SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 17, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Moskowitz, Acosta, JJ.

3338 In re Richard Vecchio, etc., Petitioner, Index 116210/08

-against-

Raymond W. Kelly, etc., et al., Respondents.

London & Worth, LLP, New York (Howard B. Sterinbach of counsel), for petitioner.

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

Determination of respondent Commissioner, dated September 5, 2008, which, upon findings of official misconduct and violations of the Police Department Patrol Guide, terminated petitioner's employment as a police officer, annulled, without costs, the petition granted to the extent of dismissing specifications 6 and 10 in Case No. 81292/05, and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of the Supreme Court, New York County [Alice Schlesinger, J.], entered March 24, 2009) remanded for a determination of a new penalty on

the remaining specifications.

The findings that petitioner committed the criminal offense of official misconduct and violated several provisions of the Patrol Guide by, among other things, improperly taking and possessing nude photos of an arrestee and a rape victim are supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). There is no basis for disturbing the hearing officer's findings of credibility as to those charges (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The finding that petitioner was guilty under specifications 6 and 10 of leaving work early on certain dates and falsifying business records in the second degree regarding those dates is not based on substantial evidence. The inference that on those days petitioner used the 592 EZ Pass to travel from his assignment in Brooklyn to Staten Island Health Services, but did not return to work in Brooklyn, because the EZ pass was not used to return to Staten Island, where petitioner resided, was unduly speculative, given the plausible testimony that other family members also used the vehicle and the EZ Pass during that time period. In light of our vacatur of this finding, the matter must be remitted to the Police Commissioner to redetermine the penalty

to be imposed (*see Matter of Eng v Brown*, 196 AD2d 89, 96 [1994], *lv denied*, 83 NY2d 758 [1994]).

If the Commissioner sees fit to adhere to the penalty of termination, petitioner should be permitted to apply for a vested interest retirement. In so directing, we acknowledge that the Commissioner's penalty determination is deserving of due deference, but we are also mindful of the fact that we "cannot operate merely as a rubber stamp of the administrative determination 'if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all of the circumstances, as to be shocking to one's sense of fairness'" (*Matter of McDougall v Scoppetta*, 76 AD3d 338, 341 [2010], *appeal withdrawn*, 17 NY3d 902 [2011], quoting *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], and citing, *inter alia*, *Matter of Kelly v Safir*, 96 NY2d 32, 38 [2002]). In *McDougall*, the petitioner's isolated use of cocaine resulted in his termination. The Second Department, "recogniz[ing] that the petitioner committed a serious infraction which militates against his continued employment as a firefighter," remitted the matter to the respondents to impose the lesser penalty of a fine, while permitting the petitioner to

retire as of the date of his now vacated termination so that he could collect his pension (76 AD3d at 432-343). In so doing, the court noted the devastating financial impact that loss of his pension would have on the petitioner's family, the isolated nature of the infraction, and the undisputed fact that the petitioner was otherwise an exemplary member of the Fire Department, considered to be a mentor and a role model.

Like the conduct of the firefighter in *McDougall*, petitioner's conduct, however unseemly, was an aberration from his otherwise exemplary career over approximately two decades. Before the proceedings at issue here, petitioner had never been subject to formal disciplinary charges, and indeed had earned a "highly competent" rating in his most recent performance review. He was the recipient of 12 medals for excellent police duty, one medal for meritorious police duty, and one commendation. Also similar to the situation in *McDougall* is the fact that termination would work an extreme hardship on petitioner's innocent family, three members of which are foster children whom petitioner and his wife adopted. *Matter of Harp v New York City Police Dept.* (277 AD2d 147 [2000], *revd* 96 NY2d 892 [2001]), cited by the dissent, is notably missing this last, critical, factor. We therefore disagree with the dissent that it is "far

more on point" than *McDougall*. Under these circumstances, even in light of the repellent behavior exhibited by petitioner, the deprivation of his retirement benefits is shocking to one's sense of fairness (*See Matter of Pell*, 34 NY2d at 233).

All concur except Sweeny, J. who dissents in part in a memorandum as follows:

SWEENY, J. (dissenting in part)

I agree with the majority that the Commissioner failed to establish by substantial evidence specifications 6 and 10 (leaving work early and falsifying business records). I also agree that the matter must be remanded for a determination of the appropriate penalty on the remaining specifications.

I must disagree, however, with the additional direction of the majority that, regardless of the penalty to be imposed, even if the Commissioner still sees fit to order termination, he must grant petitioner the right to apply for a vested interest retirement.

The law is clear that in our review of a penalty imposed by the Commissioner, we may not substitute our judgment for his but merely must determine whether that penalty is "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Town of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222, 237 [1974]; *Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

The majority's reliance on *Matter of McDougall* (76 AD3d 338 [2010], *appeal withdrawn*, 17 NY3d 902 [2011]), a Second Department case, is misplaced. There, the petitioner engaged in

one instance of taking cocaine. Here, petitioner, at different times engaged in taking nude photographs of a rape victim. He also compelled a young female suspect brought to the station for a minor motor vehicle matter to allow him to photograph her naked breast, falsely claiming it was in case she was brought in on later charges.

Certainly, a case far more on point is *Matter of Harp* v *New York City Police Dept*. (96 NY2d 892 [2001] *revg* 277 AD2d 147 [2000]). There, petitioner NYPD officer was found guilty after a disciplinary hearing of making false or misleading statements during an internal investigation interview. He was dismissed and his pension rights forfeited. We upheld the guilty finding, but found that the penalty was disproportionate to the misconduct and thus shocked the judicial conscience. Citing petitioner's record of 15 years' excellent service with no prior disciplinary record and his "Exceeds Standards" ratings, as well as the fact that "the false statements given by petitioner here were of relatively minor significance," we found the penalty "a shockingly excessive sanction here" (277 AD2d at 148). The Court of Appeals reversed, holding that "[a]n administrative penalty must be upheld unless it 'is so disproportionate to the offense as to be shocking to one's sense of fairness', thus constituting an abuse of

discretion as a matter of law . . . [U]nder the circumstance of this case, it cannot be concluded that, as a matter of law, 'the penalty of dismissal imposed by the Commissioner shocks the judicial conscience'" (*Matter of Harp,* 96 NY2d at 894, quoting *Matter of Kelly v Safir,* 96 NY2d 32, 39-40 [2001], *supra).*

The majority cannot question that the Commissioner engaged in anything other than a careful review of this case, including the effect the penalty would have on petitioner. Supporting the Commissioner's determination on the record before us is hardly the "rubber stamp" the majority so cavalierly refers to; it is, by the constraints of the limited review afforded us, whether we agree with it or not, completely supported by the record.

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Andrias, Acosta, Freedman, Richter, JJ.

5960 Terex Corporation, Index 651889/10
Plaintiff-Appellant-Respondent,

-against-

Bucyrus International, Inc.,
Defendant-Respondent-Appellant.

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Skadden, Arps, Slate, Meagher & Flom, LLP, New York (Maura Barry Grinalds of counsel), for appellant-respondent.

Sullivan & Cromwell LLP, Palo Alto, CA (Brendan P. Cullen, of the bar of the State of California, admitted pro hac vice, of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 7, 2011, which denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment on the cause of action for declaratory relief interpreting the parties' agreement, and granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment on the causes of action for specific performance requiring defendant to provide certain books and records and to engage in good faith efforts to resolve the parties' dispute before submitting the dispute to an independent accounting firm, unanimously modified, on the law, to grant plaintiff's motion for summary judgment on its cause of action for declaratory relief

and deny defendant's motion on said claim, and to declare that the post-closing adjustment provision in the parties' agreement authorizes adjustments based only on changes in valuation occurring during the period between the signing and the closing and not on any other accounting issues, to grant defendant's motion for summary judgment on the cause of action for specific performance requiring that defendant provide books and records and deny plaintiff's motion on said claim, and to deny plaintiff's motion for summary judgment on the cause of action requiring defendant to engage in good faith resolution of the dispute, and otherwise affirmed, without costs.

On November 23, 2009, plaintiff informed defendant that it was the winning bidder (on a bid of approximately $1.3 billion) at an auction by plaintiff to sell certain assets of its mining equipment business. Before entering into an asset and stock purchase agreement (ASPA), defendant conducted due diligence and was given access to plaintiff's management, books and records, and to plaintiff's independent auditor.

The ASPA set forth a process for determining the amount of a post-closing purchase price adjustment, which would be required if the final statement of Net Asset Value (NAV) deviated by more than $15 million from the target NAV of approximately $433

million established by the parties. Under Section 2.8 of the ASPA, the final statement of NAV was defined as the NAV statement (i) prepared by the buyer, if the seller did not object; or (ii) agreed to by the parties; or (iii) adjusted by a CPA firm if the parties could not resolve their disagreement in good faith.

In particular, under Section 2.8(a), the buyer was required, within 60 day after closing, to prepare a statement containing a calculation of NAV (as defined therein), as of the closing date (the NAVS). Under Section 2.8(b), the seller had 30 days from receipt of the NAVS to provide the buyer with a written objection thereto. Under Section 2.8(c), the buyer had 30 days from receipt to review and respond to the objection. If the parties could not resolve any disagreements over the post-closing adjustment within 30 days of the buyer's response,

> "after having used their good faith efforts to reach a resolution, they shall refer their remaining differences to Ernst & Young LLP ... who shall, acting as experts in accounting and not as arbitrators, determine on a basis consistent with the requirements of Section 2.8(a), and only with respect to the specific remaining accounting related differences so submitted, whether and to what extent the [NAVS] requires adjustment" (section 2.8[c]).

Defendant provided plaintiff with a NAVS that calculated NAV at $265,516,000 and proposed a $152,403,000 post-closing adjustment. Plaintiff timely objected. When the parties failed

to reach an agreement, defendant's counsel wrote to Ernst & Young to request their assistance, in accordance with Section 2.8 of the ASPA. Plaintiff then commenced this action seeking injunctive and declaratory relief, and the parties stipulated to seek by cross motions for summary judgment a determination of (1) plaintiff's request for access to the books and records of the mining business and account materials related to the NAVS prepared by defendant; (2) the proper interpretation of defendant's obligation under the ASPA to engage in good faith efforts to resolve the NAV dispute; and (3) the proper scope of jurisdiction and instruction to the CPA firm for any proceeding under Section 2.8(c) of the ASPA.

Reading the parties' agreement "as a harmonious and integrated whole" (*see Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]), we find that its post-closing adjustment provision was unambiguously intended solely to govern changes in the value of the assets acquired thereunder that occurred during the period between the signing of the contract and the closing date, and not to allow the buyer defendant to challenge the seller plaintiff's accounting methodology. To allow a designated CPA firm to resolve the parties' dispute by amending the $1.3 billion purchase price pursuant to defendant's

proffered interpretation by the approximately $150 million adjustment it sought, after competitive bidding in which defendant had prevailed by only $50 million, would be absurd and commercially unreasonable (*see Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [2010]).

Contrary to the motion court's finding, the parties' agreement is indistinguishable from that in *Westmoreland* in that both provide the exclusive remedy of indemnification for any financial misrepresentations by the seller, thereby precluding the use of the post-closing adjustment provision as a remedy. The court also misallocated the parties' burdens with respect to the buyer's due diligence, a significant factor barring defendant's claim for an adjustment (*see Westmoreland* at 359-360), since plaintiff's showing of defendant's unfettered precontractual access to its financial information was unrebutted. However, the court correctly found that it had the authority to instruct the CPA firm, which was expressly charged with being an expert and not an arbitrator, with the proper interpretation of the agreement (*see 936 Second Ave. L.P. v Second Corporate Dev. Co., Inc.*, 10 NY3d 628 [2008]).

