SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 7, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10752 FNF Touring LLC, Index 650009/12
Plaintiff-Respondent,

-against-

Transform America Corp.,
Defendant,

Chester Asher,
Defendant-Appellant.

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Linklaters LLP, New York (Jonathan M. Grant of counsel), for appellant.

Lisa Bonner, New York, for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 19, 2012, which, insofar as appealed from, denied defendant Chester Asher's motion to dismiss the fraud claim asserted against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Asher dismissing the complaint as against him.

Plaintiff entered into an agreement with defendant Transform

America Corp., under which plaintiff was to produce a musician to perform at a benefit concert and meet with up to 40 VIP guests, in exchange for $25,000 and reimbursement of certain expenses. After paying a $12,500 deposit, Transform America cancelled the concert one day before it was scheduled to occur and refused to pay plaintiff the balance claimed under the contract. Alleging that Transform America cancelled the event due to insufficient funding, plaintiff commenced this action against Transform America and its director and president, defendant Asher, asserting causes of action for breach of contract and fraud. The breach of contract claim as against Asher has been dismissed.

To plead a claim for fraud, the complaint must allege "'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'"(*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [*quoting Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b) (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]).

Even accepting for the purpose of the motion that defendant

Asher was the one who allegedly misrepresented that Transform America had the financial capacity to perform the contract, plaintiff does not plead facts sufficient to permit a reasonable inference that the statement was made with fraudulent intent to induce plaintiff's reliance to its detriment. Indeed, plaintiff's admissions that Transform America had paid the $12,500 deposit, scheduled press interviews and a "meet and greet," and was relying on ticket sales to pay the balance due plaintiff undermines a finding of fraudulent intent. Furthermore, "[a]bsent a confidential or fiduciary relationship, there is no duty to disclose, and [a defendant's] mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud (*see NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 55 AD3d 454, 454 [1st Dept 2008], *affd* 13 NY3d 573 [2009]).

In light of this determination, we need not reach the issue of whether Asher is entitled to qualified immunity pursuant to Not-for-Profit Law § 720-a (*see* CPLR 3211[a][11]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10759 In re Nyrie W., and Others,

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

Paul M.,
Respondent-Appellant,

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

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

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

_____

Order of fact-finding and disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about March 29, 2011, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, found that respondent father had sexually abused his daughter Nyrie W., derivatively abused his daughter Porscha M., and derivatively neglected his sons Damar M., Dmitri M. and Donovan M., unanimously affirmed, without costs.

The Family Court's finding that the father had sexually

abused his daughter Nyrie was supported by a preponderance of the evidence (Family Ct Act §§ 1012[e][iii], 1046[b][i]). Nyrie's out-of-court statements to caseworkers that her father had raped her on five occasions were corroborated by North Central Bronx Hospital's records (*see* § 1046[a][vi]). Those records were properly certified and contained the requisite delegation of authority (*see* § 1046[a][iv]). Nyrie also made statements to caseworkers that her father would enter the bathroom while she was showering and tell her she had to wash her private parts only. Her statements were adequately corroborated by the statements her siblings made to the caseworkers (*see Matter of Tiara G.* [*Cheryl R.*], 102 AD3d 611, 612 [1st Dept 2013], *lv denied* 21 NY3d 855 [2013]).

The derivative findings of abuse of Porscha and neglect of Damar, Dmitri and Donovan were also supported by a preponderance of the evidence (*see* Family Ct Act § 1046[a][i]). The evidence of the father's multiple rapes of Nyrie "demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his] care" (*Matter of Vincent M.*, 193 AD2d 398, 404 [1st Dept 1993]). The derivative findings of abuse and neglect were further supported by evidence that some of the children were in the father's apartment while he raped Nyrie

(*see Matter of Brandon M. [Luis M.]*, 94 AD3d 520, 520-521 [1st Dept 2012].

We reject the father's claim that he was denied effective assistance of counsel. His counsel's failure to object to the admissibility of medical records from Jacobi Medical Center did not prejudice him, as those records were not necessary to find, by a preponderance of the evidence, that he had abused Nyrie (*cf. Matter of Cassandra Tammy S. [Babbah S.*], 89 AD3d 540, 541 [1st Dept 2011]; *Matter of Chaquill R.*, 55 AD3d 975, 977 [3d Dept 2008], *lv denied* 11 NY3d 715 [2009]).

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

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10944 In re Miguel Bermudez, Index 400128/12
Petitioner-Appellant,

-against-

Dora B. Schriro, etc., et al.,
Respondents-Respondents.

