasonable view of the evidence that defendant committed the lesser offense but not the greater (see *People v Demus*, 82 AD3d 1667, 1668 [2011], *lv denied* 17 NY3d 815 [2011]; *People v Bolden*, 70 AD3d 1352, 1353 [2010], *lv denied* 14 NY3d 838 [2010]). Present—Centra, J.P., Carni, Valentino and Whalen, J.J.

46 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DANIEL UBBINK, Appellant. [993 NYS2d 406]—

Contempt—Criminal Contempt—Insufficient Evidence to Sustain Conviction Where Defendant Did Not Place Victim in Fear of Physical Injury Crimes—Stalking—Prior Relationship between Defendant and Victim

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 21, 2011. The judgment convicted defendant upon a jury verdict, of criminal contempt in the first degree, stalking in the third degree and resisting arrest.

It is hereby ordered that the judgment so appealed from is unanimously modified on the law by reducing the conviction of criminal contempt in the first degree (Penal Law § 215.51 [b] [ii]) to criminal contempt in the second degree (§ 215.50 [3]) and vacating the sentence imposed on count one of the indictment and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Onondaga County, for sentencing on the conviction of criminal contempt in the second degree.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal contempt in the first degree (Penal Law § 215.51 [b] [ii]) and stalking in the third degree (§ 120.50 [4]). Contrary to the contention of the People, we conclude that defendant’s challenge to the legal sufficiency of the evidence with respect to those crimes is preserved for our review (see *People v Payne*, 3 NY3d 266, 273 [2004]), and

we further conclude that the evidence is legally insufficient to support the conviction of criminal contempt in the first degree (see generally *People v Bleakley*, 69 NY2d 490, 495 [1987]). The evidence presented at trial does not establish that defendant intentionally placed or attempted to place the victim in reasonable fear of physical injury, “let alone ‘serious physical injury or death’ ” (see *People v Demisse*, 24 AD3d 118, 119 [2005], *lv denied* 6 NY3d 833 [2006]). Defendant went to the victim’s residence, but the evidence does not establish that his words or actions while he was there constituted an actual or implied threat of physical harm to the victim. “While defendant should have known that the victim did not want to have any contact with him and that the [visit] could well be upsetting to her, it does not necessarily follow that defendant, when he made the [visit], intended to place the victim in reasonable fear for her physical safety. Without such evidence, the evidence is legally insufficient and his conviction for criminal contempt in the first degree cannot stand” (*People v Brown*, 61 AD3d 1007, 1010 [2009]).

We further conclude, however, that there is legally sufficient evidence to sustain a conviction of the lesser included offense of criminal contempt in the second degree (Penal Law § 215.50 [3]) inasmuch as the evidence established that, despite having knowledge of the order of protection, defendant intentionally disobeyed it (see *Brown*, 61 AD3d at 1010). We therefore modify the judgment by reducing defendant’s conviction of criminal contempt in the first degree to criminal contempt in the second degree and vacating the sentence imposed on count one of the indictment (see CPL 470.15 [2] [a]), and we remit the matter to Supreme Court for sentencing on the conviction of criminal contempt in the second degree (see CPL 470.20 [4]).

We reject defendant’s contention that the evidence is not legally sufficient to support the conviction of stalking in the third degree. The evidence submitted in support of that crime “must be viewed in the context of the prior relationship that existed between defendant and the victim” (*Brown*, 61 AD3d at 1009). Here, defendant had been previously convicted of stalking as a result of his fixation with the victim such that he “had to have known that any attempt on his part to contact [her] would have no legitimate purpose and, at the very minimum, would serve to harass and annoy her[,] . . . [and that,] even absent some express threat directed at her, she [would have] legitimate and well-founded fears for her physical safety” if he visited her residence (*id.*). Contrary to defendant’s contention, we further conclude that the evidence established the necessary element of a course of conduct, i.e., a series of acts “evidencing

a continuity of purpose” (*People v Payton*, 161 Misc 2d 170, 174 [1994]), for stalking in the third degree. Thus, viewing the evidence in the light most favorable to the People, we conclude that the evidence demonstrates a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury with respect to that crime (see *Bleakley*, 69 NY2d at 495).

Finally, viewing the evidence in light of the elements of the crime of stalking in the third degree as charged to the jury (see *People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant’s further contention that the verdict is against the weight of the evidence with respect to that crime (see generally *Bleakley*, 69 NY2d at 495). Present—Centra, J.P., Carni, Valentino and Whalen, JJ.

47 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ROBERT D. CURRY, Appellant. [993 NYS2d 232]—

**Crimes—Possession of Weapon—Constructive Possession of Weapon
Crimes—Sentence—Persistent Violent Felony Offender—Separate Predicate Felonies**

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 16, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), criminal possession of a weapon in the third degree (§ 265.02 [3]), and assault in the third degree (§ 120.00 [1]). The charges arose from an incident in which defendant was involved in a physical altercation with another man. We reject defendant’s contention that, because he had neither actual nor constructive possession of the handgun, the evidence is legally insufficient to support the conviction with respect to the weapon possession counts. Viewing the evidence in the light most favorable to the People (see *People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Brown*, 92 AD3d 1216, 1217 [2012], *lv denied* 18 NY3d 992 [2012]), we conclude that there is a valid line of reasoning and permissible inferences that could lead the jury to conclude that defendant actually or constructively possessed the subject weapon (see Penal Law § 10.00 [8]; see also *People v Manini*, 79 NY2d 561, 573 [1992]; see generally *People v Bleakley*, 69 NY2d

490, 495 [1987]). Furthermore, viewing the evidence in the light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant also contends that he was illegally sentenced as a persistent violent felony offender (*see generally* Penal Law § 70.08). Defendant's contention is premised on the fact that, on the same day, he was resentenced for a 2004 felony weapons possession offense after pleading guilty to a probation violation and was sentenced for a separate 2005 felony weapons possession offense. We reject defendant's contention that the resentencing on the 2004 conviction "reset[] the controlling sentencing date for purposes" of determining whether the sentence of the 2004 conviction was imposed before commission of the 2005 felony (*People v Davis*, 93 AD3d 524, 524-525 [2012], *lv denied* 19 NY3d 995 [2012]; *see* § 70.08 [1] [b]; *see also* § 70.04 [1] [b] [ii]). We therefore conclude, contrary to defendant's contention, that those crimes constitute separate predicate violent felonies, not a single predicate violent felony, for purposes of determining whether defendant was a persistent violent felony offender (*see Davis*, 93 AD3d at 524-525; *People v Newton*, 91 AD3d 1281, 1282 [2012], *lv denied* 19 NY3d 965 [2012]; *see also People v Acevedo*, 17 NY3d 297, 302 [2011]). We have reviewed defendant's remaining contentions in his pro se supplemental brief with respect to his persistent violent felony offender status and conclude that they are without merit. Present—Centra, J.P., Carni, Valentino and Whalen, JJ.

48 In the Matter of the Application for Discharge of CHARLES BROOKS, Consecutive No. 262223, from Central New York Psychiatric Center Pursuant to Mental Hygiene Law § 10.09, Appellant, v STATE OF NEW YORK et al., Respondents. [993 NYS2d 409]—

Crimes—Sex Offenders—Civil Commitment or Supervision—Use of Hearsay Testimony

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered June 13, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order continued the commitment of petitioner to a secure treatment facility.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner was previously determined to be a dangerous sex offender requiring civil confinement and was committed to a secure treatment facility (*see* Mental Hygiene

Law § 10.01 *et seq.*; *Matter of State of New York v C.B.*, 88 AD3d 599, 599 [2011], *appeal dismissed and lv denied* 18 NY3d 905 [2012]). Petitioner now appeals from an order continuing his confinement in a secure treatment facility (*see* § 10.09 [h]). We reject petitioner's contention that respondents failed to prove by clear and convincing evidence that he is a dangerous sex offender requiring continued confinement (*see Matter of Sincere KK. v State of New York*, 111 AD3d 1083, 1083-1084 [2013], *lv denied* 22 NY3d 862 [2014]; *Matter of William II. v State of New York*, 110 AD3d 1282, 1283 [2013]). To the extent that petitioner contends that respondents' expert witness improperly relied upon hearsay testimony, we conclude that Supreme Court is presumed to have properly given any hearsay statements limited legal significance in making its determination, and that any evidentiary error is harmless (*see Matter of State of New York v Mark S.*, 87 AD3d 73, 80 [2011], *lv denied* 17 NY3d 714 [2011]).

As the First Department concluded on his appeal from the initial determination under Mental Hygiene Law article 10, "there is no merit to [petitioner's] argument that he is entitled to release on the ground that his initial confinement under article 9 of the Mental Hygiene Law had been illegal" (*C.B.*, 88 AD3d at 599-600; *see People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 15 NY3d 126, 133 [2010], *rearg denied* 15 NY3d 847 [2010]). Indeed, petitioner and others similarly situated challenged their confinement under Mental Hygiene Law article 9 in *State of N.Y. ex rel. Harkavy v Consilvio* (7 NY3d 607 [2006]; *see Matter of State of New York v C.B.*, 18 Misc 3d 1136[A], 2008 NY Slip Op 50329[U], *1 [2008]), and the Court of Appeals determined that the petitioners were not entitled to immediate release, but rather should be afforded the appropriate hearing (*see Harkavy*, 7 NY3d at 614; *see also State of N.Y. ex rel. Harkavy v Consilvio*, 8 NY3d 645, 651-652 [2007]), which petitioner received here.

Contrary to petitioner's contention, the court properly denied his motion for a change of venue because the court did not have the authority to change venue in a hearing held pursuant to Mental Hygiene Law § 10.09 (*see Matter of Davis v State of New York*, 106 AD3d 1488, 1489 [2013], *lv granted* 22 NY3d 852 [2013]). In any event, petitioner failed to establish good cause for a change of venue inasmuch as he made only conclusory statements regarding the convenience of his witnesses (*see Matter of State of New York v Steinmetz*, 101 AD3d 1726, 1727 [2012]).

We reject petitioner's further contention that the court erred in denying his request to substitute counsel or to proceed pro

se. Petitioner failed to show good cause for substitution (*see People v Sides*, 75 NY2d 822, 824 [1990]). Assuming, arguendo, that petitioner had a right to self-representation (*see Matter of State of New York v Raul L.*, 120 AD3d 52, 62-63 [2014]; *see also Matter of State of New York v Timothy BB.*, 113 AD3d 18, 21 [2013], *appeal dismissed and lv denied* 23 NY3d 941 [2014]), we conclude that petitioner did not make an unequivocal request to proceed pro se (*see People v Gillian*, 8 NY3d 85, 88 [2006]; *People v McIntyre*, 36 NY2d 10, 17 [1974]). Present—Centra, J.P., Carni, Valentino and Whalen, JJ.

49 SCAN TUBE & STEEL SERVICES, LTD., Appellant-Respondent, v ALTX, INC., et al., Respondents-Appellants, and TUBACEX CANADA, INC., Respondent. [992 NYS2d 659]—Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 18, 2013. The order granted in part and denied in part the motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 26, 2014,

It is hereby ordered that said appeal and cross appeal are unanimously dismissed without costs upon stipulation. Present—Centra, J.P., Carni, Valentino and Whalen, JJ.

50 In the Matter of the Arbitration between DENIS J. SULLIVAN, Respondent, and JAMES R. MULDOON, Appellant, and GEORGE S. BLASIAK, Respondent. [992 NYS2d 659]—Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 15, 2013. The order granted the motion of petitioner to confirm an arbitration award and denied the cross motion of respondent James R. Muldoon to modify or vacate the arbitration award.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Centra, J.P., Carni, Valentino and Whalen, JJ.

51 In the Matter of RAFAEL RODRIGUEZ, Petitioner, v ANTHONY ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [993 NYS2d 234]—

Parole—Revocation—Alleged Bias of Hearing Officer

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 26, 2014) to review

a determination of respondent. The determination revoked the parole of petitioner.

It is hereby ordered that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his parole release and remanding him to serve the remainder of his sentence. We note at the outset that Supreme Court erred in transferring the matter to this Court inasmuch as petitioner does not allege that the determination is not supported by substantial evidence (*see* CPLR 7804 [g]). We nevertheless review the merits of the petition in the interest of judicial economy (*see Matter of Moulden v Coughlin*, 210 AD2d 997, 997 [1994]). We reject petitioner's contention that he was deprived of due process based upon the alleged bias of the Hearing Officer. Indeed, "[t]here is no support in the record for the contention of petitioner that the Hearing Officer's determination was influenced by any alleged bias against [him]" (*Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [2011]; *see generally Matter of Hughes v Suffolk County Dept. of Civ. Serv.*, 74 NY2d 833, 834 [1989], *not to amend remittitur granted* 74 NY2d 942 [1989]). We also reject petitioner's contention that the Hearing Officer usurped the role of the prosecution, thereby depriving him of due process (*cf. Matter of Moore v Alexander*, 53 AD3d 747, 748-749 [2008], *lv denied* 11 NY3d 710 [2008]). Contrary to petitioner's further contention, the Hearing Officer, rather than a member of the Parole Board, properly determined the penalty in accordance with Executive Law § 259-i (3) (*see Matter of Mayfield v Evans*, 93 AD3d 98, 102-107 [2012]; *see also People ex rel. Clinton v Fischer*, 111 AD3d 1360, 1361 [2013]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

52 In the Matter of KEVIN MARKMAN, Petitioner, v GLADYS CARRION, Commissioner, New York State Office of Children and Family Services, et al., Respondents. [993 NYS2d 593]—

Parent, Child and Family—Abused or Neglected Child—Indicated Report of Maltreatment

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [John J. Ark, J.], entered January 9, 2014) to review a determination of the New York State Office of Children and Family Services. The determination denied petitioner's application to amend the indicated report of maltreatment to an unfounded report.

It is hereby ordered that the determination is unanimously confirmed without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination, made after a fair hearing, denying in part his request to amend an indicated report of maltreatment with respect to two of his children to an unfounded report, and to seal it (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). We conclude that the determination is supported by substantial evidence and therefore decline to disturb it (*see Matter of Arbogast v New York State Off. of Children & Family Servs., Special Hearing Bur.*, 119 AD3d 1454, 1454-1455 [2014]; *Matter of Parker v Carrion*, 90 AD3d 512, 512 [2011]). Where, as here, hearsay evidence is “sufficiently relevant and probative,” it may constitute substantial evidence (*People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]; *see Matter of Bullock v State of N.Y. Dept. of Social Servs.*, 248 AD2d 380, 382 [1998]). The Administrative Law Judge credited the children’s accounts of the incidents over petitioner’s denials thereof, and we perceive no basis to disturb those credibility determinations (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]; *Matter of Scaccia v Martinez*, 9 AD3d 882, 883 [2004]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

53 In the Matter of JEREMY A. McNEIL, Appellant, v MICHAEL DEERING et al., Respondents. (Appeal No. 1.) [992 NYS2d 810]—

Parent, Child and Family—Custody—Lack of Extraordinary Circumstances to Disturb Primary Custody with Grandparents—Petitioning Father’s History of Domestic Violence

Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 6. The amended order dismissed the amended petition for modification of custody.

It is hereby ordered that the amended order so appealed from is unanimously affirmed without costs.

Memorandum: In appeal No. 1, petitioner father appeals from an amended order that dismissed his amended petition seeking modification of the existing custody arrangement (2012 modification petition). Pursuant to a stipulated order, respondents Michael Deering and Tina Deering, the children’s maternal grandparents, have joint legal custody of the children along with the father and respondent Beth L. Deering, the children’s mother, and the grandparents have primary physical

residence of the children with visitation to the father. By the amended petition in appeal No. 1, the father sought sole custody of the children. In appeal No. 2, the father appeals from an amended order that dismissed his petition alleging that the mother violated a visitation order. In appeal Nos. 3 and 4, the father appeals from amended orders that dismissed his petitions seeking an order of protection against the grandfather and the grandmother, respectively. Finally, in appeal No. 5, the father appeals from an order that dismissed his second petition seeking, inter alia, modification of the existing custody arrangement (2013 modification petition) on the ground that Vermont, rather than New York, is the more convenient forum. We note at the outset that the father has failed to address on appeal any issues with respect to the propriety of the amended orders in appeal Nos. 2, 3 and 4, and therefore is deemed to have abandoned any such issues (see *Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [1994]).

The father contends in appeal No. 1 that Family Court erred in failing to apply the extraordinary circumstances standard when evaluating the 2012 modification petition and should have granted the 2012 petition because it would be in the best interests of the children for the father to have sole custody. We agree with the father that the court erred in failing to conduct the threshold inquiry whether extraordinary circumstances existed here to warrant the continuation of primary physical residence with the grandparents (see *Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147 [2009]). “The nonparent has the burden of establishing that extraordinary circumstances exist even where, as here, ‘the prior order granting custody of the child to [the] nonparent[] was made upon consent of the parties’ ” (*id.*). We need not remit the matter to Family Court to make that determination, however, because the record here is adequate to enable us to do so (*cf. id.* at 1148). We conclude that there are the requisite extraordinary circumstances, based on the father’s history of domestic violence, including an incident that occurred in the presence of one of the children and resulted in at least three orders of protection and incarceration, his history of substance abuse, and his sporadic contact with the children (see *Matter of Roberta W. v Carlton McK.*, 112 AD3d 729, 730 [2013]; *Matter of Barnes v Evans*, 79 AD3d 1723, 1724 [2010], *lv denied* 16 NY3d 711 [2011]; *Matter of Campo v Chapman*, 24 AD3d 439, 439-440 [2005], *lv denied* 6 NY3d 709 [2006]). Nevertheless, we further conclude that the father failed to demonstrate a change in circumstances to warrant an inquiry into the best interests of the children on the issue of custody because the record does not support his contention that

there was a deterioration in the parties' relationships and that the grandparents interfered with his scheduled visitation or telephone access (*see Matter of Kashif II. v Lataya KK.*, 99 AD3d 1075, 1076 [2012]).

In appeal No. 5, the father contends that the court erred in refusing to retain jurisdiction over the 2013 modification petition because, contrary to the court's determination, New York is the more convenient forum. We reject that contention, inasmuch as there is a sound and substantial basis in the record to support the court's determination that Vermont is the more appropriate forum (*see Matter of Frank MM. v Lorain NN.*, 103 AD3d 951, 952 [2013]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

54 In the Matter of JEREMY A. McNEIL, Appellant, v BETH L. DEERING, Respondent. (Appeal No. 2.) [992 NYS2d 660]—Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 6. The amended order dismissed the petition.

It is hereby ordered that the amended order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of McNeil v Deering* ([appeal No. 1] 120 AD3d 1581 [2014]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

55 In the Matter of JEREMY A. McNEIL, Appellant, v MICHAEL DEERING, Respondent. (Appeal No. 3.) [992 NYS2d 660]—Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 8. The amended order dismissed the petition seeking an order of protection.

It is hereby ordered that the amended order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of McNeil v Deering* ([appeal No. 1] 120 AD3d 1581 [2014]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

56 In the Matter of JEREMY A. McNEIL, Appellant, v TINA DEERING, Respondent. (Appeal No. 4.) [992 NYS2d 813]—Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 8. The amended order dismissed the petition seeking an order of protection.

It is hereby ordered that the amended order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of McNeil v Deering* ([appeal No. 1] 120 AD3d 1581 [2014]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

57 In the Matter of the Adoption of SAPPHIRE W., an Infant. MARY W., Appellant; DEBBIE R., Respondent. [992 NYS2d 599]—

Parent, Child and Family—Visitation—Biannual Visits in Exchange for Judicial Surrender of Parental Rights—Parent’s Breach of Agreement

Appeal from an amended order of the Family Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered September 10, 2013 in a proceeding pursuant to Domestic Relations Law § 112-b. The amended order terminated post-adoption contact between petitioner and the subject child.

It is hereby ordered that the amended order so appealed from is unanimously modified on the law by granting the petition in part and directing respondent to comply with that part of the agreement requiring her to provide petitioner with annual progress reports and photographs in the event that petitioner provides respondent with annual notice of her address, and as modified the amended order is affirmed without costs.

Memorandum: Petitioner, the biological mother of the child at issue herein, entered into an agreement with respondent, the adoptive mother of the child, which provided for biannual visits with the child as a condition of her judicial surrender of her parental rights. The agreement was determined by Family Court (Nenno, J.) to be in the best interests of the child (*see* Domestic Relations Law § 112-b [2]; *cf. Matter of Kaylee O.*, 111 AD3d 1273, 1274 [2013]). The agreement provided, *inter alia*, that petitioner was entitled to visit the child for a period of two hours in the months of July and December, and that she was obligated to contact respondent by the first Monday of July and the first Monday of December to arrange the visits. The parties orally modified the agreement to provide for visitation on the day after Thanksgiving, rather than in December. It is undisputed that petitioner failed to contact respondent in July 2012 and that in November 2012 she did not contact respondent until November 15, rather than on November 5, which was the first Monday of November. Respondent refused to schedule the visit in November 2012, and petitioner sought to enforce the agreement.

Following a hearing, Family Court (Ploetz, A.J.) determined that, although petitioner’s cell phone containing respondent’s telephone number was destroyed, petitioner failed to make sufficient attempts to obtain respondent’s telephone number by other means. The court therefore determined that petitioner

breached the agreement. The court further determined that it was in the best interests of the child that visitation be terminated.

The court properly determined that, although petitioner was ready, willing, and able to visit with the child in November 2012 (*cf. Matter of Mya V.P. [Amber R.—Laura P.]*, 79 AD3d 1794, 1795 [2010]), she breached the agreement based upon her failure to contact respondent for a visit in July and her failure to provide timely notice of the visit in November (*see id.*; *cf. Matter of Brown v Westfall*, 36 Misc 3d 1234[A], 2012 NY Slip Op 51598[U] [Fam Ct, Yates County 2012]). We further conclude that the court was entitled to credit respondent's testimony regarding the special needs of the child and her opinion that continued visits with petitioner would not be in the best interests of the child based upon the child's needs and petitioner's periodic inattention to the child during the two-hour visits (*see generally Kaylee O.*, 111 AD3d at 1274). The court's determination that it is not in the best interests of the child to resume visits with petitioner is entitled to great deference and, inasmuch as it is supported by a sound and substantial basis in the record, we will not disturb it (*see Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1337-1338 [2011]).

We nevertheless conclude that the petition should be granted to the extent that it seeks to enforce that part of the agreement providing that, in the event that visitation is terminated, petitioner is to notify respondent of her address each year by November 1 and respondent is to provide a progress report and photographs of the child to petitioner in December of each year. By the terms of the agreement (*see generally Mya V.P.*, 79 AD3d at 1795), the provision requiring annual progress reports and photographs did not become effective until after visitation was terminated, i.e., at the time of the court's order. We therefore conclude that the court erred in failing to grant the petition to that extent, and we modify the amended order accordingly. Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

58 In the Matter of JANET WOODWORTH, Respondent, v MICHAEL ATKINSON, Respondent, and DEANNA LOWDEN, Appellant. [992 NYS2d 661]—Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered January 23, 2013 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent Deanna Lowden to an order of a support magistrate.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court. Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

59 In the Matter of JEREMY A. McNEIL, Appellant, v MICHAEL DEERING et al., Respondents. (Appeal No. 5.) [992 NYS2d 661]—Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered June 18, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of custody.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Same memorandum as in *Matter of McNeil v Deering* ([appeal No. 1] 120 AD3d 1581 [2014]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

60 In the Matter of WALTER BYAS, Appellant, v BRIAN FISCHER, Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [992 NYS2d 813]—

Parole—Denial—Consideration of Relevant Factors—Formal Procedures Focusing on Rehabilitation Not Required

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered May 22, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the Parole Board denying him parole release. As an initial matter, we reject petitioner’s contention that the 2011 amendment to Executive Law § 259-c (4) required the Parole Board to promulgate formal procedures to focus on rehabilitation in making parole release decisions. Instead, we agree with the Third Department that the 2011 memorandum issued by Chairwoman Andrea Evans to Parole Board members “sufficiently establishes the requisite procedures for ‘incorporat[ing] risk and needs principles’ into the process of making parole release decisions” (*Matter of Montane v Evans*, 116 AD3d 197, 202 [2014], *lv granted* 23 NY3d 903 [2014]). In any event, we note that the Parole Board has promulgated regulations for “parole release decision-making procedures,” which became effective July 30, 2014, that are consistent with the procedures set forth in the 2011 memorandum (*see* 9 NYCRR 8002.3).

We reject petitioner’s further contention that the Parole Board’s determination denying him parole release was based entirely on the severity of the crimes committed. The record establishes that the Parole Board properly considered not only the crimes committed, but also the fact that they were commit-

ted while petitioner was on parole release, in addition to petitioner's criminal history, the COMPAS risk assessment instrument, his institutional programming and extensive history of institutional misbehavior reports, and his plans for release (see *Matter of Robles v Fischer*, 117 AD3d 1558, 1559 [2014]). Petitioner "made no showing of irrationality bordering on impropriety to warrant judicial intervention" (*id.* [internal quotation marks omitted]; see *Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

61 In the Matter of WATERTOWN CITY SCHOOL DISTRICT et al., Appellants, v ANONYMOUS, a Tenured Teacher, Respondent. [992 NYS2d 814]—

Witnesses—Subpoena Duces Tecum—Teacher Disciplinary Proceeding—Student Records

Appeal from a judgment and order (one paper) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 27, 2013 in a proceeding pursuant to CPLR article 75. The judgment and order denied the petition to quash the subpoena duces tecum issued by the hearing officer on July 5, 2013 and granted the cross motion to compel petitioners to comply with the subpoena duces tecum.

It is hereby ordered that the judgment and order so appealed from is unanimously reversed on the law without costs, the cross motion is denied and the petition is granted.

Memorandum: Petitioners commenced this proceeding seeking, inter alia, to quash a subpoena duces tecum served on them by respondent, a tenured teacher, in the course of an administrative proceeding commenced against respondent pursuant to Education Law § 3020-a. Respondent cross-moved to compel petitioners to comply with the subpoena duces tecum. We agree with petitioners that Supreme Court erred in denying the petition and granting the cross motion. The record establishes that, following an initial prehearing conference in the section 3020-a proceeding, the Hearing Officer granted respondent's request for production of the testifying high school students' records, notwithstanding protections under the Family Educational Rights and Privacy Act of 1974 (FERPA), and thereafter limited production of students' records to those from seventh grade forward. In connection with that request, the Hearing Officer issued a subpoena duces tecum ordering the production of those student records. Although the Hearing Officer had the authority to order the production of student records that were material and relevant to respondent's defense (see § 3020-a [3] [c])

[iii] [A], [C]), it is well established that “[g]enerally, a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence” (*Matter of Terry D.*, 81 NY2d 1042, 1044 [1993]). Where, as here, “the relevance of the subpoena is challenged, it is incumbent upon the issuer to come forward with a factual basis establishing the relevance of the documents sought to the investigation,” to show “that the material sought bears a reasonable relation to the matter under investigation” (*Matter of N. v Novello*, 13 AD3d 631, 632 [2004]; see *Matter of Constantine v Leto*, 157 AD2d 376, 378 [1990], *aff’d for reasons stated* 77 NY2d 975 [1991]). Here, the allegations of misconduct against respondent involved activities outside of the classroom, and respondent stated only generally that the students’ records were “highly relevant” in asserting a defense and that the records are “necessary and relevant to the preparation of a defense to the charges on its face.” Thus, in light of respondent’s failure to indicate how the records are reasonably related to respondent’s defense and a factual basis establishing their relevance (see *Novello*, 13 AD3d at 632), we conclude that the court abused its discretion in refusing to quash the subpoena duces tecum (see generally *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 [1998]; *Kephart v Burke*, 306 AD2d 924, 925 [2003]).

In light of our decision, we do not consider petitioners’ remaining contention, concerning the alleged violation of FERPA. Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

62 MARKITA SMITH, Individually and as Mother and Natural Guardian of RA’SHADRIAN THOMAS, an Infant, Plaintiff, v CITY OF BUFFALO et al., Respondents, and COUNTY OF ERIE, Appellant. [992 NYS2d 816]—

Municipal Corporations—Tort Liability—Maintenance of Splash Pool—Respective Responsibility of City and County

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered July 24, 2013. The order denied the motion of defendant County of Erie for partial summary judgment and granted the cross motion of defendants City of Buffalo and City of Buffalo Department of Public Works, Parks and Streets for partial summary judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action, individually and on behalf of her daughter, seeking damages for an injury her daughter sustained when her leg became lodged in a drain

intake opening of a splash pool owned by defendant City of Buffalo (City) and operated by defendant County of Erie (County) pursuant to their Intermunicipal Cooperation Agreement (agreement), which provided for the operation, management and improvement of the City's parklands. It is undisputed that plaintiff's daughter stepped into the drain intake opening because the cover was missing. Pursuant to the agreement, the City transferred to the County personnel and equipment necessary for the management and operation of the parklands and paid an annual fee to the County for the operational services; however, the City retained certain responsibilities with respect to the parklands. The agreement also provided that each party agreed to defend, indemnify and hold harmless the other party for, inter alia, injuries that resulted directly or indirectly from the ownership of the parklands and from the services provided by the respective parties. The County moved for partial summary judgment on its cross claim alleging that the City is obligated to defend and indemnify it in this personal injury action, and the City and defendant City of Buffalo Department of Public Works, Parks and Streets (City defendants) cross-moved for partial summary judgment on their cross claim against the County seeking the same relief. Supreme Court granted the cross motion of the City defendants. We affirm.

