SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 29, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, Freedman, Richter, Román, JJ.

5127-
5128-
5129-
5130-
5130A

In re Naomi S.,

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

Hadar S.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

- - - -

In re Uriel S.,
Petitioner-Respondent,

-against-

Hadar S.,
Respondent-Appellant,

Administration for Children's Services
of the City of New York,
Respondent.

_____

Louise Belulovich, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for municipal respondent.

Benjamin Haber, Staten Island, for Uriel S., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about November 30, 2009, which, upon denial of respondent mother's application to dismiss the neglect petition pursuant to Family Court Act § 1051(c) and a fact-finding determination that the mother neglected the subject child, among other things, released the subject child to the custody of non-respondent father, and order, same court and Judge, entered on or about November 9, 2009, which, to the extent appealed from as limited by the briefs, awarded custody of the child to the father, unanimously affirmed, without costs. Appeal from orders, same court and Judge, entered on or about February 2, 2010, which to the extent appealed from as limited by the briefs, set forth a visitation schedule for respondent mother, unanimously dismissed, without costs, as taken from a non-appealable order. Order, same court and Judge, entered on or about February 16, 2010, which, to the extend appealed from as limited by the briefs, modified the February 2, 2010 order and set forth certain travel and relocation conditions for petitioner father, unanimously affirmed, without costs. Order, same court and Judge, entered on or about April 8, 2010, which granted respondent father's motion to dismiss the mother's petition to

modify the visitation orders, unanimously affirmed, without costs.

A preponderance of the evidence supports Family Court's finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's long-standing history of mental illness and resistance to treatment (*see* Family Ct Act §§ 1046[b][i], 1012[f][i][B]; *Matter of Madeline R.*, 214 AD2d 445 [1995]). The mother testified to multiple extended hospitalizations for mental illness, and the record showed her lack of insight into her illness and her repeated relapses due to noncompliance with treatment and medication (*see Matter of Christopher R. [Lecrieg B.B.]*, 78 AD3d 586, 586-587 [2010]). Family Court also properly denied the mother's motion to dismiss the neglect petition pursuant to Family Ct Act § 1051(c), since the dangers the mother posed to the child had not passed and thus the court's continued aid was required (*cf. Matter of Eustace B. [Shondella M.]*, 76 AD3d 428, 428 [2010]).

The totality of the circumstances establishes that the award of custody of the child to her father was in the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The evidence at the consolidated hearing on the disposition of the

neglect petition and the father's custody petition showed that the mother was incapable of caring for the child and continued to have a lack of insight about her illness, and that the child is doing well while living with her father.

Because the February 2, 2010 visitation order was entered on consent, it is not appealable (*see Matter of Reilly v Reilly*, 49 AD3d 883, 884 [2008]). Family Court did not abuse its discretion when it entered the February 16, 2010 visitation order, modifying the February 2, 2010 order, which set forth travel and relocation conditions for petitioner father.

Family Court properly dismissed, without a hearing, the mother's petition to modify the visitation orders. The mother failed to make an evidentiary showing of changed circumstances sufficient to warrant a hearing (*see Matter of Rodriguez v Hangartner*, 59 AD3d 630, 631 [2009]).

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

> The Decision and Order of this Court entered herein on May 19, 2011 is hereby recalled and vacated (*see* M-2709 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5537N Tony Chin, et al., Index 106219/08
Plaintiffs-Respondents,

-against-

Herman Patterson, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (George J. Silver, J.), entered on or about December 8, 2010,

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 May 9, 2011,

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5588 The People of the State of New York, Ind. 6248/07
Respondent,

-against-

Travon Williams,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J. at hearing; Lewis Bart Stone, J. at jury trial and sentencing), rendered November 6, 2008, convicting defendant of two counts each of robbery in the first and second degrees, and sentencing him to an aggregate term of 11 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing evidence established that the police had reasonable suspicion to detain defendant for a showup identification, based on a radioed description that was sufficiently specific given the close spatial and temporal factors (*see e.g. People v Johnson*, 63 AD3d 518 [2009], *lv denied* 13 NY3d 797 [2009]). While there was no specific testimony as to the source of the information for the

radio call, circumstances support the inference that one or both of the victims provided the description (*see People v Daniels*, 6 AD3d 245, 246 [2004], *lv denied* 3 NY3d 658 [2004]).

The prompt showup identification, conducted near the scene of the crime, was not unduly suggestive. The manner in which the showup was conducted was justified by the exigencies of the case and the interest of prompt identification (*see People v Love*, 57 NY2d 1023, 1024 [1982]). There is no evidence that, in making their identifications, the victims were influenced by each other or by other persons on the street.

We perceive no basis for reducing the sentence.