Defendant's obligation to provide books and records in connection with the post-closing adjustment is governed by the

specific requirements of Section 2.8(c) of the ASPA, not the general inspection provisions of Sections 5.20(c) and 5.26(a) (*see Oakgrove Constr., Inc. v Genesee Val. Nurseries, Inc.*, 39 AD3d 1283 [2007]). Pursuant to Section 2.8(c), the obligation to provide books and records is triggered by the submission of the dispute to the CPA firm after the prerequisites set forth therein have been fulfilled. Each party is required to provide relevant documents and information to the CPA firm during the proceeding before it, and to each other as directed by the CPA firm. Because this has yet to occur, defendant's motion for summary judgment dismissing the cause of action for specific performance requiring that defendant provide books and records should have been granted and plaintiff's motion denied.

There exist issues of fact as to whether defendant had engaged in good faith efforts to resolve the dispute; the court

should not have tied its determination to whether defendant complied with any obligation to provide books and records.

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

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

6034 Victor Barocas, Index 314374/10
Plaintiff-Respondent,

-against-

Deborah Barocas,
Defendant-Appellant.

Mulhern & Klein, Wantagh (Jeff Klein of counsel), for appellant.

Raoul Felder & Partners, PC, New York (Barry Abbott of counsel), for respondent.

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered May 4, 2011, which denied defendant wife's motion for summary judgment declaring void the parties' November 1, 1995 prenuptial agreement, affirmed, without costs.

We reject defendant's contention that the property division provisions of the prenuptial agreement are unconscionable. Defendant failed to establish that her execution of the agreement was the result of inequitable conduct on plaintiff's part. Rather, the parties fully disclosed their respective assets and net worth, and the agreement was reviewed by independent counsel, who defendant admits had told her that the agreement was

"completely unfair" and advised against signing it (*Strong v Dubin*, 48 AD3d 232 [2008]; *Colyer v Colyer*, 26 AD3d 303, 304 [2006]; *Cron v Cron*, 8 AD3d 186 [2004], *lv dismissed* 7 NY3d 864 [2006], *lv denied* 10 NY3d 703 [2008]). The fact that plaintiff's attorney recommended defendant's counsel, and that plaintiff paid her counsel's fees, is insufficient to demonstrate duress or overreaching (*see Smith v Walsh-Smith*, 66 AD3d 534 [2009], *lv denied* 14 NY3d 704 [2010]). Defendant's claim that she believed that there would be no wedding if she did not sign the agreement, that the wedding was only two weeks away and that wedding plans had been made, is insufficient to demonstrate duress (*see Colello v Colello*, 9 AD3d 855, 858 [2004]). Although application of the provisions would result in plaintiff retaining essentially all the property, courts will not set aside an agreement on the ground of unconscionability where inequitable conduct was lacking and simply because, in retrospect, the agreement proves to be improvident or one-sided (*see Christian v Christian*, 42 NY2d 63, 72 [1977]; *McCaughey v McCaughey*, 205 AD2d 330, 331 [1994]). The circumstances surrounding the execution of the agreement disclose no issue of fact as to whether there was overreaching. We therefore adhere to the general rule that "'[i]f the execution of the agreement . . . be fair, no further inquiry will be

made'" (*Levine v Levine,* 56 NY2d 42, 47 [1982], citing *Christian,* 42 NY2d at 73).

Moreover, "[d]uly executed prenuptial agreements are accorded the same presumption of legality as any other contract" (*Bloomfield v Bloomfield,* 97 NY2d 188, 193 [2001]). We disagree with the dissent's conclusion that there is an issue of fact as to whether the property division provisions of the instant agreement are unconscionable. An unconscionable contract is one "which is so grossly unreasonable as to be unenforcible because of an absence of meaningful choice on part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*King v Fox,* 7 NY3d 181, 191 [2006]). Here, meaningful choice is not an issue inasmuch as defendant knowingly entered into the agreement against the advice of her counsel.

Although defendant's waiver of spousal support was not unfair or unreasonable at the time she signed the agreement, given her knowing and voluntary execution thereof with benefit of counsel, factual issues exist as to whether the waiver would be unconscionable as applied to the present circumstances (*see* Domestic Relations Law § 236[B][3][3]). Child support award for the parties' two children has not been established, and it is unclear whether defendant would become a public charge without

spousal support (*see Cron*, 8 NY3d at 187; *see also* Domestic Relations Law § 236[B][3][3]; General Obligations Law § 5-311; *Bloomfield*, 97 NY2d at 194). Also, it is unclear whether waiver of all spousal support would result in inequality "so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense" (*Christian*, 42 NY2d at 71 [internal quotation marks omitted]). In particular, the evidence shows that, despite the 15-year marriage, under the agreement, plaintiff would be entitled to retain property valued at about $4,600,000, while defendant would be entitled to only an IRA account valued at approximately $30,550. She claims that she has no other assets or sources of income, and could no longer work, given that she is now 50 years old and that plaintiff had thwarted her efforts to get a college education and pursue a career during the marriage. Plaintiff, however, contends that defendant chose not to get a college degree or pursue a career, and that, while he supported her various business projects, the projects failed or she would quit after losing interest. Accordingly, we find that issues of fact exist as to whether the

maintenance waiver would be unconscionable as applied to the current circumstances.

All concur except Freedman and Manzanet-Daniels, JJ. who dissent in part in separate memoranda as follows:

MANZANET-DANIELS, J. (dissenting in part)

I agree with the majority that the motion court properly held that an issue of fact exists as to whether maintenance waiver contained in the parties' prenuptial agreement is unconscionable under the standard set forth in section 236(B)(3) of the Domestic Relations Law. I would also find that an issue of fact exists as to whether the property waiver contained in the agreement is unconscionable (*see Christian v Christian*, 42 NY2d 63 [1977]; *Bloomfield v Bloomfield*, 281 AD2d 301 [2001], *revd on other grounds* 97 NY2d 188 [2001]).

Defendant wife was born in Guyana, the second of seven children. She arrived in the United States in 1981, at the age of twenty-one. She obtained a GED in 1982, and worked menial jobs. In 1989, she worked part-time as a receptionist for plaintiff husband's family business. While working there, she and plaintiff began to date, and in 1993, she moved in with plaintiff at his apartment located on Sutton Place. Other than sporadic attempts at small business ventures, the wife did not work outside the home for the duration of the marriage (indeed, to the present day). She has no further education and no special skills.

The parties were married on November 11, 1995. A prenuptial agreement was presented to the wife approximately two weeks prior to the wedding. Schedules attached to the agreement indicated that plaintiff husband had no liabilities and total assets in the amount of approximately $580,000, including a cooperative apartment and an interest in a family trust with an unspecified value. Defendant wife, on the other hand, had only $2,500 in a bank account, jewelry and a fur coat valued at less than $20,000, collectively. Under the terms of the prenuptial agreement, the wife waived any claims to any property that the husband owned or acquired not only prior to, but also subsequent to the marriage. She further waived any right of election. The agreement contained a complete maintenance waiver, irrespective of the length of the marriage or whether the marriage produced children. The agreement also provided that the wife would forfeit any gifts or jewelry she had been given before and during the marriage.

The parties had been married 15 years when the husband initiated divorce proceedings in late 2010. Their sons are presently 14 and 7 years of age.

In January 2011, the wife moved for summary judgment declaring the parties' prenuptial agreement void. The motion court sustained the property division provisions of the

prenuptial agreement and determined that her waiver of maintenance was fair and reasonable at the time of the execution of the agreement, but set a hearing to determine whether the maintenance waiver was unconscionable in light of present circumstances.

I agree with the majority that the motion court properly set down for a hearing the issue of whether the maintenance waiver is unconscionable. I would also find, however, that an issue exists as to whether the property division provisions of the prenuptial agreement are unconscionable under the common-law standard. The instant agreement is so one-sided and the inequality "so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense" (*Christian v Christian*, 42 NY2d at 63 [internal quotation marks omitted]).

The husband's net worth as of the execution of the agreement was $580,000; the wife's was $19,200, only $2,500 of which represented liquid assets she was entitled to retain upon dissolution of the marriage. The husband has a current net worth of approximately $4.6 million; the wife has a current net worth of $30,554. Thus, during the 15-year period the parties were married, the husband's net worth increased in excess of $4 million, whereas the wife's net worth only marginally increased.

Given the disparity of the property distribution division, it would be difficult to conceive of an instance in which the unconscionability standard has any real purpose, if not applied to this agreement. The instant agreement does not, like others we have upheld, provide some measure of distribution to the non-monied spouse varying in degree based on the length of the marriage and whether the marriage has produced any children. Indeed, not only does the wife receive no property, under any circumstances (nor any maintenance), but she is required to forfeit jewelry and gifts given to her during the marriage.

In *Bloomfield v Bloomfield*, 281 AD2d 301 [2001], *revd on other grounds* 97 NY2d 188 [2001], *supra*, this Court affirmed Supreme Court's determination that the parties' prenuptial agreement was unenforceable as per the General Obligations Law in effect at the time. We went on to state:

> "[I]t also appears that the agreement could be held unconscionable. . . . This prenuptial agreement, which provides for no division of property at the end of the marriage, without regard for when, how or why it ends, and absolutely no right of election, is manifestly unfair. No rational person would agree to this arrangement and no fair and honest person would accept it. Equity must intervene to prevent an injustice."

(281 AD2d at 305 [internal citations omitted]). Although the

statutory standard set forth in Section 236(B)(3) of the Domestic Relations Law may be inapplicable to adjudge the property division provisions of the agreement, traditional common-law standards apply to test the validity and enforceability of the agreement as a whole *(see Christian v Christian*, 42 NY2d 63 [1977], *supra* [holding property division provisions of separation agreement so unconscionable as to be unenforceable]). There are instances in which an agreement is so one-sided that, in the words of the Court, "no [person] in his [or her] senses and not under delusion would make on the one hand, and [] no honest and [fair] person would accept on the other" (*Christian*, 42 NY2d at 71 [internal quotation marks omitted]). We have held that equitable principles must be taken into account in deciding whether to vacate property settlement agreements between spouses on grounds that might otherwise be insufficient to nullify an ordinary contract since "[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith . . . [I]t is appropriate to take into account these common-law equitable factors, notwithstanding the inapplicability here of the broader fair and reasonable [when made] and . . . not unconscionable at final judgment statutory standard" (*Goldman v Goldman*, 118 AD2d 498,

500 [1986] [internal quotation marks omitted]).

The parties' agreement provides for no division of property at the end of a lengthy marriage producing two children, without any consideration to the contribution the wife may have made towards its acquisition. Indeed, the agreement requires that the wife return any jewelry and gifts she had been given before and during the marriage. I would accordingly find that an issue of fact exists as to the unconscionability of the property division provision of the parties' prenuptial agreement, and remand for further consideration.

FREEDMAN, J. (dissenting in part)

I respectfully dissent and would modify the decision below as follows. I agree that the wife is not entitled to summary judgment declaring the parties' prenuptial agreement dated November 1, 1995 void as unconscionable with respect to either the property division or maintenance waiver, but would find that the conscionability of the property division or equitable distribution waiver, as well as that of the maintenance waiver, should be explored at a hearing.