As a preliminary matter, we reject the County's contention that the court erred in determining that Supreme Court's decision in *Hall v City Fence, Inc.* (36 Misc 3d 1237[A], 2012 NY Slip Op 51694[U] [2012]), a personal injury action, is inapposite. The court in *Hall* denied motions of the City and the County for summary judgment dismissing the amended complaint and any cross claims against them, but the applicability of the indemnification clause was not at issue.

"It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, '[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible' " (*New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567 [2010]; see *RLI Ins. Co. v Smiedala*, 96 AD3d 1409, 1411 [2012]). " 'Moreover, the contract must be interpreted so as to give effect to, not nullify, its general or primary purpose' " (*Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799 [2010]). Here, the purpose of the agreement was to share responsibility for the improvement and operation of city-owned parklands. Pursuant to article X, the County has a "limited role in the provision or financing of capital improvements," which includes "major repairs, replacement and removal of capital assets as well as construction of

new capital assets.” Pursuant to article XIII, section 13.1, however, “the County shall operate, maintain, and manage the Parklands, including but not limited to having the power, discretion and responsibility to provide routine repairs . . . and generally exercise the same day-to-day powers, responsibilities and duties it does with respect to County-owned parks and recreation facilities.” Schedule 4 of the agreement provides that the “County will maintain pools . . . inside Olmsted Parks,” and it is undisputed that the splash pool at issue here is located in an “Olmsted” park. In view of the well-settled principles of contract construction, we conclude that the city defendants established their entitlement to summary judgment determining that the replacement of the drain intake cover falls within the provisions of section 13.1, and not article X, and the County failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 561 [1980]).

The County contends for the first time that the court erred in granting summary judgment without first allowing discovery on the issue whether the replacement of the drain intake cover is a major repair, and thus subject to the provisions of article X, or a minor repair, and thus subject to the provisions of article XIII. That contention, therefore, is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [1994]). Further, the County has abandoned its contention that, because the required repair was to a capital asset, i.e., a splash pool, the City was responsible to undertake the repair (*see id.* at 984). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

63 JUDITH R. WHITMER, Appellant, v NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, Respondent. [992 NYS2d 818]—

Taxation—Sales and Use Taxes—Individual’s Responsibility to Pay Corporation’s Sales Taxes

Limitation of Actions—Six-Year Statute of Limitations—Collection of Corporation’s Sales Taxes from Individual

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered May 10, 2013. The order, among other things, granted defendant’s motion for summary judgment dismissing the complaint.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In November 2007, defendant sent plaintiff a notice and demand for payment of sales taxes under jeopardy assessment (jeopardy assessment) pursuant to Tax Law § 1138 (b), and a notice of determination for sales taxes due pursuant

to Tax Law § 1138 (a) (1) and (3) (B). The jeopardy assessment and notice of determination advised plaintiff that defendant determined that she was liable as an officer or a responsible person of the named corporation for payment of the sales taxes. The jeopardy assessment indicated that a jeopardy assessment was required inasmuch as plaintiff appeared to be preparing to transfer property or to leave the state. Defendant filed tax warrants and liens against plaintiff.

On July 2, 2008, plaintiff commenced this declaratory judgment action alleging that she was not an officer, director, employee, shareholder, or responsible person of the named corporation and was not liable for the assessment. Plaintiff sought a judgment declaring that Tax Law § 1138 was not applicable to her, that the assessment issued by defendant was null and void, and that the liens were null and void because she was not a person responsible for the sales taxes. Plaintiff also sought a return of money seized by defendant from the sale of property she owned.

Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint as time-barred. It is well settled that a court must examine the substance of a declaratory judgment action to determine if the issues could be resolved in another proceeding for which a specific limitation period is provided by law (*see Solnick v Whalen*, 49 NY2d 224, 229-230 [1980]). "Of course, when the claim is one against a governmental body or officer, the form of action that immediately springs to mind is a proceeding brought under CPLR article 78, a traditional, and surely the most common, vehicle for challenging a governmental decision or action" (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 201 [1994], *rearg denied* 84 NY2d 865 [1994]).

As the court properly determined, the gravamen of plaintiff's complaint is that she is not responsible for the corporation's sales tax payments because she was not an officer, director, employee, shareholder, or responsible person of the corporation. This controversy could have been resolved in a CPLR article 78 proceeding to challenge the November 5, 2007 jeopardy assessment and notice of determination and, under the four-month statute of limitations, plaintiff's complaint is time-barred (*see Heron v Division of Taxation of Dept. of Taxation & Fin. of State of N.Y.*, 209 AD2d 989, 990 [1994], *lv denied* 85 NY2d 809 [1995]; *Davidoff v State Tax Commn. of State of N.Y.*, 208 AD2d 1095, 1096 [1994]; *Inserillo v State Tax Commn.*, 159 AD2d 488, 489 [1990], *appeal dismissed* 76 NY2d 772 [1990], *lv denied* 76 NY2d 709 [1990]).

Plaintiff contends that the catch-all six-year statute of limitations applies because the nature of the action is a return of money paid under protest to defendant, which is a cause of action for monies had and received. She contends that such a cause of action is appropriate where the allegations are that defendant was without jurisdiction to collect the money, and the court has already ruled that the jeopardy assessment was untimely as a matter of law and thus defendant was without authority, or jurisdiction, to issue the jeopardy assessment (*Whitmer v New York State Dept. of Taxation & Fin.*, 24 Misc 3d 1017, 1021-1022 [2009]). We reject those contentions. Although plaintiff's fourth cause of action sought a refund of approximately \$73,000 for the money seized by defendant pursuant to the assessment and levies, that claim for monetary relief was incidental to the primary relief sought, i.e., a declaration that plaintiff was not a responsible person for the taxes sought under Tax Law § 1138 (see CPLR 7806; *Matter of Gross v Perales*, 72 NY2d 231, 236 [1988], *rearg denied* 72 NY2d 1042 [1988]). When a tax statute is alleged to be unconstitutional, or attacked as wholly inapplicable, "the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided in it" (*Matter of First Natl. City Bank v City of N.Y. Fin. Admin.*, 36 NY2d 87, 92-93 [1975]; see *City of Rochester v Chiarella*, 98 AD2d 8, 12 [1983], *affd* 63 NY2d 857 [1984]). "To challenge a statute as wholly inapplicable, the taxpayer must allege that the agency had no jurisdiction over it or the matter that was taxed" (*Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 322 [2003]). Even assuming, arguendo, that the jeopardy assessment was untimely, we disagree with plaintiff that Tax Law § 1138 is therefore wholly inapplicable and unconstitutionally applied to her. As explained above, defendant also issued a notice of determination pursuant to Tax Law § 1138 (a) seeking the unpaid sales taxes, which is not dependent upon the jeopardy assessment. Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

64 KERRY BENNETT, Respondent, v JEFFREY PAUL, Appellant. [1992 NYS2d 661]—Appeal from an amended order of the Supreme Court, Onondaga County (Charles C. Merrell, J.), entered January 2, 2014. The amended order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ordered that the amended order so appealed from is unanimously affirmed without costs for reasons stated in the amended decision at Supreme Court. Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

65 In the Matter of AARON HAURI, Respondent, v SPRINGVILLE-GRIFFITH INSTITUTE CENTRAL SCHOOL DISTRICT,

Appellant. [992 NYS2d 662]—Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered July 9, 2013. The order, insofar as appealed from, granted claimant's application for leave to serve a late notice of claim.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on June 12 and 30, 2014,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

66 CHARLES G. MICHAELS et al., Appellants, v MATTHEW DRAKE et al., Respondents. (Appeal No. 1.) [992 NYS2d 662]—Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 4, 2013. The order dismissed the complaint.

It is hereby ordered that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977 [1989]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

67 CHARLES G. MICHAELS et al., Appellants, v MATTHEW DRAKE et al., Respondents. (Appeal No. 2.) [992 NYS2d 821]—

Motor Vehicles—Collision—Collision with On-Duty Police Officer Responding to Emergency

Appeal from a judgment of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 4, 2013. The judgment dismissed the complaint.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Charles G. Michaels when the vehicle he was driving collided with a vehicle driven by defendant Matthew Drake, a police officer with defendant City of Rochester. Following a bench trial, Supreme Court found in favor of defendants and dismissed the complaint. We affirm. Viewing the evidence in the light most favorable to sustain the judgment following this bench trial (*see Wayne Coop. Ins. Co. v Woodward*, 21 AD3d 1270, 1272 [2005]), we conclude that a fair interpretation of the evidence supports the court's verdict. It is undisputed that at the time of the accident Drake was operating his vehicle in response to a dispatch call concerning a domestic dispute. He was thus engaged in the emergency operation of a vehicle as defined in Vehicle and Traffic Law § 114-b as a mat-

ter of law (see *Criscione v City of New York*, 97 NY2d 152, 154 [2001]; *Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373 [2012]), and the applicable standard of liability is reckless disregard for the safety of others rather than ordinary negligence (see Vehicle and Traffic Law § 1104 [e]; *Criscione*, 97 NY2d at 154; *Herod v Mele*, 62 AD3d 1269, 1270 [2009], *lv denied* 13 NY3d 717 [2010]). Although Drake admitted that he exceeded the speed limit in responding to the dispatch, speeding is expressly privileged under Vehicle and Traffic Law § 1104 (b) (3) provided that the driver “does not endanger life or property” (*id.*; see *Saarinen v Kerr*, 84 NY2d 494, 499 [1994]; *Herod*, 62 AD3d at 1270), and his conduct did not constitute the type of recklessness necessary for liability to attach (see *Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; *Dodds v Town of Hamburg*, 117 AD3d 1428, 1429-1430 [2014]). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

68 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v GREGORY L. RUSSELL, Appellant. [992 NYS2d 822]—

Crimes—Appeal—Preservation of Issue for Review—Propriety of Issuing Order of Protection for Two Witnesses

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 4, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [2]), defendant contends that Supreme Court erred in issuing an order of protection in favor of two witnesses (see CPL 530.13 [4] [a]), i.e., the mother of defendant’s children and their daughter. As a preliminary matter, we agree with defendant that his waiver of the right to appeal does not preclude us from considering his contention inasmuch as the order of protection was “not a part of the plea agreement” (*People v Lilley*, 81 AD3d 1448, 1448 [2011], *lv denied* 17 NY3d 860 [2011]), and is not a part of his sentence (see *People v Nieves*, 2 NY3d 310, 316 [2004]; *People v Tate*, 83 AD3d 1467, 1467 [2011]). We note, however, that defendant failed to preserve his contention for our review by not objecting at sentencing to the issuance of the order of protection in favor of those two witnesses (see CPL 470.05 [2]; *Nieves*, 2 NY3d at 315-317; *People v Collins*, 117 AD3d 1535, 1535 [2014]; *People v Loffler*, 111 AD3d 1059, 1060-1061 [2013]; *People v Sweeney*,

106 AD3d 841, 842 [2013]). In any event, we conclude that the contention lacks merit (*see* CPL 530.13 [4] [a]; *People v Wilson*, 115 AD3d 1229, 1229 [2014], *lv denied* 23 NY3d 969 [2014]). Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

69 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v PHILLIP L. JONES, Appellant. [992 NYS2d 823]—

Crimes—Confession—Waiver of Right to Remain Silent

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered March 1, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that the People failed to establish that he knowingly, voluntarily, and intelligently waived his *Miranda* rights, and that County Court therefore erred in refusing to suppress the statements he made to the police after the arresting officer read him those rights. Specifically, defendant contends that the evidence at the *Huntley* hearing demonstrates that he did not waive his *Miranda* rights, but that he asked the arresting officer “[w]hat’s going on” after the arresting officer read him the *Miranda* warnings. Contrary to defendant’s contention, the court properly refused to suppress those statements. It is well settled that “an explicit verbal waiver is not required; an implicit waiver may suffice and may be inferred from the circumstances” (*People v Smith*, 217 AD2d 221, 234 [1995], *lv denied* 87 NY2d 977 [1996]). Thus, “[w]here, as here, a defendant has been advised of his *Miranda* rights and within minutes thereafter willingly answers questions during interrogation, ‘no other indication prior to the commencement of interrogation is necessary to support a conclusion that the defendant implicitly waived those rights’ ” (*People v Goncalves*, 288 AD2d 883, 884 [2001], *lv denied* 97 NY2d 729 [2002], quoting *People v Sirno*, 76 NY2d 967, 968 [1990]; *see People v Strahin*, 114 AD3d 1284, 1285 [2014], *lv denied* 23 NY3d 968 [2014]). Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

70 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WILLIAM ALLEN, Also Known as SEAN GILMORE, Appellant. [992 NYS2d 824]—

Crimes—Confession—Spontaneous Statement to Police

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 17, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, sexual abuse in the first degree and rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]), sexual abuse in the first degree (§ 130.65 [1]), and rape in the third degree (§ 130.25 [3]). Viewing the evidence in light of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]). “[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury” (*People v Witherspoon*, 66 AD3d 1456, 1457 [2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]) and “[w]here, as here, the defendant’s challenge is focused upon the credibility of the witnesses, we [must] accord ‘great deference to the resolution of credibility issues by the trier of fact because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record’ ” (*People v Cole*, 111 AD3d 1301, 1302 [2013], *lv denied* 23 NY3d 1019 [2014]).

Contrary to the People’s contention, we conclude that defendant preserved his challenge to County Court’s *Sandoval* ruling (*cf. People v Manning*, 286 AD2d 690, 690 [2001], *lv denied* 97 NY2d 684 [2001]), but we nevertheless conclude that defendant’s challenge lacks merit (*see People v Hayes*, 97 NY2d 203, 207-208 [2002]; *People v Ayala*, 27 AD3d 1087, 1089 [2006], *lv denied* 6 NY3d 892 [2006]). We reject defendant’s further contention that the court erred in refusing to suppress statements that he made to the police. “The suppression hearing testimony established that defendant’s initial statement[] [was] made spontaneously and [was] not in response to any police questioning or its functional equivalent, and defendant’s later statements were made after defendant was advised of his *Miranda* rights and had waived them” (*People v Burnett*, 41 AD3d 1201, 1202 [2007]; *see People v Irvin*, 111 AD3d 1294, 1295 [2013]; *see generally People v Thomas*, 22 NY3d 629, 641-642 [2014]). Finally, we conclude that the sentence is not unduly harsh or severe. Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

71 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v
KEVIN A. DUKES, Appellant. [993 NYS2d 411]—

Crimes—Plea of Guilty—Withdrawal of Plea—Failure to Make Informed Decision Concerning Waiver of Potential Affirmative Defense

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered August 17, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and criminal sexual act in the first degree.

It is hereby ordered that the judgment so appealed from is unanimously reversed on the law, the plea is vacated and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]) and criminal sexual act in the first degree (§ 130.50 [1]). We agree with defendant that Supreme Court erred in accepting his plea without ensuring that he was making an informed decision to waive a potential affirmative defense to the robbery charge. We therefore reverse the judgment of conviction, vacate the plea and remit the matter to Supreme Court for further proceedings on the indictment.

The indictment alleged, inter alia, that defendant and an accomplice robbed a store in Rochester by displaying what appeared to be a firearm. At the outset of the plea colloquy, defense counsel stated that, although defendant told the police that he used a .45 caliber handgun in the robbery, the weapon he had used was actually a BB gun. Defense counsel further stated, however, that defendant would waive the affirmative defense set forth in Penal Law § 160.15 (4), which applies where the weapon used in the robbery “was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged.” During the ensuing plea colloquy, defendant stated that the gun he had used was a BB gun that looked like a revolver, not a .45 caliber handgun as he had told the police. At the end of the plea colloquy, defense counsel, in response to concerns expressed by the prosecutor, again stated that defendant was waiving the affirmative defense set forth in section 160.15 (4). The court then accepted defendant’s plea.

Although “no catechism is required in connection with the acceptance of a plea” (*People v Goldstein*, 12 NY3d 295, 301 [2009]), it is well established that “where the defendant’s recitation of the facts underlying the crime pleaded to clearly casts

significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, . . . the trial court has a duty to inquire further to ensure that [the] defendant's guilty plea is knowing and voluntary" (*People v Lopez*, 71 NY2d 662, 666 [1988]; see *People v Serrano*, 15 NY2d 304, 308-309 [1965]). "Where the court fails in this duty and accepts the plea without further inquiry, the defendant may challenge the sufficiency of the allocution on direct appeal," despite having failed to make that challenge in a "postallocation motion" directed to the plea court (*Lopez*, 71 NY2d at 666).

Here, we conclude that reversal is mandated by the reasoning of *People v Mox* (20 NY3d 936 [2012]). In that case, the defendant, who was offered the opportunity to plead guilty to a reduced charge of manslaughter in the first degree, stated during the plea colloquy that he was hearing voices on the day of the homicide, was in a psychotic state, and had not taken his prescribed medication for several days. County Court nevertheless accepted the defendant's plea. Immediately after the plea was entered, defense counsel stated that she had discussed with the defendant the potential defense of not guilty by reason of mental disease or defect, and that the defendant was willing to waive that defense in order to accept the People's plea offer. The court then asked the defendant if that was correct, and the defendant answered in the affirmative. The Court of Appeals vacated the plea, concluding that County Court had a duty to "inquire further into whether defendant's decision to waive a potentially viable insanity defense was an informed one such that his guilty plea was knowing and voluntary" (*Mox*, 20 NY3d at 939). According to the Court of Appeals, County Court's "single question to defendant verifying that he discussed that defense with his attorney and opted not to assert it was insufficient to meet that obligation" (*id.*).

Here, as noted, defendant made statements during the plea colloquy indicating that he had a potentially viable affirmative defense to the charge of robbery in the first degree. Thus, the court was obligated under the holding of *Mox* and the rule set forth in *Lopez* to ensure that defendant was aware of that defense and that he was knowingly and voluntarily waiving it. Although defense counsel stated that he had discussed the potential defense with defendant and that defendant was waiving it in order to accept the plea offer, the court did not ask any questions of defendant regarding the potential defense. Thus, the facts of the instant case present an even stronger basis for vacatur of the plea than those in *Mox*, where the plea court took the additional step—one not taken here—of asking the de-

defendant whether it was true that he had discussed the applicable affirmative defense with his attorney and was willing to waive it (*see Mox*, 20 NY3d at 939; *see also People v Grason*, 107 AD3d 1015, 1016 [2013]).

In light of our determination, we do not address defendant's remaining contention. Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

72 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRIAN K. HUTCHINGS, Appellant. (Appeal No. 1.) [992 NYS2d 596]—

Crimes—Bribe Receiving—Acceptance of Goods or Services Influencing Discretion of Public Servant

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 26, 2011. The judgment convicted defendant, upon a jury verdict, of bribe receiving in the third degree, receiving reward for official misconduct in the second degree, official misconduct, coercion in the second degree (three counts), falsifying business records in the first degree, offering a false instrument for filing in the second degree, falsely reporting an incident in the third degree, making a punishable false written statement, obstructing governmental administration in the second degree and harassment in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, bribe receiving in the third degree (Penal Law § 200.10), and in appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of, inter alia, a separate count of bribe receiving in the third degree (*id.*).

We reject defendant's contention in both appeal Nos. 1 and 2 that his conviction for bribe receiving in the third degree is not supported by legally sufficient evidence. In each case, the People presented legally sufficient evidence from which the jury could find that defendant accepted free or discounted goods or services from local companies "upon an agreement or understanding" that defendant's "opinion, judgment, action, decision or exercise of discretion as a public servant" would be influenced thereby (Penal Law § 200.10; *see People v Bac Tran*, 80 NY2d 170, 175-176 [1992], *rearg denied* 81 NY2d 784 [1993]; *People v Harper*, 145 AD2d 933, 933 [1988], *affd* 75 NY2d 313 [1990]; *People v Kitsos*, 299 AD2d 291, 291-292 [2002], *lv denied* 100 NY2d 540 [2003]; *People v Souvenir*, 209 AD2d 455, 455-456 [1994], *lv denied* 85 NY2d 914 [1995]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to

the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant failed to preserve his contention that he was deprived of his right to a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that County Court should have taken judicial notice of 17 NYCRR 820.13 was abandoned by his express agreement to the court's instruction to the jury on the lawful stop of a vehicle (*see People v Graves*, 85 NY2d 1024, 1027 [1995]; *People v Dennis*, 55 AD3d 385, 385 [2008], *lv denied* 12 NY3d 783 [2009]; *see also* CPL 470.05 [2]), which conveyed the appropriate legal standard to the jury in any event (*see People v Fields*, 87 NY2d 821, 823 [1995]; *People v Rose*, 67 AD3d 1447, 1448 [2009]). We have considered defendant's remaining contentions and conclude that they are without merit. Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

73 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BRIAN K. HUTCHINGS, Appellant. (Appeal No. 2.) [992 NYS2d 663]—Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered May 26, 2011. The judgment convicted defendant, upon a jury verdict, of bribe receiving in the third degree, receiving reward for official misconduct in the second degree and official misconduct (nine counts).

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

Same memorandum as in *People v Hutchings* ([appeal No. 1] 120 AD3d 1599 [2014]). Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

74 SUSAN L. BOTTICELLI, Appellant, v GARY A. BOTTICELLI, Respondent. [992 NYS2d 663]—Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 18, 2013 in a divorce action. The judgment, *inter alia*, equitably distributed the assets of the parties.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties and filed on September 10, 2014,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

75 ANTHONY PAONE, JR., Appellant, v PROGRESSIVE CASUALTY INSURANCE COMPANY, Respondent. [993 NYS2d 523]—Appeal from

an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 17, 2013. The order granted defendant's motion to vacate the default judgment entered against defendant and granted defendant's motion to dismiss plaintiff's complaint in its entirety.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

76 SCOTT GREEN, Individually and as Father and Natural Guardian of MORGAN GREEN, Respondent, v GRAND ISLAND CENTRAL SCHOOL DISTRICT et al., Appellants. [992 NYS2d 664]—Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 27, 2013. The order, insofar as appealed from, granted that part of the application of claimant seeking leave to serve a late notice of claim on behalf of Morgan Green.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

77 FISSURE PARTNERS LLC, Respondent, v MAXIMUS HILL, LLC, et al., Defendants, RICHARD FERGUSON, Appellant, and VLADIMIR SHNEYDER et al., Respondents. DEAN J. FERO, ESQ., Respondent. [992 NYS2d 664]—Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 26, 2013. The order, among other things, denied the motion of defendant Richard Ferguson to set aside and cancel certain assignments of judgments.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Smith, J.P., Fahey, Lindley, Valentino and DeJoseph, JJ.

78 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v AARON JACKSON, Appellant. [992 NYS2d 597]—

Crimes—Plea of Guilty—Withdrawal of Plea—Knowing, Voluntary Nature of Plea

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloï, J.), rendered January 20, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting

him upon his plea of guilty of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]). Defendant's contention that his plea was not knowingly, voluntarily and intelligently entered is not preserved for our review because defendant did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Brown*, 115 AD3d 1204, 1205 [2014]; *People v Oldham*, 24 AD3d 1289, 1289 [2005], *lv denied* 6 NY3d 779 [2006]). Contrary to defendant's further contention, his factual allocation did not indicate a lack of intent or attempt, and thus County Court had no duty to make a further inquiry into those elements during the plea allocation (*see generally People v Lopez*, 71 NY2d 662, 666 [1988]).

We reject defendant's contention that the court failed to make an appropriate inquiry into his complaints concerning defense counsel and in response to his request for new counsel. We conclude that the court made the requisite “ ‘minimal inquiry’ ” into defendant's reasons for requesting new counsel (*People v Porto*, 16 NY3d 93, 100 [2010]). Indeed, the record establishes that “the court afforded defendant the opportunity to express his objections concerning [defense counsel], and . . . thereafter reasonably concluded that defendant's . . . objections had no merit or substance” (*People v Singletary*, 63 AD3d 1654, 1654 [2009], *lv denied* 13 NY3d 839 [2009] [internal quotation marks omitted]; *see People v Walker*, 114 AD3d 1257, 1258 [2014], *lv denied* 23 NY3d 1044 [2014]). Finally, we reject defendant's contention that the negotiated sentence is unduly harsh and severe. Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

79 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WILLIAM RIVERA, Appellant. [992 NYS2d 825]—

Crimes—Right to Speedy Trial—Good Cause for Delay in Grand Jury Presentation

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered November 5, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31). Contrary to defendant's contention, County Court properly refused to dismiss the indictment on the grounds that his constitutional rights to a speedy trial and to due process were violated (*see generally People v Taranovich*, 37 NY2d 442, 445 [1975]). The

court properly determined, following a hearing, that the People established good cause for the 13-month preindictment delay (*see generally People v Singer*, 44 NY2d 241, 254 [1978]; *People v Perez*, 85 AD3d 1538, 1538-1539 [2011]; *People v Cody*, 30 AD3d 1068, 1068-1069 [2006]), and that there was no “indication that the defense [was] impaired by reason of the delay” (*People v Vernace*, 96 NY2d 886, 887 [2001]; *cf. People v Romeo*, 12 NY3d 51, 58 [2009], *cert denied* 558 US 817 [2009]). We perceive no basis to disturb the court’s determination that there was good cause for the delay in the grand jury presentation, i.e., the undercover officer involved in investigating defendant also was involved in another, unrelated investigation in the rural area in which defendant resided (*see People v Lesiuk*, 81 NY2d 485, 490-491 [1993]), and, if the undercover officer’s identity was revealed, both the safety of the undercover officer and the success of the unrelated investigation could be jeopardized. Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

80 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v BARRY WYZYKOWSKI, Appellant. [992 NYS2d 665]—Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 25, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [4]). To the extent that defendant’s contention that he was denied effective assistance of counsel at sentencing survives his guilty plea, we conclude that it lacks merit (*see People v LaCroce*, 83 AD3d 1388, 1388 [2011], *lv denied* 17 NY3d 807 [2011]). Defendant failed to preserve for our review his contention that Supreme Court erred in failing to recuse itself (*see People v Prado*, 4 NY3d 725, 726 [2004], *rearg denied* 4 NY3d 795 [2005]; *People v Dewiel*, 100 AD3d 1524, 1525 [2012], *lv denied* 20 NY3d 1010 [2013]). In any event, that contention is without merit (*see generally People v Glynn*, 21 NY3d 614, 618 [2013]; *People v Moreno*, 70 NY2d 403, 405-406 [1987]; *People v Williams*, 57 AD3d 1440, 1441 [2008], *lv denied* 12 NY3d 789 [2009]). Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

81 In the Matter of KEVEN A. NUNN, Respondent, v MARY J. NUNN, Appellant. [992 NYS2d 665]—Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered

May 1, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary physical placement of the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Family Court. Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

82 In the Matter of KAHLIN T.D.W., an Infant. ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent; BETSEY J.D., Appellant. In the Matter of BRADLEY A.W., Respondent, v BETSEY J.D., Appellant. (Appeal No. 1.) [993 NYS2d 523]—Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered April 9, 2013. The order, among other things, awarded petitioner Bradley A.W. custody of the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

83 In the Matter of KAHLIN T.D.W., an Infant. ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES, Respondent; BETSEY J.D., Appellant. (Appeal No. 2.) [993 NYS2d 523]—Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered May 14, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

84 TIFFANE ELLINGTON, Appellant, v JOHN ELLINGTON, Respondent. [993 NYS2d 523]—Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 7, 2013. The order, among other things, ordered plaintiff's counsel to pay defendant's counsel the sum of \$4,000 as partial reimbursement for expenses for a neuropsychological examination scheduled by defendant, which plaintiff failed to attend.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

85 CONLEY & SON EXCAVATING CO., LTD., Respondent, v THE DELTA ALLIANCE, LLC, et al., Defendants, and McDONALD'S REAL ESTATE COMPANY OF COLUMBIA, MARYLAND, Appellant. [992 NYS2d 827]—

Disclosure—Protective Order—Confidentiality Agreement to Prevent Revelation of Trade Secrets

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered September 18, 2013. The order, among other things, denied the cross motion of defendant McDonald's Real Estate Company of Columbia, Maryland for a protective and confidentiality order.