Defendant's remaining claims are either identical or substantially similar to arguments this Court rejected on a codefendant's appeal (*People v Banks*, 66 AD3d 485 [2009], *lv denied* 13 NY3d 905 [2009]), and there is no basis to reach a different result.

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5589 Ali Yusuf, etc., Index 27045/99
Plaintiff-Respondent,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for appellants.

Pollack Pollack Isaac & DeCicco, LLP, New York (Jillian Rosen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered June 3, 2010, which, insofar as appealed from, in this class action seeking, inter alia, damages for poundage overcharges in connection with scofflaw towing, granted plaintiff's motion for partial summary judgment on liability for excess poundage charges, unanimously affirmed, without costs.

The motion court correctly applied our prior holding (309 AD2d 721 [2003]) that the judgment was improperly augmented by additional fees in calculating poundage. Defendants have not advanced any basis for departing from that decision; their

reliance on a regulation in the New York City Marshals Handbook is misplaced, as it does not apply to sheriffs, whose fees are governed by CPLR 8012(b)(1).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5590 The People of the State of New York, Ind. 8673/99
Respondent,

-against-

Oscar Peralta,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered March 24, 2010, as amended April 1, 2010, resentencing defendant to a term of 10 years, with 3 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]), and we do not find that term to be excessive. We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5591 The People of the State of New York, Ind. 265/09
Respondent,

-against-

Daphney Polodore,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about July 7, 2010, 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 [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 thirty (30) days after

service of a copy of this order.

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

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5592 In re Michael R.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about March 23, 2010, 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 assault in the third degree and menacing in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. Furthermore, its fact-finding determination was based on legally

sufficient evidence and was not against the weight of the evidence. Appellant's challenges to both determinations are identical or substantially similar to arguments this Court rejected on a companion appeal (*Matter of Daniel E.*, 82 AD3d 639 [2011]), and there is no reason to reach a different result here.

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5593 The People of the State of New York, Ind. 1667/99
Respondent,

-against-

Carlos Savinon,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered December 18, 2008, as amended January 9, 2009, resentencing defendant to an aggregate term of 9 years, with an aggregate term of 5 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]), and we do not find that term to be excessive. We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5595 The People of the State of New York, Ind. 5475/08
Respondent,

-against-

Darnell Childers,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about September 10, 2009, 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 [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 thirty (30) days after

service of a copy of this order.

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

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5596 The People of the State of New York, Ind. 7606/00
Respondent,

-against-

Wayne Newland,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Cheryl Williams of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 23, 2009, resentencing defendant to a term of 10 years, with 5 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]).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5598 The People of the State of New York, Ind. 491/04
Respondent,

-against-

Andre Williams,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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

_____

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered February 13, 2009, resentencing defendant to a term of 6 years, with 5 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]).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5599-
5599A The People of the State of New York, Respondent, Ind. 2813/07 6025/07

-against-

Marcus Dreher,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Martin M. Lucente of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Bruce Allen, J. at plea and sentence), rendered on or about January 30, 2009, 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 [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 thirty (30) days after

service of a copy of this order.

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

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5601 The People of the State of New York, Ind. 6210/00
Respondent,

-against-

Leonia Diaz,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 6, 2009, resentencing defendant to a term of 10 years, with 2½ 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 have no

authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5603-
5604 In re Aliyah B., and Another,

Denise J.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.
- - - - - -
James B.,
Nonrespondent.

_____

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for Administration for Children's Services, respondent.

Steven N. Feinman, White Plains, for James B., respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), attorney for the children.

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about September 28, 2010, which, upon a fact-finding determination that respondent mother neglected her three children, released two of the children to the custody of their father with 12 months of supervision by the Administration for Children's Services (ACS), and ordered the mother to, among other things, comply with the terms of an order of protection, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that the mother neglected her children by committing acts of domestic violence against the children's father in the children's presence (*see* Family Court Act § 1012[f][i][B]; *Matter of Enrique V., [Jose U.V.]*, 68 AD3d 427 [2009]). The out-of-court statements made by one of the children regarding the mother's attacks on the father were corroborated by the father's testimony, the responding police officer's testimony, and the out-of-court statements of the mother's daughters (*see Matter of Nicole V.*, 71 NY2d 112, 118-119, 124 [1987]). "No expert or medical testimony is required to show that the violent acts exposed the children to an imminent risk of harm" (*Enrique V.*, 68 AD3d at 427).

A preponderance of the evidence also supports the court's finding of educational neglect as to one of the children. The record shows that, for the 2008-2009 school year, the child missed 64 out of 181 days of school and was late 38 out of 181 days. Evidence of excessive unexcused absences from school will support a finding of neglect (*see Matter of Annalize P. [Angie D.]*, 78 AD3d 413, 414 [2010]). The child's guidance counselor testified that he had contacted the mother on numerous occasions regarding the child's truancy, and there is no basis for

disturbing the court's credibility determinations (*Enrique V.*, 68 AD3d at 427).