The agreement, entered into 15 years earlier, less than two weeks before the marriage, provided that the parties waive any claim to maintenance in the event of divorce and that all property acquired by either party before or during the marriage shall remain the separate property of that party except for gifts or jewelry or family heirlooms given by one party to the other, which must be returned to the gifting party in the event of divorce. Prior to the signing of the prenuptial agreement, the husband retained counsel for the wife who advised the wife that the agreement was completely unfair and that she should not sign it.

Defendant signed the prenuptial agreement despite the fact that she had not worked for two years prior to the marriage; that

she had dropped out of high school in Guayana (but later obtained a G.E.D.); that her future husband was a lawyer; that her only assets were $2,500 other than jewelry plaintiff had given her; that plaintiff husband's assets were in excess of $900,000; and that counsel advised against signing the agreement.

The parties now have two children ages 7 and 13. The husband owns the apartment that he purchased during the marriage for $900,000 but may be worth $3,000,000 (with no mortgage). His Net Worth statement lists bank, investment and retirement accounts in his name valued at approximately $1,745,000. The evidence shows that, despite their 15-year marriage, under the agreement, plaintiff would be entitled to retain property valued at about $4,600,000, while defendant would have no other assets than an IRA account valued at approximately $30,550. She claims that given that she is now 50 years old and that plaintiff had thwarted her efforts to get a college education and pursue a career during the marriage, the waiver provisions are unconscionable. Plaintiff, however, contends that defendant chose not to get a college degree or pursue a career, and that, while he supported her various business projects, the projects failed or she would quit after losing interest.

The motion court held that Domestic Relations Law § 236(B)(3) permits parties to make agreements before, after or during marriage concerning property division and spousal maintenance, but that maintenance provisions are subject to General Obligations Law § 5-311, which prohibits waivers of maintenance where the spouse is in danger of becoming a public charge. Additionally, Domestic Relations Law § 236(B)(3) requires that the terms of maintenance provisions be "fair and reasonable at the time of the making of the agreement and . . . not unconscionable at the time of entry of final judgment." With respect to property division provisions of an agreement, the court noted that they are void as unconscionable if they are unconscionable on their face. The court then determined that defendant wife failed to show that there was any "inequitable conduct or other infirmity" on the plaintiff's part inducing her to sign the agreement, and she signed it willingly in spite of her lawyer's contrary advice. The court found that the property division aspects of the agreement, "while perhaps improvident for the [w]ife, are not unconscionable." With respect to spousal support, the court found that the wife's waiver of maintenance was fair and reasonable at the time of execution, but that it was less clear whether it is unconscionable under the present

circumstances, in part because the parties have two children and the child support award had not yet been determined. The court denied defendant's request for summary judgment voiding the agreement and deferred determination of unconscionability with reference to the maintenance waiver to a hearing at which time the issue of the 50-year old wife's failure to work outside the home or pursue an education would be relevant.

The court, in effect, granted summary judgment to plaintiff with respect to the property allocation which included return of all jewelry and heirlooms that he gave defendant before and during the marriage. However, it did not decide the maintenance issue based on the unconscionability provision of DRL § 236(B)(3)(3) and the danger of becoming a public charge provision of General Obligations Law § 5-311.

Although the parties fully disclosed their respective assets and net worth, and the agreement was reviewed by independent counsel, who defendant admits had told her that the agreement was "completely unfair" and advised against signing it (*Strong v Dubin*, 48 AD3d 232 [2008]; *Cron v Cron*, 8 AD3d 186 [2004], *lv dismissed* 7 NY3d 864 [2006], *lv denied* 10 NY3d 703 [2008]), the court should still look at the impact of the agreement at the time of its implementation (*Cron* at 186-187; *see also Bloomfield*

v Bloomfield, 97 NY2d 188, 194 [2001]). Defendant's claim that she believed that there would be no wedding if she did not sign the agreement, that the wedding was only two weeks away and that wedding plans had been made, may have been insufficient to demonstrate duress (*see Colello v Colello*, 9 AD3d 855, 858 [2004]). However, where, as here, application of the provision would result in plaintiff retaining essentially all the property acquired before and during the marriage and thus appears "manifestly unfair to a spouse because of the other's overreaching," the court should make sure it does not contain an unconscionable bargain that "no [person] in his [or her] senses and not under delusion would make" (*Christian v Christian*, 42 NY2d 63, 71, 72 [1977] [internal quotation marks omitted]; *see Bloomfield*, 97 NY2d at 194 [2001]; *McCaughey v McCaughey*, 205 AD2d 330, 331 [1994]).

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

ENTERED: APRIL 17, 2012

CLERK

Sweeny, J.P., Renwick, DeGrasse, Richter, JJ.

7018 Rocio Rojas, Index 114773/07
Plaintiff-Respondent-Appellant,

-against-

Michael Palese, M.D., et al.,
Defendants-Appellants-Respondents.

_____

Edward J. Guardaro, Jr., White Plains, for appellants-respondents.

Godosky & Gentile, PC, New York (Diane K. Toner of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about June 18, 2010, which, after a jury verdict in plaintiff's favor, denied defendants' motion to set aside the verdict, and denied plaintiff's cross motion to increase the damages award, unanimously modified, on the facts, to vacate the award for future pain and suffering, and the matter remanded for a new trial solely as to damages for future pain and suffering, unless defendants, within 30 days of service of a copy of this order, with notice of entry, stipulate to increase the award for future pain and suffering to the amount of $350,000, and to the entry of judgment in accordance therewith, and otherwise affirmed, without costs.

The jury's finding that defendant Palese deviated from the

standard of care in causing plaintiff's aorta to tear during a laparoscopic donor nephrectomy was based on legally sufficient evidence and was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]). Defendants' objections to the qualifications of plaintiff's vascular surgery expert go to the weight and not the admissibility of the expert's testimony (*Williams v Halpern*, 25 AD3d 467, 468 [2006]); the weight to be accorded to conflicting expert testimony is a matter for the jury (*see Torricelli v Pisacano*, 9 AD3d 291 [2004], *lv denied* 3 NY3d 612 [2004]).

Plaintiff's expert was properly allowed to testify as to future damages since there was no showing of a willful failure to disclose this testimony or of resulting prejudice to defendants (*see* CPLR 3101[d][1][i]; *Colome v Grand Concourse 2075*, 302 AD2d 251 [2003]). The videotape and photographs proffered by defendants were properly excluded; the limited probative value of a demonstration of Palese's performance of the same procedure on another patient was outweighed by the prejudicial effect of showing the jury the complexity of the surgery and the level of skill exhibited by Palese (*see Glusaskas v John E. Hutchinson, III, M.D., P.C.*, 148 AD2d 203, 205-206 [1989]).

The jury instructions on liability, which presupposed an

injury, were not confusing since defendants only contested plaintiff's claim as to the cause of the injury, i.e., a departure from the standard of care.

As a result of the injury and surgery, plaintiff was left with a large raised scar across her abdomen. Plaintiff testified that she was embarrassed by the scar, it affected the way she dresses and that she does not like her scar to be seen. Furthermore, plaintiff offered medical testimony that her scar could worsen if she were to become pregnant, and may require surgical repair in the future. Here, the damages award for future pain and suffering deviated from what is reasonable compensation under the circumstances to the extent indicated.

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

ENTERED: APRIL 17, 2012

CLERK

Saxe, J.P., Sweeny, Freedman, Manzanet-Daniels, JJ.

7051 Elizabeth Gonzalez, Index 21178/04
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 7, 2011, which granted plaintiff's motion to renew and adhered to its prior determinations granting defendant's motion to dismiss the complaint and denying plaintiff's cross motion to apply the doctrine of equitable estoppel, unanimously affirmed, without costs.

Plaintiff alleges that she was injured when she slipped and fell on an accumulation of snow and ice in a public school parking lot. Under the circumstances, the action was properly dismissed since defendant is not a proper party. The 2002 amendments to the Education Law (L 2002, ch 91), and the alleged public confusion that ensued, do not justify holding defendant

liable for plaintiff's injuries (*see Bailey v City of New York*, 55 AD3d 426 [2008]; *Perez v City of New York*, 41 AD3d 378, 379 [2007], *lv denied* 10 NY3d 708 [2008]).

Contrary to plaintiff's argument, the City is not equitably estopped from claiming that it is not a proper party. In its answer, the City specifically denied plaintiff's allegations that it controlled, maintained, or managed the school premises, or had any duty to remove snow and ice from the grounds (*see Flores v City of New York*, 62 AD3d 506 [2009]). That denial should have alerted plaintiff that she had sued the wrong party, and, when the City served the answer, plaintiff had adequate time to seek leave to file a late notice of claim naming the correct defendant.

The circumstances of this case can be readily distinguished from those of *Padilla v Department of Educ. of the City of N.Y.* (90 AD3d 458 [2011]), which concerned another injury on the grounds of a City public school. In *Padilla*, we held that the doctrine of equitable estoppel barred the City from denying that it was a proper party because its answer did not alert the plaintiff that it lacked control over the school premises, but instead merely objected that the attempted service of the notice of claim was improper (90 AD3d at 458). We also found that,

after the notice of claim was filed, the City's wrongful or negligent actions discouraged the plaintiff from serving a timely amended notice of claim (*id.* at 459).

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: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7379 In re Brian F.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about December 1, 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 sexual abuse in the first and third degrees, and placed him on enhanced supervision 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, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The combination of appellant's acts and statements supports the

conclusion that he had sexual contact with the victim, and that the contact was for the purpose of sexual gratification (*see e.g. Matter of Najee A.*, 26 AD3d 258 [2006], *lv denied* 7 NY3d 703 [2006]; *Matter of Kenny O.*, 276 AD2d 271 [2000], *lv denied* 96 NY2d 701 [2001]).

We have considered and rejected appellant's remaining claims.

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7380 Fook Cheung Lung Realty Corp., Index 106519/06
Plaintiff, 590177/07
590083/08
-against- 590384/09
590929/09
Yang Tze River Realty Corp., et al.,
Defendants.
- - - - -
[And Third Party Actions]
- - - - -
J&A Concrete Corp., et al.,
Third Third-Party Plaintiffs-Respondents,

-against-

QBE Insurance Corporation,
Third Third-Party Defendant-Appellant.

_____

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Thomas R. Maeglin of counsel), for appellant.

Law Offices of Jeffrey S. Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for respondent.

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Order and judgment, Supreme Court, New York County (Joan A. Madden, J.), entered April 27, 2010, granting J&A Concrete Corp.'s motion for summary judgment declaring that QBE Insurance is obligated to defend and indemnify it in an underlying property damage action, unanimously affirmed, with costs.

J&A provided its insurer with notice of plaintiff's property damage claim within a reasonable time (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743 [2005]). J&A made

a prima facie showing on its motion through the affidavit of its vice president stating the date that J&A arrived at the construction site and the extent of its duties and denying knowledge of the property damage until J&A's receipt of an attorney's letter in May of 2007, coupled with the deposition testimony of plaintiff's president regarding the date he first noticed the damage, which was before J&A's arrival. QBE's claim in opposition that J&A had knowledge of the damage before May of 2007 failed to raise an issue of fact, as evidence of conversations between plaintiff's president and a representative of the general contractor working at the adjoining premises and of complaints to the Department of Buildings would not necessarily have put J&A on notice, and it is mere conjecture that J&A was in fact told by others of the damage. QBE's claimed need for discovery to oppose the motion reflected an ineffectual

mere hope (*see MAP Mar. Ltd. v China Constr. Bank Corp.*, 70 AD3d 404 [2010]). In view of the foregoing, we also find that the determination as to the duty to indemnify was not premature.