It is hereby ordered that the order so appealed from is unanimously modified on the law by vacating the second through fourth ordering paragraphs and granting the cross motion insofar as it sought to condition disclosure upon plaintiff's execution of a confidentiality agreement, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, to foreclose on a mechanic's lien arising out of a construction project on property owned by defendant McDonald's Real Estate Company of Columbia, Maryland (MREC). Plaintiff had entered into a subcontract with defendant The Delta Alliance, LLC (Delta), the general contractor on the construction project, to provide building and site demolition in connection with the rebuilding of a McDonald's restaurant. Plaintiff moved to compel MREC to disclose, inter alia, the original contract between Delta and MREC and any amendments thereto. MREC asserted that the requested documents contained confidential, proprietary business information, and cross-moved for a protective order pursuant to CPLR 3103 (a). We agree with MREC that Supreme Court abused its discretion in denying the cross motion insofar as it sought to condition disclosure of the documents on plaintiff's execution of a confidentiality agreement (see *Kimmel v State of New York*, 302 AD2d 908, 908 [2003]; see generally *Herbenson v Carrols Corp.*, 101 AD3d 1220, 1221-1222 [2012]). We therefore modify the order accordingly. "Discoverability of such documents involves a two-fold analysis: the moving party must show that the discovery demand would require it to reveal a trade secret, which then shifts the burden of the responding party to show that the information was indispensable to proving its [case]" (*Finch, Pruyn & Co. v Niagara Paper Co.*, 228 AD2d 834, 837 [1996], *appeal dismissed* 88 NY2d 979 [1996]). Here, MREC met its burden of establishing that the documents sought by plaintiff contained information "not known by those outside the business, [and that the documents] were kept under lock and key, were the product of substantial effort and expense, and could not easily be acquired or duplicated" (*Terwilliger v Max Co., Ltd.*, 64 AD3d 1232, 1233 [2009]; see *Finch, Pruyn & Co.*, 228 AD2d at 837). We nevertheless conclude that plaintiff established that the documents sought "were indispensable to [its] case and were otherwise un-

available if they could not be obtained from [MREC]” (*Terwilliger*, 64 AD3d at 1233; see *Hodgson, Russ, Andrews, Woods & Goodyear v Isolatek Intl. Corp.*, 300 AD2d 1047, 1048 [2002]). Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

86 KENNETH ZIOLKOWSKI, Respondent, v HAN-TEK, INC., et al., Appellants. [992 NYS2d 666]—Appeals from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 5, 2013. The order, among other things, denied defendants’ motions for summary judgment.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

87 WESTERN NEW YORK IMMEDIATE MEDICAL CARE, PLLC, Respondent, v HEALTHNOW NEW YORK, INC., Doing Business as BLUE CROSS BLUE SHIELD OF WESTERN NEW YORK, Appellant. [992 NYS2d 666]—Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 20, 2013. The order, insofar as appealed from, granted a preliminary injunction enjoining defendant from removing plaintiff from its list of participating providers.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on September 2, 2014, and filed in the Erie County Clerk’s Office on September 3, 2014,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Scudder, P.J., Peradotto, Carni and Valentino, JJ.

88 EUNICE KIM, as Administratrix of YOUNG GUN WANG, Deceased, Respondent, v HENRY CHANG, Also Known as HYUN SUNG CHANG and Others, Appellant. [992 NYS2d 667]—Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 11, 2012. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 25 and 28, 2013, and filed in the Onondaga County Clerk’s Office on June 10, 2013,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Centra, J.P., Peradotto, Carni and Lindley, JJ.

89 In the Matter of ATLAS HENRIETTA, LLC, et al., Appellants, v TOWN OF HENRIETTA ZONING BOARD OF APPEALS et al.,

Respondents. [992 NYS2d 667]—Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 9, 2013 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, denied the first, second and fourth causes of action and dismissed the third cause of action.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court. Present—Centra, J.P., Fahey, Whalen and DeJoseph, JJ. [**Prior Case History: 2013 NY Slip Op 23473.**]

90 In the Matter of ALLEN MORRIS, Appellant, v BRIAN FISCHER, Commissioner, New York State Department of Corrections and Community Supervision, Respondent. [992 NYS2d 668]—Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 10, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ordered that said appeal is unanimously dismissed without costs (*see Matter of Sanchez v Evans*, 111 AD3d 1315 [2013]). Present—Centra, J.P., Fahey, Whalen and DeJoseph, JJ.

91 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v STEVEN T. CARLISLE, Appellant. [992 NYS2d 828]—

Crimes—Appeal—Preservation of Issue for Review—Challenge to Admission of Probation Violation—Failure to Move to Withdraw Admission

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 31, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]) and sentencing him to a definite term of imprisonment. Defendant contends that his admission to the violation of probation was not voluntary, but “[b]y failing to move to withdraw his admission to the violation of probation or to vacate the judgment revoking the sentence of probation on that ground,” defendant failed to preserve that contention for our review (*People v Rodriguez*, 74 AD3d 1858, 1858 [2010], *lv denied* 15 NY3d 809 [2010]; *see People v Torres*, 294 AD2d 865, 865 [2002], *lv denied* 99 NY2d 540 [2002]; *see generally People v Lopez*, 71 NY2d 662, 665-666 [1988]). This case does not fall within the narrow excep-

tion to the preservation doctrine (*see Lopez*, 71 NY2d at 666), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Inasmuch as the contentions of defendant in his pro se supplemental brief relate solely to the validity of his plea of guilty to the underlying crime of sexual abuse in the first degree and the original sentence of probation, those contentions are not properly before us (*see People v Prokopienko*, 72 AD3d 1528, 1529 [2010]; *People v Ralston*, 303 AD2d 1010, 1011 [2003]; *see generally People v Smith*, 21 AD3d 1360, 1360 [2005], *lv denied* 5 NY3d 885 [2005]; *People v Luddington*, 5 AD3d 1042, 1042 [2004], *lv denied* 3 NY3d 643 [2004]). Present—Centra, J.P., Fahey, Whalen and DeJoseph, JJ.

92 In the Matter of MELISSA J. GETTINGS, Appellant, v DAVID L. MURACO, Respondent. [993 NYS2d 523]—Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered May 28, 2013. The order dismissed the petitions.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Present—Smith, J.P., Peradotto, Valentino, Whalen and DeJoseph, JJ.

93 KATHLEEN MILLS, Respondent, v JOSEPH DAVID MILLS, SR. Respondent. [992 NYS2d 668]—Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 31, 2013 in a divorce action. The judgment, inter alia, confirmed the report of a referee equitably distributing the marital property of the parties.

It is hereby ordered that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision and the report of the Referee at Supreme Court. Present—Smith, J.P., Peradotto, Valentino, Whalen and DeJoseph, JJ.

94 ANNE FREEMAN, Appellant, v ANTHONY FREEMAN, Respondent. [992 NYS2d 668]—Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 29, 2012. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 25, 2013, and filed in the Erie County Clerk's Office on August 21, 2013,

It is hereby ordered that said appeal is unanimously dismissed without costs upon stipulation. Present—Scudder, P.J., Fahey, Peradotto, Carni and Valentino, JJ.

95 In the Matter of MELISSA ANN MAHLER, for Reinstatement to the Practice of Law in the State of New York. [992 NYS2d

669]—Order entered terminating suspension and reinstating petitioner to the practice of law. Present—Smith, J.P., Fahey, Valentino and DeJoseph, JJ. (Filed Sept. 9, 2014.)

96 In the Matter of DAVID J. MARINI, an Attorney, Resignor. [992 NYS2d 669]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed Aug. 15, 2014.)

97 In the Matter of KARYN A. BOOTH, an Attorney, Resignor. [992 NYS2d 669]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed Aug. 15, 2014.)

98 In the Matter of ROBERT H. SHAW, an Attorney, Resignor. [992 NYS2d 669]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed Aug. 15, 2014.)

99 In the Matter of RONALD A. FORTUNA, an Attorney, Resignor. [992 NYS2d 670]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed Aug. 15, 2014.)

100 In the Matter of DANA M. SCHMIDT, an Attorney, Resignor. [992 NYS2d 670]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed Aug. 15, 2014.)

101 In the Matter of JOSEPH ANDRÉ PLUMMER, an Attorney, Resignor. [992 NYS2d 670]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed Sept. 12, 2014.)

102 In the Matter of ROBERT M. CARTER, an Attorney, Resignor. [992 NYS2d 670]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed Sept. 12, 2014.)

103 In the Matter of DONNA M. LATTANZIO, an Attorney, Resignor. [992 NYS2d 670]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Smith, J.P., Fahey, Carni, Sconiers and Valentino, JJ. (Filed Sept. 12, 2014.)

104 In the Matter of CARL S. CONROY, an Attorney, Resignor. [992 NYS2d 671]—Voluntary resignation accepted and name removed from roll of attorneys. Present—Centra, J.P., Peradotto, Lindley, Whalen and DeJoseph, JJ. (Filed Sept. 19, 2014.)

105 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DANIEL JONES, Appellant. [993 NYS2d 524]—Motion for writ of er-

ror coram nobis denied. Present—Scudder, P.J., Smith, Centra, Fahey and Valentino, JJ.

106 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ALVIN FULTON, JR., Also Known as SHAIK S., Also Known as SHAIKH S. ABDMUQTADIR, Appellant. [993 NYS2d 524]—Motion for reconsideration denied. Present—Scudder, P.J., Centra, Peradotto and Carni, JJ.

107 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MARVIN D. VASSAR, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Scudder, P.J., Smith, Lindley, Valentino and Whalen, JJ.

108 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CLEOTIS MERCER, Appellant. [993 NYS2d 523]—Motion seeking renewal of direct appeal denied. Present—Scudder, P.J., Centra, Peradotto, Lindley and Whalen, JJ.

109 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JAMES F. CAHILL, III, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Scudder, P.J., Smith, Fahey and Lindley, JJ.

110 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TIMOTHY R. THOMAS, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Scudder, P.J., Centra, Whalen and DeJoseph, JJ.

111 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHAWN M. CAMPBELL, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Scudder, P.J., Centra, Fahey, Peradotto and Carni, JJ.

112 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WILLIE J. SINGLETON, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Scudder, P.J., Smith, Centra and Carni, JJ.

113 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v LORCEN BURROUGHS, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Smith, J.P., Fahey, Carni and Lindley, JJ.

114 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CHARLES S. COBB, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Centra, J.P., Fahey, Peradotto and Whalen, JJ.

115 In the Matter of JAYSON BULMAHN, Petitioner, v NEW YORK STATE OFFICE OF MEDICAID INSPECTOR GENERAL et al.,

Respondents. [993 NYS2d 523]—Motion to compel denied. Present—Scudder, P.J., Peradotto, Lindley and Valentino, JJ.

116 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RICHARD E. SHINEBARGER, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Smith, J.P., Fahey, Valentino and Whalen, JJ.

117 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JETONE JONES, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Smith, J.P., Peradotto, Lindley and Valentino, JJ.

118 In the Matter of EDDIE ORTIZ, Petitioner, v CHARLES KELLY, JR., Superintendent, Marcy Correctional Facility, et al., Respondents. [993 NYS2d 523]—Motion for reargument denied. Present—Centra, J.P., Fahey, Carni and Whalen, JJ.

119 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v JESSE ROBERITES, Appellant. [993 NYS2d 523]—Motion for reargument and other relief denied. Present—Smith, J.P., Fahey, Valentino and Whalen, JJ.

120 In the Matter of SHERIDAN PARK, INC., et al., Appellants, v NEW YORK STATE DIVISION OF CEMETERIES et al., Respondents. [993 NYS2d 523]—Motion for leave to appeal to the Court of Appeals denied. Present—Centra, J.P., Peradotto, Carni, Valentino and Whalen, JJ.

121 HILLCREST HOMES, LLC, Appellant, v ALBION MOBILE HOMES, INC., Doing Business as HERITAGE ESTATES, et al., Respondents. [993 NYS2d 523]—Motion for reargument denied. Present—Scudder, P.J., Centra, Fahey, Peradotto and Whalen, JJ.

122 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v STEPHAN MERRITT, Appellant. [992 NYS2d 829]—Motion for reargument denied. Present—Scudder, P.J., Peradotto, Carni, Lindley and Valentino, JJ.

123 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CEDRIC J. WILLIAMS, Appellant. [993 NYS2d 523]—Motion for reargument denied. Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

124 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v SHUVON J. WILLIAMS, Appellant. [993 NYS2d 523]—Motion for reargument denied. Present—Centra, J.P., Fahey, Peradotto, Lindley and Valentino, JJ.

125 PETER A. PRIOLA, III, Appellant, v SHEILA FALLON et al., Respondents. [993 NYS2d 523]—Motions for reargument and leave to appeal to the Court of Appeals denied. Present—Fahey, J.P., Peradotto, Lindley and Valentino, JJ.

126 In the Matter of LAZY ACRES PARK, LLC, Appellant, v PAUL FERRETTI et al., Respondents. [993 NYS2d 523]—Motion and cross motion for reargument or leave to appeal to the Court of Appeals denied. Present—Fahey, J.P., Peradotto, Carni and Valentino, JJ.

127 In the Matter of BUFFALO NIAGARA BUSINESS PARK, LLC, Appellant, v BOARD OF ASSESSMENT REVIEW FOR CITY OF BUFFALO et al., Respondents, and COUNTY OF ERIE, Intervenor-Respondent. [993 NYS2d 523]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Centra, J.P., Peradotto, Carni, Lindley and Whalen, JJ.

128 LAURA LANKENAU, Appellant, v PATRICK K. BOLES et al., Respondents. (Appeal No. 1.) [993 NYS2d 523]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Centra, J.P., Peradotto, Carni, Lindley and Whalen, JJ.

129 CHALINA RUIZ, Respondent, v BRENDAN L. COPE et al., Appellants. [993 NYS2d 524]—Motion for reargument, reconsideration, or leave to appeal to the Court of Appeals denied. Present—Scudder, P.J., Fahey, Lindley, Valentino and Whalen, JJ.

130 DAWN STEFANIAK, Plaintiff, v NFN ZULKHARNAIN, Respondent. ROBERTA L. REEDY, as Administrator of the Estate of KEVIN M. REEDY, Deceased, Appellant. [993 NYS2d 523]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Scudder, P.J., Fahey, Lindley and Whalen, JJ.

131 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KEITH LYMAN, Also Known as KEITH J. LYMAN, Also Known as KEITH JOSEPH LYMAN, Appellant. [992 NYS2d 657]—Motion for writ of error coram nobis granted. Memorandum: The order of June 13, 2014 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046 [1989]). Defendant is directed to file and serve his records and briefs with this Court on or before January 7, 2015. Present—Scudder, P.J., Smith, Carni, Lindley and Whalen, JJ.

132 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RICHARD D. SACKEL, Appellant. [993 NYS2d 523]—Motion for leave to appeal to the Court of Appeals denied. Present—Scudder, P.J., Fahey, Peradotto, Valentino and DeJoseph, JJ.

133 In the Matter of PAUL KAIRIS, Appellant, v HAROLD D. GRAHAM, Superintendent, Auburn Correctional Facility, Respondent. [993 NYS2d 523]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Centra, J.P., Carni, Whalen and DeJoseph, JJ.

134 TEHAN'S CATALOG SHOWROOMS, INC., Appellant, v STATE OF NEW YORK, Respondent. (Claim No. 117360.) (Appeal No. 1.) [993 NYS2d 523]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Centra, J.P., Carni, Whalen and DeJoseph, JJ.

135 TEHAN'S CATALOG SHOWROOMS, INC., Appellant, v STATE OF NEW YORK, Respondent. (Claim No. 117360.) (Appeal No. 2.) [993 NYS2d 523]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Centra, J.P., Carni, Whalen and DeJoseph, JJ.

136 APRIL M. WILLIAMS, Respondent-Appellant, v CHARLES A. FASSINGER et al, Appellants-Respondents. (Appeal No. 1.) [993 NYS2d 523]—Motion for reargument or leave to appeal to the Court of Appeals denied. Present—Scudder, P.J., Fahey, Peradotto and Valentino, JJ.

137 In the Matter of OBSESSION BAR AND GRILL, INC., et al., Respondents, v ZONING BOARD OF APPEALS OF CITY OF ROCHESTER et al., Appellants. [993 NYS2d 523]—Motion for leave to appeal to the Court of Appeals denied. Present—Scudder, P.J., Fahey, Peradotto and Valentino, JJ.

138 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MICHAEL HASSETT, Appellant. [993 NYS2d 523]—Motion for reargument denied. Present—Scudder, P.J., Fahey, Peradotto and Lindley, JJ.

139 In the Matter of JOY ARBOGAST, Petitioner, v NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, SPECIAL HEARING BUREAU, Respondent. [993 NYS2d 522]—Motion for leave to appeal to the Court of Appeals denied. Present—Centra, J.P., Fahey, Carni, Lindley and Valentino, JJ.

140 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WILLIAM J. MILLER, Appellant. [993 NYS2d 524]—Motion for writ of error coram nobis denied. Present—Scudder, P.J., Centra, Lindley and DeJoseph, JJ.

141 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v TYLER T. CODY, Appellant. [992 NYS2d 915]—Motion to dismiss granted. Memorandum: The matter is remitted to Monroe

County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). Present—Scudder, P.J., Smith, Centra, Fahey and Peradotto, JJ.

142 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v KENNETH H. FORD, Appellant. [992 NYS2d 916]—

Crimes—Right to Counsel—Relief of Assigned Counsel—Challenge to Sex Offender Registration Act Risk Level Determination

The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38 [1979]), and has submitted an affidavit in which he states that there are no meritorious issues for appeal. Upon our review of the record, we conclude that nonfrivolous issues exist concerning the determination of defendant's risk level classification, with regard to both the assessment of the risk factor points challenged by defendant, and the application of an automatic override for a prior felony conviction of a sex crime (*see People v Moore*, 115 AD3d 1360, 1360-1361 [2014]). We therefore relieve counsel of his assignment and assign new counsel to brief these issues, as well as any other issues that counsel's review of the record may disclose. (Appeal from Order of Wayne County Court, John B. Nesbitt, J.—Sex Offender Registration Act). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

143 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v WILLIE J. HARRIS, JR., Appellant. [993 NYS2d 522]—Appeal dismissed as moot. Counsel's motion to be relieved of assignment granted. (Appeal from an Order of Supreme Court, Monroe County, Francis A. Affronti, J.—Criminal Sale of a Controlled Substance, 3rd Degree). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

144 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v RAYMOND JAMES, Appellant. [993 NYS2d 522]—Appeal dismissed as moot. Counsel's motion to be relieved of assignment granted. (Appeal from an Order of Supreme Court, Monroe County, David D. Egan, J.—Criminal Sale of a Controlled Substance, 3rd Degree). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

145 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v ROMMEL LEWIS, Appellant. [992 NYS2d 915]—Resentence unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Resentence of Monroe County Court, Patricia D. Marks, J.—Assault, 1st Degree). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

146 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DONALD E. MEAD, JR., Also Known as DONALD MEAD, JR., Also Known as DONALD MEAD, Appellant. [992 NYS2d 916]—

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The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his *Alford* plea of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Defendant’s assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38 [1979]). Our review of the record reveals a nonfrivolous issue regarding the validity of defendant’s plea, i.e., whether there was sufficient evidence of guilt in the record to support the *Alford* plea (*see People v Richardson*, 72 AD3d 1578, 1579-1580 [2010]; *People v Oberdorf*, 5 AD3d 1000, 1001 [2004]). We therefore relieve counsel of her assignment and assign new counsel to brief this issue, as well as any other issues that counsel’s review of the record may disclose. (Appeal from Judgment of Genesee County Court, Robert C. Noonan, J.—Attempted Assault, 2nd Degree). Present—Scudder, P.J., Centra, Carni, Lindley and Whalen, JJ.

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commerce'' and each of the agreements in question affected commerce, broadly understood. Plaintiffs' entities rented commercial property, and because commercial real estate can affect interstate commerce, the ownership and investment in plaintiff's commercial buildings, one of which was occupied by an international chain hotel with another housing a national chain drug store in Florida, rendered the Act applicable to the parties' agreements. The fact that the parties' action concerned the alleged mismanagement of family entities in New York did not render the Act inapplicable. The proper inquiry is whether the economic activity in question represented a general practice bearing on interstate commerce in a substantial way, and here that activity involved substantial commercial transactions covering real properties, some of which were not in New York, and the properties were part of national businesses. Moreover, the Act was not rendered inapplicable by the fact that the agreements themselves did not expressly contemplate interstate transactions. Requiring parties to include a specific reference to interstate commerce in their agreements would undermine the purpose of the Act by encouraging further litigation as parties contested whether interstate commerce was contemplated at the time the agreement was executed. *Cusimano v Schnurr*, 120 AD3d 142.

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6. Participation in Litigation — Lack of Prejudice.—Where an action and an arbitration proceeding were commenced arising out of the same dispute, which ultimately was determined by the court to be governed by the Federal Arbitration Act, plaintiffs did not waive their right to have a statute of limitations issue determined by the arbitrator by commencing the action, since their actions did not result in the requisite prejudice to defendants that would support a finding of waiver. When assessing the question of waiver, any doubts concerning whether there has been a waiver are to be resolved in favor of arbitration. Although plaintiffs commenced the action in court, they did not engage in aggressive litigation involving multiple motions addressed to the merits, nor did they pursue state court appeals. The only substantive motion in the action was made by defendants. Plaintiffs did move to disqualify defense counsel, relief which could have been sought in arbitration, but that type of motion would be insufficient to constitute waiver under federal case law. Although plaintiffs requested subpoenas while defendants' motion to dismiss was pending, no actual discovery took place. Therefore, plaintiffs did not obtain any evidence that would not have been available to them in arbitration. Moreover, inasmuch as the motion court gave plaintiffs leave to replead with specificity their claims of fraud and breach of fiduciary duty, they were not attempting to relitigate issues they had lost before the motion court, as they did not receive any greater advantage by filing a statement of claim in an arbitration than they would have obtained had they filed an amended complaint. A delay of one year did not, in itself, amount to protracted litigation, and the expense incurred in responding to plaintiffs' procedural motion and subpoenas did not, by itself, establish waiver. *Cusimano v Schnurr*, 120 AD3d 142.

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3. Disbarment.—Inasmuch as more than six months had elapsed since respondent attorney was suspended from the practice of law based on his failure to cooperate with the Departmental Disciplinary Committee's investigation of allegations that he neglected a client matter and his failure to register, and he neither appeared nor applied in writing for a hearing or reinstatement during that time period, respondent was disbarred pursuant to 22 NYCRR 603.4 (g). *Matter of Obten*, 120 AD3d 1.

4. Public Censure.—Respondent attorney aided a nonlawyer in the unauthorized practice of law in violation of former Code of Professional Responsibility DR 3-101 (a) and DR 1-102 (a) (4), (5) and (7) (22 NYCRR 1200.16 [a]; 1200.3 [a] [4], [5], [7]), failed to safeguard funds entrusted to him as a fiduciary in violation of former Code of Professional Responsibility DR 9-102 (b) (1) and DR 1-102 (a) (5) and (7) (22 NYCRR 1200.46 [b] [1]; 1200.3 [a] [5], [7]) and engaged in conduct that was deceptive and misleading to the public and clients. Under the totality of circumstances, including respondent's lack of a prior disciplinary history, his lack of intent to deceive, his due diligence inasmuch as he did research the rules governing legal consultants in an effort to comply with the rules, his cooperation with the Grievance Committee's investigation, his contributions to the military as a member of the National Guard, the commendation he received upon being honorably discharged, his hard work, the award he received as a distinguished student from the American Bar Association, and his current provision of legal services to low-income Spanish speaking clients, respondent was publicly censured. *Matter of Terc*, 120 AD3d 4.

5. Interim Suspension.—Respondent attorney was immediately suspended from the practice of law on an interim basis pending further disciplinary proceedings for her willful failure to cooperate with the Departmental Disciplinary Committee's investigation into allegations of professional misconduct which immediately threatened the public interest arising out of a Securities and Exchange Commission complaint based on charges surrounding respondent's role as a transaction manager within an investment banking entity that mislead investors in a collateralized debt deal. *Matter of Snorteland*, 120 AD3d 14.

6. Disbarment.—Inasmuch as more than six months elapsed since respondent attorney was suspended from the practice of law based on his failure to cooperate with the Departmental Disciplinary Committee's investigation of allegations that he was guilty of professional misconduct, and he neither appeared nor applied in writing for a hearing or reinstatement during that time period, respondent was disbarred pursuant to 22 NYCRR 603.4 (g). *Matter of Anyikwa*, 120 AD3d 49.

7. Suspension.—Respondent attorney was guilty of professional misconduct based upon her conviction of the federal misdemeanor of filing a false income tax return, a serious crime within the meaning of Judiciary Law § 90 (4) (d). Under the totality of circumstances, including respondent's expression of remorse, her otherwise unblemished record, and the fact that she had made restitution in full, as well as

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the fact that the misconduct involved committing a fraud on the government in direct contravention of the obligation of all attorneys to comply with the laws, respondent was suspended for two years. *Matter of Yaeger*, 120 AD3d 70.

8. Suspension.—Respondent attorney was guilty of professional misconduct based upon his conviction of the misdemeanor of criminal tax fraud in the fifth degree, a serious crime within the meaning of Judiciary Law § 90 (4) (d). Under the totality of circumstances, including the serious nature of the misconduct, as well as respondent's otherwise unblemished record, and the facts that he had paid the delinquent taxes arising from the misconduct and the misconduct was unrelated to his practice of law, respondent was suspended from the practice of law for three years, but the suspension was stayed on certain conditions. *Matter of Ianacone*, 120 AD3d 88.

9. Censure.—Pursuant to the reciprocal disciplinary provisions of 22 NYCRR 603.3, respondent was publicly censured predicated upon similar discipline imposed on him by the United States Court of Appeals for the Second Circuit for his misconduct in connection with numerous petitions for review in immigration matters in which he failed to comply with the court's scheduling orders, and submitted deficient and untimely briefs. Because the report of the Committee on Admissions and Grievances was not sufficiently clear as to how respondent violated disciplinary rules prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation, and illegal conduct adversely reflecting on his honesty, trustworthiness or fitness as a lawyer, that finding was not a basis for reciprocal discipline. Furthermore, the Departmental Disciplinary Committee did not specifically cite to those violations as part of its argument that respondent's misconduct before the Second Circuit would also constitute misconduct if committed before the courts of New York State. *Matter of Violet*, 120 AD3d 91.

10. Disbarment.—Since respondent attorney, who had been immediately suspended from the practice of law based on his failure to cooperate with the Grievance Committee, inasmuch as he failed to submit an answer to a complaint of professional misconduct filed against him, failed to serve an answer to the Committee's petition or to request additional time in which to do so, the charges in the petition were deemed established, and respondent was disbarred upon his default (Judiciary Law § 90). *Matter of McDowell*, 120 AD3d 114.

11. Disbarment.—Since respondent attorney, who had been immediately suspended from the practice of law based on allegations that he converted funds entrusted to him in connection with a real estate transaction, failed to submit an answer to the Committee's petition or to request additional time in which to do so, the charges in the petition were deemed established, and respondent was disbarred upon his default (Judiciary Law § 90). *Matter of McDowell*, 120 AD3d 117.

12. Disbarment.—Respondent attorney, who failed to advise an investor in a high-risk hedge fund, which he had formed and managed, that the fund engaged in trading activities not authorized by its controlling documents; falsely represented that the fund had retained the services of an independent accountant; falsely represented to the investor that her funds were lost as a result of the fund's unsuccessful investment in computer chips; and failed to provide the Departmental Disciplinary Committee with documents requested during its investigation, was guilty of professional misconduct and was disbarred (Code of Professional Responsibility DR 1-102 [a] [4], [5], [7] [22 NYCRR 1200.3 (a) (4), (5), (7)]). Notwithstanding respondent's lack of prior disciplinary history, his misconduct was intentional and involved repeated, material misrepresentations to the investor who lost most of her savings. Significant evidence was presented in aggravation, namely that respondent testified falsely at his deposition before the Committee, that he engaged in similar misconduct with respect to other investors and has not satisfied the two judgments obtained against him, and that he improperly transferred the funds of a deceased tax client into a joint brokerage account. Furthermore, the Appellate Division could not issue an order directing restitution pursuant to Judiciary Law § 90 (6-a) (a) because respondent's fraudulent solicitation of investment funds from the investor occurred in his role as a financial adviser, not in connection with the practice of law. *Matter of Colodne*, 120 AD3d 120.

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13. Resignation.—Inasmuch as respondent's proffered resignation complied with the requirements of 22 NYCRR 603.11 in that his affidavit averred that the resignation was submitted voluntarily and with full awareness of the implications of its submission, and he acknowledged that he could not successfully defend himself against charges of professional misconduct if they were predicated upon the matters under investigation, respondent's resignation was accepted and his name was stricken from the roll of attorneys. *Matter of Teplen*, 120 AD3d 139.