_____

Steven Banks, The Legal Aid Society, New York (Marlen S. Bodden of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Greenberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 20, 2012, denying the petition to direct respondent New York City Department of Correction (DOC) to appoint petitioner as a correction officer, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner argues that, having prevailed in an administrative appeal of the determination that he was psychologically unqualified for a position as a correction officer based on an arrest that was dismissed and sealed pursuant to CPL 170.55, he is entitled to a new psychological evaluation and reconsideration of his candidacy "with no reference to the nullified arrest." Because petitioner did not assert this

specific argument before DOC or the article 78 court – he argued that the improper disqualification entitled him to an appointment as a correction officer – the claim is unpreserved for our review (*see Matter of Prendergast v City of New York*, 44 AD3d 414 [1st Dept 2007], *lv denied* 9 NY3d 818 [2008], *cert denied* 553 US 1066 [2008]; *Green v New York City Police Dept.*, 34 AD3d 262 [1st Dept 2006]).

In any event, petitioner failed to establish either that he has a right to have the circumstances underlying his non-appointment expunged from the record before DOC or that DOC's determination not to appoint him, after restoring him to the eligible list and considering him on three occasions (along with other candidates), was arbitrary and capricious and therefore subject to a judicial direction for reconsideration (*see Matter of Andriola v Ortiz*, 82 NY2d 320, 325 [1993], *cert denied* 511 US 1031 [1994]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10945 In re Angie G., and Others,

Dependent Children Under Eighteen Years of Age, etc.,

Jose D.G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Kelly A. O'Neill Levy, J.), entered on or about August 23, 2012, which, upon a fact-finding determination of neglect, inter alia, released the subject children to the custody of their mother with six months of supervision by petitioner agency, unanimously affirmed insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed, without costs, as moot.

The Family Court's finding that the children were neglected due to the father's inadequate supervision and guardianship was

supported by a preponderance of the evidence, including evidence of a prior neglect finding and his plea in a criminal case arising from an incident admitting to threatening the mother with a fire extinguisher (*see Matter of Jamoneisha M. [Ebony M.]*, 84 AD3d 650 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011]).

The record shows that the father engaged in a pattern of domestic violence against the mother, and the proximity of the children's bedroom to the physical and verbal fighting that occurred in the kitchen of the shelter where the family resided placed the children in imminent risk of emotional and physical impairment (*see Matter of Jayden B. [Erica R.]*, 91 AD3d 1344 [4th Dept 2012]).

The appeal from the order of disposition insofar as it placed the children with the mother under the supervision of the agency for six months and directed the father to comply with

certain conditions is dismissed as moot, as that portion of the order has expired by its own terms (*see Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516, 517 [1st Dept 2012]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Moskowitz, J.P., Renwick, DeGrasse, Gische, JJ.

10946 Phillip Matthews, Index 101477/10
Plaintiff-Appellant,

-against-

400 Fifth Realty LLC, et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Michael H. Zhu of counsel), for appellant.

Cornell Grace, P.C., New York (Keith D. Grace of counsel), for respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 18, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, and granted defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims to the extent asserted against defendant Pavarini McGovern LLC (Paravini), unanimously reversed, on the law, without costs, plaintiff's cross motion granted and defendants' motion denied.

Plaintiff was injured when a metal grate fell on him while he was working in the elevator shaft of a building owned by defendant 400 Fifth Realty. 400 Fifth Realty retained defendant

Paravini as the construction manager for construction of the building. Pavarini subcontracted with nonparty Fujitec Serge (plaintiff's employer) to install the elevators in the building, and with defendant GC Ironworks (GCI) to install, among other things, iron-grate platforms in the elevator shafts.

Plaintiff is entitled to partial summary judgment on the issue of liability as to his Labor Law § 240(1) cause of action. The evidence shows that plaintiff's injuries flowed directly from the application of the force of gravity to the grate (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]), and were caused by defendants' failure to adequately secure the grate so as to prevent it from falling (*see Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479 [1st Dept 2007]). GCI's foreman testified that the accident occurred while he was setting up the grates to prepare them for welding, and that the subject grate fell because it had not yet been welded in place. Contrary to defendants' contention, the falling grate was not an inherent risk involved in working at a construction site. Rather, the grate was part of the work of the construction project in which plaintiff was engaged and was required to be secured "for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]; *cf. Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]).