The court properly determined that it was in the best interests of the children to be released to the custody of their father (Family Court Act § 1052[a][ii]). The mother failed to cooperate with the agency or address the domestic violence issues that led to the removal of her children. By contrast, the father had taken steps to cooperate with family services and to create a stable home for his children (*see Matter of Jason M.*, 146 AD2d 904, 905 [1989]).

Given the court's finding that the mother committed acts of domestic violence against the father, which was supported by a preponderance of the evidence, it providently exercised its discretion in issuing an order of protection prohibiting her from contacting her children for a period of one year (*see* Family Court Act §§ 1054[a], 1056[1]; *Matter of Stefani C.*, 61 AD3d 681 [2009]).

During the pendency of the neglect proceeding, the mother never moved for a hearing pursuant to *Matter of Tropea v Tropea* (87 NY2d 727 [1996]) to prevent the relocation of the children to another jurisdiction. Accordingly, her argument that the court improperly permitted the children to relocate to Pennsylvania

with the father is unpreserved, and we decline to review it in the interest of justice. Were we to review it, we would reject it. A preponderance of the evidence demonstrates that the father's relocation to Pennsylvania is in the children's best interests (*Matter of Jennings v Yillah-Chow*, 84 AD3D 1376, 1377 [2011]). The father informed ACS that he wanted to move to Philadelphia to live in his sister's home in order to improve the children's lives. Pennsylvania Child Protective Services assessed the sister's home and found it to be appropriate and safe. In addition, the children's expression of a clear preference for remaining in the father's care in Pennsylvania "is entitled to some weight" (*Jennings*, 84 AD3D at 1377).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5605 Lawrence Kasoff, Index 116954/07
Plaintiff-Appellant,

-against-

KVL Audio Visual Services, Inc., et al.,
Defendants-Respondents.

_____

Grabell & Associates, P.A., New York (Matthew R. Grabell of counsel), for appellant.

Clifton Budd & DeMaria, LLP, New York (George F. Brenlla of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 8, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on his Labor Law cause of action, denied his motion to strike defendants' answer, granted defendants' motion for summary judgment to the extent of dismissing portions of plaintiff's breach of contract cause of action and dismissing his Labor Law cause of action in its entirety, unanimously modified, on the law, to deny summary judgment to defendants on the Labor Law cause of action, grant partial summary judgment to plaintiff on his Labor Law § 191(1)(c) claim, and grant plaintiff's motion to strike defendants' answer to the extent of prohibiting defendants from offering evidence in support of the contention

that plaintiff was fully paid the Miscellaneous commission, and otherwise affirmed, with costs against defendants.

The court improperly granted summary judgment to defendants dismissing the portions of plaintiff's breach of contract cause of action alleging nonpayment of commissions on the Metropolitan Club, Miscellaneous, and Meadowlands Exposition Center accounts. There are issues of fact as to whether the accounts were properly classified, whether plaintiff knew of the classifications and whether, had plaintiff disputed the designation, defendants would have changed the designation.

The court also improperly granted summary judgment to defendants dismissing plaintiff's Labor Law § 191(1)(c) claim. Plaintiff qualified as a "commission salesman" as defined by Labor Law § 190(6) and thus may be afforded the protections of Labor Law §§ 191(1)(c) and 195(3). In addition, plaintiff has shown that, despite repeated written requests, defendants failed to provide him with "a statement of earnings paid or due and unpaid" that included "a description of how wages, salary, drawing account, commissions and all other monies earned and payable shall be calculated" (Labor Law § 191[1][c]). The ledgers presented by defendants are insufficient to satisfy the specificity proscribed by the statute and plaintiff is entitled

to summary judgment on this claim. Plaintiff, however, is not entitled to summary judgment on his Labor Law § 195(3) claim. Plaintiff has offered evidence of unpaid commissions only and the term "wages," despite its broad definition (Labor Law § 190[1]), does not encompass commissions (*see Matter of Dean Witter Reynolds v Ross*, 75 AD2d 373, 381 [1980]).

Plaintiff's motion to strike should have been granted to the extent of prohibiting defendants from offering evidence in support of the contention that plaintiff was fully paid the Miscellaneous commission of $47,731.47, and awarding plaintiff that amount. The record establishes that defendants' counsel actively interfered with discovery by intercepting documents under subpoena to a third party. Defendants also admittedly altered a commission report pertaining to the Miscellaneous account and produced it in the course of discovery as if it were the original business record. These acts, together, evidence a sanctionable pattern of behavior (*see 317 W. 87 Assoc. v Dannenberg*, 159 AD2d 245, 245-246 [1990]; *see also Garnett v*

Hudson Rent a Car, 258 AD2d 559 [1999]) requiring preclusion.