14. Censure.—Respondent attorney was guilty of professional misconduct based upon his plea of guilty to failure to pay tax, an unclassified misdemeanor. Under the totality of circumstances, including respondent's disciplinary history, which consisted of a caution and an admonishment for failing to register with the Office of Court Administration, as well as his remorse and acceptance of responsibility; his cooperation with the Grievance Committee's investigation; his excellent reputation in the legal community; his sentence in the criminal action of a conditional discharge; personal circumstances, including his battle with throat and neck cancer; the placing of the financial needs of others over his own; and the fact that he was forced to close his law practice for approximately 1½ years due to serious illness, respondent was publicly censured. *Matter of Stella*, 120 AD3d 153.

15. Suspension.—Respondent attorney was guilty of professional misconduct based upon her conviction of the class A misdemeanor of criminal tax fraud in the fifth degree, a serious crime within the meaning of Judiciary Law § 90 (4) (d), for failure to file tax returns and pay state and New York City personal income taxes for a two-year period. Under the totality of circumstances, including that respondent had no prior disciplinary history; acknowledged her misconduct; took prompt corrective action to make necessary filings in dealing with taxing and criminal authorities and put in place safeguards to ensure ongoing compliance; the fact that respondent's misconduct was not venal, although it was protracted—with persistent violations of the Tax Law over the course of nearly a decade; no client was harmed; and notwithstanding that respondent had opted to expend funds for travel rather than for payment of her taxes, respondent was suspended from the practice of law for a period of six months. *Matter of Racht*, 120 AD3d 156.

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license agreement between plaintiffs and the defendants who obtained the letters, was not excused from making payment on the letters because the amendment to the license agreement was backdated. While an issuing bank may refuse to honor documents that appear on their face strictly to comply with the terms and conditions of the letter of credit but are forged or materially fraudulent, or if honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant (*see* UCC 5-109 [a]), because the smooth operation of international commerce requires that requests for payment under letters of credit not be routinely obstructed by prepayment litigation, the fraud exception is a narrow one that is only available on a showing of intentional fraud. Moreover, the fact that plaintiffs signed the amended license agreement approximately two weeks after the date appearing in the agreement was not material to the terms of the letters. There was a valid underlying transaction, and the backdating does not excuse the issuer from paying on the letters. *BasicNet S.p.A. v CFP Servs. Ltd.*, 120 AD3d 97.

2. Compliance with Terms of Irrevocable Standby Letter of Credit — Ambiguous Compliance Term.—The terms of irrevocable standby letters of credit (SLC) requiring plaintiffs, beneficiaries of the SLCs and licensors of certain trademarks, to submit an authenticated Society for Worldwide Interbank Financial Telecommunication (SWIFT) message from defendant SLC issuer confirming plaintiffs' "fulfilment of their commitment towards the account party" were satisfied when the issuer sent a SWIFT message to plaintiffs' bank confirming its receipt of the fully executed amended agreement between plaintiffs and defendant licensee and its guarantor. The SWIFT message requirement was ambiguous as the singular term "commitment" was not defined and the requirement made no reference to the amended license agreement. All ambiguities in a letter of credit are construed against the issuer and consequently the ambiguity as to what "commitment" the requirement referred to, and therefore what document was required to satisfy it, must be construed in plaintiffs' favor. Moreover, plaintiffs' interpretation of the requirement was the only reasonable and legally cognizable interpretation of the provision. The purpose of the amended license agreement was to restructure the debt owed and payable to plaintiffs as a result of the licensee's and its guarantor's default under the original licensing agreement, and plaintiffs fulfilled their commitment to the licensee and guarantor to do so when they executed the amendment. Accordingly, when defendant issued the SWIFT message acknowledging receipt of the fully executed amended agreement, the requirement was satisfied. *BasicNet S.p.A. v CFP Servs. Ltd.*, 120 AD3d 97.

3. Compliance with Terms of Irrevocable Standby Letter of Credit — Independence Principle.—Plaintiffs, beneficiaries of irrevocable standby letters of credit (SLC) and licensors of certain trademarks, complied with the terms of the letters requiring them to produce an authenticated Society for Worldwide Interbank Financial Telecommunication (SWIFT) message from defendant SLC issuer confirming plaintiffs' "fulfilment of their commitment towards the account party," when defendant sent a SWIFT message to plaintiffs' bank confirming its receipt of the fully executed amended agreement between plaintiffs and defendant licensee and its guarantor, notwithstanding the issuer's contention that, under the requirement, it was to be the sole arbiter of plaintiffs' fulfillment of their commitment. Defendant issuer's interpretation of the requirement would impermissibly conflict with the independence principle, which is the foundation on which all letters of credit are built. The principle provides that the issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the contract, and separate as well from any obligation of the issuer to its customer under their agreement. The independence principle is recognized by International Standby Practices (ISP) 98 of the International Chamber of Commerce, to which the letters referred, and is codified in UCC 5-103 (d). To permit defendant to interpret the SWIFT message requirement as giving it authority to decide when plaintiffs had fulfilled their commitment would conflict with the independence principle and make defendant's obligations under the letters illusory. In addition, the terms of the SLCs did not expressly modify or exclude the application of rules of ISP 98 and, even in the event of a

BANKS AND BANKING—Cont'd

conflict, the UCC provides that the independence principle is mandatory and may not be varied by agreement (*see* UCC 5-103 [c]; 5-116 [c]). *BasicNet S.p.A. v CFP Servs. Ltd.*, 120 AD3d 97.

4. Compliance with Terms of Irrevocable Standby Letter of Credit — Standard of Compliance.—Discrepancies between the documents required by the terms of irrevocable standby letters of credit (SLC) and those submitted by plaintiffs, the beneficiaries of the letters, did not excuse defendant, the issuing bank, from paying on the letters, since the documents provided by plaintiffs contained the information specified by the letters' requirements. One requirement called for a written signed statement from the beneficiary (plaintiffs) stating that the applicant, which had entered into a commercial licensing agreement with plaintiffs, failed to discharge its obligations as per the terms of the underlying contract and "this SLC", while plaintiffs submitted written signed statements stating that the applicant had failed to discharge its obligations as per the terms of the license agreement and of "SLC [relevant number]." There was no possibility that the difference between "this SLC" and "SLC [relevant number]" could have misled defendant to its detriment. Another requirement called for a signed letter of default notice from the beneficiary to the licensee be sent via either of two commercial delivery services with written confirmations evidencing inability to deliver, but one of the confirmations was misaddressed. However, as both confirmation notices indicated that the licensee had moved, the addressing error was not meaningful. *BasicNet S.p.A. v CFP Servs. Ltd.*, 120 AD3d 97.

BILLS, NOTES AND CHECKS.

See, also, BANKS AND BANKING.

PROMISSORY NOTE.

1. *Confidential Lending, LLC v Nurse*, 120 AD3d 739.
2. *J.P. Morgan Chase Bank, N.A. v Lanar Sys., Inc.*, 120 AD3d 764.

BROKERS.**REAL ESTATE BROKERS.**

1. *Confidential Lending, LLC v Nurse*, 120 AD3d 739.

CERTIORARI.

See PROCEEDING AGAINST BODY OR OFFICER.

CHIROPRACTORS.

See LICENSES; PHYSICIANS AND SURGEONS.

CHURCHES.

See RELIGIOUS CORPORATIONS AND ASSOCIATIONS.

CITIES.

See MUNICIPAL CORPORATIONS.

CIVIL RIGHTS.**DISCRIMINATION BASED ON DISABILITY.**

1. *Leon v State Univ. of N.Y.*, 120 AD3d 771.

DISCRIMINATION IN EMPLOYMENT.

2. Discrimination Based on Gender/Pregnancy.—In an action under the state Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*) arising out of plaintiff's termination from employment following her return to work after a maternity leave, plaintiff's claim of gender/pregnancy discrimination was dismissed, where the only discriminatory act alleged was the denial of plaintiff's request for a

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modified work schedule. The evidence in the record established that defendant law firm's policy did not allow for a reduced schedule for any attorney, and that the firm had not permitted any associate attorney to work part-time in the past 10 years. Thus, plaintiff was unable to establish that she suffered unequal treatment in the terms and conditions of her employment under the state Human Rights Law, or that she was treated less well than other employees under the city Human Rights Law. *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18.

3. Hostile Work Environment.—In an action alleging claims under the state Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*) arising out of plaintiff's termination from employment following her return to work after a maternity leave, dismissal of plaintiff's hostile work environment claim was warranted. There was no view of the evidence that any conduct by defendants was severe or pervasive enough to create an objectively hostile or abusive environment within the meaning of the state Human Rights Law. Plaintiff cited only isolated remarks or incidents and a reprimand for reading a book on the job. Plaintiff's claim that she was treated differently after returning from maternity leave was too vague to constitute evidence of a hostile work environment. Nor could plaintiff's hostile work environment claim be sustained under the city Human Rights Law, since a reasonable person would consider the complained-of conduct (e.g., one partner's refusal to speak to her) nothing more than petty slights and trivial inconveniences. *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18.

4. Retaliatory Discharge — Pretextual Reason Offered for Discharge.—In an action alleging retaliatory termination claims under the state Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*) arising out of plaintiff's termination from employment, defendants' motion to dismiss was properly denied where there was no dispute that plaintiff engaged in protected activity by making two complaints opposing discriminatory treatment. Similarly, there was no question that defendant law firm's termination of her constituted an adverse or disadvantageous employment action. After making the first complaint, plaintiff alleged she was told by one partner to refrain from complaining in the workplace, and following the second complaint, plaintiff claimed that another partner barely spoke to her again. In addition, plaintiff's termination two months after the second complaint may establish the necessary causal nexus between the protected activity and her discharge. Although defendants articulated a nonretaliatory reason for plaintiff's termination, namely a workforce reduction, triable issues of fact existed as to whether that stated reason was a pretext for retaliation, and whether, absent a retaliatory motive, defendant's decision to terminate her would have occurred, where the record contained evidence that at the time plaintiff was terminated the law firm was expanding and allegedly was "busier than ever." Accordingly, viewed in the light most favorable to plaintiff, the evidence was sufficient to defeat summary judgment on the retaliation claims. *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18.

5. Sexual Orientation—Retaliation Claim.— *Cole v Sears, Roebuck & Co.*, 120 AD3d 1159.

6. Sexual Orientation—Hostile Work Environment.— *Cole v Sears, Roebuck & Co.*, 120 AD3d 1159.

7. Predisposing Genetic Characteristic.— *Peterson v City of New York*, 120 AD3d 1328.

ELECTION OF REMEDIES.

8. Retaliation in Employment Claim—Prior Action.— *Charite v Duane Reade, Inc.*, 120 AD3d 1378.

FEDERAL CIVIL RIGHTS CLAIM.

9. Action against Municipality.— *De Lourdes Torres v Jones*, 120 AD3d 572.

10. Unreasonable Seizure.— *De Lourdes Torres v Jones*, 120 AD3d 572.

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STATE DIVISION OF HUMAN RIGHTS.

11. *Matter of Ferguson v New York State Div. of Human Rights*, 120 AD3d 497.

CIVIL SERVICE.

See, also, ARBITRATION; LABOR UNIONS; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; SCHOOLS, and other specific titles.

DISCIPLINARY PUNISHMENT.

1. Termination Penalty Excessive for First Incident.— *Matter of Fernandez v New York City Tr. Auth.*, 120 AD3d 407.

PUBLIC EMPLOYMENT RELATIONS BOARD.

2. Remittal to Fashion Appropriate Remedy Following Court Decision.— *Matter of Town of Islip v New York State Pub. Empl. Relations Bd.*, 120 AD3d 1425.

RETIREMENT AND PENSION BENEFITS.

3. Accidental Disability Retirement—Police Officer Responding to Fire Emergency—Trip and Fall over Charged Fire Hose.— *Matter of Pastalove v Kelly*, 120 AD3d 419.

4. Accidental Disability Retirement—Failure to Establish Permanent Incapacitation—Conflicting Medical Evidence.— *Matter of James v DiNapoli*, 120 AD3d 859.

5. Accidental Disability Retirement—Failure to Establish Permanent Incapacitation.— *Matter of Weldon v DiNapoli*, 120 AD3d 869.

6. Accidental Disability Retirement—Failure to Establish Permanent Incapacitation—Conflicting Medical Evidence.— *Matter of Bates v New York State & Local Police & Fire Retirement Sys.*, 120 AD3d 872.

7. Health Insurance.— *Iasillo v Pilla*, 120 AD3d 1192.

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1. Lien Priority—Mortgage Consolidation.— *Plotch v Citibank, N.A.*, 120 AD3d 1210.

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LAW GOVERNING CONTRACT ACTIONS.

1. No-Fault Automobile Insurance—Grouping of Contacts Inquiry.— *Matter of Unitrin Direct/Warner Ins. Co. v Brand*, 120 AD3d 698.

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1. *Air & Power Transmission, Inc. v Weingast*, 120 AD3d 524.
2. *Confidential Lending, LLC v Nurse*, 120 AD3d 739.

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CIVIL CONTEMPT.

1. Violation of Injunction—Counsel Fees.— *Genger v Genger*, 120 AD3d 1102.

CRIMINAL CONTEMPT.

2. Insufficient Evidence to Sustain Conviction Where Defendant Did Not Place Victim in Fear of Physical Injury.— *People v Ubbink*, 120 AD3d 1574.

CONTRACTS.

See, also, ARBITRATION; BILLS, NOTES AND CHECKS; BROKERS; FRAUDS, STATUTE OF; INFANTS; INSURANCE; LANDLORD AND TENANT; MORTGAGES; MUNICIPAL CORPORATIONS; SALES; SPECIFIC PERFORMANCE; STATE; VENDOR AND PURCHASER, and other specific titles.

BREACH OR PERFORMANCE OF CONTRACT.

1. Failure to Procure Insurance.— *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552.
2. *Khan v Kaieteur Constr., Inc.*, 120 AD3d 770.
3. Summary Judgment.— *1375 Equities Corp. v Buildgreen Solutions, LLC*, 120 AD3d 783.
4. Summary Judgment.— *S.E.M. Sec. Sys., Inc. v Earl Lorence Enters.*, 120 AD3d 1211.
5. Failure to Pay Purchase Price for Restaurant.— *Patsis v Nicolita*, 120 AD3d 1326.
6. Contract for Engineering Services Performed on Construction Projects—Implied-in-Fact Contract.— *Deerkoski v East 49th St. Dev. II, LLC*, 120 AD3d 1387.

CONSTRUCTION.

7. Rent Obligations of Partnership's Partners-in-Dissolution under Sublease.— *Arkin Kaplan Rice LLP v Kaplan*, 120 AD3d 422.
8. Construction Agreement—Granite Substitution.— *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905.
9. Construction Agreement—Disposal of Nonhazardous Contaminated Soil.— *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905.
10. Agreement to Procure Insurance—No Requirement to Name Additional Insured.— *General Motors, LLC v B.J. Muirhead Co., Inc.*, 120 AD3d 927.
11. Acceleration Language in Loan Purchase Agreement.— *Orix Venture Fin. LLC v Eagle Ltd.*, 120 AD3d 1108.

CONSTRUCTION CONTRACTS.

12. *GMS Batching, Inc. v TADCO Constr. Corp.*, 120 AD3d 549.
13. Change Work Orders.— *Assos Constr. Corp. v 1141 Realty LLC*, 120 AD3d 1151.
14. Validity—Mistake in Name of Corporate Entity.— *Assos Constr. Corp. v 1141 Realty LLC*, 120 AD3d 1151.

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15. Mutual Mistake.— *Friedland Realty, Inc. v 416 W, LLC*, 120 AD3d 1185.

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1. Lack of Direct Claim No Bar to Contribution.— *Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 120 AD3d 1323.

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CAPACITY TO SUE.

1. Winding Up Affairs Following Dissolution.— *MMI Trading, Inc. v Nathan H. Kelman, Inc.*, 120 AD3d 478.

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2. Abuse of Corporate Form.— *Baby Phat Holding Co., LLC v Kellwood Co.*, 120 AD3d 428.

INDIVIDUAL LIABILITY OF OFFICERS.

3. Contract Signed on Behalf of Principal.— *GMS Batching, Inc. v TADCO Constr. Corp.*, 120 AD3d 549.
4. Tortious Conduct.— *Villafrank v David N. Ross, Inc.*, 120 AD3d 935.

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5. Investigation of Alleged Mismanagement and Breaches of Fiduciary Duty were Proper Bases for Shareholder Inspection.— *Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw-Hill Cos., Inc.*, 120 AD3d 1052.

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1. Legal Fees Unfounded in Employee Discharge Action.— *Lukose v Long Is. Med. Diagnostic Imaging, PC.*, 120 AD3d 1312.

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LIABILITY FOR ACTIONS OF SHERIFF AND DEPUTIES.

1. Absence of Local Law Assuming Liability.— *D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956.

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1. Displacement.— *Matter of Cruz v New York State Unified Ct. Sys.*, 120 AD3d 494.

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1. *People v Bowens*, 120 AD3d 1148.

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2. Matters Reviewable.— *People v Simpson*, 120 AD3d 412.
3. Waiver of Right to Appeal.— *People v Moore*, 120 AD3d 592.
4. Waiver of Right to Appeal Unenforceable Despite Execution of Written Waiver Form.— *People v Michael*, 120 AD3d 713.
5. Invalid Waiver of Right to Appeal—Defendant Not Made Aware of Meaning of Right to Appeal.— *People v Williams*, 120 AD3d 721.
6. Valid Waiver of Right to Appeal.— *People v Arney*, 120 AD3d 949.
7. Preservation of Issue for Review—Court's Failure to Advise Defendant of Deportation Consequences of Guilty Plea.— *People v Chelley*, 120 AD3d 987.
8. Preservation of Issue for Review—Admission of Testimonial Hearsay in Violation of Confrontation Clause—Decision to Object to Evidence Belongs to Attorney.— *People v Lee*, 120 AD3d 1137.
9. Waiver of Right to Appeal.— *People v Brooks*, 120 AD3d 1255.
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12. Preservation of Issue for Review—Discretionary Review of Unpreserved Issue.— *People v Walters*, 120 AD3d 1272.
13. Waiver of Right to Appeal Precluded Review of Excessive Sentence Claim.— *People v Roberts*, 120 AD3d 1360.

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14. Preservation of Issue for Review—Denial of Due Process—Lack of Representation at Judicial Diversion Program Status Conferences.— *People v Cooney*, 120 AD3d 1445.

15. Preservation of Issue for Review—Sufficiency of Plea Allocution.— *People v Waite*, 120 AD3d 1446.

16. Waiver of Right to Appeal—Validity.— *People v Waite*, 120 AD3d 1446.

17. Waiver of Right to Appeal—Validity.— *People v Yaw*, 120 AD3d 1447.

18. Waiver of Right to Appeal—Validity.— *People v Miner*, 120 AD3d 1449.

19. Preservation of Issue for Review—Challenge to Voluntariness of Plea Survives Waiver of Right to Appeal.— *People v Davis*, 120 AD3d 1530.

20. Preservation of Issue for Review—Propriety of Issuing Order of Protection for Two Witnesses.— *People v Russell*, 120 AD3d 1594.

21. Preservation of Issue for Review—Challenge to Admission of Probation Violation—Failure to Move to Withdraw Admission.— *People v Carlisle*, 120 AD3d 1607.

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22. *People v Taylor*, 120 AD3d 519.

23. Prosecutor's Cross-Examination of Defendant as Interested Witness.— *People v Barill*, 120 AD3d 951.

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28. Serious Physical Injury—Sufficiency of Evidence.— *People v Ragguete*, 120 AD3d 717.

29. Physical Injury—Weight of Evidence.— *People v Burrell*, 120 AD3d 911.

30. Sufficiency and Weight of Evidence.— *People v Figueroa-Norse*, 120 AD3d 913.

31. Serious Physical Injury.— *People v Philips*, 120 AD3d 1266.

32. Attempted Criminal Obstruction of Breathing or Blood Circulation and Related Crimes—Deference to Jury's Conclusion.— *People v Ward*, 120 AD3d 1440.

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33. Assault—Victim Stabbed and Slashed Repeatedly with Knife Until She Lost Consciousness.— *People v Ragguete*, 120 AD3d 717.

34. Attempted Murder Charge Rendered Duplicious by Trial Testimony—Review of Unpreserved Contention.— *People v Wilson*, 120 AD3d 1531.

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35. Acceptance of Goods or Services Influencing Discretion of Public Servant.— *People v Hutchings*, 120 AD3d 1599.

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36. *People v Wilkinson*, 120 AD3d 521.

37. Noncustodial Statements.— *People v Marcelle*, 120 AD3d 833.

38. Noncustodial Statements—Police Interview at Hospital.— *People v Figueroa-Norse*, 120 AD3d 913.

39. Voluntariness—Length of Questioning and Promises Made by Police.— *People v Figueroa-Norse*, 120 AD3d 913.

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40. Right to Counsel—Failure to Unequivocally Request Counsel.— *People v Brown*, 120 AD3d 954.

41. Voluntariness—No Evidence of Physical Force by Police.— *People v Brown*, 120 AD3d 954.

42. Invalid Waiver of Rights.— *People v Barnes*, 120 AD3d 1355.

43. Suppression of Statements Made after Improper Arrest.— *People v Delvil-lartron*, 120 AD3d 1429.

44. Voluntary Nature of Statements.— *People v Wilson*, 120 AD3d 1531.

45. Noncustodial Statements—Defendant Advised That He was Free to Leave.— *People v McGuay*, 120 AD3d 1566.

46. Spontaneous Statement to Police.— *People v Allen*, 120 AD3d 1595.

47. Waiver of Right to Remain Silent.— *People v Jones*, 120 AD3d 1595.

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48. Burglary and Robbery Crimes.— *People v Garcia*, 120 AD3d 406.

49. Evidence Relating to Codefendants Admissible and Necessary to Prove Con-spiracy—Absence of Antagonistic Defenses.— *People v Hernandez*, 120 AD3d 1141.

50. No Basis to Conclude Defendants Antagonistic to Each Other.— *People v Wilson*, 120 AD3d 1531.

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51. Violation of Order of Protection.— *People v Quantano*, 120 AD3d 1116.

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52. *People v Marcelle*, 120 AD3d 833.

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53. Failure to Disclose Exculpatory Material—Records Casting Doubt on Reli-ability of Key Prosecution Witness.— *People v Wagstaffe*, 120 AD3d 1361.

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54. Mistrial Granted over Defendant's Objection—Discharge of Juror.— *Matter of Gentil v Margulis*, 120 AD3d 1414.

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56. Hearsay Evidence—Failure to Give Limiting Instruction to Jury Sua Sponte was Harmless.— *People v Wisdom*, 120 AD3d 724.

57. Admission of Nontestifying Witness's Statements to Police to Explain Police Actions.— *People v Quantano*, 120 AD3d 1116.

58. New Evidence Admitted during Jury Deliberation—Reversal in Interest of Justice.— *People v Lee*, 120 AD3d 1137.

59. Tape Recordings—Telephone Calls Made by Defendant from Correction Facil-ity.— *People v Johnson*, 120 AD3d 1154.

60. DNA Identification Tests.— *People v Adams*, 120 AD3d 1253.

61. Exclusionary Rule—Inevitable Discovery Exception.— *People v Adams*, 120 AD3d 1253.

62. Surveillance Video.— *People v France*, 120 AD3d 1357.

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63. *People v Gibbs*, 120 AD3d 510.

64. Jury Notes—No Mode of Proceedings Error.— *People v Best*, 120 AD3d 707.

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65. *Matter of Garbarino v Garbarino*, 120 AD3d 578.

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66. Sufficiency of Evidence—Threat of Physical Harm.— *People v Harris*, 120 AD3d 411.

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- 67.** *People v Fitzgerald*, 120 AD3d 506.

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- 68.** Pattern Distinctive to Other Crimes.— *People v Garcia*, 120 AD3d 406.
69. Lineup—Instruction on Cross-Racial Identification Not Warranted.— *People v Best*, 120 AD3d 707.
70. Photographic Array.— *People v Taylor*, 120 AD3d 842.
71. *Matter of Dashawn R.*, 120 AD3d 1250.
72. Photographic Array—Multiple Arrays.— *People v Wilson*, 120 AD3d 1531.

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- 73.** Multiplicitous Counts.— *People v Campbell*, 120 AD3d 827.

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- 74.** Justification Defense—Assault on Police Officer.— *People v Nunez*, 120 AD3d 714.
75. Denial of Request for Intoxication Charge.— *People v Barill*, 120 AD3d 951.
76. Denial of Request for Missing Witness Charge.— *People v Barill*, 120 AD3d 951.
77. Erroneous Definition of Sex Crimes Not Substantial Error.— *People v Barnes*, 120 AD3d 1355.

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- 78.** Notice to Counsel of Substantive Juror Inquiry—Mode of Proceedings Error.— *People v Morris*, 120 AD3d 835.
79. Notice to Counsel of Substantive Juror Inquiry—Failure of Court to Apprise Counsel of Contents of Juror's Notes and Substance of Intended Responses.— *People v Sydoriak*, 120 AD3d 840.
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- 81.** Burglary and Robbery in Third Degree Lesser Included Offenses of Burglary and Robbery in Second Degree.— *People v Best*, 120 AD3d 707.
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- 84.** Extreme Emotional Disturbance—Applicability to Attempted Murder.— *People v Nunez*, 120 AD3d 714.
85. Justification Defense—Weight of Evidence.— *People v Barill*, 120 AD3d 951.
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- 89.** *People v Isakov*, 120 AD3d 589.

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- 90.** Notification When Award from Civil Rights Action Received by Inmate.— *Matter of Hutchinson v Fischer*, 120 AD3d 1476.

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91. Sufficiency of Allocution—Failure to Establish Factual Basis for Offense or Advise Defendant of Consequences of Plea.— *People v Harris*, 120 AD3d 411.

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93. Withdrawal of Plea—Denial of Motion to Withdraw Plea—Prescription Medication Not Affecting Defendant's Decision to Plead Guilty.— *People v DeBenedetto*, 120 AD3d 1428.

94. Forfeiture of Right to Raise Issues on Appeal—Right to Testify before Grand Jury.— *People v Carlton*, 120 AD3d 1443.

95. Sufficiency of Allocution.— *People v Miner*, 120 AD3d 1449.

96. Sufficiency of Allocution—Waiver of Constitutional Rights.— *People v Ocasio-Rosario*, 120 AD3d 1463.

97. Forfeiture of Right to Raise Issues on Appeal—Failure to Make Minimal Perfunctory Inquiry.— *People v Finch*, 120 AD3d 1524.

98. Forfeiture of Right to Raise Issues on Appeal—Voluntary, Intelligent Written Waiver of Right to Appeal.— *People v Williams*, 120 AD3d 1526.

99. Forfeiture of Right to Raise Issues on Appeal—Adequacy of Colloquy—Failure to Preserve Issue for Appellate Review.— *People v Lorenz*, 120 AD3d 1528.

100. Forfeiture of Right to Raise Issues on Appeal—Inadequacy of Colloquy—Failure to Advise Defendant of Postrelease Supervision.— *People v Davis*, 120 AD3d 1530.

101. Forfeiture of Right to Raise Issues on Appeal—Fear of Harsher Sentence Not Coercion.— *People v Griffin*, 120 AD3d 1569.

102. Withdrawal of Plea—Failure to Make Informed Decision Concerning Waiver of Potential Affirmative Defense.— *People v Dukes*, 120 AD3d 1597.

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105. Abandonment of Request for *Dunaway* Hearing.— *People v Barill*, 120 AD3d 951.

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106. Proof of Uncharged Crimes to Establish Motive of Perpetrator.— *People v Wisdom*, 120 AD3d 724.

107. Development of Narrative in Contempt Prosecution.— *People v Anderson*, 120 AD3d 1548.

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108. *People v Perez*, 120 AD3d 514.

RIGHT OF CONFRONTATION.

109. Unnamed Witness Who Provided Tip—Prosecutor's Improper Comments About Tip Necessitated New Trial.— *People v Benitez*, 120 AD3d 705.

110. Harmless Error.— *People v Gonzalez*, 120 AD3d 832.

111. Admission of Codefendant's Guilty Plea Allocution—New Trial Ordered.— *People v Lee*, 120 AD3d 1137.

RIGHT TO BE PRESENT AT TRIAL.

112. Presence at *Ventimiglia* Hearing.— *People v Burrell*, 120 AD3d 911.

RIGHT TO COUNSEL.

113. Effective Representation—Failure to Advise Defendant of Deportation Consequences of Guilty Plea.— *People v Simpson*, 120 AD3d 412.