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7381 Mohammad Zinnah, Index 304689/09
Plaintiff-Respondent,

-against-

Isabella City Carting Corp., et al.,
Defendants-Appellants.

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of counsel), for appellants.

Mitchell Dranow, Sea Cliff, for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 3, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Assuming that defendants met their burden, the record presents triable issues of fact as to whether the injuries plaintiff sustained to his lumbar spine and to his cervical spine were serious within the meaning of section 5102(d). Plaintiff submitted the affirmed MRI reports revealing multiple herniations, as well as the affirmation of a neurologist who found diminished range of motion in multiple planes, and attributed the subject accident as the cause. Plaintiff also submitted the affidavit of his chiropractor who noted diminished

ranges of motion, addressed causation, and explicitly rejected degeneration as the cause of the spinal injuries (*see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481 [2011]). In view of the foregoing, it is unnecessary to address plaintiff's proof with respect to the injuries he sustained to his left knee (*see Linton v Nawaz*, 14 NY3d 821 [2010]).

Defendants failed to establish their entitlement to judgment as a matter of law as to the 90/180-day claim. Defendants failed to meet their burden as to causation, and none of their experts examined plaintiff during the relevant period of time (*see Feaster v Boulabat*, 77 AD3d 440 [2010]; *Alexandre v Dweck*, 44 AD3d 597 [2007]).

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

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7384 In re Blerim M.,
Petitioner-Respondent,

-against-

Racquel M.,
Respondent-Appellant.

Steven N. Feinman, White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

Karen P. Simmons, Brooklyn (Janet Neustaetter of counsel), attorney for the children.

Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about December 1, 2010, which, after a nonjury trial, modified a prior order, Family Court, Albany County (Gerard E. Maney, J.), dated August 1, 2005, to the extent of awarding sole physical and legal custody of the parties' four children to petitioner father, with liberal visitation afforded to respondent mother, unanimously affirmed, without costs.

Pursuant to the prior order of the Albany Family Court, the parties shared joint custody of their four children, with primary physical custody to the respondent mother who was permitted to relocate to North Carolina with the children, with liberal visitation to the father. Subsequently, the father brought the

instant proceeding challenging that arrangement and alleging that a change of circumstances had occurred in that, inter alia, the mother had been home-schooling the children without his knowledge and consent; another tenant had been residing in her apartment and she refused to inform the father who that person is; the mother had instructed the children not to tell the father who was supervising them, when they were hurt or any such information about them; and the mother interfered with the father's visits with the children.

In light of, inter alia, the mother's surreptitious home-schooling of the children, over the father's objections, despite being completely unqualified to do so; her failure to keep the father informed of the children's address, living conditions, educational progress, or any other relevant details; and her habit of repeatedly leaving the children in the care of multiple members of her church who disciplined the children by inflicting corporal punishment, the father has demonstrated that, since the prior order had been entered, in or around 2005, there has been a significant change of circumstances such that a change in the custody arrangement is in the children's best interests (*see Matter of Diffin v Towne*, 47 AD3d 988, 990 [2008], *lv denied* 10 NY3d 710 [2008]).

The record further establishes that the parties' children were negatively affected by the mother's behavior, which, among other things, caused them to fall behind their peers, academically and socially. On the other hand, the children have thrived in the father's custody. He has provided a stable home for the children, and has met their educational and medical needs (*see Matter of Westfall v Westfall*, 28 AD3d 1229, 1230 [2006], *lv denied* 7 NY3d 706 [2006]; *Matter of Williams v Williams*, 66 AD3d 1149, 1151 [2009]). There is no evidence to support a disruption of the stability the children have experienced in the father's care (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]).

Moreover, the mother has demonstrated a complete unwillingness to fulfill her obligations under the prior joint custody order, and, thus, joint custody is inappropriate (*see Matter of Rosario WW. v Ellen WW.*, 309 AD2d 984, 986 [2003]).

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7385 Maninder Bhugra, Index 110825/07
Plaintiff-Appellant,

-against-

Massachusetts Casualty Insurance Company, et al.
Defendants-Respondents.

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Maninder Bhugra, appellant pro se.

Rivkin Radler LLP, Uniondale, (Cheryl F. Korman of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered February 1, 2011, which, insofar as appealed from as limited by the briefs, granted the cross motion of defendants Massachusetts Casualty Insurance Company, Centre Life Insurance Company, Centre Solutions, and Zurich American Insurance Company (the MCIC defendants) to compel plaintiff to accept service of its answer, unanimously affirmed, without costs.

Plaintiff had no basis to reject the MCIC defendants' answer, which was timely served in accordance with the written

stipulation that was signed by plaintiff's prior counsel and counsel for the MCIC defendants (*see* CPLR 2104; *see also La Marque v North Shore Univ. Hosp.*, 120 AD2d 572 [1986]).

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: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7388 Michael Anthony Miloscia, Index 116881/09
Plaintiff-Respondent,

-against-

B.R. Guest Holdings, LLC, et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

-against-

Metropolitan Transportation
Authority, et al.,
Third-Party Defendants-Respondents,

City of New York,
Third-Party Defendant.

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Fox Rothschild LLP, New York (Ernest E. Badway of counsel), for appellants.

The Sattiraju Law Firm, P.C., Lynbrook (Ravi Sattiraju of counsel), for Michael Anthony Miloscia, respondent.

Wallace D. Gossett, Brooklyn (Lawrence A. Heisler of counsel), for Metropolitan Transportation Authority and New York City Transit Authority, respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered August 18, 2011, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint, granted third-party defendants Metropolitan Transportation Authority and New York City Transit Authority's (together "NCYTA") motion to dismiss the third-party complaint

against them, and denied defendants'/third-party plaintiffs' cross motion for summary judgment on the third-party complaint, unanimously modified, on the law, to the extent of granting that portion of defendants' summary judgment motion seeking dismissal of the breach of contract claim against defendant Pamela Friedl, and otherwise affirmed, without costs.

In this action for employment discrimination and breach of an agreement to provide health insurance benefits, plaintiff, who began employment with defendant BR Guest on April 29, 2009, was struck by a bus owned and operated by third party defendant New York City Transit Authority (NYCTA) and hospitalized on July 16, 2009, shortly before he became eligible for health insurance benefits pursuant to the offer of employment letter which provided that plaintiff would be eligible for benefits on the first day of the month following his completion of three months of employment (i.e., August 1, 2009). The parties dispute the date of plaintiff's termination, which plaintiff maintains occurred on August 4, 2009, when defendant Pamela Friedl, BR Guest's corporate recruiter, sent plaintiff's mother a letter stating, in effect, that plaintiff had been terminated as of the date of the accident. In light of the August 4th 2009 letter that plaintiff was terminated on the same day as the accident which caused his disability, we find that issues of fact exist as

to whether, among other things, defendants "engage[d] in a good faith interactive process that assesses the needs of the disabled individual and the reasonableness of the accommodation requested," as required under the New York State and City Human Rights Laws ("HRL") (*see Phillips v City of New York*, 66 AD3d 170, 176 [2009]).

Defendant Friedl testified that she was one of several BR Guest employees who determined that plaintiff had to be terminated following his accident. As noted above, she also authored the letter of termination. Based on this evidence, we find that the motion court did not err in denying that portion of her motion seeking dismissal of plaintiff's HRL claims against her.

BR Guest's motion for summary judgment on the breach of contract claim was also properly denied. Although an employee may not maintain an action for breach of contract based upon provisions contained in an employee manual where that manual also expressly provides that the employment remains at-will (*see Lobosco v New York Tel. Co./NYNEX*, 96 NY2d 312, 316-17 [2001]), plaintiff's contract claim is not for termination, but rather for benefits, including health insurance. In other words, plaintiff is suing "for agreed compensation for fully completed past services" (*Falcone v EDO Corp.*, 141 AD2d 498, 499 [1989]). There

are issues of fact regarding whether he was unlawfully terminated on August 4 and whether he had earned eligibility for health insurance benefits prior to his termination (*id.*).

Plaintiff's contract claim against Friedl should be dismissed because she was merely an employee and not a party to any contract between plaintiff and BR Guest (*see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 914-915 [1978]).

Defendants have failed to preserve their argument that plaintiff's contractual claim for health insurance benefits is preempted by the Employee Retirement Income Security Act (29 USC §1001 *et seq*). In any event, we find that plaintiff's contract claim is not preempted by ERISA (*see Nealy v US Healthcare HMO*, 93 NY2d 209, 217-19 [1999]).

Defendants may not seek contribution from NYCTA since the injury which they allegedly caused — violation of plaintiff's human rights — is not the same as NYCTA's alleged negligence in striking him with their bus (*see Gonzalez v Jacoby & Myers*, 258 AD2d 560, 560-61 [1999]). Nor may they seek to shift any loss to

NYCTA via the doctrine of common-law indemnification since they are being sued entirely for their own alleged wrongdoing, not derivatively (*see Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1985]).

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels. JJ.

7389 In re Eugene T.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 20, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree, and placed him on probation for 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it adjudicated appellant a juvenile delinquent and placed him on probation rather than adjudicating him a person in need of supervision. The disposition 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]). The underlying incident was a serious and

violent attack by appellant on his mother and sister. In addition, appellant had a history of violence and intimidation at home and at school, as well as gang associations.

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7391-
7392 In re Messiah T., and Another,

Children Under the Age
of Eighteen Years, etc.,

Karen S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about August 16, 2010, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent mother had neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence supports the finding that respondent neglected the children by failing to provide proper supervision or guardianship (*see* Family Ct Act § 1012[f][i][B]). Indeed, respondent admitted that she had left the children in the care of their maternal grandmother, who had a history of drug

addiction, and her ex-boyfriend, who had a history of drug abuse and domestic violence, and was on parole for drug possession (*see Matter of Victor V.*, 261 AD2d 479, 479-480 [1999], *lv denied* 93 NY2d 819 [1999]; *Matter of Synovia G.*, 163 AD2d 257 [1990]). In addition, respondent acknowledged that she was a recreational drug user and admitted testing positive for narcotics. Although respondent was enrolled in a drug treatment program, the record shows that she tested positive for drug use while participating in the program, thereby establishing imminent risk to the children's physical, mental and emotional condition (*see* Family Ct Act § 1012[f][i][B]; *Matter of Keira O.*, 44 AD3d 668, 670-671 [2007]). The finding of neglect is also supported by evidence that respondent was aggressive with petitioner's staff, and had failed to continue treatment for her mental illness despite suicidal thoughts (*see Matter of Kayla W.*, 47 AD3d 571, 572 [2008]; *Matter of Caress S.*, 250 AD2d 490 [1998]).

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7394-
7395 In re City of New York, Index 401266/10
Petitioner-Respondent,

-against-

American Pipe and Tank Lining Co., Inc.,
Claimant-Appellant.

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Goldstein, Rikon & Rikon, P.C., New York (Jonathan Houghton of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Rochelle Cohen of counsel), and Carter Ledyard & Milburn LLP, New York (John R. Casolaro of counsel), for respondent.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered February 14, 2011, which denied the claimant's motion for an advance payment for the subject trade fixtures, and granted petitioner's cross motion for summary judgment dismissing the fixture claim, unanimously affirmed, without costs. Order, same court and Justice, entered May 20, 2011, which, to the extent appealed from as limited by the briefs, denied claimant's motion to renew, unanimously affirmed, without costs.