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

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5606 The People of the State of New York, Ind. 1627/01
Respondent,

-against-

Derrick Ties,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered June 3, 2010, resentencing defendant to a term of 11 years, with 5 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 have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5607 The People of the State of New York, Ind. 29/08
Respondent,

-against-

Javier Mena,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Renee A. White, J. at plea and sentencing), rendered July 8, 2008, convicting defendant of attempted criminal possession of a controlled substance in the third degree and attempted criminal possession of a weapon in the second degree and sentencing him to an aggregate term of 2½ years, unanimously affirmed.

Initially, we note that defendant's present claim is unpreserved. The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

At the suppression hearing, the police officers testified that during a lawful car stop, they detected the odor of

marijuana emanating from the vehicle; moreover, the codefendant admitted to police officers that he and defendant had been smoking marijuana earlier in the day in the car on the way to New York from Atlantic City. Accordingly, the police clearly had probable cause to search the vehicle under the automobile exception, and this included a search of the trunk (*see United States v Ross*, 456 US 798, 825 [1982]; *People v Langen*, 60 NY2d 170, 180-182 [1983], *cert denied* 465 US 1028 [1984]; *People v Hughes*, 68 AD3d 894 [2009], *lv denied* 14 NY3d 841 [2010]).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5608-
5608A The People of the State of New York, Ind. 4817/02
Respondent, 7799/02

-against-

Lionel Pitman,
Defendant-Appellant.

_____

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

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

_____

Judgments of resentence, Supreme Court, New York County (Roger S. Hayes, J.), rendered November 20, 2009, resentencing defendant to an aggregate term of 10 years, with an aggregate term of 5 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]), and we do not find that term to be excessive. We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Tom, J.P., Catterson, Renwick, Freedman, Manzanet-Daniels, JJ.

5609N Victor Weingarten, Index 102230/08
Plaintiff-Appellant,

-against-

S & R Medallion Corp., et al.,
Defendants-Respondents,

David Beier,
Defendant.

_____

Cobert, Haber & Haber, Garden City (Eugene F. Haber of counsel), for appellant.

Evan L. Gordon, New York, for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 19, 2010, which, in this breach of contract action, denied plaintiff's motion to amend the complaint, unanimously affirmed, without costs.

The court providently exercised its discretion in denying plaintiff's motion. The proposed allegation of a "tacit" modification of the parties' written agreement, which required modifications to be in writing, is clearly devoid of merit (*see Bishop v Maurer*, 83 AD3d 483, 485 [2011]). Plaintiff denies that there was any oral modification of the written agreement, and he makes no allegations to support a claim of modification based upon conduct. With respect to the remaining proposed

allegations, plaintiff asserts that they merely clarify the existing pleading. Accordingly, the court properly determined that they may be proven at trial and, if necessary, the pleadings can be amended to conform to the proof.

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

ENTERED: SEPTEMBER 29, 2011

CLERK

Saxe, J.P., Sweeny, Catterson, Freedman, Román, JJ.

4409 Magen David of Union Square, et al., Index 600573/08
Plaintiffs-Appellants, 590326/08

-against-

3 West 16th Street, LLC,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

Steven J. Ancona,
Third-Party Defendant-Appellant.

_____

Hughes Hubbard & Reed LLP, New York (Christopher M. Paparella of counsel), for appellants.

Hartman & Craven LLP, New York (Edward A. White of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered July 22, 2010, affirmed, with costs.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Saxe, J.P.
John W. Sweeny, Jr.
James M. Catterson
Helen E. Freedman
Nelson S. Román, JJ.

4409
Index 600573/08
590326/08

_____x

Magen David of Union Square, et al.,
Plaintiffs-Appellants,

-against-

3 West 16th Street, LLC,
Defendant/Third-Party
Plaintiff-Respondent,

-against-

Steven J. Ancona,
Third-Party Defendant-Appellant.
_____x

Plaintiffs and third-party defendant appeal from an order of the Supreme Court, New York County (Debra A. James, J.), entered July 22, 2010, which, to the extent appealed from, granted defendant/third-party plaintiff's motion for summary judgment dismissing the fourth, fifth and sixth causes of action; declared, upon the first, second, third, seventh and eighth causes of action that (1) defendant has a fee simple interest in the subject property; (2) plaintiffs possess no equitable ownership interest in the property; and (3) plaintiff 3 West Development LLC's leasehold interest was

legally terminated 30 days after defendant served its May 8, 2008 Notice of Termination; and granted summary judgment on defendant/third-party plaintiff's first, second, fourth and sixth counterclaims and on its third-party complaint.

Hughes Hubbard & Reed LLP, New York (Christopher M. Paparella, William J. Sanchez, Andrea Engels and Meaghan Gragg of counsel), for appellants.