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- 114. Effective Representation.— *People v Fitzgerald*, 120 AD3d 506.
- 115. Effective Representation.— *People v Hall*, 120 AD3d 588.
- 116. Effective Representation.— *People v Townsend*, 120 AD3d 595.
- 117. Effective Representation—Inadequate Explanation of Deficiencies in Representation.— *People v Hayes*, 120 AD3d 711.
- 118. Effective Representation—Mixed Claim of Ineffectiveness—Appellate Review.— *People v Ragguete*, 120 AD3d 717.
- 119. Effective Representation—Mixed Claim of Ineffectiveness—Appellate Review.— *People v Williams*, 120 AD3d 721.
- 120. Effective Representation.— *People v Casseus*, 120 AD3d 828.
- 121. Effective Representation.— *People v Romero*, 120 AD3d 947.
- 122. Effective Representation—Trial Strategy.— *People v Nowrang*, 120 AD3d 1112.
- 123. Evidence Improperly Admitted Based on Defendant's Request over Counsel's Opposition.— *People v Lee*, 120 AD3d 1137.
- 124. Effective Representation—Meaningful Representation.— *People v McDaniel*, 120 AD3d 1437.
- 125. Effective Representation—Failure to Effectuate Defendant's Appearance before Grand Jury.— *People v Carlton*, 120 AD3d 1443.
- 126. Withdrawal of Counsel—Nonfrivolous Appeal—Arguable Issue.— *People v Anderson*, 120 AD3d 1490.
- 127. Effective Representation—Advantageous Resentence.— *People v Griffin*, 120 AD3d 1529.
- 128. Effective Representation—Failure to Request Missing Witness Charge.— *People v Wilson*, 120 AD3d 1531.
- 129. Effective Representation—Conceding Issue Likely Decided against Defendant.— *People v Smith*, 120 AD3d 1544.
- 130. Effective Representation—Failure to Object to Allegedly Improper Prosecutorial Misconduct.— *People v Brown*, 120 AD3d 1545.
- 131. Effective Representation—Failure to Request Accomplice Charge.— *People v Anderson*, 120 AD3d 1549.
- 132. Relief of Assigned Counsel—Challenge to Sex Offender Registration Act Risk Level Determination.— *People v Ford*, 120 AD3d 1614.
- 133. Relief of Assigned Counsel—Validity of Plea.— *People v Mead*, 120 AD3d 1615.

RIGHT TO REMAIN SILENT.

- 134. Valid Waiver Notwithstanding Injuries.— *People v Nunez*, 120 AD3d 714.

RIGHT TO REPRESENTATION PRO SE.

- 135. Searching Inquiry by Court Required — Generalized Warnings Insufficient.—In a prosecution for burglary, the trial court failed to conduct the required “searching inquiry” before allowing defendant to proceed pro se where the court gave nothing more than generalized warnings, and completely failed to advise defendant of the benefits of being represented by counsel. Before allowing a defendant to proceed pro se, the court must determine that the defendant’s waiver of the right to counsel is made knowingly, voluntarily, and intelligently. A waiver cannot be deemed knowing, voluntary and intelligent unless, after a “searching inquiry,” the court is satisfied that defendant is aware of the dangers and disadvantages of proceeding without counsel. The court must adequately inform the accused of the risks inherent in proceeding pro se and apprise the defendant of the singular importance of the lawyer in the adversarial system of adjudication. Here, the court’s statements to defendant that it was in his “interest” to continue with counsel; that “[g]enerally, [self-representation] is a very bad idea”; and that there were “all kinds of dangers in doing this,” its sole example being that defendant would have to give

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the opening statement himself, failed to insure that the dangers and disadvantages of giving up the fundamental right to counsel had been impressed on defendant. The court also failed to advise defendant about the importance of a lawyer in the adversarial system of adjudication. Further, a searching inquiry encompasses consideration of a defendant's pedigree since such factors as age, level of education, occupation and previous exposure to the legal system may bear on the waiver's validity. The colloquy should be extensive and should also include the nature of the charges and the range of allowable punishments. *People v Cole*, 120 AD3d 72.

RIGHT TO SPEEDY TRIAL.

136. *People v Sant*, 120 AD3d 517.

137. *People ex rel. Marcus v Warden*, 120 AD3d 523.

138. Excludable Time—Material and Necessary DNA Analysis.— *People v Lathon*, 120 AD3d 1132.

139. Due Process Not Denied by Delay in Executing Search Warrant—Ongoing Investigation.— *People v Williams*, 120 AD3d 1526.

140. Good Cause for Delay in Grand Jury Presentation.— *People v Rivera*, 120 AD3d 1602.

ROBBERY.

141. Sufficiency of Evidence—Larcenous Intent—Discarding Stolen Items.— *People v Johnson*, 120 AD3d 1154.

SCHEME TO DEFRAUD.

142. Fraudulent Immigration Services and Forgery.— *People v Payen*, 120 AD3d 1123.

SEARCH WARRANT.

143. Probable Cause.— *People v Cooper*, 120 AD3d 710.

144. Probable Cause—Search of Defendant's Residence for Cocaine—Hearsay Information Provided by Confidential Informant and Unwitting Participant—Reliability and Basis of Knowledge.— *People v Myhand*, 120 AD3d 970.

145. Probable Cause—Search of Defendant's Residence for Cocaine—Personal Observations of Police during Controlled Drug Buys.— *People v Myhand*, 120 AD3d 970.

SENTENCE.

146. Concurrent and Consecutive Terms.— *People v Fitzgerald*, 120 AD3d 506.

147. Resentence.— *People v Hodge*, 120 AD3d 510.

148. Resentence.— *People v John*, 120 AD3d 591.

149. Concurrent and Consecutive Terms—Separate and Discrete Events.— *People v Nunez*, 120 AD3d 714.

150. Second Felony Offender—Predicate Offense Committed within 10-Year Look-Back Period.— *People v Williams*, 120 AD3d 721.

151. Second Felony Offender—Right to Challenge Prior Conviction.— *People v Densmore*, 120 AD3d 844.

152. What Constitutes Illegal Interruption of Sentence—Extradition Pursuant to Interstate Agreement on Detainers.— *Matter of Moore v New York State Dept. of Corr. & Community Supervision*, 120 AD3d 845.

153. Petitioner Not Entitled to Termination of Sentence—Not Convicted of Qualifying Drug Felony.— *People ex rel. Albert v Schneiderman*, 120 AD3d 856.

154. Unduly Harsh Sentence.— *People v Romero*, 120 AD3d 947.

155. Resentencing for Youthful Offender Determination.— *People v James*, 120 AD3d 1105.

156. No Basis for Reducing 15-Year Sentence for Attempted Murder in Second Degree.— *People v Lalondriz-Castillo*, 120 AD3d 1109.

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- 157.** Resentence—Postrelease Supervision—Double Jeopardy.— *People v Lopez*, 120 AD3d 1126.
- 158.** Drug Law Reform Act.— *People v Ramirez*, 120 AD3d 1136.
- 159.** Second Violent Felony Offender.— *People v Bowens*, 120 AD3d 1148.
- 160.** Reduction in Sentence.— *People v Howard*, 120 AD3d 1259.
- 161.** Resentence.— *People v Latimer*, 120 AD3d 1264.
- 162.** Defendant's Request to Defer Mandatory Surcharge and Fees—No Showing of Unreasonable Hardship.— *People v Larose*, 120 AD3d 1442.
- 163.** Judicial Diversion Program—Termination from Program for Subsequent Arrest.— *People v Cooney*, 120 AD3d 1445.
- 164.** Failure to Comply with Terms of Interim Probation.— *People v Cloutier*, 120 AD3d 1462.
- 165.** Second Felony Offender—Right to Challenge Constitutionality of Prior Conviction.— *People v McCaster*, 120 AD3d 1464.
- 166.** Enhancement of Sentence Following Violation of Condition of Furlough.— *People v Botte*, 120 AD3d 1488.
- 167.** Probation—Revocation.— *People v Provenzano*, 120 AD3d 1488.
- 168.** Trial Court Mistakenly Indicated Defendant Pleaded Guilty to Different Crime.— *People v Dunham*, 120 AD3d 1489.
- 169.** Harsh and Excessive—Violation of Probation Conditions—Consumption of Alcohol and Marihuana.— *People v Roach*, 120 AD3d 1506.
- 170.** Harsh and Excessive—Immediate Violation of Probation Conditions.— *People v Burkhardt*, 120 AD3d 1507.
- 171.** Harsh and Excessive—Violation of Probation Conditions.— *People v Colsten*, 120 AD3d 1508.
- 172.** Denial of Motion to Resentence Absconding Re-Offending Drug Offender.— *People v Colome-Rodriguez*, 120 AD3d 1525.
- 173.** Illegal Sentence.— *People v Enderlin*, 120 AD3d 1527.
- 174.** Resentence—Lack of Updated Presentence Report No Bar to Resentence.— *People v Griffin*, 120 AD3d 1529.
- 175.** Probation—Extension of Probationary Term—Revocation of Probation and Imposition of Period of Incarceration and Restitution.— *People v Conti*, 120 AD3d 1546.
- 176.** Restitution—Payment of Extradition Expenses.— *People v Conti*, 120 AD3d 1546.
- 177.** Persistent Violent Felony Offender—Separate Predicate Felonies.— *People v Curry*, 120 AD3d 1576.

SEX OFFENDERS.

- 178.** Civil Commitment or Supervision — Dangerous Sex Offender Requiring Confinement.—In a Mental Hygiene Law article 10 proceeding commenced following respondent's sodomy and assault convictions after he, at 15 years of age, entered a woman's home, struck her in the head with a baseball bat and engaged in anal sexual contact with her while she was unconscious, clear and convincing evidence supported Supreme Court's determination that respondent was a dangerous sex offender requiring civil confinement in a secure treatment facility. A "dangerous sex offender requiring confinement" is defined under Mental Hygiene Law § 10.03 (e) as a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility. Here, following Supreme Court's determination that respondent suffered from a mental abnormality, the State adduced evidence at a dispositional hearing that respondent displayed psychopathy, antisocial attitude and behavior and deviant sexual interests, the three factors that are the strongest predictors for sexually reoffending. Respondent's age

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also increased the risk that he would sexually reoffend. The State further adduced evidence that respondent fell into the group of sex offenders with the highest rate of recidivism—those with antisocial behavior with psychopathy and deviant sexual interests. *Matter of State of New York v Raul L.*, 120 AD3d 52.

179. Civil Commitment or Supervision — Mental Abnormality.—In a Mental Hygiene Law article 10 proceeding commenced following respondent's sodomy and assault convictions after he, at 15 years of age, entered a woman's home, struck her in the head with a baseball bat and engaged in anal sexual contact with her while she was unconscious, Supreme Court's determination that respondent suffered from a "mental abnormality" within the meaning of Mental Hygiene Law § 10.03 (i) was warranted by the facts. At a nonjury trial, the State adduced evidence that respondent was diagnosed with sexual sadism, a mental condition listed in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, as one of the paraphilias, a group of diagnoses applicable to a range of abnormal sexual arousal. The State also adduced evidence that respondent was diagnosed with, among other things, paraphilia not otherwise specified, which may constitute a viable predicate mental disorder for a finding of mental abnormality. Although respondent submitted the report of a psychiatric examiner who opined that, given the lack of information about the underlying offense and respondent's refusal to acknowledge the sexual aspects of the crime, it was not possible to determine whether he should be diagnosed with sexual sadism and that he could not be diagnosed with paraphilic disorder because he had been incarcerated since age 15 and had not displayed any signs of the disorder during that time, the case came down to a battle of the experts, and Supreme Court's determination to credit the testimony of the State's expert witnesses instead of respondent's expert witness was supported by the record. *Matter of State of New York v Raul L.*, 120 AD3d 52.

180. Civil Commitment or Supervision — Statutory Right to Counsel — Right to Representation Pro Se.—Due process requires that a sex offender in a Mental Hygiene Law article 10 proceeding can effectively waive his or her statutory right to counsel only after the court conducts a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent. Accordingly, where a sex offender makes a request to proceed pro se, the court must ascertain that the sex offender is aware of the dangers and disadvantages of giving up the right to counsel, such as must be conducted when a criminal defendant seeks to waive that fundamental right. An article 10 proceeding for the civil management of a sex offender is civil, rather than criminal, in nature, and the constitutional protections of the Sixth Amendment, which guarantees the right to counsel in criminal prosecutions, do not apply. Nevertheless, a respondent in an article 10 proceeding has a statutory right to counsel (*see* Mental Hygiene Law § 10.06 [c], [d]), and the principles established to safeguard the right to counsel in criminal cases have been applied to a variety of Family Court proceedings, which are also civil in nature but implicate constitutional due process considerations. The rights at stake in an article 10 proceeding are no less significant than those involved in the Family Court proceedings to which the criminal standard has been applied, and a respondent in an article 10 proceeding arguably faces an even more severe threat to his or her liberty than that faced by a criminal defendant. When successfully litigated by the State, an article 10 proceeding can result in civil confinement, after the respondent is released from prison, which is involuntary and indefinite, and can last the remainder of the respondent's life. *Matter of State of New York v Raul L.*, 120 AD3d 52.

181. Civil Commitment or Supervision — Statutory Right to Counsel — Right to Representation Pro Se.—In a Mental Hygiene Law article 10 proceeding, respondent's waiver of the statutory right to counsel was ineffective where Supreme Court failed to conduct the requisite searching inquiry to ensure that the waiver was unequivocal, voluntary, and intelligent. Respondent's waiver of the right to counsel was not unequivocal as he did not express any desire to represent himself until after his counsel moved to withdraw due to an apparent disagreement with him over whether to seek an adjournment and the court informed him that, if new counsel were appointed, he or she would need four to five months to prepare. Respondent's primary motivation in seeking to represent himself apparently was

CRIMES—Cont'd

his concern that the appointment of new counsel would delay the proceeding, and the court engaged in no colloquy to ascertain whether his request arose from an unequivocal desire to forgo the assistance of counsel. Moreover, respondent could not make an intelligent and voluntary choice to waive the assistance of counsel without being apprised, in any manner, of the dangers and disadvantages of self-representation. That respondent was alleged to be suffering from mental abnormality requiring confinement to a mental institution made it all the more imperative that the court adequately warn him of the risks inherent in proceeding pro se. Nevertheless, the court erroneously insisted, notwithstanding the concerns voiced by the Assistant Attorney General, that it had fulfilled its obligations by merely placing on the record that respondent did not want an attorney, that he understood he would represent himself and that he could read and write. Supreme Court thus deprived respondent of his statutory right to counsel. *Matter of State of New York v Raul L.*, 120 AD3d 52.

182. Sex Offender Registration Act.— *People v Fitzpatrick*, 120 AD3d 565.

183. Civil Commitment or Supervision—Mental Abnormality—Confinement Required.— *Matter of State of New York v Dennis K.*, 120 AD3d 694.

184. Sex Offender Registration Act—Upward Departure—Conviction Not Addressed in Risk Assessment Instrument.— *People v Becker*, 120 AD3d 846.

185. Sex Offender Registration Act—“Relationship with Victim” Risk Factor—“Grooming” Behavior through Online Contact with Victims.— *People v Izzo*, 120 AD3d 860.

186. Sex Offender Registration Act—“Number of Victims” Risk Factor—Self-Touching while in Contact with Victim Via Webcam.— *People v Izzo*, 120 AD3d 860.

187. Civil Commitment or Supervision—Dangerous Sex Offender Requiring Confinement.— *Matter of State of New York v Nervina*, 120 AD3d 941.

188. Civil Commitment or Supervision—Mental Abnormality.— *Matter of State of New York v Nervina*, 120 AD3d 941.

189. Civil Commitment or Supervision—Sexually Motivated Crime.— *Matter of State of New York v Nervina*, 120 AD3d 941.

190. Sex Offender Registration Act—Downward Departure Not Warranted.— *People v McFarland*, 120 AD3d 1121.

191. Sex Offender Registration Act—Downward Departure Not Warranted.— *People v Torres*, 120 AD3d 1126.

192. Civil Commitment or Supervision—Mental Abnormality—Paraphilia Disorder.— *Matter of State of New York v David M.*, 120 AD3d 1423.

193. Civil Commitment or Supervision—Reliability of Expert Witnesses.— *Matter of State of New York v Castleberry*, 120 AD3d 1535.

194. Sex Offender Registration Act—Downward Departure Not Warranted.— *People v Johnson*, 120 AD3d 1542.

195. Civil Commitment or Supervision—Use of Hearsay Testimony.— *Matter of Brooks v State of New York*, 120 AD3d 1577.

STALKING.

196. Prior Relationship between Defendant and Victim.— *People v Ubbink*, 120 AD3d 1574.

TRIAL.

197. Mistrial—No Mistrial Where Prosecution Witness Failed to Recognize Anyone in Courtroom.— *People v Edwards*, 120 AD3d 1435.

UNLAWFUL SEARCH AND SEIZURE.

198. Suppression Hearing Necessary to Determine Existence of Exigent Circumstances Justifying Forced Warrantless Entry.— *People v Chamlee*, 120 AD3d 417.

199. Search of Vehicle and Trunk—Founded Suspicion of Criminality Based upon Totality of Known Circumstances.— *People v Mercado*, 120 AD3d 441.

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200. Voluntariness of Consent to Search of Vehicle and Trunk—Defendant was Cooperative, Alert, Offered No Resistance, and Had Prior Contact with Criminal Justice System.— *People v Mercado*, 120 AD3d 441.

201. Plain View Doctrine.— *People v John*, 120 AD3d 511.

202. *People v Campbell*, 120 AD3d 827.

203. Recovery of Handgun from Defendant's Person—Lack of Reasonable Suspicion Justifying Pat Frisk.— *People v Mobley*, 120 AD3d 916.

204. Probable Cause to Seize Vehicle Following Alert of Narcotics-Sniffing Canine.— *People v Romero*, 120 AD3d 947.

205. Search Incident to Arrest—Arrest Supported by Probable Cause.— *People v Verges*, 120 AD3d 1028.

206. Flight from Police—No Justification for Police Pursuit Absent Other Indicia of Criminality.— *Matter of Reggie T.*, 120 AD3d 1145.

207. *Matter of Dashawn R.*, 120 AD3d 1250.

208. *People v Mitchell*, 120 AD3d 1265.

209. Well-Founded Suspicion of Criminal Activity—Discarded Gun during Flight Improperly Suppressed.— *People v Williams*, 120 AD3d 1441.

VACATUR OF JUDGMENT OF CONVICTION.

210. *People v Woods*, 120 AD3d 595.

211. Sufficiency of Plea Allocation—Review of Proceedings Underlying Judgment.— *People v Hayes*, 120 AD3d 711.

212. *People v Griffin*, 120 AD3d 1257.

VERDICT.

213. Sufficiency of Evidence.— *People v Rose*, 120 AD3d 593.

214. Sufficiency and Weight of Evidence.— *People v Hernandez*, 120 AD3d 1141.

WITNESSES.

215. Expert Witness—Denial of Request for Expert Witness in Eyewitness Identification.— *People v Mallayev*, 120 AD3d 1358.

DAMAGES.

FUTURE DAMAGES.

1. Future Physical Therapy and Medical Expenses—Unsupported by Record and Based upon Speculation.— *Weathers v Rios*, 120 AD3d 663.

INADEQUATE AND EXCESSIVE DAMAGES.

2. Past and Future Pain and Suffering—Material Deviation from Reasonable Compensation.— *Weathers v Rios*, 120 AD3d 663.

3. Serious and Permanent Damage to Vision Provided Sufficient Basis for Award.— *Devadas v Niksarli*, 120 AD3d 1000.

4. Excessive Damages—Back Injury Arising Out of Automobile Accident.— *Cicola v County of Suffolk*, 120 AD3d 1379.

PUNITIVE DAMAGES.

5. *Dawson v YMCA of Long Is., Inc.*, 120 AD3d 748.

DEBTOR AND CREDITOR.

See ASSIGNMENTS FOR BENEFIT OF CREDITORS; ATTACHMENT; CREDITORS' SUITS; EXECUTION; FRAUDULENT CONVEYANCES; LIENS; LIS PENDENS; MORTGAGES, and other specific titles.

DECEDENTS' ESTATES.

See ALIENS; COURTS (SURROGATE'S COURT); DEAD BODIES; DEATH; DESCENT AND DISTRIBUTION; DOMICILE; EXECUTORS AND ADMINISTRATORS; GIFTS; INSURANCE; POWERS; TAXATION; TRUSTS; WILLS, and other specific titles.

DENTISTS.

See LICENSES; PHYSICIANS AND SURGEONS.

DEPOSITIONS.

See DISCLOSURE.

DISCLOSURE.

EXAMINATION BEFORE TRIAL.

1. Nonparty Witness—Motion to Quash Subpoena.— *Menkes v Beth Abraham Health Servs.*, 120 AD3d 408.

MENTAL EXAMINATION.

2. Psychiatric Examinations—Denial of Application to Compel Plaintiff to Submit to Psychiatric Examination Where Mental Condition Not in Controversy.— *Kennedy v Mahopac Cent. Sch. Dist.*, 120 AD3d 1394.

PENALTY FOR FAILURE TO DISCLOSE.

3. *Dutchess Truck Repair, Inc. v Boyce*, 120 AD3d 543.
4. Spoliation of Evidence—Destruction of Crucial Physical Evidence—Answer Stricken.— *Biniachvili v Yeshivat Shaare Torah, Inc.*, 120 AD3d 605.
5. Spoliation of Evidence—Sanctions Inappropriate Absent Proof Evidence was Lost or Destroyed.— *Eremina v Scparta*, 120 AD3d 616.
6. Preclusion of Expert Testimony—No Wilfulness or Significant Prejudice Demonstrated.— *Matter of State of New York v Dennis K.*, 120 AD3d 694.
7. Failure to Disclose Expert Witnesses and Spoliation of Evidence—Preclusion of Witnesses and Adverse Inference Warranted.— *Matter of Western Ramapo Sewer Extension Project*, 120 AD3d 703.
8. Enforcement of Conditional Order of Preclusion.— *Hughes v Brooklyn Skating, LLC*, 120 AD3d 758.
9. Spoliation of Evidence.— *Mangilit-Pradlik v Valvoline Instant Oil Change GE6604-White Plains*, 120 AD3d 774.
10. Spoliation of Evidence—Answer Stricken and Summary Judgment on Issue of Liability Granted.— *Lentini v Weschler*, 120 AD3d 1200.
11. Failure to Appear for Court-Ordered Deposition—Abuse of Discretion to Strike Answer Following Reasonable Excuse for Failure to Appear.— *Cason v Smith*, 120 AD3d 1554.

PHYSICAL EXAMINATION.

12. Failure to Show Plaintiff Willfully Refused to Attend Examination—Medical Malpractice—Extension of Time to Conduct Examination.— *Dimoulas v Roca*, 120 AD3d 1293.

PROTECTIVE ORDER.

13. Confidentiality Agreement to Prevent Revelation of Trade Secrets.— *Conley & Son Excavating Co., Ltd. v Delta Alliance, LLC*, 120 AD3d 1604.

SCOPE OF DISCLOSURE.

14. *Middleton v Russell*, 120 AD3d 477.
15. Trade Secrets—Source Code Underlying Technologies Discoverable in Misappropriation Action.— *MSCI Inc. v Jacob*, 120 AD3d 1072.

SUPERVISION OF DISCLOSURE.

16. Allow Party to Respond to Disclosure Requests before Imposing Sanctions.— *Eremina v Scparta*, 120 AD3d 616.

DISCONTINUANCE.

See DISMISSAL AND NONSUIT.

DISCOVERY AND INSPECTION.

See DISCLOSURE.

DISMISSAL AND NONSUIT.

ABANDONED CASES.

1. Judgment Not Subject to 60-Day Time Limit.— *47 Thames Realty, LLC v Robinson*, 120 AD3d 1183.

DISMISSAL OF COMPLAINT.

2. Documentary Evidence—Emails Submitted to Refute Fraudulent and Negligent Misrepresentation Claims Were Not “Essentially Undeniable”.— *Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431.
3. Documentary Evidence—Emails and Affidavits Failed to Conclusively Refute Claim of Oral Joint Venture Agreement.— *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436.
4. Sua Sponte Dismissal.— *Bank of N.Y. v Cepeda*, 120 AD3d 451.
5. Sua Sponte Dismissal.— *Deutsche Bank Natl. Trust Co. v Meah*, 120 AD3d 465.
6. Documentary Evidence.— *Air & Power Transmission, Inc. v Weingast*, 120 AD3d 524.

FAILURE TO APPEAR.

7. Dismissal Not Warranted Where Plaintiff Actively Participated in Subsequent Litigation.— *Bank of N.Y. v Castillo*, 120 AD3d 598.

WANT OF PROSECUTION.

8. Failure to Serve 90-Day Demand for Service and Filing of Note of Issue—Action Restored to Calendar.— *Diemer v Eben Ezer Med. Assoc.*, 120 AD3d 614.

DIVORCE.

See HUSBAND AND WIFE AND OTHER DOMESTIC RELATIONSHIPS.

DOUBLE JEOPARDY.

See CRIMES.

ELDER LAW.

See HEALTH; INCAPACITATED AND MENTALLY DISABLED PERSONS; INSURANCE; SOCIAL SERVICES; TRUSTS.

ELECTION OF REMEDIES.

ADMINISTRATIVE OR JUDICIAL RELIEF.

1. Claim for Illegal Placement of Video Cameras in Employee Restrooms Not Barred by Remedies Available in Collective Bargaining Agreement.— *Davis v Duane Reade, Inc.*, 120 AD3d 1386.

ELECTIONS.

ACCEPTANCE OF NOMINATION.

1. *Matter of Maher v New York State Bd. of Elections*, 120 AD3d 891.

BOARD OF ELECTIONS.

2. *Matter of Sloan v Kellner*, 120 AD3d 895.

DESIGNATING PETITIONS.

3. Validity—Use of Shortened Name.— *Matter of Abinanti v Duffy*, 120 AD3d 668.
4. Validity—Use of Shortened Name.— *Matter of Abinanti v Duffy*, 120 AD3d 669.
5. Standing.— *Matter of Axelrod v Reda*, 120 AD3d 671.
6. Validity of Signatures—Inactive Voter Status of Subscribing Witness.— *Matter of Bichotte v Adolphe*, 120 AD3d 674.
7. Validity of Signatures—Residence Address of Subscribing Witness.— *Matter of Bichotte v Adolphe*, 120 AD3d 674.

ELECTIONS—Cont'd

- 8. Number of Signatures.— *Matter of Kropp v Hackeling*, 120 AD3d 685.
- 9. Uninitialed Alterations to Dates on Signature Lines Invalidated Petition.— *Matter of Merrill v Fritz*, 120 AD3d 689.
- 10. Signers' Town and City Completed by Third Party.— *Matter of Collins v New York State Bd. of Elections*, 120 AD3d 882.
- 11. *Matter of Conti v Clyne*, 120 AD3d 884.
- 12. Fraud.— *Matter of VanSavage v Jones*, 120 AD3d 887.
- 13. Validity of Signatures.— *Matter of VanSavage v Jones*, 120 AD3d 887.
- 14. Witness Identification Information.— *Matter of VanSavage v Jones*, 120 AD3d 887.
- 15. Term of Office.— *Matter of Maher v New York State Bd. of Elections*, 120 AD3d 891.
- 16. Signature Requirement—Number of Signatures Required for Municipal Common Council Election.— *Matter of Vescera v Stewart*, 120 AD3d 990.
- 17. Cover Sheets—Failure of Subscribing Witness to Date Sheet Fatal.— *Matter of Quinn v Erie County Bd. of Elections*, 120 AD3d 992.
- 18. Failure to Serve Attorney General with Order to Show Cause Nonfatal Technical Defect in Proceeding to Invalidate Petition.— *Matter of O'Brien v Pordum*, 120 AD3d 993.
- 19. Cover Sheets—Service of Objections—Rule of County Board of Elections.— *Matter of Zalocha v Donovan*, 120 AD3d 994.
- 20. Qualification of Subscribing Witness—Failure to Challenge Voter Registration Status of Subscribing Witness Fatal to Proceeding to Invalidate.— *Matter of Carney v Ward*, 120 AD3d 995.
- 21. Challenge to Residence of Delegate to Judicial Nominating Convention Premature.— *Matter of Locke v Walsh*, 120 AD3d 997.

PETITION FOR OPPORTUNITY TO BALLOT.

- 22. Signatures Invalid Where Witnessing Notaries Public Failed to Administer Oath.— *Matter of Fuchs v Itzkowitz*, 120 AD3d 682.
- 23. Signatures Invalid Where Jurat Predated Signatures.— *Matter of Stevens v Collins*, 120 AD3d 696.

RESIDENCE REQUIREMENT.

- 24. *Matter of Jones v Blake*, 120 AD3d 415.
- 25. Challenger Bears Burden to Prove Candidate Does Not Meet Residency Requirement by Clear and Convincing Evidence.— *Matter of Weiss v Teachout*, 120 AD3d 701.

EMINENT DOMAIN.**CONSEQUENTIAL DAMAGES.**

- 1. Award That Included Value of Land Sold before Taking.—In a proceeding in which claimants sought damages for the diminished value of land remaining after defendant State of New York's taking of approximately 1.22 acres from what was claimants' 17.3-acre parcel, Court of Claims erred in including within the acreage for which it awarded consequential damages a 4.63-acre parcel that was sold by claimants before the taking. When the sovereign takes part of a condemnee's property and leaves a remainder, just compensation includes not only the direct damages for the portion that was taken, but also any consequential or indirect damages caused by the taking that impaired the remaining portion of the property. However, the condemnee is allowed to multiply the higher per-acre value of the original parcel by the number of acres under his or her ownership at the time of the taking, not by the acreage he or she once owned and had previously sold. The concept of condemnation blight is irrelevant where the claimants did not own the parcel at issue at the time of the taking. *Rose Park Place, Inc. v State of New York*, 120 AD3d 8.