The untimeliness of plaintiff's cross motion does not preclude summary judgment on the issue of section 240(1) liability. In the course of reviewing defendants' motion, this Court may search the record and grant summary judgment to any party without the necessity of a cross motion (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]).

To the extent the motion court concluded that plaintiff must show that the object fell while being hoisted or secured in order to prevail on the section 240(1) claim, the Court of Appeals has stated that "'falling object' liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]).

The court also erred in dismissing the Labor Law § 200 and common-law negligence claims insofar as asserted against construction manager Paravini. The evidence indicates that Paravini managed the day-to-day activities on the job site, and exercised at least some control over the coordination of GCI's and Fujitec's work, enabling it "to avoid or correct [the] unsafe

condition" (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998]) that arose when both subcontractors were working simultaneously in the same elevator shaft.

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10947 Nelson Denis, etc., Index 15856/07
Plaintiff-Appellant,

-against-

Manhattanville Rehabilitation and
Health Care Center, LLC, etc., et al.,
Defendants-Respondents.

_____

Cynthia A. Matheke, New York, for appellant.

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of counsel), for Manhattanville Rehabilitation and Health Care Center, LLC, respondent.

Garson & Jakub, LLP, New York (Susan M. McNamara of counsel), for Carl Franzetti, M.D., Vandana Patil, M.D. and Riverdale Family Practice, LLC, respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered September 19, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the causes of action for medical malpractice, negligence and lack of informed consent, unanimously affirmed, without costs.

Plaintiff failed to submit evidence to rebut defendants' prima facie showing that they did not deviate from the accepted standard of care in their treatment of the decedent during her 20-day admission at defendant Manhattanville. His expert assumed

that the decedent had a *C. difficile* infection throughout her admission and that the infection worsened during her stay. He failed to support these conclusions by referring to specific entries in the records, and, as to two negative stool sample tests, he speculated that they had been handled poorly. Plaintiff's expert's claims that the decedent suffered from dehydration and was not properly nourished were conclusory and failed to controvert defendants' expert's evidence to the contrary. Moreover, the expert failed to causally relate the decedent's injuries to defendants' alleged departures from the standard of care (*see Margolese v Uribe*, 238 AD2d 164 [1st Dept 1997]).

Plaintiff's expert's opinion as to the lack of informed consent was predicated on his unsupported assumption as to the duration of the *C. difficile* infection and relied on alternative "potential" treatments that were experimental, without addressing whether the decedent would have been a candidate for any of them. Moreover, the expert did not opine that the lack of informed consent was a proximate cause of the decedent's injuries. The opinion was therefore insufficient to raise an inference that a reasonably prudent person in the decedent's circumstances, having been appropriately informed of the risks and alternatives,

would have elected an alternate course of treatment, and that the lack of informed consent was the proximate cause of the decedent's injuries (*see* Public Health Law § 2805-d[1], [3]; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995], *lv denied* 87 NY2d 895 [1995]).

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: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10949 In re Kelly Brennan, Index 113427/11
Petitioner-Appellant,

-against-

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

_____

Jeffrey L. Goldberg, Port Washington, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Paul T. Rephen of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered July 3, 2012, denying the petition to annul respondents' determination, dated August 10, 2011, which denied petitioner's application for World Trade Center accidental disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination that petitioner was not present at the World Trade Center (WTC) site during the requisite time period is supported by credible evidence (*see* Retirement and Social Security Law § 2[36][a], [e], [f], [g]; *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145, 147 [1997]). Respondents' investigation

revealed no contemporaneous records, roll call or command logs, records of the Medical Division, or exposure logs, indicating that petitioner was present at the WTC site. All respondents' records indicate that petitioner was in Brooklyn during the relevant period. Respondents were entitled to reject petitioner's self-serving affidavit and the affidavits by two fellow officers, which were unsupported by contemporaneous memo book entries or other documentation (*see Matter of Velez v Kelly*, 84 AD3d 693 [1st Dept 2011]).

Contrary to petitioner's contention, the court did not improperly shift the burden of proof to her. Petitioner was not entitled to the statutory WTC presumption that her condition or impairment of health was incurred in the performance and discharge of duty, because, by failing to demonstrate that she was present at the WTC site, she failed to demonstrate a qualifying World Trade Center condition as defined by Retirement and Social Security Law § 2(36) (*see* Administrative Code of City of NY § 13-252.1[1][a]; *Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Dept. Pension Fund, Art. II*, 20 NY3d 268,

275 [2012] ["an officer's disability or death *as a result of a qualifying condition* is presumed to be caused by his or her exposure at the WTC site for purposes of benefit upgrades"] [emphasis added]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10951 Alexandre Van Damme, Index 601995/07
Plaintiff, 590203/08

-against-

Nahum Gelber,
Defendant-Appellant,

Arij Gasiunasen Fine Art
of Palm Beach, Inc., etc.,
Defendant-Respondent.