Hartman & Craven LLP, New York (Edward A. White and Michael P. Reagan of counsel), for respondent.

CATTERSON, J.

The resolution of this long-simmering dispute over a six-story building in Manhattan's Flatiron district lies in the application of a basic tenet of contract law: the best evidence of the parties' intent is memorialized in their written agreement. The specific question arising in this action is whether the defendant landlord agreed to sponsor the conversion of its building to condominium use. The plaintiffs concede that there is no provision in the lease that obligates the landlord to do so. However, they claim that the obligation is implicit. Moreover, they claim that, without the conversion of the building, the tenant (one of the plaintiffs) cannot realize any revenue from it, and hence is unable to pay the rent or any incidentals due under the triple-net lease.

For the reasons set forth below, we find that the plaintiffs' argument is without merit. The defendant's alleged breach of a nonexistent provision does not excuse the tenant's undisputed breach of the lease where the tenant's obligation to pay rent is unconditional.

The plaintiffs are 3 West Development LLC (hereinafter referred to as "the tenant"), and Magen David of Union Square Synagogue and the Sixteenth Street Synagogue (both hereinafter referred to collectively as "the synagogues"). Steven J. Ancona,

leader of the Magen David synagogue, is the third party defendant and appellant. The defendant/third-party plaintiff is 3 West 16th Street LLC (hereinafter referred to as "the landlord") whose principal, John Braha, purchased the building at 3 West 16th Street from nonparty National Council of Young Israel ("NCYI"). NCYI had owned the building since 1945 and provided space for The Sixteenth Street Synagogue, and subsequently for Magen David (an orthodox group of Sephardic Jews).

In or around 1999, NCYI's attempt to sell the building to a developer gave rise to protracted litigation after the synagogues were asked to vacate the building. In early 2005, Mr. Ancona proposed that the two synagogues settle the litigation with NCYI by raising funds to jointly purchase the building through an entity Mr. Ancona controlled, 3 West 16th LLC (now the defendant/third-party plaintiff). Mr. Ancona proposed that 3 West 16th LLC would convert the building into a condominium, renovate it, sell the top four floors as apartments to pay off third-party financing, and donate the basement and the first and second floors, along with any profits, to the synagogues. The synagogues accepted Mr. Ancona's proposal.

Subsequently, Mr. Ancona sought third party financing for approximately $10 million by issuing an offering to potential investors for the purchase of limited partnership interests in 3

West 16th LLC. The offering specified that Mr. Ancona's company, Flatiron Real Estate Advisors LLC, would act as the managing member and project manager to convert the building to condominium use and renovate and sell the top four floors as luxury apartments, so that the basement and the first and second floors would be deeded to the synagogues.

Mr. Ancona eventually negotiated a deal with a sole investor, John Braha, who, in order to take advantage of Internal Revenue Code § 1031, negotiated to acquire the building outright using the sale proceeds of another building. To qualify for such an exchange, the entity that acquired the interest in the building had to be owned and controlled by the taxpayer, Mr. Braha. Therefore, Mr. Ancona, as principal and sole owner of 3 West 16th LLC which held the purchase rights, agreed that Mr. Braha could assume ownership and control of 3 West 16th LLC in order to make the purchase. Upon purchase, 3 West 16th LLC would then lease back the building for development by 3 West Development LLC, another entity owned and controlled by Mr. Ancona.

On March 24, 2006, NCYI deeded the building to 3 West 16th LLC with Mr. Braha as its principal. On the same date, 3 West 16th LLC, as landlord, entered into a 35-year lease with 3 West Development LLC (hereinafter referred to as the "tenant"). In

addition to executing the lease on behalf of the tenant, Mr. Ancona also executed a guaranty and indemnity agreement in which he personally guaranteed the obligation of the tenant under the lease.

Pursuant to the 35-year lease, the following terms, in relevant part, were agreed to by the landlord and the tenant:

(1) The landlord would fund up to a maximum of $2,850,000 for pre-approved alterations. These are listed in exhibit C to the lease, and include the floor plans for all the floors from basement to 6th floor with the note that "[a]ll work therein and related contracts, demolition, construction and renovation are included within the [p]re-[a]pproved [a]lterations." Exhibit C includes a preliminary construction budget of approximately $2.7 million for the renovation of only four floors, and budgets prepared by Mr. Ancona to reflect the "possible" donations of the basement and the first and second floors of the building. The pre-approved alterations include the hiring of all contractors and subcontractors; the filing of all development and condominium plans and permits; and the marketing and sale of units in the building.

(2) The tenant was to have sole responsibility for implementation, supervision and completion of the retrofitting of the building including obtaining all necessary approvals for

permits and licenses, and "caus[ing] the [c]onstruction of the [p]re-[a]pproved [a]lterations to be [c]ompleted with diligence and continuity." Continued construction was required in order for the tenant to maintain its entitlement to disbursements from the fund.