EMINENT DOMAIN—Cont'd

VALUATION.

2. Condemnation of Vacant Land to Extend Sewer Service—Highest and Best Use of Property—Unconsummated Contract Evidence of Value.— *Matter of Western Ramapo Sewer Extension Project*, 120 AD3d 703.

EMPLOYMENT RELATIONSHIPS.

See, also, CIVIL SERVICE; LABOR; LABOR UNIONS; MUNICIPAL CORPORATIONS; SCHOOLS; STATE; UNEMPLOYMENT INSURANCE; WORKERS' COMPENSATION, and other specific titles.

RESPONDEAT SUPERIOR.

1. *Lepore v Town of Greenburgh*, 120 AD3d 1202.

ENVIRONMENTAL CONSERVATION.

STATE POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT.

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1. *Abrahams v Commonwealth Land Tit. Ins. Co.*, 120 AD3d 1165.

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2. Demand That Beneficiary of Irrevocable Standby Letter of Credit Comply with Certain Terms — Collusion of Issuing Bank.—Defendant, the issuing bank of irrevocable standby letters of credit, would be estopped from asserting that plaintiffs, beneficiaries of the letters, failed to comply with terms in the letters requiring the issuer's confirmation of plaintiffs' "fulfilment of their commitment towards the account party" where defendant engaged in improper communications relating to dishonoring the letters with the defendants who obtained the letters. To permit the payor to pressure or collude with the bank to dishonor the draft destroys the very principle upon which the commercial utility of letters of credit rests. *BasicNet S.p.A. v CFP Servs. Ltd.*, 120 AD3d 97.

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1. *Matter of Elenidis*, 120 AD3d 1229.
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2. *Matter of Moore v New York State Div. of Parole*, 120 AD3d 1475.

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5. Division of Income Tax Refund.—*Nimkoff v Nimkoff*, 120 AD3d 1099.
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8. Termination of Consultation Fees Paid to Wife upon Termination of Business Relationship with Husband Following Wife's Opening of Competing Business.—*Anderson v Anderson*, 120 AD3d 1559.

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10. Residence Purchased Prior to Marriage Separate Property—Appreciation in Value of Marital Property.—*Rizzo v Rizzo*, 120 AD3d 1400.

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- 12. Obligation to Make Distributive Payment.— *Tallo v Tallo*, 120 AD3d 945.
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- 14. Open Court Stipulation Too Incomplete and Indefinite to be Enforceable—Consent to Divorce in Exchange for Financial Payments against Public Policy.— *Cohen v Cohen*, 120 AD3d 1060.
- 15. Distribution of Assets of Pension Plan—Validity of Stipulation.— *Murphy v Murphy*, 120 AD3d 1319.

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- 16. Maintenance.— *Rabinovich v Shevchenko*, 120 AD3d 786.
- 17. Maintenance—Excessive Award.— *Cohen v Cohen*, 120 AD3d 1060.
- 18. Maintenance—Imputed Income—Counsel Fees and Child Care.— *Weitzner v Weitzner*, 120 AD3d 1406.

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- 1. Capacity of Incapacitated Person to Marry.— *Matter of Dandridge*, 120 AD3d 1411.

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2. Priority of Claims upon Death of Person in Need of Assistance — Competing Claims of Social Services Department and Skilled Nursing Facility.—In a proceeding to settle competing claims to the funds in an incapacitated decedent's guardianship account, the claim of respondent skilled nursing facility for services rendered during decedent's life had priority over respondent Department of Social Services's (DSS) Medicaid lien, which arose after decedent's death, since the nursing facility's claim arose before the decedent's death and Mental Hygiene Law § 81.44 (d) allows the guardian to retain assets to secure known claims. Section 81.44 (d) provides that, within 150 days of the death of an incapacitated person, a guardian must serve on the personal representative of the decedent's estate a statement of assets and notice of claim, and, "except for property retained to secure any known claim, lien or administrative costs of the guardianship," deliver all guardianship property to the personal representative. Consistent with section 81.44 (d), the order and judgment appointing the guardian authorized the guardian to "[p]ay bills after [decedent's] death . . . if incurred prior to said death, if authority to pay any such bills would otherwise have existed." Furthermore, section 81.44 (d) does not limit "any claims" to administrative costs and should be broadly construed. Here, the nursing facility filed a notice of claim against the guardianship account during decedent's lifetime while DSS asserted a claim against the estate only. Although DSS was a preferred creditor pursuant to Social Services Law § 104, it had a priority claim only against the estate and the nursing facility should have been paid before any funds passed to the estate. *Matter of Shannon*, 120 AD3d 128.

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- 1. *Sobel v City of New York*, 120 AD3d 485.
- 2. *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552.
- 3. *Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570.

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4. Commercial Lease.— *Bacon v 4042 Austin Blvd., LLC*, 120 AD3d 727.
5. Scope of Indemnification Provision.— *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902.
6. Worker Injured on Hazardous Wooden Planks at Construction Site—Subcontractor's Contractual Duty to Keep Area Clear of Debris.— *DePaul v NY Brush LLC*, 120 AD3d 1046.
7. Summary Judgment.— *Best v Tishman Constr. Corp. of N.Y.*, 120 AD3d 1081.

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8. Common-Law Indemnification.— *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902.
9. Common-Law Indemnification—Products Liability—No Indemnification for Defense Costs Assumed by Retailer Where Manufacturer Not at Fault.— *Bigelow v General Elec. Co.*, 120 AD3d 938.

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See, also, ADOPTION; CHILDREN BORN OUT OF WEDLOCK; COURTS (FAMILY COURT); GUARDIAN AND WARD; HUSBAND AND WIFE AND OTHER DOMESTIC RELATIONSHIPS; PARENT, CHILD AND FAMILY; SCHOOLS; SOCIAL SERVICES, and other specific titles.

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4. Violation of Probation—Fair Notice of Conditions of Probation.— *Matter of Marquise B.*, 120 AD3d 1130.
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6. *People v Brooks*, 120 AD3d 1255.

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1. *Caruso v Bumgarner*, 120 AD3d 1174.

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2. *Baldwin Union Free Sch. Dist. v County of Nassau*, 120 AD3d 1166.
3. *Hofstra Univ. v Nassau County*, 120 AD3d 1191.

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See, also, ARBITRATION; UNEMPLOYMENT INSURANCE; WORKERS' COMPENSATION, and other specific titles.

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1. Negligent Failure to Procure Requested Coverage—Findings of Arbitration Panel Sufficient to Rebut Claim.— *Sea Trade Mar. Corp. v Marsh USA, Inc.*, 120 AD3d 1153.

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2. Underinsured Motorist Endorsement—Comparison of Liability Limits.— *Matter of Government Empls. Ins. Co. v Lee*, 120 AD3d 497.
3. Underinsured Motorist Endorsement—Permanent Stay of Arbitration.— *Matter of Government Empls. Ins. Co. v Beltran*, 120 AD3d 684.
4. Underinsured Motorist Endorsement—SUM Coverage Not Triggered Where Liability Limits Identical to Those Covering Offending Vehicle.— *Matter of Unitrin Direct/Warner Ins. Co. v Brand*, 120 AD3d 698.

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5. Underinsured Motorist Endorsement—Temporary Substitute Car.— *Matter of State Farm Mut. Auto. Ins. Co. v O'Brien*, 120 AD3d 1252.

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6. What Constitutes “Entrustment”.— *Lexington Park Realty LLC v National Union Fire Ins. Co. of Pittsburgh, PA*, 120 AD3d 413.

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7. Late Notice of Occurrence—Nine-Month Delay—Failure to Demonstrate Reasonableness or Good Faith Belief in Nonliability.— *Guideone Ins. Co. v Darkei Noam Rabbinical Coll.*, 120 AD3d 625.

8. Timeliness—Diligent Investigation.— *Guideone Ins. Co. v Darkei Noam Rabbinical Coll.*, 120 AD3d 625.

9. Failure to Provide Timely Written Notice of Disclaimer.— *Key Fat Corp. v Rutgers Cas. Ins. Co.*, 120 AD3d 1195.

10. Purported Late Notice of Underlying Claim against Insured—Estoppel to Raise Issue of Late Notice.— *B&R Consol., LLC v Zurich Am. Ins. Co.*, 120 AD3d 1366.

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11. *Salt Constr. Corp. v Farm Family Cas. Ins. Co.*, 120 AD3d 568.

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12. Taking Involving or Related to Principles of Eminent Domain.— *Scottsdale Indem. Co. v Beckerman*, 120 AD3d 1215.

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13. Intentionally Set Fire Basis for Denying Claim.— *Abdulnabi v Allstate Ins. Co.*, 120 AD3d 1571.

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14. Standing to Commence Direct Action against Tortfeasor's Insurer—Quantum Meruit and Deceptive Business Practices Claims Not Barred.— *Nick's Garage, Inc. v Liberty Mut. Fire Ins. Co.*, 120 AD3d 967.

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15. Breach of Contract.— *Phoenix Life Ins. Co. v Jacob P ILIT A*, 120 AD3d 566.

MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION.

16. Hit and Run Accident—Satisfaction of Notification Requirements.— *Matter of Hernandez v Motor Veh. Acc. Indem. Corp.*, 120 AD3d 1347.

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17. Serious Injury—Summary Judgment.— *Werthner v Lewis*, 120 AD3d 490.

18. Recovery of Assigned First-Party No-Fault Benefits—Summary Judgment.— *Mount Sinai Hosp. v New York Cent. Mut. Fire Ins. Co.*, 120 AD3d 561.

19. Serious Injury—Plaintiff Unable to Continue Working Due to Neck and Hand Pain.— *Hernandez v Sollo*, 120 AD3d 628.

20. Serious Injury.— *Preston v Ziane*, 120 AD3d 647.

21. Serious Injury.— *Smith v Berrios*, 120 AD3d 658.

22. Serious Injury—Jury's Weighing of Expert Testimony.— *Sanchez v Dawson*, 120 AD3d 933.

23. Serious Injury—Significant Disfigurement—Postaccident Surgical Scar.— *Sanchez v Dawson*, 120 AD3d 933.

24. Serious Injury—No Permanent Consequential Limitation of Use.— *Gates v Longden*, 120 AD3d 980.

25. Serious Injury—Causation—Refusal to Consider Affidavit of Expert Engineer.— *Gates v Longden*, 120 AD3d 980.

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26. Serious Injury—Causation—Degenerative Conditions and History of Arthritis.— *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043.

27. Serious Injury—Cervical Spine and Wrist—Permanent Consequential Limitations in Use and 90/180-Day Claims Properly Dismissed.— *Boone v Elizabeth Taxi, Inc.*, 120 AD3d 1143.

28. Serious Injury—Cervical and Lumbar Spine—Permanent Consequential and Significant Limitations of Use.— *Mulligan v City of New York*, 120 AD3d 1155.

29. Serious Injury—Knee—No Evidence of Limitations in Use.— *Mulligan v City of New York*, 120 AD3d 1155.

30. Serious Injury—Injury to Lumbar Region of Spine.— *Assemi v Levan*, 120 AD3d 1365.

31. Serious Injury—Shoulder and Back Injuries.— *Yeong Sun Koo v Cheng Jin Dai*, 120 AD3d 1408.

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32. *Phoenix Life Ins. Co. v Jacob P ILIT A*, 120 AD3d 566.

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1. Date from Which Prejudgment Interest Computed.— *Assos Constr. Corp. v 1141 Realty LLC*, 120 AD3d 1151.

2. Denial of Prejudgment Interest Where Default Not Willful in Support Action.— *Lundon v Lundon*, 120 AD3d 1395.

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See PARTIES.

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1. *People v Suazo*, 120 AD3d 1270.

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See, also, EXECUTION, and other specific titles.

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1. Improper Collateral Attack of Prior Litigation for Alleged Fraud.— *Kai Lin v Department of Dentistry, Univ. of Rochester Med. Ctr.*, 120 AD3d 932.

COLLATERAL ESTOPPEL.

2. Discrimination Claims under State and Municipal Human Rights Laws Not Barred by Dismissal of Prior Federal Action Asserting Retaliation Claim Based on Family and Medical Leave Act.—Collateral estoppel did not bar plaintiff's claims of retaliatory termination in an action to recover under the state Human Rights Law (Executive Law § 290 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-107 *et seq.*) where plaintiff's prior federal action asserting retaliation claims under the Family and Medical Leave Act (29 USC § 2601 *et seq.*) were dismissed, since the state and city claims were entirely distinct from the retaliation claims asserted in the federal action. In the federal action, the court only decided whether plaintiff was retaliated against for exercising her rights under the federal statute. In the state action however, plaintiff did not claim retaliation based on her exercise of federal statutory rights, but instead alleged retaliation under the state and city Human Rights Laws based on entirely different instances of protected activity. Specifically, plaintiff alleged she was discharged for filing a written complaint about her reprimand for allegedly reading a book during

JUDGMENTS—Cont'd

work hours, and for verbally complaining about an alleged inappropriate comment. Because the federal court's decision did not address either of those claimed bases for retaliation, it could not be said that the federal action "necessarily decided" the same issues raised by the state and city retaliation claims, and thus collateral estoppel did not apply. While the federal court found insufficient facts to conclude that discrimination played a role in the decision to terminate plaintiff, that finding was made solely in the context of analyzing the discrete claim of retaliation under the federal statute, and was unrelated to plaintiff's state and city claims. *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18.

3. *Carrasco v Weissman*, 120 AD3d 531.

4. Litigation of Issue in Prior Federal Action.— *Bielby v Middaugh*, 120 AD3d 896.

5. Action by Crime Victim to Recover Damages.— *Abdelzaher v Sallustio*, 120 AD3d 1160.

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7. *Bennett v Patel Catskills, LLC*, 120 AD3d 458.

8. Notice Requirements.— *Confidential Lending, LLC v Nurse*, 120 AD3d 739.

9. Vacatur—Lack of Jurisdiction to Entertain Summary Judgment Motion—Inadequate Notice of Return Date.— *State Bank of Texas v Kaanam, LLC*, 120 AD3d 900.

10. Inquest to Assess Damages.— *Henderson-Jones v City of New York*, 120 AD3d 1123.

11. *Abrahams v Commonwealth Land Tit. Ins. Co.*, 120 AD3d 1165.

12. Vacatur.— *Macaluso v Macaluso*, 120 AD3d 1205.

13. Vacatur.— *Selechnik v Law Off. of Howard R. Birnbach*, 120 AD3d 1220.

14. Failure to Establish Reasonable Excuse.— *Abdelqader v Abdelqader*, 120 AD3d 1275.

15. Failure to Demonstrate Reasonable Excuse for Failure to Submit Opposition Papers in Medical Malpractice Action.— *Bhuiyan v New York City Health & Hosps. Corp.*, 120 AD3d 1284.

16. Vacatur—Reasonable Excuse—Clerical Oversight.— *New York Hosp. Med. Ctr. of Queens v Nationwide Mut. Ins. Co.*, 120 AD3d 1322.

17. Vacatur—Failure to Establish Lack of Proper Service—Failure to Establish Basis for Discretionary Vacatur.— *Youngstown Tube Co. v Russo*, 120 AD3d 1409.

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18. Renewal Judgment.— *Guerra v Crescent St. Corp.*, 120 AD3d 754.

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19. *Conlon v Conlon*, 120 AD3d 539.

20. State Action Not Barred by Prior Federal Action—Federal Court Declined Pendent Jurisdiction over State Law Claims.— *Bielby v Middaugh*, 120 AD3d 896.

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21. Timeliness of Motion.— *Carrasco v Weissman*, 120 AD3d 534.

22. *Commissioners of State Ins. Fund v Kaywood Props., Ltd.*, 120 AD3d 539.

23. Failure to Procure Insurance.— *Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570.

24. Successive Motions for Summary Judgment.— *Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570.

25. Assignment of Interest in Insurance Premium—Triable Issues of Fact.— *Bankdirect Capital Fin. v Insurance Co. of State of Pa.*, 120 AD3d 601.

26. Motion Filed Prior to Deposition of Eyewitnesses Denied as Premature.— *Worley v Safemove Rental*, 120 AD3d 667.

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- 27. *Hunter Sports Shooting Grounds, Inc. v Foley*, 120 AD3d 759.
- 28. Hearsay Statement Did Not Create Question of Fact Where Belied by Documentary Evidence.— *Andron v Libby*, 120 AD3d 1056.
- 29. Premature Motion.— *Quezada v Topside Sys. Inc.*, 120 AD3d 1120.
- 30. Premature Motion.— *Board of Educ. of E. Meadow Union Free Sch. Dist. v County of Nassau*, 120 AD3d 1170.
- 31. Motion for Summary Judgment in Foreclosure Action Not Premature.— *CSMC 2007-C1 Oswego Rd., LLC v Kimbrook Rte. 31, LLC*, 120 AD3d 1539.

JUDICIAL NOTICE.

See EVIDENCE.

LABOR.

See, also, ARBITRATION; CIVIL SERVICE; EMPLOYMENT RELATIONSHIPS; LABOR UNIONS; MUNICIPAL CORPORATIONS; SCHOOLS; STATE; UNEMPLOYMENT INSURANCE; WORKERS' COMPENSATION, and other specific titles.

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- 1. Transfer of Ownership of Business—Definition of Employer.— *Matter of Yick Wing Chan v New York Indus. Bd. of Appeals*, 120 AD3d 1120.
- 2. Recovery of Unpaid Wages—At-Will Employee.— *Jennings v Huntington Crescent Club*, 120 AD3d 1394.

SAFE PLACE TO WORK.

3. Failure to Provide Worker with Adequate Safety Device — Unavailability of Sole Proximate Cause Defense — No Need to Challenge Supervisor's Instructions.—In an action to recover for personal injuries plaintiff worker sustained when he fell from an inadequate A-frame ladder while working at defendant's store, plaintiff was entitled to partial summary judgment on the issue of liability where plaintiff's supervisor explicitly directed him not to use an otherwise available Baker scaffold and defendant did not dispute that a Baker scaffold would have been the adequate device for plaintiff to engage in the required demolition work. A contractor's or owner's duty to furnish adequate safety devices under Labor Law § 240 (1) is nondelegable, rendering those who fail to furnish such devices absolutely liable for injuries that proximately result from an employee's elevation-related accident. While a defendant who provides an adequate safety device may assert the defense that an injured worker's neglect to use or misuse of an available device was the sole proximate cause of his or her injuries, that defense does not apply where a plaintiff was not provided with an adequate safety device. That plaintiff's supervisor explicitly directed him not to use the scaffold, citing defendant's policy against rolling equipment through the store while customers were present, rendered the scaffold essentially unavailable to plaintiff. Therefore, inasmuch as plaintiff was not provided with an adequate safety device, defendant could not avail itself of the sole proximate cause defense notwithstanding possible questions concerning which specific ladder plaintiff used or how he used it. Moreover, plaintiff was under no duty to have fetched the Baker scaffold in light of his supervisor's instructions to the contrary, since the law recognizes the realities of construction and demolition work and does not require a worker to demand an adequate safety device by challenging his or her supervisor's instructions and withstanding hostile behavior. *DeRose v Bloomingdale's Inc.*, 120 AD3d 41.

- 4. Statutory Agent—Supervisory Control over Work.— *Johnson v City of New York*, 120 AD3d 405.
- 5. Fall from Flatbed Truck—Elevation-Related Risk.— *Biscup v E.W. Howell, Co., Inc.*, 120 AD3d 459.
- 6. *Carrasco v Weissman*, 120 AD3d 531.
- 7. Summary Judgment.— *Carrasco v Weissman*, 120 AD3d 534.
- 8. Fall from Ladder.— *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552.

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9. Liability of Lessee.— *Karanikolas v Elias Taverna, LLC*, 120 AD3d 552.
10. Liability of Owner—Defective or Dangerous Condition on Premises.— *Baumann v Town of Islip*, 120 AD3d 603.
11. Trip and Fall on Electrical Wire.— *Baumann v Town of Islip*, 120 AD3d 603.
12. Fall from Unsecured A-Frame Ladder—Plaintiff's Actions Not Sole Proximate Cause.— *Przyborowski v A&M Cook, LLC*, 120 AD3d 651.
13. Labor Law § 241 (6) Claim—Failure to Identify Industrial Code Provision in Complaint or Bill of Particulars Not Fatal.— *Przyborowski v A&M Cook, LLC*, 120 AD3d 651.
14. Statutory Agent—Liability of Subcontractor as Owner of Allegedly Defective Scaffold.— *Van Blerkom v America Painting, LLC*, 120 AD3d 660.
15. Fall from Ladder—Failure to Allege Specific Provision of Industrial Code.— *Warren v Stepanova*, 120 AD3d 662.
16. Fall from Roof.— *Cruz v Cablevision Sys. Corp.*, 120 AD3d 744.
17. Common-Law Negligence—Installation of Makeshift Ladder.— *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902.
18. Statutory Agent—Lack of Authority or Control.— *Krajnik v Forbes Homes, Inc.*, 120 AD3d 902.
19. Architect/Engineer Not Statutory Agent of Owner—Lack of Supervision or Control.— *Wrobel v Town of Pendleton*, 120 AD3d 963.
20. Fall through Hole in Ground—Liability of Owner—Industrial Code Violations.— *Wrobel v Town of Pendleton*, 120 AD3d 963.
21. Fall through Hole in Ground—Liability of Architect/Engineer for Negligence.— *Wrobel v Town of Pendleton*, 120 AD3d 963.
22. Fall through Hole in Ground—Liability of Owner—Absence of Elevation-Related Hazard.— *Wrobel v Town of Pendleton*, 120 AD3d 963.
23. Fall through Hazardous Wooden Planks—Notice of Dangerous Condition.— *DePaul v NY Brush LLC*, 120 AD3d 1046.
24. Industrial Code Violation—Loose Wooden Planks Did Not Qualify as "Structure".— *DePaul v NY Brush LLC*, 120 AD3d 1046.
25. Industrial Code Violations—Trip over Electrical Cord in Passageway.— *Best v Tishman Constr. Corp. of N.Y.*, 120 AD3d 1081.
26. No Recovery for Injury Caused by Very Condition Worker Undertook to Remedy.— *Griffiths v FC-Canal, LLC*, 120 AD3d 1100.
27. Supervision and Control of Subcontractor's Work.— *Griffiths v FC-Canal, LLC*, 120 AD3d 1100.
28. Authority to Supervise or Control Performance of Work.— *Abelleira v City of New York*, 120 AD3d 1163.
29. Injury while Pressure Testing Pipe.— *Abelleira v City of New York*, 120 AD3d 1163.
30. Fall from Truck while Unloading Heavy Materials—Failure to Provide Safety Device—Direction and Control of Plaintiff's Work.— *Treile v Brooklyn Tillary, LLC*, 120 AD3d 1335.

TERMINATION FROM EMPLOYMENT.

31. Retaliation by Employer Unfounded—Plaintiff's Failure to Perform Duties.— *Lukose v Long Is. Med. Diagnostic Imaging, P.C.*, 120 AD3d 1312.

WHISTLEBLOWER LAW.

32. Reasonable Belief of Improper Governmental Action—Order to Commit Unlawful Act.— *Zielonka v Town of Sardinia*, 120 AD3d 925.
33. Healthcare Whistleblower Law—Covered Employee.— *Matter of Moynihan v New York City Health & Hosps. Corp.*, 120 AD3d 1029.

LANDLORD AND TENANT.

See, also, NEGLIGENCE (MAINTENANCE OF PREMISES).

LANDLORD AND TENANT—Cont'd**LEASE.**

1. Acceptance of Rent Following Termination of Lease.— *North Shore Community Servs., Inc. v Community Dr. LLC*, 120 AD3d 1142.

LIBEL AND SLANDER.

See, also, NEWSPAPERS, and other specific titles.

LIBEL PER SE.

1. Making of False Statement in Supporting Deposition to Police.— *D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956.

TRUTH.

2. Defamation by Implication — Legal Standard.—To survive a motion to dismiss a claim for defamation by implication where the factual statements at issue are substantially true, a plaintiff must make a rigorous showing that the language of the communication as a whole can reasonably be read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference. The standard is an objective one that asks whether the plain language of the communication itself suggests that an inference was intended or endorsed. Such a rule strikes the appropriate balance between a plaintiff's right to recover in tort for statements that defame by implication and a defendant's First Amendment protection for publishing substantially truthful statements. Accordingly, in a defamation action arising out of an article defendant published detailing an embezzlement conspiracy involving Russian businessmen and officials, plaintiffs were not impliedly defamed when the article noted that employees of the corporate plaintiff were directors of a shell company formed by an entity implicated in assorted illegal activities without clarifying that a certain wire transfer from the shell company occurred before anyone connected to plaintiffs began serving as a director of any affiliate of the shell company. The minor omission of the timeline of the shell company's involvement with the corporate defendant did not raise an implication that the plaintiff was connected to the scheme described in defendant's article. *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28.

3. Defamation by Implication — Properly Identifying or Misidentifying Plaintiff.—In a libel action arising out of an article defendant published, entitled *Crime and Punishment in Putin's Russia*, detailing an embezzlement conspiracy involving Russian businessmen and officials, the individual plaintiff was not defamed by implication by a statement in the article identifying him as a "former Russian diplomat," where the article did not clarify that plaintiff had left office before Putin's presidency. There was no reasonable reading of the factually true statement that could lend itself to a defamatory implication, since the article did not allege any corruption at all in Russia's diplomatic corps and did not imply that the individual plaintiff himself was involved in any corruption. In addition, the article did not imply that the individual plaintiff was somehow involved in the criminal scheme, notwithstanding that it expressly stated that a woman and her husband with the same last name as plaintiff were central to the fraud without clarifying that they had no connection to plaintiff, since there was simply no reasonable reading of the article that imparted such an inference. The lone fact that they shared a last name that plaintiffs' counsel conceded is very common in Russia was far too attenuated to support a reasonable implication that plaintiff was not only related to the couple but somehow involved in their fraudulent activities. *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28.

4. Defamation by Implication — Reporting on Illegal International Financial Scheme.—In a libel action arising out of an article defendant published detailing an embezzlement conspiracy involving Russian businessmen and officials, plaintiffs were not defamed by implication where the article connected the corporate plaintiff to a shell corporation formed by an agency implicated in money laundering and other illegal activities. While the connection was attenuated, it was established that it was substantially true. The article also truthfully stated that the individual plaintiff was a former Russian diplomat and that the corporate plaintiff was founded

LIBEL AND SLANDER—Cont'd

in Cyprus. Those facts led to an inference that the shell corporation was at some point associated with two money laundering risk factors: “politically connected individuals” and “high-risk jurisdictions.” Although the article could have more clearly stated the timeline of the shell corporation’s involvement with the corporate plaintiff, that would not have made the involvement irrelevant, because the intended or endorsed implication, and the entire import, of that connection was clearly not to show that the corporate plaintiff was involved in a transaction carried out by the shell corporation or a tax-fraud scheme, but rather to show that the shell corporation had satisfied the money laundering risk factors and it should have been reported to regulators. In addition, plaintiffs were not defamed by an implication that they were involved in the illegal actions perpetrated by other shell companies formed by the agency notwithstanding that the article did not note that plaintiffs had severed ties with the agency before the activities occurred. The clear implication intended by the mention of those illegal activities was to show that the transaction involving the initial shell corporation was suspicious. The article could not reasonably be read to imply that plaintiffs were somehow involved in illegality. *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28.

5. Express Defamation — Statements Not Capable of Defamatory Connotation.—In a libel action arising out of an article defendant published detailing an embezzlement conspiracy involving Russian businessmen and officials, plaintiffs’ complaint, insofar as it was premised on express defamation, was properly dismissed since the claims in the published article were based on substantially true statements that were not reasonably susceptible of defamatory connotations. The article stated that a shell company whose directors worked for plaintiff corporation was nested inside of a second shell company formed by an agency implicated in various illegal activities. At most, the article pointed out a connection between the second shell company and certain directors working for plaintiff as of the date of the article’s publication. The article did not state that there was a connection while the illegal events were being perpetrated, over three years before publication. Moreover, evidence showed that at the time of publication there was in fact a connection between the two shell companies indicating that the article’s assertions were substantially true. *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28.

6. Express Defamation — Statements Not Capable of Defamatory Connotation.—In a libel action arising from an article defendant published entitled *Crime and Punishment in Putin’s Russia*, which detailed an embezzlement conspiracy involving Russian businessmen and officials, a statement in the article identifying the individual defendant as a “former Russian diplomat,” without clarifying that plaintiff served as a diplomat before Putin’s presidency, was not expressly defamatory. The article’s statement was clearly true, as it was clear that plaintiff was, in fact, a former Russian diplomat. Furthermore, even if the language could be construed to mean that plaintiff served during Putin’s tenure, the corruption detailed in the article involved Russian police and tax officials, not diplomats. *Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28.