- - - - -

Nahum Gelber,
Third-Party Plaintiff-Appellant,

-against-

Arij Gasiunasen,
Third-Party Defendant-Respondent.

_____

Boies, Schiller & Flexner LLP, Armonk (Jason C. Cyrulnik of counsel), for appellant.

Melvyn R. Leventhal, New York, for respondents.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered May 12, 2012, in favor of defendant Gasiunasen Gallery, awarding it $47,638.36 on its cross claim seeking interest on its commission from February 5, 2007, plus costs and disbursements, dismissing defendant Gelber's cross claims against Gasiunasen Gallery and the third-party complaint against third-party defendant Arij Gasiunasen, and awarding third-party

defendant costs and disbursements, and which brings up for review orders, same court and Justice, entered March 23, 2012 and April 23, 2012, which denied Gelber's motion for leave to amend his cross claim and third-party complaint, and granted a motion by defendant Gasiunasen Gallery and third-party defendant Arij Gasiunasen for summary judgment dismissing Gelber's pleadings against them, unanimously affirmed, with costs.

In this action for specific performance of an agreement to purchase an oil painting, the motion court properly granted summary judgment to Gasiunasen Gallery and Arij Gasiunasen. Throughout the litigation, Gelber denied that Gasiunasen Gallery was his agent and, instead, asserted that it was working on its own behalf, as an art dealer, to assist the purchaser of the painting (plaintiff) with the sale, in exchange for a commission on the transaction. Prior final orders in this litigation rejected Gelber's position that an agency relationship did not exist between the gallery and himself (*see Van Damme v Gelber*, 24 Misc.3d 1218(A) [NY Co. Sup Ct 2009], *affd* 79 AD3d 534 [1st Dept 2010], *lv denied* 16 NY3d 708 [2011]; *Van Damme v Gelber*, 104 AD3d 534 [1st Dept 2013]). In opposition to the motion for summary judgment, Gelber asserted a new theory of liability that contradicts his former position disavowing an agency

relationship, arguing for the first time that an agency existed and alleging that Gasiunasen Gallery engaged in unauthorized acts as his agent. Gelber's belated, self-serving assertions that Gasiunasen Gallery engaged in unauthorized acts as his agent, and otherwise failed to comply with the standard fiduciary obligations of an agent, merely create feigned factual issues and are insufficient to defeat the summary judgment motion (*see e.g. Armstrong v Sensormatic/ADT*, 100 AD3d 492 [1st Dept 2012]; *Schwartz v JP Morgan Chase Bank, N.A.*, 84 AD3d 575,577 [1st Dept 2011]).

Further, Gelber did not move to amend his pleadings to assert this new theory until 3 ½ years after he filed his original pleadings, after discovery had concluded, the note of issue filed and his motion to vacate plaintiff's judgment against him denied. This unexcused delay warranted the denial of his

motion to amend the pleadings (*see Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 293 [1st Dept 2004]).

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

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10952 Kleinberg Electric, Inc., Index 105986/08
Plaintiff-Appellant,

-against-

E-J Electric Installation Co., et al.,
Defendants-Respondents.

_____

Goulston & Storrs, P.C., Boston, MA (Derek B. Domain of the bar of the State of Massachusetts, admitted pro hac vice, of counsel), for appellant.

Gallet Dreyer & Berkey, LLP, New York (Randy J. Heller of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 8, 2012, after a nonjury trial, awarding defendants damages, and bringing up for review an order, same court and Justice, entered August 25, 2011, which, insofar as appealed from as limited by the briefs, granted judgment in defendants' favor on their counterclaim, and an order, same court and Justice, entered October 2, 2012, which found that defendants were entitled to $570,935.00 for overpayment damages and $1,165,263.00 for cost-to-complete work damages, for a total sum of $1,736,198.00 plus interest, costs and disbursements, unanimously modified, on the facts, to vacate the award of $570,935 for overpayment damages, and otherwise affirmed, without

costs.