(3)Pursuant to article 9.5, the landlord agreed to cooperate in furthering any of the pre-approved alterations by executing required documents and taking reasonable action.

The lease contemplated that the landlord would recoup its equity in the building (purchase price and advances for alterations) together with 10% rate of return on investment, compounded annually, and accruing from the commencement date of the lease. Article 33 of the lease contemplated that the landlord would be paid the net proceeds from the sale of each unit until all the equity and interest were paid.

As of January 2008, however, whether or not there was income being produced through sales or subleases, repayment was to commence through a monthly rental of approximately $99,000 per month. The tenant was obligated to pay rent until such time as rent and/or income from sales or subleases satisfied the landlord's return on investment. Thereafter, the net proceeds from the sales of the units were to be split 55:45 between the landlord and the tenant, respectively, and the landlord would

release the space being sold from the lease.

Accordingly, the tenant had a two-year grace period while alterations and renovations were in progress in the building. By its terms, the lease was to terminate the earlier of April 1, 2041 (35 years after commencement), or when releases had been issued for "all of the premises."

The record reflects that the relationship between the landlord and the tenant soured in mid-2007 when the landlord declined to sign a preliminary application for condominium conversion. Mr. Braha averred that he declined to sign the "condominium offering plan" because it "omitted and misrepresented material facts" regarding the long-term lease of the property. He also informed the tenant that as "a dealer of condominiums" he would have a greater tax liability.

Allegations in the verified complaint and counterclaims point to a subsequent swift deterioration of the relationship. The landlord alleges that the tenant was using a portion of the advances to pay for construction work in the basement and first two floors, which he claims was not in accordance with pre-approved plans, and that the tenant allegedly instructed its contractors to abandon their work in December 2007. The tenant alleges that the landlord refused to advance a requested installment of approximately $200,000 from the pre-approved

alterations fund in December 2007. However, none of these allegations are substantiated in the record.

What is undisputed is that the tenant failed to pay the first rent installment due by January 20, 2008 and subsequently failed to pay rent in February and March. This gave the landlord the right to terminate the lease 30 days after issuing a notice of termination. However, the landlord allowed the rent to be paid beyond the grace periods in January, February and March. The tenant admittedly has paid nothing since then. The tenant has also failed to pay any of the insurance or taxes it was obligated to pay under the lease. Also undisputed is that the landlord withheld the disbursement of an advance from the pre-approved alterations in February 2008.

In that same month, the synagogues and the tenant (hereinafter collectively referred to as "the plaintiffs") commenced this action to quiet title to the three lower floors of the building, and to enforce the landlord's promise to donate the floors to them. The plaintiffs asserted causes of action, inter alia, seeking a declaratory judgment that the landlord had breached its funding obligations; and that the landlord's refusal to cooperate in the condominium conversion excused the tenant's obligation to pay rent under the lease.

The landlord filed an amended answer and counterclaims. It

asserted breach of contract by the tenant for the failure to pay rent, and for the failure to complete pre-approved alterations. The landlord sought a declaratory judgment that the lease had been terminated by the tenant's failure to pay rent. It also sought to recover possession of the building by ejecting the tenant for default under the lease. It also commenced a third-party action against Mr. Ancona for indemnification.

In May 2008, the landlord served the tenant with a notice of lease termination for failure to pay rent. Further, on August 25, 2008, the landlord moved for an order, pursuant to Real Property Law § 220, awarding use and occupancy, or alternatively, sole possession of the building. This motion remained pending in February 2009 when the landlord moved for summary judgment dismissing the complaint, and for judgment on its counterclaims and third-party claims against Mr. Ancona.

By order dated January 11, 2010, the court granted the landlord's motion for summary judgment to the extent of dismissing the plaintiffs' causes of action in breach of contract and enforcement of a charitable gift, and declaring that the landlord has a fee simple interest in the building; that the synagogues do not possess any equitable ownership interest in the building; and that the tenant's leasehold interest was legally terminated 30 days after service of the landlord's May 8, 2008

notice of termination. The court also granted summary judgment on the landlord's third-party complaint against Mr. Ancona.

On appeal, the plaintiffs argue that the motion court erred because factual issues exist which preclude a grant of summary judgment to the landlord. They argue, as they did before the motion court, that the landlord frustrated the agreement's objective by reneging on its promise to submit an offering plan for condominium conversion to the State Attorney General, and by advancing only $2,710,973.95 of the $2,850,000 in pre-approved alteration funding. Moreover, they argue that such failure of performance interfered with the tenant's ability to timely pay the rent due by depriving it of condo sales that were contemplated as the source of loan repayment. The plaintiffs further argue that the lease precluded the tenant from subleasing to generate income.