LICENSES.

See, also, BROKERS; DRUGS AND PHARMACISTS; INTOXICATING LIQUORS; MOTOR VEHICLES; PHYSICIANS AND SURGEONS, and other specific titles.

FIREARMS.

1. Denial of Pistol Permit Application—Failure to Provide Reason for Denial.—*Matter of Parker v Randall*, 120 AD3d 946.

LIENS.**MECHANIC’S LIEN.**

1. Summary Judgment.—*Infra-Metals Co. v DK Indus. Servs. Corp.*, 120 AD3d 762.

2. Foreclosure—Foreclosure Precluded by Wrongdoing.—*CPN Mech., Inc. v Madison Park Owner, LLC*, 120 AD3d 1148.

LIMITATION OF ACTIONS.

CONTINUOUS RELATIONSHIP DOCTRINE.

1. Legal Malpractice Claim—Failure to Give Municipality Proper Advice Regarding Selection of Hearing Officer—Privity of Contract.— *Town of Amherst v Weiss*, 120 AD3d 1550.

CONTINUOUS TREATMENT DOCTRINE.

2. Failure to Diagnose Tumor while Continuously Treating Patient for Symptoms.— *Miccio v Gerdis*, 120 AD3d 639.

3. Medical Malpractice—Plaintiffs' Failure to Raise Question of Fact.— *Ceglio v BAB Nuclear Radiology, PC.*, 120 AD3d 1376.

DEFENDANTS UNITED IN INTEREST.

4. Relation-Back Doctrine.— *Avila v Distinctive Dev. Co., LLC*, 120 AD3d 449.

5. Relation-Back Doctrine.— *Roseman v Baranowski*, 120 AD3d 482.

ESTOPPEL TO PLEAD STATUTE OF LIMITATIONS.

6. *Saretto v Panos*, 120 AD3d 786.

FOUR-MONTH STATUTE OF LIMITATIONS.

7. Application for Restitution from Home Improvement Restitution Fund.— *Matter of Reilly v Farley*, 120 AD3d 693.

8. Timeliness of Petition—Date of Reviewable Final and Binding Determination.— *Matter of Lynch v City of New York*, 120 AD3d 1146.

9. Challenge to Prison Disciplinary Determination.— *Matter of Stevenson v Prack*, 120 AD3d 1465.

MEDICAL MALPRACTICE.

10. *Bennett v Panos*, 120 AD3d 729.

11. Continuous Treatment Doctrine—Blurry Vision Following Lasik Surgery—Timely Return Visit Instigated by Patient.— *Devadas v Niksarli*, 120 AD3d 1000.

12. Continuous Treatment Doctrine—Inapplicable to Derivative Claim of Wife for Loss of Services.— *Devadas v Niksarli*, 120 AD3d 1000.

SIX-YEAR STATUTE OF LIMITATIONS.

13. Collection of Corporation's Sales Taxes from Individual.— *Whitmer v New York State Dept. of Taxation & Fin.*, 120 AD3d 1590.

TOLLING.

14. *Lepore v Town of Greenburgh*, 120 AD3d 1202.

WHAT STATUTE GOVERNS.

15. Whistleblower Law Limitations Period Takes Precedence over Notice of Claim Limitations Period.— *Matter of Moynihan v New York City Health & Hosps. Corp.*, 120 AD3d 1029.

WHEN CAUSE OF ACTION ACCRUES.

16. Teachers' Claim to be Put on Preferred Eligibility List.— *Matter of Gervais v Board of Educ. of E. Aurora Union Free Sch. Dist.*, 120 AD3d 1556.

LITTORAL RIGHTS.

See ENVIRONMENTAL CONSERVATION; NAVIGABLE WATERS; WATERS AND WATERCOURSES, and other specific titles.

LOCAL LAWS.

PREEMPTION BY STATE.

1. Local Law Requiring Sufficient Heat in Apartments Not Preempted by State Law.— *Paolicelli v Fieldbridge Assoc., LLC*, 120 AD3d 643.

MANDAMUS.

See PROCEEDING AGAINST BODY OR OFFICER.

MARRIAGE.

VALIDITY.

1. Capacity of Incapacitated Person to Marry.— *Matter of Dandridge*, 120 AD3d 1411.

MASTER AND SERVANT.

See EMPLOYMENT RELATIONSHIPS.

MEDICAL REPORTS.

See DISCLOSURE.

MENTAL HEALTH.

PERSON ACQUITTED OF CRIME BY REASON OF INSANITY.

1. Subsequent Retention Order.—In a proceeding pursuant to CPL 330.20 (9) seeking a subsequent retention order by petitioner Commissioner of Mental Health, Supreme Court erred in determining that respondent no longer suffered from a dangerous mental disorder and ordering his release upon an order of conditions. The Appellate Division determined that Supreme Court did not make the appropriate inquiry—whether respondent suffers from a “dangerous mental disorder or is mentally ill” (CPL 330.20 [9])—and, making its own findings of fact, concluded that appellants demonstrated by a fair preponderance of the evidence that respondent was mentally ill as statutorily defined and that he currently constituted a physical danger to himself or others (CPL 330.20 [1] [c]). Appellants’ psychologist and psychiatrist opined that respondent suffered from bipolar disorder and various personality disorders, and respondent’s documented behaviors over the past 20 years were indicative of those disorders. While respondent refused to submit to an examination of his current medical condition by petitioner’s mental health professionals, a reliable diagnosis could be made based on interactions with and observations of respondent. Moreover, respondent’s dangerousness warranted his retention in a secure psychiatric facility. Respondent had a long history of volatile propensities toward other patients and staff, medication refusal and noncompliance, and repeated refusal to comply with treatment programs; in addition, although the underlying offense was committed nearly 20 years earlier, it was extremely violent, and respondent refused to take responsibility for it, nor did he acknowledge that he even had an active mental illness. Furthermore, the evidence respondent presented to show that he did not suffer from a mental illness and was not dangerous was not credible. *Matter of Marvin P.*, 120 AD3d 160.

MORTGAGES.

CONSTRUCTION.

1. Increased Mortgage Payments Authorized under Loan Documents.— *Brown v Deutsche Bank Natl. Trust Co.*, 120 AD3d 440.

FORECLOSURE.

2. Order of Reference.— *Bank of N.Y. v Cepeda*, 120 AD3d 451.
3. Motion to Restore Action to Mortgage Foreclosure Settlement Conference Part Calendar.— *Flagstar Bank, FSB v Titus*, 120 AD3d 469.
4. Standing.— *US Bank N.A. v Faruque*, 120 AD3d 575.
5. Duty to Negotiate in Good Faith.— *Bank of N.Y. v Castillo*, 120 AD3d 598.
6. Improper Sua Sponte Dismissal—Plaintiff Not Given Fair Warning—Court Improperly Relied upon Personal Opinion and Facts Outside Record.— *Bank of N.Y. v Castillo*, 120 AD3d 598.
7. Required Notice—Service.— *Deutsche Bank Natl. Trust Co. v Quinn*, 120 AD3d 609.
8. Vacatur of Judgment—Not Warranted Where Defendant Failed to Appear.— *Emigrant Mtge. Co., Inc. v Hart*, 120 AD3d 615.

MORTGAGES—Cont'd

9. Motion to Discharge Mortgage—Grant of Relief Not Requested.— *Evans v Argent Mtge. Co., LLC*, 120 AD3d 618.
10. Standing—Unclear Whether Mortgagee was Lawful Holder of Note at Commencement.— *Federal Natl. Mtge. Assn. v Cappelli*, 120 AD3d 621.
11. Standing.— *HSBC Bank USA, N.A. v Gilbert*, 120 AD3d 756.
12. Summary Judgment.— *Katz v Miller*, 120 AD3d 768.
13. Standing.— *US Bank, N.A. v Morrison*, 120 AD3d 1223.
14. Order of Reference.— *Wells Fargo Bank, NA v Ambrosio*, 120 AD3d 1225.
15. Court's Equitable Power to Vacate Judgment of Foreclosure.— *Hudson City Sav. Bank v Cohen*, 120 AD3d 1304.
16. Standing of Holder of Subject Note.— *PHH Mtge. Corp. v Israel*, 120 AD3d 1329.
17. Default by Debtors Waived Defense of Lack of Standing.— *Southstar III, LLC v Entienne*, 120 AD3d 1332.
18. Lien Removed by Release.— *Yeshiva Chasdei Torah v Dell Equity, LLC*, 120 AD3d 1346.
19. Commercial Property—Failure to Pay Note—Wrongful Refusal to Release Escrow Funds—Nonbinding Negotiations.— *CSMC 2007-C1 Oswego Rd., LLC v Kimbrook Rte. 31, LLC*, 120 AD3d 1539.

VALIDITY.

20. Securitization.— *Brown v Deutsche Bank Natl. Trust Co.*, 120 AD3d 440.

MOTELS.

See INNKEEPERS.

MOTIONS AND ORDERS.

MOTION PAPERS.

1. Relief Not Requested against All Defendants.— *Henderson-Jones v City of New York*, 120 AD3d 1123.

MOTION TO DISMISS.

2. Documentary Evidence.— *3615-15 Realty I, LLC v Bedford Ave. Assoc. I, LLC*, 120 AD3d 487.
3. Complaint.— *Blum v Rosenberg*, 120 AD3d 529.

MOTION TO VACATE DEFAULT.

4. *Inta-Boro Acres, Inc. v Mattoo & Bhat Med. Assoc., PC.*, 120 AD3d 475.

REARGUMENT OR RENEWAL.

5. *Carrasco v Weissman*, 120 AD3d 534.
6. New Evidence—Evidence Not Unavailable at Time of Original Motion.— *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 909.
7. Leave to Renew Following Grant of Dismissal to Codefendant at Appellate Level—Law of Case Does Not Provide Basis for Renewal Motion Where Codefendants Not Similarly Situated.— *Dauria v Castlepoint Ins. Co.*, 120 AD3d 1016.
8. *Stuve v Baingan*, 120 AD3d 1221.
9. Facts Already Known on Motion to Renew.— *Haberman v Meyer*, 120 AD3d 1301.

MOTOR VEHICLES.

AGGRAVATED UNLICENSED OPERATION OF MOTOR VEHICLE.

1. Proof of Impairment.— *People v Tuszyński*, 120 AD3d 1568.

COLLISION.

2. Rear-End Collision—Summary Judgment.— *Amador v City of New York*, 120 AD3d 526.

MOTOR VEHICLES—Cont'd

3. Summary Judgment.— *Cattan v Sutton*, 120 AD3d 537.
4. Summary Judgment on Issue of Liability Premature.— *Johnson v Richardson*, 120 AD3d 767.
5. Emergency Doctrine—Brake Failure.— *Colangelo v Marriott*, 120 AD3d 985.
6. Negligence of Driver with Right-of-Way.— *Colangelo v Marriott*, 120 AD3d 985.
7. Summary Judgment—Rear-End Collision.— *Morales v Garzon*, 120 AD3d 1126.
8. Rear-End Collision.— *Billis v Tunjian*, 120 AD3d 1168.
9. *Stuve v Baingan*, 120 AD3d 1221.
10. Rear-End Collision.— *D'Agostino v YRC, Inc.*, 120 AD3d 1291.
11. Collision with On-Duty Police Officer Responding to Emergency.— *Michaels v Drake*, 120 AD3d 1593.

INJURIES TO BICYCLIST.

12. *Lurrie v Atwood*, 120 AD3d 559.
13. *Mohr v Carlson*, 120 AD3d 1206.

INJURIES TO PASSENGERS.

14. Summary Judgment.— *Gorenkoff v Nagar*, 120 AD3d 470.
15. Innocent Passenger.— *Johnson v Braun*, 120 AD3d 765.

INJURIES TO PEDESTRIANS.

16. *Brown v Mackiewicz*, 120 AD3d 1172.
17. Injured Plaintiff Struck in Crosswalk.— *Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296.

MUNICIPAL CORPORATIONS.

See, also, BRIDGES; CIVIL SERVICE; COUNTIES; ELECTIONS; EMINENT DOMAIN; ENVIRONMENTAL CONSERVATION; HIGHWAYS; LICENSES; NEGLIGENCE; PROCEEDING AGAINST BODY OR OFFICER; PUBLIC HOUSING; PUBLIC UTILITIES; SCHOOLS; TAXATION; WORKERS' COMPENSATION, and other specific titles.

NOTICE OF CLAIM.

1. Sufficient Particularity of Notice.— *Thomas v New York City Hous. Auth.*, 120 AD3d 401.
2. Amendment.— *Murtha v Town of Huntington*, 120 AD3d 480.
3. Late Notice—Extremely Serious and Incapacitating Injuries Reasonably Excused Minimal Delay.— *Matter of Lopez v County of Nassau*, 120 AD3d 688.
4. Late Notice—Failure to Serve Timely Notice.— *Nurena v Westchester County*, 120 AD3d 781.
5. Late Notice—Denial—No Viable Cause of Action.— *Matter of Moynihan v New York City Health & Hosps. Corp.*, 120 AD3d 1029.
6. Late Notice—Medical Records Did Not Put Hospital on Notice of Alleged Medical Malpractice—Infant's Condition Consistent with Premature Birth Rather than Malpractice.— *Wally G. v New York City Health & Hosps. Corp. (Metro. Hosp.)*, 120 AD3d 1082.

NOTICE OF STREET DEFECT.

7. Prior Written Notice Law—Voicemail Messages Insufficient Even if Reduced to Writing by Municipal Employee.— *Wilson v Incorporated Vil. of Hempstead*, 120 AD3d 665.
8. *Johnson v Braun*, 120 AD3d 765.

SIDEWALKS.

9. Prior Notice of Defective Condition—Slip and Fall on Uneven Portion of Sidewalk.— *Fleisher v City of New York*, 120 AD3d 1390.

SNOW AND ICE.

10. Prior Written Notice.— *Barnes v Incorporated Vil. of Port Jefferson*, 120 AD3d 528.

MUNICIPAL CORPORATIONS—Cont'd

11. Absence of Prior Written Notice.— *Palka v Village of Ossining*, 120 AD3d 641.

TORT LIABILITY.

12. Correction Officers—Deliberate Indifference to Inmate's Serious Medical Needs.— *Luckey v City of New York*, 120 AD3d 403.
13. Emergency Vehicle.— *Benn v New York Presbyt. Hosp.*, 120 AD3d 453.
14. Ministerial Governmental Functions.— *Benn v New York Presbyt. Hosp.*, 120 AD3d 453.
15. Special Relationship.— *Benn v New York Presbyt. Hosp.*, 120 AD3d 453.
16. Ministerial Governmental Function—Garbage Collection—Special Relationship.— *Katz v Town of Clarkstown, N.Y.*, 120 AD3d 632.
17. Firefighters—General Municipal Law § 205-a Liability—Causal Connection between Injury and Landlord's Failure to Provide Sufficient Heat in Apartment.— *Paolicelli v Fieldbridge Assoc., LLC*, 120 AD3d 643.
18. Firefighters—Statutory and Regulatory Predicates for General Municipal Law § 205-a Liability.— *Paolicelli v Fieldbridge Assoc., LLC*, 120 AD3d 643.
19. Governmental Function Immunity Defense.— *Dixon v City of New York*, 120 AD3d 751.
20. Negligent Maintenance of Sewer System.— *Gugel v County of Suffolk*, 120 AD3d 1189.
21. Police—Excessive Force.— *Lepore v Town of Greenburgh*, 120 AD3d 1202.
22. Special Relationship—Lack of Special Duty to Plaintiff Assaulted by Municipal Worker.— *Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 120 AD3d 1323.
23. Failure to Show Injury Resulted from Noncompliance with Applicable Statute Ordinance or Rule.— *Warshefskie v New York City Hous. Auth.*, 120 AD3d 1344.
24. Maintenance of Splash Pool—Respective Responsibility of City and County.— *Smith v City of Buffalo*, 120 AD3d 1588.

ZONING.

25. Special Use Permit.— *Matter of Smyles v Board of Trustees of Inc. Vil. of Mineola*, 120 AD3d 822.
26. Variance—Lot-Depth Variance.— *Matter of Quintana v Board of Zoning Appeals of Inc. Vil. of Muttontown*, 120 AD3d 1248.

NEGLIGENCE.

See, also, ANIMALS; AVIATION; CARRIERS; DEATH; DRUGS AND PHARMACISTS; EMPLOYMENT RELATIONSHIPS; HOSPITALS; INDEMNITY; INSURANCE; LABOR; LANDLORD AND TENANT; MOTOR VEHICLES; MUNICIPAL CORPORATIONS; PHYSICIANS AND SURGEONS; PUBLIC AUTHORITIES; PUBLIC UTILITIES; SCHOOLS; STATE, and other specific titles.

ASSUMPTION OF RISK.

1. Trip and Fall on Cart Path while Playing Golf.— *Simon v Hamlet Windwatch Dev., LLC*, 120 AD3d 657.
2. Fall from Slippery Diving Board.— *Freeman v Village of Hempstead*, 120 AD3d 1393.
3. Go-Kart Accident—Slick Race Course.— *Treacy v Castle Fun Ctr.*, 120 AD3d 1405.

COMPARATIVE NEGLIGENCE.

4. Rear-End Collision—Summary Judgment.— *Delgado v Bang*, 120 AD3d 608.

DUTY.

5. State's Duty to Protect Inmates—Emergency Medical Assistance.— *Luckey v City of New York*, 120 AD3d 403.
6. Contractor Owed No Duty to Injured Third Party.— *Ayala v Johnson Controls, Inc.*, 120 AD3d 596.

NEGLIGENCE—Cont'd

7. Snow Removal Contractor Owed No Duty to Injured Third Party.— *Diaz v Port Auth. of NY & NJ*, 120 AD3d 611.

EMERGENCY DOCTRINE.

8. *Mohr v Carlson*, 120 AD3d 1206.

9. Multiple Automobile Collision.— *Garcia v Stewart*, 120 AD3d 1298.

FORESEEABILITY.

10. *Granata v City of White Plains*, 120 AD3d 1187.

MAINTENANCE OF PREMISES.

11. Slip and Fall upon Entering Lobby—Placement of Mat.— *Topchieva v Lovett Co., LLC*, 120 AD3d 413.

12. Trip and Fall.— *Doughim v M & US Prop., Inc.*, 120 AD3d 466.

13. Fall Down Staircase.— *Fajardo v Schapiro*, 120 AD3d 468.

14. Summary Judgment.— *Hecht v Saccoccio*, 120 AD3d 474.

15. Summary Judgment.— *Sobel v City of New York*, 120 AD3d 485.

16. Fall into Sewer Trap.— *Fernandez v Rutman*, 120 AD3d 545.

17. Liability of Out-of-Possession Landlord.— *Garcia v Town of Babylon Indus. Dev. Agency*, 120 AD3d 546.

18. Ownership, Occupancy or Control of Premises.— *Garcia v Town of Babylon Indus. Dev. Agency*, 120 AD3d 546.

19. Liability of Out-of-Possession Landlord.— *Tingling v C.I.N.H.R., Inc.*, 120 AD3d 570.

20. Criminal Acts by Third Parties.— *Black v New York City Hous. Auth.*, 120 AD3d 731.

21. Reasonably Foreseeable Tripping Hazard.— *Francis v New York Yankees Partnership*, 120 AD3d 1127.

22. Constructive Notice of Dangerous Condition—Defective Windows—Obligation to Inspect.— *Hermina v 2050 Valentine Ave. LLC*, 120 AD3d 1131.

23. Slip and Fall on Stairwell Landing—Summary Judgment.— *Santiago v New York City Hous. Auth.*, 120 AD3d 1134.

24. Duty of Out-of-Possession Landlord.— *Stephen v Brooklyn Pub. Lib.*, 120 AD3d 1221.

25. Trip and Fall—Failure to Show Defendant's Responsibility for Alleged Defective Condition.— *Cruz v Keyspan*, 120 AD3d 1290.

26. Failure to Provide Adequate Security to Prevent Assault of Patron.— *Deinzer v Middle Country Pub. Lib.*, 120 AD3d 1292.

27. Slip and Fall on Ice—Notice of Dangerous Condition.— *Haberman v Meyer*, 120 AD3d 1301.

28. Slip and Fall on Snowy Sidewalk—Maintenance Contract.— *Rodriguez v County of Westchester*, 120 AD3d 1331.

29. Slip and Fall in Supermarket—Plaintiff Unable to Identify Cause of Fall.— *Smith v Jesadan Meat Corp.*, 120 AD3d 1332.

30. Slip and Fall on Black Ice as Storm in Progress.— *Talamas v Metropolitan Transp. Auth.*, 120 AD3d 1333.

31. Liability for Snow Removal of Owner Occupied Property Owner.— *Medina v City of New York*, 120 AD3d 1398.

NEGLIGENT MISREPRESENTATION.

32. Privity—Subcontractor's Reliance on Representations Made by Construction Manager Caused Relationship to be Functional Equivalent of Privity.— *North Star Contr. Corp. v MTA Capital Constr. Co.*, 120 AD3d 1066.

NEGLIGENT SUPERVISION.

33. Negligent Hiring.— *Saretto v Panos*, 120 AD3d 786.

NEGLIGENCE—Cont'd

PROXIMATE CAUSE.

34. Slip and Fall.— *Cipriano v City of New York*, 120 AD3d 738.

35. *Dawson v YMCA of Long Is., Inc.*, 120 AD3d 748.

RES IPSA LOQUITUR.

36. Summary Judgment—Train Ceiling Utility Panel Swung Open and Struck Passenger—Exclusive Control.— *Barney-Yeboah v Metro-North Commuter R.R.*, 120 AD3d 1023.

SIDEWALKS.

37. Liability of Abutting Landowner—Trip and Fall.— *Buonviaggio v Parkside Assoc., L.P.*, 120 AD3d 460.

38. Liability of Abutting Landowner.— *Repetti v City of New York Dept. of Envtl. Protection*, 120 AD3d 655.

SNOW AND ICE.

39. Summary Judgment.— *Calabro v Harbour at Blue Point Home Owners Assn., Inc.*, 120 AD3d 462.

40. Abutting Landowner Not Liable for Failure to Remove Snow and Ice from Sidewalk.— *Palka v Village of Ossining*, 120 AD3d 641.

41. Storm in Progress.— *Sherman v New York State Thruway Auth.*, 120 AD3d 792.

42. *Telsaint v City of New York*, 120 AD3d 794.

43. Trip and Fall on Icy Sidewalk—Liability of Abutting Landowner.— *Ortiz v New York City Hous. Auth.*, 120 AD3d 1059.

VIOLATION OF STATUTORY DUTY.

44. Landlord's Duty to Remove Lead Paint—Infant Did Not Reside in Apartment.— *Yaniveth R. v LTD Realty Co.*, 120 AD3d 1142.

NEGOTIABLE INSTRUMENTS.

See BILLS, NOTES AND CHECKS.

NEWSPAPERS.

See, also, LIBEL AND SLANDER, and other specific titles.

OPTICIANS.

See LICENSES; PHYSICIANS AND SURGEONS.

OPTOMETRISTS.

See LICENSES; PHYSICIANS AND SURGEONS.

PARENT, CHILD AND FAMILY.

See, also, ADOPTION; CHILDREN BORN OUT OF WEDLOCK; COURTS (FAMILY COURT); HUSBAND AND WIFE AND OTHER DOMESTIC RELATIONSHIPS; INFANTS; SCHOOLS; SOCIAL SERVICES, and other specific titles.

ABUSED OR NEGLECTED CHILD.

1. Mother's Mental Condition Did Not Support Neglect Finding.— *Matter of Trevor McK. (Teanja N.T.)*, 120 AD3d 416.

2. *Matter of Lucinda A. (Luba A.)*, 120 AD3d 492.

3. Derivative Neglect.— *Matter of Jamel T. (Gemayel T.)*, 120 AD3d 504.

4. Excessive Corporal Punishment.— *Matter of Adam Christopher S. (Deborah D.)*, 120 AD3d 1110.

5. Neglect of Child's Special Needs—Inadequate Supervision, Educational Neglect and Failure to Attend Numerous Medical Appointments.— *Matter of Jaquan F. (Alexis F.)*, 120 AD3d 1113.

PARENT, CHILD AND FAMILY—Cont'd

- 6. Sexual Abuse.— *Matter of Yesennia B. (Angel N.)*, 120 AD3d 1115.
- 7. Corroboration of Child's Out-of-Court Statement.— *Matter of Jasmine A. (Albert G.)*, 120 AD3d 1125.
- 8. Violation of Order of Protection.— *Matter of Jasmine A. (Albert G.)*, 120 AD3d 1125.
- 9. Excessive Corporal Punishment.— *Matter of Jerome S. (Tazine R.)*, 120 AD3d 1421.
- 10. Indicated Report of Maltreatment.— *Matter of Markman v Carrion*, 120 AD3d 1580.

CUSTODY.

- 11. Modification.— *Macchio v Macchio*, 120 AD3d 560.
- 12. *Matter of Gribeluk v Gribeluk*, 120 AD3d 579.
- 13. *Matter of Weinberger v Monroe*, 120 AD3d 583.
- 14. Petition for Sole Physical Custody and Relocation to Another State—Best Interests of Child.— *Matter of Doyle v Debe*, 120 AD3d 676.
- 15. Uniform Child Custody Jurisdiction and Enforcement Act—Modification Petition—Child's Significant Connection to New York.— *Matter of Mojica v Denson*, 120 AD3d 691.
- 16. Uniform Child Custody Jurisdiction and Enforcement Act—Inconvenient Forum—Consideration of Statutory Factors.— *Matter of Mojica v Denson*, 120 AD3d 691.
- 17. Modification.— *Matter of Cisse v Graham*, 120 AD3d 801.
- 18. Relocation of Custodial Parent.— *Matter of Gravel v Makrianes*, 120 AD3d 815.
- 19. Modification.— *Matter of Lombardi v Valenti*, 120 AD3d 817.
- 20. *Matter of Saravia v Godzieba*, 120 AD3d 821.
- 21. Relocation Outside School District—Necessity of Hearing.— *Lauzonis v Lauzonis*, 120 AD3d 922.
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2. World Trade Center Volunteer Fund — Definition of “Volunteer.”—An individual need not have been affiliated with an authorized rescue entity or volunteer agency at the time he or she participated in World Trade Center rescue, recovery, or cleanup operations in order to qualify for coverage under Workers' Compensation Law article 8-A as a “volunteer” (*see* Workers' Compensation Law § 161 [1] [b] [i]). Thus, the decision of the Workers' Compensation Board denying claimant benefits for injuries allegedly sustained as a result of his exposure to dust and toxins during the two days that he assisted as an emergency medical technician at ground zero and a nearby triage center, solely on the basis that he “did not serve under the direction of an authorized rescue entity or volunteer agency” in accordance with the definition of volunteer provided in Board-issued orders, was reversed. The Board's imposition of such a requirement is contrary to the plain terms of the statute, which does not define the term volunteer, and also the commonly-understood meaning of the word. That similar restrictive language was considered, but deleted from the final version of Workers' Compensation Law article 8-A, is persuasive evidence that the legislature rejected the more restrictive definition of volunteer that was originally proposed. While the Board has consistently relied upon its own orders in denying benefits to volunteers who were not affiliated with an authorized rescue entity or volunteer association, the Board's chair, although vested with certain powers to administer the Workers' Compensation Law (Workers' Compensation Law § 141), is not vested with the authority to supplement or amend duly enacted legislation. *Matter of Hazan v WTC Volunteer Fund*, 120 AD3d 82.

DISABILITY BENEFITS.

3. Intermittent Lost Time Benefits for Sick Leave Charged for Weekly Psychologist Appointments—Time off Based upon Convenience Rather than Inability to Work.— *Matter of Schwartz v State Ins. Fund*, 120 AD3d 1450.

DISQUALIFICATION FOR FALSE REPRESENTATION.

4. Work Activity while Receiving Benefits.— *Matter of Schuss v Delta Airlines, Inc.*, 120 AD3d 850.

5. Effect of Medication on Mobility Following Injury—Penalty of Disqualification Not Warranted.— *Matter of Van Etten v Mohawk Val. Community Coll.*, 120 AD3d 1457.

6. Sanction against Attorney—Request to Change Venue without Reasonable Basis.— *Matter of Cedeno v PACOA*, 120 AD3d 1458.

EXCLUSIVENESS OF REMEDY.

7. Special Employee.— *Munion v Trustees of Columbia Univ. in City of N.Y.*, 120 AD3d 779.

8. Primary Jurisdiction of Workers' Compensation Board.— *Narro v MMC Holding of Brooklyn, Inc.*, 120 AD3d 1321.

EXISTENCE OF EMPLOYER-EMPLOYEE RELATIONSHIP.