The documentary evidence demonstrates that claimant and nonparty 538-540 West 35th Corporation (538 Corporation), the latter of which owned the condemned real property at issue, were owned and controlled by the same person. As a result, the IAS court correctly held that claimant was not entitled to additional

compensation for trade fixtures, since petitioner paid 538 Corporation for condemnation of the real property based on a determination that redevelopment, and disposal of the fixtures, is the highest and best use of the property (*Matter of West Bushwick Urban Renewal Area Phase 2,* 69 AD3d 176, 182-183 [2009]).

The motion to renew was correctly denied since claimant presented no reasonable justification for failing to present the "new facts" on the prior motion (CPLR 2221[e][3]; *Henry v Peguero*, 72 AD3d 600, 602 [2010], *appeal dismissed* 15 NY3d 820 [2010]; *see also Cabrera v Gilpin*, 72 AD3d 552, 553 [2010]). Contrary to claimant's contention, the issue of 538 Corporation's ownership was not raised for the first time at oral argument on the prior motions. In any event, the new documents and affidavits regarding ownership would not have changed the prior determination (CPLR 2221[e][2]).

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

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

ENTERED: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7396 The People of the State of New York, Ind. 3313/08
Respondent,

-against-

Richard Almonte,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered on or about April 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: APRIL 17, 2012

CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7399N In re Grace Colon, Index 118161/09
Petitioner-Appellant,

-against-

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

Grace Colon, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Francis F. Caputo of counsel), for respondents.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered November 29, 2010, denying the petition to vacate an arbitration award dated December 7, 2009, and dismissing the proceeding brought pursuant to Education Law § 3020-a and CPLR 7511, unanimously affirmed, without costs.

The arbitration award was made in accord with due process, is supported by adequate evidence, and is rational and not arbitrary and capricious (*see City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445, 450 [2010], *affd* 17 NY3d 917 [2011]). Contrary to petitioner's contention, "[h]earsay evidence can be the basis of an administrative determination" (*Matter of Gray v Adduci*, 73 NY2d 741 [1988]). Each of the specifications pertaining to the incidents involving students was supported not only by consistent, albeit unsworn, statements by

several students who witnessed the incidents, but also by testimony from either the school principal or the school psychologist, or both, who investigated the incidents, including consulting with the students involved. In her own testimony, petitioner generally acknowledged the incidents, while offering differing exculpatory accounts thereof. The hearing officer's credibility findings in favor of respondents' witnesses are entitled to deference (*see Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856 [2011]). We note particularly that petitioner's accounts of the incidents were uncorroborated. The testimony of respondents' witnesses supports the hearing officer's determinations as to the remaining specifications.

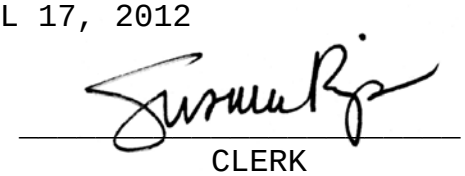
We do not find the penalty of termination so disproportionate to the multiple specifications upheld charging petitioner with verbal and physical abuse of students and faculty members as to shock our sense of fairness, even considering the mitigating factors of petitioner's recurrent health issues and

the recent death of her mother (*see Matter of Kaufman v Wells*, 56 AD3d 674 [2008], *lv denied* 13 NY3d 707 [2009]).

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

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

ENTERED: APRIL 17, 2012



CLERK

Andrias, J.P., Friedman, Moskowitz, Freedman, Manzanet-Daniels, JJ.

7400N Hassan Shabazz, Index 14390/03
Plaintiff,

-against-

The City of New York, et al.,
Defendants.
- - - - -
[And a Third-Party Action]
- - - - -
The Perecman Firm, PLLC,
Nonparty Appellant,

-against-

Segal & Lax, P.C.,
Nonparty Respondent.

The Perecman Firm, PLLC, New York (Peter D. Rigelhaupt of counsel), for appellant.

Segal & Lax, P.C., New York (Patrick Daniel Gatti of counsel), for respondent.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 2, 2011, which, after a hearing for the judicial determination of the apportionment of legal fees earned in a personal injury action, apportioned 15% or $110,126.98 of the net contingency fee to the outgoing attorneys Segal & Lax, P.C., and apportioned the remainder to the incoming attorneys The Perecman Firm, PLLC, unanimously modified, on the facts, to reduce the apportionment of the net contingency fee to Segal & Lax to 5%, and increase the apportionment to The Perecman Firm to 95%, and

otherwise affirmed, without costs.

Although the outgoing attorneys served the notices of claim on the municipal defendants, obtained plaintiff's medical records, represented him in a municipal 50-h hearing, and commenced the action by filing and serving a summons and complaint, the record shows that the incoming attorneys performed significantly more work. Indeed, the incoming attorneys conducted all of the discovery and depositions in the case, retained all of the experts, selected a jury, represented plaintiff throughout the 10-day jury trial, obtained a $4 million verdict in plaintiff's favor, made and opposed post-verdict motions, and ultimately negotiated a $2.2 million settlement on plaintiff's behalf in an action that was complicated by plaintiff's credibility issues and the lack of witnesses. Accordingly, we modify the apportionment of the attorney's fee to the extent indicated (*see Brown v Governele*, 29 AD3d 617 [2006]; *Poulas v James Lenox House, Inc.*, 11 AD3d 332 [2004]; *Greenberg v Cross Is. Indus., Inc.*, 522 F Supp 2d 463, 469 [ED NY 2007]).

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7401 The People of the State of New York, Dkt. 41635C/07
Respondent,

-against-

Muhammad Abdurraheem,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Christopher Terranova of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered January 7, 2008, convicting defendant, upon his plea of guilty, of disorderly conduct, and sentencing him to a conditional discharge, unanimously affirmed.

The accusatory instrument was not jurisdictionally defective. The misdemeanor information included the deposition of the arresting officer, which alleged that for approximately 10 minutes, defendant stood immediately next to a table on which t-shirts were "spread out," and that defendant was "arranging and handling said merchandise." The table was "in the vicinity" of a given private address and was "open to public view." When approached, defendant stated that he did not need a license because he "work[ed] at the store."

Giving these facts "a fair and not overly restrictive or

technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000]), we find that the accusatory instrument sufficiently alleged unlicensed general vending (Administrative Code of City of New York § 20-453). "[A]s a matter of common sense and reasonable pleading" (*People v Davis*, 13 NY3d 17, 31 [2009]), the information adequately alleged that defendant engaged in the conduct required for acting as a general vendor (*see* Administrative Code § 20-452[b]). The alleged conduct, taken together with defendant's statement to the officer, negated any noncommercial explanation (*see People v Sylla*, 154 Misc 2d 112, 115-116 [Crim Ct, NY County 1992]; *People v Diouf*, 153 Misc 2d 887, 889-890 [Crim Ct, NY County 1992]). Likewise, the information, read as a whole, supported the inference that defendant was acting in a "public space" (*see* Administrative Code § 20-452[d]).

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7403-
7403A-
7403B In re Jarvis H.,

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

_____

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for presentment agency.

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Orders of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about February 17, 2010, which adjudicated appellant a juvenile delinquent upon findings that appellant committed acts that, if committed by an adult, would constitute criminal mischief in the third and fourth degrees and criminal possession of a controlled substance in the seventh degree, and which revoked a prior order of disposition, entered on or about September 30, 2008, that had imposed a conditional discharge, and placed him with the Office of Children and Family Services for an aggregate period of 18 months, unanimously affirmed, without costs.

The court's findings were based on legally sufficient evidence and were not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348 [2007]). With regard to the

petition charging criminal mischief, the presentment agency introduced a properly authenticated surveillance videotape that fully depicted the crime. Family Court viewed the tape, observed appellant in the courtroom, and concluded that appellant was the person shown on the tape. There is no basis for disturbing that determination. Appellant's other challenges to the sufficiency and weight of the evidence supporting the criminal mischief and possession of a controlled substance findings are without merit.

The court properly denied appellant's suppression motion. The police saw appellant and another person engaging in a transfer of small objects that was suggestive of a drug transaction. This provided, at least, a founded suspicion of criminality warranting a common-law inquiry, and when appellant fled the level of suspicion increased to reasonable suspicion justifying pursuit (*see e.g. People v Church*, 217 AD2d 444, 445 [1995], *lv denied* 87 NY2d 920 [1996]).

The disposition was the least restrictive dispositional alternative consistent with appellant's needs and the community's

need for protection, given appellant's repeated delinquent acts (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

We have considered and rejected appellant's remaining claims.

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7404 Digital Centre, S.L., Index 307280/10
Plaintiff-Respondent

-against-

Apple Industries, Inc.
Defendant-Appellant.

_____

Jeffrey A. Sunshine, Lake Success, for appellant.

Gleason & Koatz, LLP, New York (John P. Gleason of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered August 11, 2011, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(8) and denied defendant's motion to dismiss the first, second, third and seventh causes of action pursuant to CPLR 3211(a)(7), unanimously modified, on the law, to grant defendant's CPLR 3211(a)(7) motion to dismiss the third cause of action, for an account stated, and the seventh cause of action, to the extent that it pleads patent and trademark infringement, and otherwise affirmed, with costs.

This matter arose from a dispute between plaintiff, a Spanish company that manufactures photo booths, and defendant, a New York-based coin-operated machine business that had purchased some of plaintiff's booths. In lieu of an answer, defendant

filed a motion to dismiss the complaint under CPLR 3211(a)(7), for failure to state a cause of action and CPLR 3211(a)(8), for lack of jurisdiction over plaintiff.

Defendant's CPLR 3211(a)(8) motion is based on what it argues is plaintiff's failure to register as a foreign corporation doing business in the State of New York as required by Business Corporation Law § 1312(a). Defendant asserts that plaintiff ships hundreds of photo booths into New York State, that its contacts within the State are sufficiently systematic and regular to warrant registration with the Secretary of State, and that plaintiff's failure to do so mandates dismissal of the action. However, it is well established that the solicitation of business and facilitation of the sale and delivery of merchandise incidental to business in interstate and/or international commerce is typically not the type of activity that constitutes doing business in the state within the contemplation of § 1312(a) (*Uribe v Merchants Bank of N.Y.*, 266 AD2d 21 [1999]). The court correctly denied the motion, finding that at the very least, the record shows that a question of fact exists concerning whether or not plaintiff's contacts were systematic and regular enough to warrant compliance with the statute (*see e.g. Alicanto, S.A. v Woolverton*, 129 AD2d 601 [1987]).

Furthermore, it should be noted that defendant brought this

part of its motion under the wrong subsection of CPLR 3211(a). Dismissal pursuant to Business Corporation Law § 1312(a) is not jurisdictional, but rather, affects the legal capacity to sue. Accordingly, a motion to dismiss for lack of compliance with Business Corporation Law § 1312(a) is properly brought pursuant to CPLR 3211(a)(3), not (a)(8)(*see e.g. Hot Roll Mfg. Co. v Cerone Equip. Co.*, 38 AD2d 339 [1972]). It should also be noted that the motion court's characterization of this issue as being one of standing was improper. The question of capacity to sue is conceptually distinct from the question of standing (*see e.g. People v Grasso,* 54 AD3d 180, 190 n 4 [2008], citing *Silver v Pataki*, 96 NY2d 532, 537 [2001]).