We now affirm the motion court's order in its entirety. The landlord is correct in asserting that the plaintiffs are not asking this Court to interpret the contract, but rather are seeking to rewrite it. The landlord relies on Vermont Teddy Bear Co. v. 538 Madison Realty Co., (1 N.Y.3d 470, 775 N.Y.S.2d 765, 807 N.E.2d 876 (2004)) to assert the impermissibility of inserting new terms and obligations where the language of a lease is clear and unambiguous as it is in this case. Moreover, we

agree that the plaintiffs' arguments are refuted by the plain language of the lease.

There is no question that article 33 of the lease and exhibit C reflect a clear intent of the parties to renovate the top four floors of the building into luxury apartments. The lease also contemplates the possibility of a conversion of the building to condominium or cooperative ownership use, but it does not mandate such conversion. Nor could it, given that such conversions are subject to approval by the State Attorney General.

More significantly, there is no specific provision in either the lease or the attached incorporated exhibits that requires the landlord to pursue a condo conversion by preparing, signing or submitting an offering plan with the Attorney General. In other words there is no provision that obligates the landlord to sponsor the conversion. Indeed, the word, "sponsor" does not appear at all in either the lease or exhibits.

The plaintiffs concede as much, but argue that a triable issue of fact is raised as to the landlord's obligation under the lease since it requires him to *cooperate* in the condominium conversion of the building. The plaintiffs point to article 6.2 which states, in relevant part, that "[l]andlord agrees to reasonably cooperate with tenant . . ., and to execute any

documents necessary in order for Tenant to obtain said approvals, permits and/or licenses." They also rely on article 9.5 which states: "Landlord agrees to execute such documents, take such reasonable action and cooperate in all respects ... to further any alteration, including the [p]re-[a]pproved [a]lteration." As the plaintiffs correctly state, pre-approved alterations include the filing of all development and condominium plans and permits. Thus, they assert that it is implicit in the lease that the landlord must *sponsor* the conversion.

However, the plain language of article 9.5 clearly excuses the landlord's cooperation in executing documents or taking action where "such action would broaden his obligations hereunder." Given the landlord's unrefuted assertion that he would incur a greater tax burden as a result of becoming "a dealer of condominiums," his refusal to act as sponsor is a bargained for right under the lease rather than a breach of that agreement.

None of the essential and material terms for an agreement to pursue a condominium conversion are provided for in the lease. The lease does not specify what is to be included in the offering plan, or when such plan should be filed, or even whether the building will be a condominium or cooperative. Where such material terms are left for future negotiation, the requirement

that the landlord pursue the condominium conversion is unenforceable. See e.g. Joseph Martin, Jr., Delicatessen v. Schumacher, 52 N.Y.2d 105, 109-111, 436 N.Y.S.2d 247, 249-250, 417 N.E.2d 541, 543-544 (1981).

Moreover, even looking beyond the four corners of the lease, as the plaintiffs urge, does not help them. The plaintiffs argue that the record demonstrates that conversion of the building to condominium use was fundamental to the parties' bargain. The plaintiffs direct us to review the record, which purportedly establishes that "3 West [16th LLC], which was then owned by Mr. Ancona, had repeatedly promised the [s]ynagogues that it would convert the [b]uilding into a condominium and give the [s]ynagogues quiet title to their floors ... [and] that Mr. Braha was familiar with the promises made by 3 West [16th LLC] to the [s]ynagogues regarding their floors."

They further urge this Court to consider that this dispute has arisen "from efforts by the [plaintiffs] to preserve the [s]ynagogues' home in the building. The [s]ynagogues ... and Mr. Ancona were not interested in making a profit."

Unfortunately for the plaintiffs, this indicates only that Mr. Ancona's purported generosity was to be funded solely out of Mr. Braha's pocket. What the record, in fact, demonstrates is that neither Mr. Ancona nor the synagogues contributed to the

purchase of the building. Mr. Braha, through 3 West 16th LLC, assumed the financial risk of purchasing the building. While there was no evidence that Mr. Braha had a personal interest in the synagogues' continued existence at the subject property, he, nevertheless, allowed the synagogues to remain in the building for the first two years on a rent-free basis.

Thus, the plaintiffs' assertion that "[the] conversion of the [b]uilding to a condominium was part of Mr. Ancona's plan from the beginning," is relevant only to the extent that it establishes that indeed it was Mr. Ancona's plan, not Mr. Braha's. Moreover, in the beginning, as the record shows, the original plan contemplated that Mr. Ancona would become a managing member of the entity that purchased the building. As such, any obligations to prepare and file an offering plan for conversion would lie with him. The plaintiffs cannot simply transpose Mr. Ancona's intentions, good wishes and aspirations onto the landlord as enforceable obligations.