9. Defendant and Plaintiff's Employer Operated as Single Integrated Entity.— *McDonald v Winter Bros. Transfer Sta. Corp.*, 120 AD3d 1315.

INJURIES ARISING OUT OF AND IN COURSE OF EMPLOYMENT.

10. Myocardial Infarction Precipitated by Stair Climbing—Board Determination Supported by Substantial Evidence.— *Matter of Gallo v Village of Bronxville Police Dept.*, 120 AD3d 849.

11. Fall from Scaffolding while Painting—Credibility Determination.— *Matter of Lima v Newport Painting & Decorating*, 120 AD3d 866.

12. Fall while Entering Workplace—Substantial Evidence Supporting Finding of Compensable Injuries.— *Matter of Wait v Hudson Val. Community Coll.*, 120 AD3d 1456.

JUDICIAL REVIEW.

13. Assessment of Costs against Attorney—Request to Change Venue without Reasonable Basis.— *Matter of Fraser v NYC Schs. Constr. ROCIP*, 120 AD3d 852.

WORKERS' COMPENSATION—Cont'd

14. Assessment of Costs against Attorney—Request to Change Venue without Reasonable Basis.— *Matter of Thomas-Fletcher v New York City Dept. of Corr.*, 120 AD3d 867.

SPECIAL FUNDS.

15. Special Fund for Reopened Cases — Date of Last Payment of Compensation — Lump-Sum Settlement.—Liability for future medical expenses did not shift to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a after a lapse of eight years from the date of claimant's injury and three years from the date claimant and his employer entered into a settlement agreement permitting claimant to retain the proceeds of a third-party action in exchange for, among other things, his forbearance of future indemnity benefits. Where a case is "disposed of by the payment of a lump sum," the date of the last payment of compensation is established by calculating the date to which the amount paid in the settlement would have extended had the award of indemnity benefits been made at the maximum compensation rate warranted on the date the lump-sum payment was approved (Workers' Compensation Law § 25-a [7]). Although the employer itself did not make the lump-sum payment to claimant, the proceeds of the third-party action constituted a lump-sum payment for purposes of Workers' Compensation Law § 25-a (7), which does not make reference to the source of such payment. Since the settlement agreement effectively "disposed" of the employer's obligation to pay future indemnity benefits in exchange for claimant's retention of the lump-sum payment from the third-party action, application of the statute was appropriate to bar the liability shift. *Matter of Nicpon v Zelasko Constr., Inc.*, 120 AD3d 66.

16. Special Fund for Reopened Cases—Standing to Litigate Underlying Claim.— *Matter of Khomitch v Crotched Mtn. Community*, 120 AD3d 1459.

THIRD-PARTY ACTION.

17. No Duty to Indemnify Employer in Absence of Grave Injury—Summary Judgment.— *National Union Fire Ins. Co. of Pittsburgh, PA v 221-223 W. 82 Owners Corp.*, 120 AD3d 1140.

WORKERS' COMPENSATION BOARD.

18. Authority to Designate Location of Hearings—Change of Venue Request Denied.— *Matter of Fraser v NYC Schs. Constr. ROCIP*, 120 AD3d 852.

ZONING.

See MUNICIPAL CORPORATIONS.

TABLE OF STATUTES AND RULES CONSTRUED

CRIMINAL PROCEDURE LAW.

330.20 (1) (c) (Procedure following verdict or plea of not responsible by reason of mental disease or defect; definition of terms; dangerous mental disorder). *Matter of Marvin P.*, 120 AD3d 160.

330.20 (9) (Procedure following verdict or plea of not responsible by reason of mental disease or defect; second and subsequent retention orders). *Matter of Marvin P.*, 120 AD3d 160.

EXECUTIVE LAW.

§ 290 *et seq.* (Human Rights Law). *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18.

LABOR LAW.

§ 240 (1) (Scaffolding and other devices for use of employees; duties of contractors and owners to supply safety devices). *DeRose v Bloomingdale's Inc.*, 120 AD3d 41.

MENTAL HYGIENE LAW.

§ 10.03 (e) (Sex offenders requiring civil commitment or supervision; “dangerous sex offender requiring confinement” defined). *Matter of State of New York v Raul L.*, 120 AD3d 52.

§ 10.03 (i) (Sex offenders requiring civil commitment or supervision; “mental abnormality” defined). *Matter of State of New York v Raul L.*, 120 AD3d 52.

§ 10.06 (c) (Sex offenders requiring civil commitment or supervision; petition and hearing; appointment of counsel). *Matter of State of New York v Raul L.*, 120 AD3d 52.

§ 10.06 (d) (Sex offenders requiring civil commitment or supervision; petition and hearing; appointment of counsel). *Matter of State of New York v Raul L.*, 120 AD3d 52.

§ 81.44 (d) (Proceedings upon death of incapacitated person; property retained to secure any known claim). *Matter of Shannon*, 120 AD3d 128.

NEW YORK CITY ADMINISTRATIVE CODE.

§ 8-107 *et seq.* (Human Rights Law; unlawful discriminatory practices). *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18.

SOCIAL SERVICES LAW.

§ 104 (Local public welfare organizations; powers to enforce support; recovery from person discovered to have property). *Matter of Shannon*, 120 AD3d 128.

UNIFORM COMMERCIAL CODE.

§ 5-103 (d) (Letters of credit; scope; independence principle). *BasicNet S.p.A. v CFP Servs. Ltd.*, 120 AD3d 97.

§ 5-109 (Letters of credit; fraud and forgery). *BasicNet S.p.A. v CFP Servs. Ltd.*, 120 AD3d 97.

UNITED STATES CODE.

9 USC § 1 *et seq.* (Federal Arbitration Act). *Cusimano v Schnurr*, 120 AD3d 142.

29 USC § 2601 *et seq.* (Family and Medical Leave Act). *Ji Sun Jennifer Kim v Goldberg, Weprin, Finkel, Goldstein, LLP*, 120 AD3d 18.

WORKERS' COMPENSATION LAW.

§ 25-a (Procedure and payment of compensation in certain claims; limitation of right to compensation). *Matter of Nicpon v Zelasko Constr., Inc.*, 120 AD3d 66.

WORKERS' COMPENSATION LAW—Continued

§ 25-a (7) (Procedure and payment of compensation in certain claims; limitation of right to compensation; date of last payment of compensation). *Matter of Nicpon v Zelasko Constr., Inc.*, 120 AD3d 66.

§ 161 (1) (b) (i) (Definitions; participant in World Trade Center rescue, recovery, or cleanup operations; volunteer). *Matter of Hazan v WTC Volunteer Fund*, 120 AD3d 82.

**APPELLATE DIVISION REPORTS
CUMULATIVE ERRATA TABLE**

1. 141 App Div 232 (Lowenstein v Hargraves Mills)	At 141 App Div 233, line 16, change “contact” to “contract.”
2. 59 AD2d 286 (Curle v Ward)	At 59 AD2d 288, in the final paragraph, line 7, change <i>Sheldon</i> to <i>Shelton</i> .
3. 78 AD2d 950	Change date at top of page within parentheses from November 26, 1979 to November 26, 1980.
4. 139 AD2d 428 (People v Stokes)	Five lines from the bottom of page 428, change the citation to <i>People v Cartagena</i> from 76 AD2d to 78 AD2d.
5. 156 AD2d 137 (West 157th St. Assoc. v Sassoonian)	Change plaintiff’s name in title from West 15th St. Assoc. to West 157th St. Assoc.
6. 179 AD2d 118 (Matter of Schulz v Warren County Bd. of Supervisors)	At 179 AD2d 121, footnote 2, line 1, change General Municipal Law § 50, to General Municipal Law § 51.
7. 205 AD2d 976 (Owen v Appelbaum)	At 205 AD2d 977, line 2 from the bottom of the page, change “contact” to “contract.”
8. 211 AD2d 692 (Bogdan v Peekskill Community Hosp.)	At 211 AD2d 977, last line on the page, change “contact” to “contract.”
9. 227 AD2d 863 (Matter of Dudley v Travis)	Change defendant’s name in title from Travis Brown to Brion D. Travis.
10. 247 AD2d 273 (McQuaig v Olympia & York 125 Broad St. Co.)	Change plaintiff’s name in title from Opympia to Olympia.

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11. **255 AD2d 438** (Wieck v Halpern) At 438, line 25, change “410” to “514.”

12. **272 AD2d 322** (Matter of Beisgen v Town of Orangetown) Add a “v” to title after “Petitioner.”.

13. **276 AD2d 143** (DeLuca v DeLuca) Change defendant’s name in title from Maria DeLuca to Marie DeLuca.

14. **288 AD2d 932** (People ex rel. Victory v Travis) At 288 AD2d 933, on line 25, change Presented to presented.

15. **290 AD2d 410** (DeLuca v DeLuca) Change defendant’s name in title from Maria DeLuca to Marie DeLuca.

16. **300 AD2d 1118** (People v Soluri) The case of People v Soluri is incorrectly printed at page 1118. The opinion is correctly printed and cited at 300 AD2d 988.

17. **303 AD2d 1026** (People v Harris) At 303 AD2d 1027, lines 10 and 11, delete (see People v Vasquez, 89 NY2d 521, 533).

18. **304 AD2d 508** (Almestica v Colon) At 304 AD2d 509, line 10, change *supra* at 843 to *supra* at 803.

19. **304 AD2d 982** (People v Elhadi) At 304 AD2d 983, line 34, change 79 NY2d 673, 783 to 79 NY2d 673, 683.

20. **304 AD2d 1027** (Matter of Vaksman) At 304 AD2d 1028, on lines 9 and 10, change *lv dismissed* 95 AD2d 896 [1983] to *lv dismissed* 95 NY2d 896 [2000].

21. **304 AD2d 1069** (Fahey v Canino) At 304 AD2d 1071, line 29, change *supra* at 775 to *supra* at 774.

22. **305 AD2d 591** (Butera v Floral Park-Bellerose Union Free School District) Change defendant’s name in title from Floral Park-Bellrose to Floral Park-Bellerose.

23. 306 AD2d 156 (Matter of McCarthy v Board of Trustees of N.Y. City Police Fund, Art. II)	At 306 AD2d 157, line 17, change 81 AD2d 543 to 81 AD2d 553.
24. 1 AD3d 432 (Matter of Devon B.)	At 1 AD3d 433, line 1, change correspondent to corespondent.
25. 1 AD3d 474 (Estate of Hamilton v Nassau Suffolk Home Health Care)	At 1 AD3d 474, line 3 from bottom of page, change CPLR [3] to CPLR [e].
26. 2 AD3d 16 (People v Darrett)	At 2 AD3d 21, line 4, change 192 AD2d 1010 to 191 AD2d 1010.
27. 2 AD3d 508 (Moloney v Wal-Mart Stores, Inc.)	At 2 AD3d 510, line 5, change 2 AD3d 48 to 1 AD3d 48.
28. 2 AD3d 1135 (Matter of Site Acquisitions, Inc. v Town of New Scotland)	At 2 AD3d 1136, line 44, change 2 AD3d 89 to 1 AD3d 89; at 2 AD3d 1137, line 10, change <i>supra</i> at 717 to <i>supra</i> at 94.
29. 3 AD3d 143 (Matter of R.M. Kliment & Frances Hasband, Architects [McKinsey & Co.])	At 3 AD3d 143, in headnote, change subhead to Architect's Malpractice.
30. 4 AD3d 629 (Matter of Rosalind EE. v William EE.)	Change title to Matter of Rosalind EE. v William EE.
31. 5 AD3d 229 (Tradewinds Fin. Corp. v Refco Sec., Inc.)	Change defendant's name in title from Repco to Refco.
32. 5 AD3d 247 (Matter of Sills v Kerik)	At 5 AD3d 247, 3 lines from bottom of page, change 560-561 to 585-586.
33. 6 AD3d 220 (Henriques v Kindercare Learning Ctr., Inc.)	Change title to D.H. v Kindercare Learning Ctr., Inc.
34. 6 AD3d 437 (Matter of Shondel J. v Mark D.)	Change all references to petitioner's name to Shondel J. and change all references to respondent's name to Mark D.
35. 7 AD3d 441 (People v Griffin)	Change defendant's name in title from Griffen to Griffin.

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36. 8 AD3d 359 (Springer v Yonkers Bd. of Educ.)	At 8 AD3d 360, add new last paragraph as follows: The appellant's remaining contentions are without merit. Also, following Judge's line add: [As amended by unpublished order entered Nov. 10, 2004].
37. 8 AD3d 658 (Taylor v New York City Tr. Auth.)	At 8 AD3d 658, line 16, change "shifting the burden to the defendant" to "shifting the burden to the plaintiff."
38. 8 AD3d 791 (Matter of Lorenzo v Neuwirth)	Change defendant's name in title from Neuwrith to Neuwirth.
39. 8 AD3d 870 (Hallett v City of Ithaca)	At 8 AD3d 871, line 19, change plaintiff sought to defendant sought.
40. 8 AD3d 1133 (People v Samuels)	Change disposition from denied to granted.
41. 10 AD3d 372 (People v Vitiello)	At 10 AD3d 372, in the first paragraph after the word hearing, add (Demakos, J.).
42. 10 AD3d 393 (Santiago v New York City Health & Hosps. Corp.)	At 10 AD3d 393, line 7, and 10 AD3d 394, line 1, change CPLR 3216 to CPLR 3126.
43. 10 AD3d 724 (Matter of McCoy v City of N.Y.)	On pages 10 AD3d 724 and 725, replace all instances of "file a late notice of claim" with "serve a late notice of claim."
44. 12 AD3d 342 (Daniels v Bovis Lend Lease, Inc.)	At 12 AD3d 343, line 10, after "answering," add the words "the reasonable excuse offered for the delay,".
45. 12 AD3d 382 (People v Richard P.)	Change defendant's name in title to Richard P.

46. **12 AD3d 870** (Matter of New York State Crime Victims Board v Mitchell) Change first named individual's name in title to "on Behalf of Anonymous." At 12 AD3d 870, line 8 of decision delete victim's name. Line 10 of decision change name to "the victim."
47. **12 AD3d 1059** (Matter of Wallace B.O.) At 12 AD3d 1059, line 13 of case No. 27, change 12 AD3d 1058 to 12 AD3d 1057.
48. **13 AD3d 285** (Balbuena v IDR Realty LLC) At 13 AD3d 286, line 9, change citation from 13 AD3d 349 to 15 AD3d 36.
49. **13 AD3d 963** (Matter of Jacob [Commissioner of Labor]) In the title change claimant's name from Jacobs to Jacob. At 13 AD3d 964, line 23, delete the words "because he made a willful misrepresentation." At 13 AD3d 964, delete the last sentence and replace with "Claimant's remaining contentions, including his assertion that the Board erred in charging him with a recoverable overpayment in benefits, have been examined and found to be lacking in merit."
50. **15 AD3d 233** (People v Berry) At 15 AD3d 234, lines 3 & 4, delete "as a second felony offender."
51. **15 AD3d 473** (Vacca v State Farm Ins. Co.) At 15 AD3d 475, line 28, change Nassau County to Kings County.
52. **15 AD3d 788** (Matter of Natasha F.) At 15 AD3d 788, in the appeal statement, change "order of the Family Court of Delaware County (Pines, J.) entered April 22, 2003" to "amended order of the Family Court of Delaware County (Connerton, J.), entered June 17, 2003)."

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53. 16 AD3d 859 (Matter of Reardon [Commissioner of Labor])	At 16 AD3d 860, line 25, change February 17, 2003 to February 7, 2003 and March 30, 2003 to March 27, 2003.
54. 17 AD3d 386 (Amona v Orange & Rockland Util., Inc.)	In second to last paragraph add the word “issue” after the word “triable.”
55. 17 AD3d 669 (Matter of Allstate Ins. Co. v Hayes)	At 17 AD3d 670, line 21, change Kings County to Queens County.
56. 17 AD3d 902 (Matter of Oberferst [Commissioner of Labor])	At 902, change appellant’s name in the title from “Stefani J. Oberferst” to “Stefani K.” At xxiii, change “Matter of Oberferst (Commissioner of Labor)” to “Matter of Stefani K. (Commissioner of Labor).”
57. 18 AD3d 551 (Matter of Shondel J. v Mark D.)	Change all references to petitioner’s name to Shondel J. and all references to respondent to Mark D.
58. 18 AD3d 1072 (Matter of Sarah FF.)	At 18 AD3d 1074, in footnote 4, change Social Services Law § 422 (A) to § 422 (4) (A).
59. 19 AD3d 422 (Matter of 151 Route 17M Assoc., LLC. v Zoning Bd. of Appeals of Vil. of Harriman)	At 19 AD3d 423, change § 104-33 to § 140-30; change § 144-30 to § 140-30; change § 144-30 (A) to § 140-30 (A); change § 144-30 (B) to § 140-30 (B).
60. 20 AD3d 550 (Galvin v Francis)	At 20 AD3d 550, delete the words “Merrill Lynch SEP Account No. 433-51M78,”. At 20 AD3d 551, after the Judges’ line add: [As amended by unpublished order entered Dec. 15, 2005.]
61. 20 AD3d 749 (Altu v Clark)	At 20 AD3d 750, in the third paragraph, change CPLR 3216 to CPLR 3126.

62. 22 AD3d 544 (NC Venture I, L.P. v Complete Analysis, Inc.)	At 22 AD3d 544, delete the third ordering paragraph. In the second ordering paragraph after the words “on the law,” add the words “without costs or disbursements,” place a period after the word “reinstated” and delete the words “and it is further.”
63. 24 AD3d 748 (St. Vincent’s Hosp. & Med. Ctr. v Country Wide Ins. Co.)	Change defendant’s name in title from County Wide to Country Wide.
64. 25 AD3d 492 (CIBC Mellon Trust Co. v Samuel Montagu & Co. Ltd.)	At 25 AD3d 493, line 7, after the word “prior” add the words “frauds which later resulted in.”
65. 26 AD3d 230 (People v Bautista)	In headnote, line 4, change “must” to “may not”; lines 5-6, omit the words “two years, and defendant was eligible for parole within.”
66. 26 AD3d 242 (Torrenzano Group, LLC v Burnham)	At 26 AD3d 243, line 15, delete the sentence beginning “Nor does TTG.”
67. 28 AD3d 783 (Matter of Brandon W.)	At 28 AD3d 783, line 3 of the decision, change Kings County to Orange County.
68. 29 AD3d 682 (Weitzenberg v Nassau County Dept. of Recreation & Parks)	Change appellant’s last name in title from Weitzberg to Weitzenberg.
69. 33 AD3d 326 (People v Alicea)	At 33 AD3d 327, add the following sentence to the first paragraph: Judgment, same court and Justice, rendered July 25, 2003, convicting defendant White, after his plea of guilty, to the crime of conspiracy in the second degree, unanimously affirmed. At 33 AD3d 328, before the last paragraph add the following paragraphs: As to the July 25, 2003 judgment, convicting defendant White, after his plea of guilty, to the crime of conspiracy in the second degree, application by appellant’s counsel to withdraw as counsel is granted (<i>see Anders v</i>

California, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no nonfrivolous 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 30 days after service of a copy of this order, with notice of entry. 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.

70. **33 AD3d 936** (*People v Greene*)

At 33 AD3d 936, first and third paragraphs, change citation to *People v Johnson* from 33 AD3d 839 to 33 AD3d 939.

71. **35 AD3d 279** (*Barrett v Delma Props, Inc.*)

Change title to Patrick D. Barrett, Individually and as a Limited Partner of Delma Associates, LP, Appellant, v Delma Properties, Inc., Respondent.

72. **35 AD3d 769** (*People v Torres*)

At 35 AD3d 770, line 8, change 15 years to 18 years.

73. **35 AD3d 843** (*Sprague v State of New York*)

In headnote, after the words "operating vehicle" add the words "that struck vehicle." In the text at p. 844, in the third paragraph, after the words "operating the vehicle" add the words "that struck the vehicle."

74. **35 AD3d 1034** (People v Conklin) In the title change the party designation for the People to Respondent, and change the party designation for Stanley L. Conklin, Jr., to Appellant.
75. **37 AD3d 855** (People v Munford) Change defendant's last name in title from Mumford to Munford.
76. **39 AD3d 797** (Costello v Casale) In third paragraph, change CPLR 5016 (b) to CPLR 5016 (c).
77. **40 AD3d 1364** (People v Williams) At 40 AD3d 1365, third paragraph, 10th line, change "supressable" to "suppressible."
78. **41 AD3d 222** (Scott v Beth Israel Med. Ctr., Inc.) At 41 AD3d 224, last sentence of decision, change "for cause" to "without cause."
79. **43 AD3d 543** (Weintraub v Stankovic) In first sentence of second paragraph change June 2007 to June 2005.
80. **44 AD3d 329** (People v Haigler) In first paragraph, line 5, delete "to life."
81. **44 AD3d 1205** (Matter of Rodriguez v LeClaire) In title change LeClaire to Leclair.
82. **45 AD3d 492** (Echevarria v New York City Tr. Auth.) At 45 AD3d 492, first paragraph, line 1, replace "Gomez" with "Guzman."
83. **47 AD3d 318** (People v Adamson) At 47 AD3d 318, headnote 1, on line 4 change Penal Law § 125.27 (1) (v) to Penal Law § 125.27 (1) (a) (v) and on line 8 change § 125.27 [1] [v] to § 125.27 [1] [a] [v]. At 47 AD3d 322, line 28 and at 47 AD3d 323, lines 1 and 26, change the statute to add [a] and (a) as indicated above.
84. **47 AD3d 938** (Matter of Piesco v Hollihan) At 47 AD3d 938, first paragraph, and at 939, fifth full paragraph (two places), change Town Building Inspector to Village Building Inspector.

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85. **48 AD3d 764** (Mirjah v New York City Tr. Auth.) At page 766, line 10, change “defendant” to “decedent.”
86. **48 AD3d 1207** (Demming v Denk) At 48 AD3d 1209, lines 13-14, remove “[appeal No. 3],” and on line 14, replace “862” with “856.”
87. **51 AD3d 196** (Gletzer v Harris) At 51 AD3d 206, line 6 and in ordering paragraph, line 2, replace “affirmed, with costs.” with “modified, so as to deem the 1991 judgment to be renewed as of March 1, 2005, the date the renewal judgment was granted, and as so modified, affirmed, with costs.”
88. **51 AD3d 301** (People v Mattocks) At 51 AD3d 301, line 5, replace “16” with “8.”
89. **54 AD3d 109** (TOA Constr. Co., Inc. v Tsitsires) At 54 AD3d 109, line 13, change “affirmed” to “reversed.”
90. **55 AD3d 1** (Matter of Parkhouse v Stringer) At 1, line 6 from the bottom, change “modified” to “affirmed.” At 5, the sentence on lines 1-3 should have a strikeout through the text. Lines 4-5, include a strikeout through the text “move to calendar these two buildings and.” Line 6, include a strikeout through the word “the” before the word “history” and the text “of the development.”
91. **55 AD3d 759** (People v Williams) At 55 AD3d 759, first paragraph, line 6, change sexual abuse in the third degree to sexual abuse in the first degree.
92. **59 AD3d 942** (People v Bunnell) At 942, lines 6-7, delete “as a matter of discretion in the interest of justice.” At 943, delete the sentence on lines 6-9 and replace with: “We reach this issue sua sponte, and we note that preservation is not required inasmuch as the ‘essential nature’ of the right to be sentenced as provided by law’ is implicated (*People v Fuller*, 57

NY2d 152, 156 [1982]). To the extent that *People v Jackson* (23 AD3d 1057 [2005], *lv denied* 6 NY3d 814 [2006]) holds otherwise, it is no longer to be followed.” Line 15, before the word “We” insert the following sentence: “It cannot be said that the procedure utilized by the court is authorized by *People v Fuller* (57 NY2d 152 [1982]). Indeed, the court attorney did not act merely as a ‘preliminary fact finder’ (*id.* at 158) but, rather, he conducted an adversarial hearing and made credibility determinations, thereby assuming a role specifically limited to the authority of the court (see Penal Law § 60.27 [2]; *Fuller*, 57 NY2d at 158-159).”

93. **61 AD3d 1398** (*People v Ziegler*)

At 61 AD3d 1398, change appellant’s name in the title from “Ziegler” to “Zeigler.”

94. **62 AD3d 100** (*People v Mojica*)

At page 108, lines 11-12 and 18, change Penal Law § 120.30 to Penal Law § 120.03.

95. **63 AD3d 493** (*Ayoub v Ayoub*)

In case title, change respondent and appellant’s name to “Anonymous.”

96. **63 AD3d 1673** (*Matter of Meegan v Brown*)

At page 1673, line 4 from the bottom, change title to In the Matter of Robert P. Meegan, Jr., Individually and as President of Buffalo Police Benevolent Association, et al., Respondents-Appellants, v Byron W. Brown, Mayor of City of Buffalo, et al., Appellants-Respondents. (Proceeding No. 1.) In the Matter of Joseph E. Foley, Individually and as President of Buffalo Professional Firefighters Association, Inc., Local 282, IAFF, AFL-CIO-CLC, et al., Respondents, v Byron W. Brown,

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Mayor of City of Buffalo, et al.,
Appellants. (Proceeding No. 2.)
Buffalo Teachers Federation, Inc.,
NYSUT, et al., Respondents, v
Buffalo Board of Education for
City School District of City of
Buffalo et al., Appellants. (Action
No. 1.)

97. **64 AD3d 1027** (Matter of Torres v Dubray) Change respondent's name in the title from Durbay to Dubray.
98. **65 AD3d 1049** (Matter of Nyenekor v Tarig) Change petitioner's name in the title from Nyenkor to Nyenekor.
99. **71 AD3d 1511** (Playtime Boutique, Inc. v Fraccola) At page 1511, line 3 of the title, change respondent's name from "Fracolla" to "Fraccola."
100. **77 AD3d 76** (People v Quinto) On page 76, in the summary, last line, change citations to "CPL 210.20 (1) (f), 30.10 (2) (b) and 30.10 (3) (f)." On page 85, line 9 from the end and on page 86, line 4, change the citations to "CPL 210.20 (1) (f), 30.10 (2) (b) and (3) (f)."
101. **78 AD3d 569** (Matter of Aoki) At page 569, line 6, delete the word "unanimously."
102. **83 AD3d 407** (Auqui v Seven Thirty One Limited Partnership) In case title, change Respondent's name to "Seven Thirty One Limited Partnership."
On page 408, lines 1-2, delete the word "unanimously."
103. **83 AD3d 573** (IRB-Brazil Resseguros, S.A. v Inepar Investments, S.A.) Change respondent's name from IRB-Brazil to IRB-Brasil in the case title.
104. **82 AD3d 409** (M.N. Dental Diagnostics, P.C. v New York City Tr. Auth.) On page 410, line 3 in the classification, delete "Crimes—Sentence—Excessive Sentence Reduced."

105. **82 AD3d 410** (People v Pitts) On page 410, after the dash on line 2 add the classification “Crimes—Sentence—Excessive Sentence Reduced.”
106. **83 AD3d 1472** (Matter of North Syracuse Cent. School Dist. v New York State Div. of Human Rights) On page 1472, line 13, change “filed by petitioner” to “filed by the mother of one of petitioner’s students.”
107. **87 AD3d 1042** (People v Vasquez) On page 1044, line 7, add to the end of paragraph, “The defendant’s remaining contention with respect to the admission of the show-up identification testimony pursuant to CPL 60.25 is without merit.”
108. **88 AD3d 1159** (People v Jeffrey VV.) On pages 1159-1160, change the text “sentence was imposed” to “the crime was committed.”
109. **90 AD3d 771** (Matter of Yearwood v Yearwood) On page 774, line 35, delete ending of sentence after the words “for further proceedings” and replace with “to establish an appropriate visitation schedule for the mother.”
110. **92 AD3d 1261** (Hecker v State of New York) On page 1263, line 13, change the word “blindsighting” to “blindsiding.”
111. **94 AD3d 456** (Fiserv Solutions, Inc. v XL Specialty Ins. Co.) On page 461, line 15 from the end, delete the sentence starting, “As we previously held,” and replace it with the following: “Finally, as we previously held, defendant may inquire into the procedures and requirements of an insured lender (*see Fiserv Solutions, Inc. v XL Specialty Ins. Co.*, 84 AD3d 480 [2011]) and the motion Court correctly held that defendant may deny coverage for a loan not made in accordance therewith.”

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112. 97 AD3d 1014 (Murchison v State of New York)	Change appellant's name in title from Murchinson to Murchison.
113. 101 AD3d 1623 (Kolbe v Tibbetts)	On page 1623, line 21, change "It is that defendant," to "It is adjudged and declared that defendant."
114. 105 AD3d 1387 (People v Conklin)	On page 1389, line 15, change "not did succeed" to "did not succeed."
115. 110 AD3d 854 (Longman v Longman)	On page 854, second line from the end, change the word "plaintiff" to "defendant."