Turning to the merits, the motion court correctly determined, as to the complaint's first and second causes of action, that plaintiff sufficiently stated claims for breach of contract and breach of the duty of good faith and fair dealing, arising from the purchase by defendant of 120 photo booths from plaintiff in or about April and May of 2009. Defendant received 60 of those booths, and allegedly cancelled shipment of the remaining 60 and refused to make payment.

The motion court erred in finding that plaintiff sufficiently alleged a cause of action for an account stated. Our review of the record shows an essential element of such claim

to be utterly missing: an agreement with respect to the balance due (*Raytone Plumbing Specialities, Inc. v Sano Constr. Corp.*, 92 AD3d 855 [2012]). Indeed, while the agreement on the balance due may be implied by the defendant's retention of the billings for an unreasonable period of time without objecting to them (*id.*), plaintiff here failed to plead precisely what that amount is and to support that amount with invoices sent to and retained by defendant.

Finally, plaintiff's seventh cause of action, for patent, trademark and trade dress infringement must be dismissed in part. Plaintiff has not stated the elements of a cause of action for patent infringement (*see e.g. McZeal v Sprint Nextel Corp.*, 501 F3d 1354, 1357 [Fed Cir 2007]). It also failed to state a cause of action for infringement of a registered trademark; however, it has sufficiently stated a cause of action on a trade dress theory (*see e.g. Yurman Design, Inc. v PAJ, Inc.* 262 F3d 101, 115-116 [2d Cir 2001]).

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7405 In re Julian Michael G.,
and Others,

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

Jeannette G.,
Respondent-Appellant,

Saint Dominic's Home, et al.,
Petitioners-Respondents.

_____

Steven N. Feinman, White Plains, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondents.

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children Marcus Issaiah M., Julian Michael G., and Matthew Jimmy M.

George E. Reed, Jr., White Plains, attorney for the child Gianni Elijah M.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about April 7, 2011, which denied respondent mother's motion to vacate dispositional orders, same court and Justice, entered on or about March 19, 2010 and September 8, 2010, which, upon her default in appearing at the fact-finding and dispositional hearings, found that she had permanently neglected the subject children, terminated her parental rights and committed the custody and guardianship of the children to petitioner and the Commissioner of the Administration for

Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent failed to present a reasonable excuse for her failure to appear at the fact-finding and dispositional hearings, and she failed to present a meritorious defense to the allegations of permanent neglect (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538, 539 [2012]). Respondent's purported excuses of depression and eviction were properly rejected, since she failed to provide any documentation to substantiate her claims. She also did not explain why she was unable to contact the court or her attorney to advise of her inability to attend the hearings or to learn of the status of the pending proceedings (*id.*). Respondent's partial compliance with the requisite service plan was insufficient to establish a meritorious defense (*see Matter of Shavenon N. [Miledy L.N.]*, 71 AD3d 401, 402 [2010]; *Matter of Hadiyyah J.M. [Fatima D.R.]*, 91 AD3d 874, 875 [2012]). Indeed, respondent failed to complete drug treatment and anger management programs, and she failed to obtain domestic violence counseling and individual therapy (*see Matter of Simon J.*, 40 AD3d 317, 318 [2007]). A preponderance of

the evidence also established that it was in the subject children's best interests to terminate respondent's parental rights so as to free the children for adoption by their respective foster parents (*id.*).

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Roman, JJ.

7407-
7407A In re The Hollow Metal Trust Fund, et al., Petitioners-Respondents, Index 110712/10

-against-

Saw Mill Auto Sales, Inc., Respondent-Appellant.

Franzblau Dratch, P.C., New York (Brian M. Dratch of counsel), for appellant.

Trivella & Forte, LLP, White Plains (Christopher Smith of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered November 19, 2010, which granted petitioner's motion to confirm an arbitration award in the amount of $24,650.00 plus interest and denied respondent's cross motion to vacate the award, unanimously reversed, on the law, without costs, the motion denied, the cross motion granted, the award vacated, and the matter remanded to the arbitrator for a hearing, in accordance with this opinion, to redetermine the attorney's fees and disbursements to which petitioner is entitled. Appeal from order, same court and Justice, entered February 7, 2011, unanimously dismissed, without costs, as academic in light of the foregoing.

The collective bargaining agreement and the trust agreements

between the parties did not require respondent, who prevailed in the arbitration proceeding, to pay the expenses of the litigation other than fees and costs incurred in bringing the underlying federal action to compel an audit. Respondent, however, was never afforded an opportunity to review the invoices upon which the award of legal fees to petitioner was made. These invoices apparently included fees for legal services that were outside the scope of the parties' agreement. As such, respondent was denied due process and we remand for a hearing to determine the fees in connection with compelling the audit and instruct that respondent be provided all evidence in the record regarding petitioner's legal fees.

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7412 The People of the State of New York, Ind. 3181/06
Respondent, 3081/07
2797/07

-against-

Tony Morton, also known as Tony Morten,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about June 23, 2010,

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

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

ENTERED: APRIL 17, 2012

CLERK

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

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7413 In re Justin A., and Others,

Children Under the Age of Eighteen Years, etc.,

Jesus A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

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

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about March 8, 2011, which, insofar as appealed from, after a fact-finding hearing, found that respondent father neglected two of the subject children and derivatively neglected the third child, unanimously affirmed, without costs.

The finding that the father neglected the children Andrew and Yelissa was supported by a preponderance of the evidence (*see* Family Court Act § 1012[f]; § 1046). The record shows that the father failed to make sure that the children were properly fed, which led to a diagnosis of failure to thrive. The father also failed to provide the children with proper medical treatment for

the condition (*see Matter of Joshua Hezekiah B. [Edgar B.]*, 77 AD3d 441 [2010], *lv denied* 15 NY3d 716 [2010]). Moreover, the father unreasonably allowed the mother to be solely responsible for tending to the children's complex medical needs, although a previous finding of neglect had been entered against her for failing to properly administer prescribed medication to Andrew. The fact that Andrew gained a significant amount of weight when he was hospitalized for treatment of injuries he accidentally sustained clearly indicated that he was not receiving proper nourishment at home (*see Matter of Kayla C.*, 19 AD3d 692 [2005]).

The acts committed by the father demonstrate an impairment of judgment sufficient to support the derivative finding of neglect as to the third child, Justin (*see e.g. Matter of Brianna R. [Marisol G.]*., 78 AD3d 437 [2010], *lv denied* 16 NY3d 702 [2011]).

We have considered the father's remaining contentions, and find then unavailing.

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7414 Noel Cruz, Index 15094/06
Plaintiff-Respondent,

-against-

Felix Rivera,
Defendant-Appellant,

Ryder Truck Rental Inc. et al.,
Defendants.

_____

Guararra & Zaitz LLP, New York (Michael J. Guararra of counsel), for appellant.

Jonathan Rice, Dobbs Ferry, for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 14, 2011, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained in a motor vehicle accident, denied defendant Felix Rivera's motion for summary judgment dismissing the complaint as against him, unanimously modified, on the law, to grant the motion to the extent of dismissing plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

Defendant established his entitlement to judgment as a matter of law. Defendant submitted the affirmed report from an orthopedist who, based upon an examination of plaintiff, found full range of motion in the relevant parts of the body and concluded that all sprains/strains had resolved. Defendant also

submitted plaintiff's bill of particulars and deposition testimony wherein he stated that he only missed about one week of work as a result of the accident.

Plaintiff raised triable issues of fact as to the existence of serious injuries to his cervical and lumbar spine. Plaintiff submitted, inter alia, the affirmation of his treating physician, who reviewed MRI reports finding disc herniations and bulges and, upon examination, found that plaintiff suffered persisting muscle spasms and limitations in multiple ranges of motion. Viewing the evidence in the light most favorable to plaintiff, the physician's attribution of a quantified percentage of loss of range of motion was sufficient to raise triable issues of fact (*see Perl v Meher*, 18 NY3d 208, 217 [2011]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). The unaffirmed MRI reports, which were referred to and not disputed by defendant's medical expert, and were relied upon by plaintiff's physician, were properly considered in opposition to the motion since they were not the sole basis for the findings of plaintiff's physician (*see Rubencamp v Arrow Exterminating Co., Inc.*, 79 AD3d 509 [2010]).

Dismissal of plaintiff's 90/180-day claim is warranted in light of the allegation in his bill of particulars that he was confined to bed for only a week, and his deposition testimony that he missed about a week of work after the accident (*see*

Hospedales v "John Doe", 79 AD3d 536 [2010]; *McClelland v Estevez*, 77 AD3d 403 [2010]).

We have considered the remaining contentions, including defendant's claim that there was an unexplained gap in treatment, and find them unavailing.

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7415 In re The State of New York, Index 250294/08
Petitioner-Respondent,

-against-

Richard Rosado,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Namita Gupta of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for respondent.

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Order of commitment, Supreme Court, Bronx County (Cassandra M. Mullen, J.), entered March 8, 2011, which, upon a finding of mental abnormality made after a jury trial, and a determination made after a dispositional hearing that appellant is a dangerous sex offender requiring confinement, committed appellant to a secure treatment facility, unanimously affirmed, without costs.

Appellant challenges only the court's determination that his father's testimony was not relevant to the first phase of the article 10 proceeding, concerning whether or not he suffered from a mental abnormality. A mental abnormality is defined as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive or volitional capacity of [the offender] in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results

in [the offender] having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03[i]). Appellant's father subsequently testified in the dispositional phase of the proceedings concerning the arrangements he had made for appellant's return to the community.

The court properly exercised its broad discretion in rejecting the proposed evidence in the first phase of the trial on the grounds of materiality and relevance (see *Mayorga v Jocarl & Ron Co.*, 41 AD3d 132, 134 [2007], *appeal dismissed* 9 NY3d 996 [2007]). Appellant's father's testimony did not relate to appellant's mental condition and was properly reserved for the later phase of the proceedings.

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7419 The People of the State of New York, Ind. 1925/08
Respondent,

-against-

David Parson,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Charles H. Solomon, J. at jury trial and sentencing), rendered July 14, 2009, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The hearing court properly denied defendant's suppression motion. An identified citizen witness waved to the police, pointed to defendant, and told an officer that defendant had a firearm. The officer testified that this witness, and a child who was a passenger in the witness's car, each displayed a frightened demeanor. Under the circumstances, the officer could infer that the witness was speaking from personal knowledge (*see e.g. People v Ransdell*, 254 AD2d 63 [1998], *lv denied* 92 NY2d 1037 [1998]).

Accordingly, the officer had, at least, reasonable suspicion to justify a stop and frisk. Immediately after a frisk failed to reveal the presence of a weapon, the witness told the officer that the weapon was in a nearby dumpster. The police immediately searched the dumpster, found a pistol, arrested defendant, and recovered cartridges from his pocket.

Defendant argues that at the moment the officer frisked defendant and failed to find a weapon any justification for detaining defendant dissipated. Even assuming defendant was detained during the brief interval between the frisk and the witness's statement about the dumpster, a brief investigatory detention was reasonable under the circumstances (*see generally People v Hicks*, 68 NY2d 234, 238-239 [1986]). The location of a deadly weapon was at issue, and it was reasonable to clarify the discrepancy between the witness's accusation and the results of the frisk.

The discovery of the pistol in the dumpster gave the officers probable cause to arrest defendant. Therefore, the cartridges were recovered during a lawful search incident to arrest.