Defendants are entitled to cost-to-complete damages because plaintiff materially breached and abandoned the subcontract, and waived any right to notice of termination or an opportunity to cure. The subcontract explicitly provides that time is of the essence, that plaintiff's delay or failure to meet scheduling requirements warrants termination, and that plaintiff must perform work even if the parties dispute that work's characterization, yet plaintiff repeatedly failed to timely perform and complete work, despite defendant E-J Electric Installation Co.'s repeated demands (*see Engels v French*, 274 AD2d 544 [2d Dept 2000]). Among other material breaches, plaintiff repudiated the subcontract by abandoning the work site when only 73.49% of plaintiff's work was complete (*see Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-463 [1998]; *General Supply & Constr. Co. v Goelet*, 241 NY 28, 34 [1925]; *Plato Gen. Constr. Corp./EMCO Tech Constr. Corp., JV, LLC v Dormitory Auth. of State of N.Y.*, 89 AD3d 819, 824 [2d Dept 2011], *lv denied* 19 NY3d 803 [2012]; *Remodeling Constr. Servs. v Minter*, 78 AD3d 1677, 1678 [4th Dept 2010]). Accordingly, plaintiff waived any right to notice of termination (*see J. Petrocelli Constr., Inc. v Realm Elec. Contrs., Inc.*, 15 AD3d

444, 446 [2d Dept 2005]; *Special Situations Fund III v Versus Tech.*, 227 AD2d 321 [1st Dept 1996], *lv denied* 88 NY2d 815 [1996]; *Sunshine Steak, Salad & Seafood v W.I.M. Realty*, 135 AD2d 891, 892-893 [3d Dept 1987]).

It is well-settled that if a subcontractor breaches before completing performance, the contractor is entitled to recover reliance, or cost-to-complete damages from the subcontractor (*see New Era Homes Corp. v Forster*, 299 NY 303, 306 [1949]; *Hydraulitall, Inc. v Jones Inlet Mar., Inc.*, 71 AD3d 1087, 1089 [2d Dept 2010]; *Feldin v Doty*, 45 AD3d 1225, 1226 [3d Dept 2007]; *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186, 189-190 [1st Dept 2002]; *Citnalta Constr. Corp. v Caristo Assoc. Elec. Contrs.*, 244 AD2d 252, 253 [1st Dept 1997]). Supreme Court correctly found that defendants were entitled to recover cost-to-complete damages from plaintiff, but, as defendants concede,

awarding them overpayment damages as well constituted an impermissible, and unsolicited, double recovery.

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

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10953 John A. Champlin, Dkt. 7644/12
Plaintiff-Appellant, Index 842/11

-against-

Daniel S. Pellegrin,
Defendant-Respondent.

_____

Pascazi Law Offices PLLC, Fishkill (Michael S. Pascazi of counsel), for appellant.

Kevin O'Rourke Moore, Chappaqua, for respondent.

_____

Order, Supreme Court, Dutchess County (Robert M. DiBella, J.), entered June 14, 2012, which denied plaintiff's motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The statute of limitations on a cause of action for legal malpractice is three years (*see* CPLR 214[6]). Here, plaintiff's claims accrued, at the latest, on October 7, 1997, three years after the underlying action had been marked by the court as "disposed." However, plaintiff did not commence this action until February 2011, more than 16 years after the disposition of his case.

Contrary to plaintiff's assertions, the claim was not tolled

by the continuous representation doctrine. Generally, tolling under the continuous representation doctrine "end[s] once the client is informed or otherwise put on notice of the attorney's withdrawal from representation" (*Shumsky v Eisenstein*, 96 NY2d 164, 171 [2001]). The parties do not dispute that there were no communications between them from 1994 until 2011, when plaintiff purported to discharge defendant from representing him. The more than 16-year lapse in communications from defendant was sufficient to constitute reasonable notice to plaintiff that defendant was no longer representing him.

Furthermore, as there was no "clear indicia of an ongoing, continuous, developing, and dependent relationship between [plaintiff and defendant]" (*Pittelli v Schulman*, 128 AD2d 600, 601 [2d Dept 1987] [internal quotation marks omitted]), or a "mutual understanding of the need for further representation on the specific subject matter[s] underlying the malpractice claim"

(*McCoy v Feinman*, 99 NY2d 295, 306 [2002]), we find that plaintiff's reliance on CPLR 321(b) is misplaced.