Moreover, to the contrary, the record supports the view that the landlord never contemplated sponsoring a condominium conversion. In an e-mail to Mr. Ancona, dated May 8, 2007, Mr. Braha acknowledges that the agreement is incomplete in so far as there is "no exit strategy for completing the transactions contemplated by the agreement." He added that he had asked his

attorneys to "hatch the exit plan at the later part of 2006 ... [and] I was really expecting that we would come to an agreement well before now that would have allowed you to sign off on the cps-1." Mr. Braha continued as follows: "So push your side ... and I'll do the same ... this way you can get the cps-1 application submitted and get this project moving forward." The record reflects therefore that, at this point, the parties understood that a conversion could go forward without the landlord necessarily acting as sponsor.

In any event, the terms of the lease are clear that the tenant's obligation to pay rent as of January 2008 is entirely unconditional. The tenant cannot, and does not, point to any language in the lease that made its rental obligations contingent upon submission of an offering plan by its landlord. Nor is the obligation dependent on the tenant deriving any income from the property.

In fact, the lease specifically obligates the tenant to pay rent in the event that the tenant has *not* received any distributable cash (defined, in relevant part, as "any and all income derived by [t]enant from any use, sublease, sale, assignment, contribution or other transaction whatsoever effecting the [p]roperty"). Thus, the tenant's argument that the landlord compromised the plaintiffs' ability to perform its

obligations because of the landlord's refusal to proceed with the condominium conversion is totally without foundation.

The tenant's argument that the only source of income available to it was from condo sales because it was not permitted to sublease any of the space is refuted by the clear language of the lease. Albeit conditioned on the landlord's approval and consent, article 23 contemplates subleases, and even assignment of the lease. Moreover, article 23.5 gives the tenant "the right, one time only, without Landlord's consent, to assign this [l]ease, or sublease all of any portion of [p]remises to any business entities directly or indirectly, controlling, controlled by or under common control by Tenant." There is also, of course, nothing in the lease preventing the tenant from collecting rent from the synagogues.

Again, the tenant's intentions, hopes, and desires for providing a rent-free home for its subtenants, the two synagogues, must be viewed independently of the defendant's rights as owner and landlord of the subject premises. Certainly, there is no language obligating the landlord to donate the basement and two lower floors to the synagogues, or to continue their rent-free status beyond January 2008. Contrary to the plaintiffs' argument, the floor plans in exhibit C do not establish any binding promise of donation on the landlord's

behalf. The references to "possible donation" are, as the motion court found, "nothing more than a written expression of Mr. Ancona's aspiration." The fact that the lease terms appear to establish that the landlord's interest in the building continues only so far as its receipt of sale proceeds connected with the building's top four floors is not determinative of an agreement to donate the rest of the building.

Indeed, whatever the *possibility* that the synagogues would eventually benefit by a donation of the lower floors and basement, any such donation was predicated on the tenant's completion of renovations, conversion into luxury apartments, and the tenant's marketing and selling of same. In other words, it depended on the tenant's fulfillment of its obligations under the lease.

Finally, the tenant's argument that its default on the rent over a period of years is excusable because the landlord breached the lease first by refusing to disburse a requested advance from the pre-approved alteration fund is also without merit. There is no evidence of record that the tenant requested disbursements in either December 2007 or February 2008, which requests were to be made in writing. There are no copies of the requested advances appended to Mr. Ancona's affidavit in opposition to the landlord's motion for summary judgment. In any event, the

plaintiffs' assertion of a breach of contract claim in its verified complaint specifically relies only on a February 2008 request for funds. Hence, any alleged breach by the landlord in failing to comply with the tenant's request for funds occurred after the tenant's own default in the payment of rent, and after the landlord sent the first notice of termination, dated January 31, 2008.

For the foregoing reasons, the tenant's default under the lease is not excusable. Therefore, the landlord rightfully sent a notice of termination in May 2008, and has the right to recover possession of the premises. Further, we find that the motion court properly granted the landlord's motion for payment of use and occupancy since March 2008, and correctly found that Mr. Ancona had raised no defense to his obligation on the guaranty and indemnity provisions and, as such, properly granted the landlord judgment on its third-party complaint.

Accordingly, the order of the Supreme Court, New York County (Debra A. James, J.), entered July 22, 2010, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the fourth, fifth and sixth causes of action; declared, upon the first, second, third, seventh and eighth causes of action, that (1) defendant has a fee simple interest in the subject property; (2) plaintiffs possess no equitable

ownership interest in the property; and (3) plaintiff 3 West Development LLC's leasehold interest was legally terminated 30 days after defendant served its May 8, 2008 Notice of Termination; and granted summary judgment on defendant/third-party plaintiff's first, second, fourth and sixth counterclaims and on its third-party complaint, should be affirmed, with costs.

All concur.

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

ENTERED: SEPTEMBER 29, 2011

CLERK