The citizen witness, a caseworker for a foster care agency, testified at trial, but his child passenger, a client of the agency, did not. The witness testified at trial that the child

pointed out of the car window while displaying an agitated demeanor, and that this caused the witness to turn around, look out the window, and see defendant pointing a weapon. Defendant raises several issues regarding this testimony and the nondisclosure of the child's identity.

The child's demeanor and conduct did not constitute a nonverbal hearsay declaration (*compare People v Nieves*, 67 NY2d 125, 131 [1986]), because they were not intended to assert facts or convey information (*see* Prince, Richardson on Evidence § 8-103 [Farrell 11th ed]; *see also People v Salko*, 47 NY2d 230, 239 [1979]). At most, the child conveyed a direction to look out of the window.

In any event, even if the child's behavior constituted a nonverbal declaration, it was not offered for its truth. Instead, it was admissible "for the legitimate nonhearsay purpose of completing the narrative and explaining" the events (*see People v Valdez*, 69 AD3d 452, 452 [2010], *lv denied* 14 NY3d 893 [2010]). Defendant's claim that the witness's testimony about the child's behavior violated the Confrontation Clause is without merit because the alleged nonverbal declaration was neither testimonial nor offered for its truth (*see e.g. People v Pearson*, 82 AD3d 475 [2011], *lv denied* 17 NY3d 809 [2011]).

Defendant did not preserve his argument that the trial court

should have given the jury a limiting instruction about this testimony, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

The trial court properly exercised its discretion in declining to compel the witness to reveal the child's identity after the witness, citing confidentiality concerns, refused to do so (*see People v Andre W.*, 44 NY2d 179, 184 [1978]). Defendant's assertion that the child might have provided exculpatory evidence is speculative. In any event, any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Roman, JJ.

7420N Rafael Berroa, Sr., Index 108242/08
Plaintiff-Respondent,

-against-

Jason Misrahi,
Defendant-Appellant,

Rafael Berroa, Jr.,
Defendant.

Lambert & Shackman, PLLC, New York (Thomas C. Lambert of counsel), for appellant.

Howard C. Chun, New York, for respondent.

Order, Supreme Court, New York (Kibbie F. Payne, J.), entered January 28, 2011, which, to the extent appealed from as limited by the briefs, following a nonjury trial, cancelled the mortgage and lien possessed by defendant Jason Misrahi and dismissed the counterclaim, unanimously affirmed, with costs.

The record supports the trial court's finding that plaintiff is the Rafael Berroa who owned the apartment that was pledged as collateral for a mortgage given to defendant Misrahi by defendant Rafael Berroa, Jr., plaintiff's son, without plaintiff's knowledge or authorization (*see Saperstein v Lewenberg*, 11 AD3d 289 [2004]). Notwithstanding plaintiff's impaired mental capacity at the time of trial, his testimony indicated that he, not his son, owned the apartment and that he did not authorize

his son to act for him. The building manager testified that plaintiff was the Rafael Berroa who owned the apartment and that plaintiff's son was not the owner. Misrahi submitted no evidence that controverted this testimony. Misrahi relied on the son's possession of the stock certificate and possession of the proprietary lease as indicia of ownership. However, the son's driver's license, which was presented as identification at the closing, lists his name as "Rafael Berroa Cruz," which does not match the name on the stock certificate and the lease.

Contrary to Misrahi's contention, plaintiff's default in replying to his counterclaim is not the equivalent of an answer that fails to deny the substantive allegations of the complaint and is deemed an admission of those allegations (*see Ballard v Billings & Spencer Co.*, 36 AD2d 71, 74 [1971]). In any event, the counterclaim was correctly dismissed in light of the finding in favor of plaintiff on the case in chief.

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

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7421 In re Melvin Peters, Ind. 76/10
[M-1148] Petitioner,

-against-

Hon. Robert Mandelbaum, et al.,
Respondents.

Melvin Peters, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for respondent Justices and Judges.

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for district attorney, respondent.

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.

ENTERED: APRIL 17, 2012

CLERK

Tom, J.P., Sweeny, Acosta, Renwick, Román, JJ.

6770-
6771- The People of the State of New York, Ind. 1402/08
Respondent,

-against-

Maurice Newman,
Defendant-Appellant.

- - - - -

6772- The People of the State of New York,
Respondent,

-against-

Freddie Wilson,
Defendant-Appellant.

- - - - -

6773 The People of the State of New York,
Respondent,

-against-

Rodger Wilson,
Defendant-Appellant.

_____

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

Steven Banks, The Legal Aid Society, New York (Paul Wiener of counsel), for Freddie Wilson, appellant.

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Paul, Hastings LLP., New York (Joshua M. Bennett of counsel), for Rodger Wilson, appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered June 12, 2009, as amended

June 24, 2009, affirmed. Judgment, same court and Justices, rendered June 12, 2009, affirmed. Judgment, same court and Justices, rendered June 12, 2009, affirmed.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Dianne T. Renwick
Nelson S. Román, JJ.

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Ind. 1402/08

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The People of the State of New York,
Respondent,

-against-

Maurice Newman,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Freddie Wilson,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Rodger Wilson,
Defendant-Appellant.

_____x

Defendant Maurice Newman appeals from the judgment of the Supreme Court, New York County (Charles H. Solomon, J. at suppression

hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered June 12, 2009, as amended June 24, 2009, convicting him of criminal possession of a weapon in the second degree (two counts), attempted criminal possession of a weapon in the second degree (two counts) and possession of an imitation pistol, and imposing sentence. Defendant Freddie Wilson appeals from the judgment, same court and Justices, rendered June 12, 2009, convicting him of criminal possession of a weapon in the second degree (two counts), attempted criminal possession of a weapon in the second degree (two counts), possession of an imitation pistol, criminal possession of stolen property in the fourth degree (11 counts) and criminal possession of stolen property in the fifth degree, and imposing sentence. Defendant Rodger Wilson appeals from the judgment, same court and Justices, rendered June 12, 2009, convicting him of criminal possession of a weapon in the second degree (two counts), attempted criminal possession of a weapon in the second degree (two counts) and possession of an imitation pistol, and imposing sentence.

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

Steven Banks, The Legal Aid Society, New York (Paul Wiener of counsel), for Freddie Wilson, appellant.

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Paul, Hastings LLP, New York (Joshua M. Bennett, Kenneth M. Breen and Douglas I. Koff of counsel), for Rodger Wilson, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee and Susan Gliner of counsel), for respondent.

ACOSTA, J.

This case addresses the kind of showing that must be made to justify a limited intrusion into a vehicle whose occupants have been removed and patted down. Applying the search and seizure provisions of the New York state constitution (NY Const, Art I, § 12), we hold that the police action at issue in this case was proper. We believe that defendant Newman's deception in conjunction with his rather disconcerting movements understandably triggered the officers' concerns that there could be a weapon in the car, which posed an "actual and specific danger." Having sufficient reason to fear for their safety, the officers were thus permitted to make a limited intrusion to verify whether there were weapons in the car.

Background

On December 19, 2007, Police Officers Gabriel Diaz and Kwane Kipp, and Sergeant Stephan O'Hagan, were on patrol in an unmarked vehicle. At approximately 10:25 p.m., as they approached the intersection of Columbia Street and Houston Street, they saw a white, four-door Ford Contour in front of them. The name of the state on the rear license plate was covered by the bottom of the license plate holder and was not visible. Since an "obstructed" license plate is a violation of the Vehicle and Traffic Law, the vehicle was pulled over.

Diaz, Kipp and O'Hagan got out of their car and approached the Contour, noticing that the car contained a driver, a front seat passenger and another passenger in the back, behind the front passenger seat. Meanwhile, Officer Jensen Dayle and Lieutenant Derrico saw Diaz stop the Contour, and pulled up in their unmarked car behind Diaz's vehicle.

As Officer Diaz walked toward the car, he saw the occupants of the car "moving a lot" as they "bent down putting something down and picking something up." Officer Kipp noticed all three individuals "moving around in their seats," "ducking down," "moving their head[s] up and down" and "looking down." Kipp believed that "[s]omething was going on," so he warned Diaz and O'Hagan to "[b]e careful, they're moving around." None of the officers had their guns drawn.

Officer Diaz approached the driver's side window and asked defendant Rodger Wilson for his license, registration and insurance card. Rodger[1] immediately told the officer that he did not have a driver's license. When Diaz asked Rodger where he was going, Rodger replied that he was lost, and was looking for a highway to head back to Cleveland, Ohio. The car had Ohio license plates, and defendant Maurice Newman, who was pretending

[1]The two defendants named Wilson will be referred to by their first name.

to be asleep, was holding a map. Rodger told the officer that the car belonged to Newman, but he was tired, which was why Rodger was driving. Diaz observed that even though Newman had his eyes closed and "acted like he was sleeping," he had been moving before they approached the car.

When Officer Diaz asked Rodger for the paperwork for the car, Rodger tapped Newman on the shoulder "like he was waking Mr. Newman up" and asked for the papers. Newman immediately reacted and opened the glove compartment but closed it right away without looking inside. Two to three seconds later, Newman leaned over the center console and reached under the driver's seat as if he was looking for something. Newman then sat in his seat again, leaned forward and reached under his seat with one hand. At that point, Diaz "did not feel comfortable" and feared for his safety; he thought that Newman "might be reaching for a weapon or something." Officer Diaz ordered Newman to stop, and Newman complied, putting his hands on his lap. Officer Diaz then ordered Rodger, a "pretty big guy," to step out of the car. After Diaz gave Rodger a quick patdown and found no weapons or contraband, he instructed Rodger to walk to the back of the car. Officer Kipp then removed defendant Freddie Wilson from the rear passenger seat and, because of the "movements" he had observed, frisked him for weapons, and then brought him to the back of the

car. Sergeant O'Hagan instructed Officer Dayle to take Newman out of the car. Dayle conducted a safety patdown of Newman, and escorted him to the back of the car. There, Officer Kipp and Lieutenant Derrico watched the three men.

Officer Diaz subsequently leaned inside the Contour through the open door on the driver's side. With the upper part of his body positioned between the steering wheel and the center console, he shined his flashlight under the front passenger seat and the driver's seat, the areas that Newman had been "making a movement towards," to find out "what he was looking for under the seat." Officer Diaz then saw the handle of a gun sticking out about three inches from under the front passenger seat. Diaz alerted the officers on his team that there was a firearm in the car. After that, Newman, Rodger and Freddie were arrested. Officer Diaz did not issue a ticket for a traffic violation or for Rodger driving without a license. Upon "completely" searching the car, Diaz recovered a loaded .25 caliber handgun from under the front passenger seat – the one he had seen sticking out, plus a loaded 9 millimeter handgun and an imitation pistol.

Officer Diaz drove the Ford Contour to the stationhouse, where he searched the remainder of the car. From the rear passenger seat, he recovered metal handcuffs, ten plastic

handcuff ties, two rounds of 9 millimeter ammunition, a blue jacket containing an extra 9 millimeter round, gloves, a wool hat and a ski mask. An additional ski mask was recovered from between the front passenger seat and the center console. Officer Kipp and Sergeant O'Hagan transported Freddie to the stationhouse in their NYPD vehicle, which Kipp had checked before going out that evening, as "standard procedure," to make sure there was no contraband or other items left behind from a previous shift. Kipp informed Freddie that since the back of the car was "clean," if anything was found, Kipp would know that Freddie had put it there. Kipp sat in the back seat with Freddie, who was handcuffed from behind. When they arrived at the precinct, Kipp checked the back seat and found seven credit cards and an identification card, all belonging to another person, directly under where Freddie had been sitting. From Freddie's wallet, Officer Kipp recovered four credit cards with the name James Carson III.

The hearing court denied defendants' motions to suppress the contraband found in the vehicle. The court held that the stop of defendants' vehicle was lawful because the name of the state was obscured on the license plate, a violation of the Vehicle and Traffic Law. Once the car was lawfully stopped, the court concluded, the police had the right to direct the driver and

passengers to exit the car, out of concern for their safety, even without a particularized reason for believing that the driver or passengers possessed a weapon. Lastly, the court concluded that Officer Diaz had acted reasonably and lawfully in searching under the passenger seat because Officers Diaz and Kipp each independently observed movements of ducking down and reaching under the seats, which "heightened their suspicion," and defendant Newman's behavior was suspicious. The court concluded that, based upon "these facts and given the totality of the circumstances, there was a sufficient predicate for Officer Diaz's limited intrusion into the car, which was appropriately circumscribed to the specific area where he had just seen Defendant Newman reaching."

On the second day of trial, Newman's counsel, joined by counsel for the other defendants, moved to reopen the suppression hearing, or in the alternative, requested that the hearing court reconsider its decision, in light of *Arizona v Gant* (556 US 332 [2009]). The trial court distinguished *Gant*, and opined that while *Gant* may have changed federal law to some extent, it did not alter New York law. The trial court, however, invited defendants to reargue the issue before the suppression court. Later that afternoon, the trial court advised the parties that it had received the hearing court's written decision, where it

stated that it had considered defendants' motion in light of *Gant*, but adhered to its previous ruling and denied the application to reopen the suppression hearing. Defendants were convicted, after a jury trial, of various crimes on the basis of the evidence obtained through the officers' search of the vehicle. Defendants now appeal from that judgment.

Analysis

As a threshold matter, the officers were legally entitled to stop defendants' vehicle because it was being operated with an obstructed license plate (*see People v Brooks*, 23 AD3d 847 [2005], *lv denied* 6 NY3d 810 [2006]; *see also* Vehicle and Traffic Law § 402[1]). It was also proper for the officers to direct the driver and passengers to exit the vehicle (*see People v Carvey*, 89 NY2d 707, 710 [1997]; *People v Garcia*, 85 AD3d 28, 31 [2011], *lv granted* 18 NY3d 883 [2012]). The primary issue before us is whether "once defendant and the other occupants had been removed from the automobile, the police could lawfully commit the greater intrusion of reaching into the vehicle" (*People v Carvey*, 89 NY2d at 710).

Defendants contend that the evidence gathered in this case should be suppressed because of the Supreme Court's recent decision in *Arizona v Gant* (556 US 332 [2009]). In that case, the Supreme Court announced a "shift in [its] Fourth Amendment

jurisprudence on searches of automobiles incident to arrests of recent occupants" (*Davis v United States*, ___ US ___, 131 S Ct 2419, 2424 [2011]). Specifically, the Court "adopted [in *Gant*] a new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional if (1) the arrestee is within reaching distance of the vehicle during the search or (2) the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest" (*Davis* at 2425 [quotation marks omitted]). However, because *Gant* only applies to searches incident to arrest (*see United States v McGregor*, 650 F3d 813, 825 n5 [1st Cir 2011]; *United States v Vinton*, 594 F3d 14, 24 n3 [DC Cir 2010], *cert denied* ___ US ___, 131 S Ct 93 [2010]; *United States v Griffin*, 589 F3d 148, 154 n8 [4th Cir 2009]; *United States v Torres*, 2011 US Dist Lexis 61330, *18-24, 2011 WL 2209144, *6-8 [SD NY 2011]), we consider *Gant* to be inapposite since the search at issue here was not conducted incident to arrest (indeed, it was the officers' search of defendant's car in this case that precipitated the arrest). Because the protections available to defendants under our state constitution are far more robust than those available under the federal constitution (*compare People v Torres*, 74 NY2d 224 [1989], *with Michigan v Long*, 463 US 1032 [1983]), however, we begin our analysis by considering the propriety of the police

search in this case under our state's law.

Any search and seizure case involving a vehicle stop requires the balancing of two important considerations: 1) the motorist's important privacy interest in his or her vehicle (*see People v Weaver*, 12 NY3d 433, 444 [2009] ["the use of a vehicle upon a public way does not effect a complete surrender of any objectively reasonable, socially acceptable privacy expectation"]) and 2) the inordinate risk that police officers face during a stop (*See People v Anderson*, 17 AD3d 166, 168 [2005], *citing Pennsylvania v Mimms*, 434 US 106 [1977]). In balancing both of those considerations, the Court of Appeals has long recognized that "[a] police officer acting on [1] *reasonable suspicion* that criminal activity is afoot and [2] on an articulable basis to fear for his own safety may intrude upon the person or personal effects of the suspect only to the extent that is actually necessary to protect himself from harm" (*People v Carvey,* 89 NY2d 707, 710 [1997], *quoting People v Torres*, 74 NY2d at 226 [emphasis added]). Since "a police officer's entry into a citizen's automobile and his inspection of personal effects located within are significant encroachments upon that citizen's privacy interests," however, such an intrusion must be "reasonably related in scope and intensity to the circumstances which rendered its initiation permissible" (*Torres*, 74 NY2d at

229-230 [internal quotations and citations omitted]; *Anderson*, 17 AD3d at 167 [2005] ["(I)t is well settled that any inquiry into the propriety of police conduct must weigh the degree of intrusion which it entails against the precipitating and attending circumstances out of which the encounter arose"]).

Where a vehicle's occupants have been "removed and patted down without incident [such that] any immediate threat to [the officer's] safety [has been] eliminated," it is generally unlawful for the officer — in the absence of probable cause — to "invade the interior of a stopped car" (*see People v Carvey*, 89 NY2d 707, 710, *citing Torres*, 74 NY2d at 226). However, if information gathered during a stop reveals that 1) there is a substantial likelihood of a weapon being present in the vehicle which 2) poses an "actual and specific danger" to the officer's safety, the officer would be justified in engaging in a limited intrusion into the suspect's vehicle — "notwithstanding the suspect's inability to gain immediate access to that weapon" (*Carvey*, 89 NY2d at 710-711).

When considering whether any further intrusion into a stopped vehicle whose occupants have been removed from the vehicle and frisked is warranted, an officer must have more than "reasonable suspicion" (*id.* at 711). That is to say, "[t]he requisite knowledge must be more than subjective; it should have

at least some demonstrable roots. Mere "hunch" or "gut reaction" will not do" (*People v May,* 52 AD3d 147, 151 [2008], *quoting People v Sobotker*, 43 NY2d 559, 564 [1978]; *cf People v Hackett*, 47 AD3d 1122, 1124 [2008] [requiring the presence of "*objective indicators* which could lead to a reasonable conclusion that there was a substantial likelihood that a weapon was located in defendant's vehicle"]). Consequently, conclusory assertions by police officers that a car's occupants have engaged in "furtive" behavior (*cf Garcia*, 85 AD3d at 32-33) or caused them apprehension (*cf People v Howard*, 147 AD2d 177 [1989], *appeal dismissed* 74 NY2d 943 [1989]), cannot validate further intrusions into the interior of a vehicle.

In ascertaining whether an officer has the requisite "reasonable suspicion" to intrude into a stopped vehicle whose occupants have been removed and frisked, "[t]he court's focus must center on whether the police conduct was reasonable in view of the totality of the circumstances, for reasonableness is the touchstone by which police-citizen encounters are measured" (*People v Anderson*, 17 AD3d 166, 167 [2005] [citations omitted]). While each case presents unique facts, we note that every Department has found that the combination of 1) movements within a car suggesting that the defendant was reaching for something that might be a weapon and 2) *some other suggestive factor(s)* was

sufficient to justify the limited intrusion of searching the area where a defendant's movements took place (*see e.g. People v Ashley,* 45 AD3d 987 [3d Dept. 2007], *lv denied* 10 NY3d 761 [2008]; *People v Jones,* 39 AD3d 1169 [4th Dept. 2007], *lv denied* 9 NY3d 1007 [2007]; *People v Hutchison*, 22 AD3d 681 [2d Dept. 2005]; *People v Shabazz*, 301 AD2d 412 [1st Dept. 2003], *lv denied* 100 NY2d 566 [2003]; *People v Worthy*, 261 AD2d 277 [1st Dept. 1999], *lv denied* 93 NY2d 1029 [1999]). Such a combination is present in this case.

Here, the movements observed by the officers as they approached the car suggested that defendants could have been searching for something underneath their seats. While those movements alone would not justify a police intrusion into the vehicle,[2] the presence of additional factors justified the officers' reasonable suspicion that there could be a weapon in the vehicle that posed an "actual and specific danger." First, despite the fact that the officers initially observed everyone in

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[2] Such movements may have simply reflected nervousness on the part of the individuals in the car – something that is not at all uncommon even when the most law-abiding individual encounters a police officer. Mere nervousness, however, cannot provide an officer with the kind of reasonable suspicion that is required to intrude into an individual's vehicle (*see People v Hackett*, 47 AD3d 1122, 1124 [2008] [While "defendant seemed nervous and repeatedly looked at his vehicle, this conduct, in and of itself, is insufficient to justify a search"]).

the stopped vehicle moving around, defendant Newman pretended to be asleep when the officers reached the vehicle. Second, when asked to search for the vehicle's registration (by one of his co-defendants), defendant Newman attempted to reach underneath his seat after perfunctorily opening and closing the glove compartment. Based on Newman's suspiciously reaching under his seat, purportedly to search for paperwork, after trying to deceive the officers by feigning sleep, the officers had ample reason to believe that 1) there was a substantial likelihood that he had a weapon underneath his seat that 2) posed an actual and specific danger to their safety. Based on the totality of the circumstances, the police were justified in conducting a limited search of the area where they saw Newmann reaching (*see People v Mundo,* 99 NY2d 55, 59 [2003], *citing Carvey*, 89 NY2d at 712). Since defendants are not entitled to have the evidence obtained against them by the police officers suppressed under our more protective state constitution, we need not address their federal claim for relief. We have considered defendants' remaining contentions and find them unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered June 12, 2009, as amended June 24, 2009, convicting defendant Newman of

criminal possession of a weapon in the second degree (two counts), attempted criminal possession of a weapon in the second degree (two counts) and possession of an imitation pistol, and sentencing him to an aggregate term of 10 years, should be affirmed. The judgment of the same court and Justices, rendered June 12, 2009, convicting defendant Freddie Wilson of criminal possession of a weapon in the second degree (two counts), attempted criminal possession of a weapon in the second degree (two counts), possession of an imitation pistol, criminal possession of stolen property in the fourth degree (11 counts) and criminal possession of stolen property in the fifth degree, and sentencing him to an aggregate term of 15 years, should be affirmed. The judgment of the same court and Justices, rendered June 12, 2009, convicting defendant Rodger Wilson of criminal possession of a weapon in the second degree (two counts), attempted criminal possession of a weapon in the second degree

(two counts) and possession of an imitation pistol, and sentencing him to an aggregate term of 10 years, should be affirmed.

All concur.

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

ENTERED: APRIL 17, 2012

CLERK