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

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10954 The People of the State of New York, Ind. 1433/06
Respondent,

-against-

Mary Foer, etc.,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered March 30, 2011, as amended April 7, 2011, convicting defendant, upon her plea of guilty, of grand larceny in the second degree, and sentencing her, as a second felony offender, to a term of 4½ to 9 years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment on the ground of unreasonable delay in sentencing, since the delay was not excessive and was occasioned by "plausible reasons" that should not trigger a loss of jurisdiction (*see People v Drake*, 61 NY2d 359, 366 [1984]). When the People learned that defendant was incarcerated in Pennsylvania, they made reasonably diligent efforts to have her returned for sentencing. The delay resulting from this

incarceration was reasonable, given the refusal of the Pennsylvania authorities to extradite defendant during the pendency of her Pennsylvania case (*see e.g. People v Ruiz*, 44 AD3d 428 [1st Dept 2007], *lv denied* 10 NY3d 770 [2008]; *People v Hendricks*, 13 AD3d 61 [1st Dept 2004], *lv denied* 4 NY3d 764 [2005]).

To the extent defendant is challenging periods of delay other than the period in which she was incarcerated in Pennsylvania, those claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10955-
10956 In re Kathleen F.,
Petitioner-Appellant,

-against-

George F., Jr.,
Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

_____

Order, Family Court, Bronx County (Allen Alpert, J.), entered on about March 1, 2012, which denied petitioner's objection to a modified order of support (Alicea Elloras, S.M.), entered on or about December 29, 2011, to the extent that it did not include in the amount of retroactive support owed by respondent George F. any amounts owed for health insurance premiums paid by petitioner on behalf of the subject child, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about November 1, 2012, which denied petitioner's objection to an order, same court and Support Magistrate, entered on or about October 2, 2012, unanimously dismissed, without costs, as abandoned.

Petitioner's objection to the first support magistrate order was properly denied because it was filed after the thirty-five

day deadline imposed by the Family Court Act (*see* Family Court Act § 439[e]; *Matter of Bodouva v Bodouva*, 53 AD3d 483, 484 [2d Dept 2008]).

The appeal from the order entered on or about November 1, 2012, which denied petitioner's objection to the support magistrate's order dated October 2, 2012, is dismissed as abandoned, since petitioner makes no argument concerning the court's determination and does not ask for any relief from that order (*see Matter of Gloria C. v Josephine I.*, 106 AD3d 630, 630-631 [1st Dept 2013]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Moskowitz, J.P., Renwick, DeGrasse, Gische, JJ.

10957 The People of the State of New York, Ind. 3443/07
Respondent,

-against-

Daniel Israel,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and Millbank, Tweed, Hadley & McCloy LLP, New York (Elise Kent Bernanke of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered February 25, 2011, as amended March 16, 2011, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the first degree, attempted assault in the first degree, assault in the first and second degrees, reckless endangerment in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 35 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant failed to prove by a preponderance of the evidence his

affirmative defense of extreme emotional disturbance. There is no basis for disturbing the jury's weighing of conflicting expert testimony concerning defendant's mental state.

The court properly exercised its discretion in admitting evidence of an uncharged crime committed by defendant while he was incarcerated pending trial on this case. Evidence that he destroyed an inmate telephone because he "felt like it" was relevant to rebut the evidence he presented that he was a calm, nonviolent person, and that the charged crimes were the product of extreme emotional distress triggered by his posttraumatic stress disorder. Defendant's statements to the testifying Correction Officer provided sufficient context to establish the relevance of this evidence, which was more probative than prejudicial (*see People v Cass*, 18 NY3d 553 [2012]; *People v Santarelli*, 49 NY2d 241 [1980]). The court's limiting instructions were sufficient to minimize any prejudice.

Defendant did not preserve his similar challenge to evidence of another uncharged crime, or his challenges to the prosecutor's

summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10959 Shani L. Nielsen, Index 109538/09
Plaintiff-Respondent,

-against-

300 East 76th Street Partners, LLC,
Defendant-Appellant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Steven H. Rosenfeld of counsel), for appellant.

Bader, Yakaitis & Nonnenmacher, LLP, New York (Darlene S. Miloski of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered March 12, 2013, which, upon reargument, adhered to the original determination denying defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion for summary judgment granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff was injured while working in a bar on premises leased from defendant. She testified that she was descending a ladder accessed through a hatch door behind the bar counter when she lost her balance, and when she reached up to grab the floor, the hatch door closed on her hand.

Defendant established prima facie that it was an out-of-possession landlord with no duty to perform non-structural

repairs by submitting the lease (*see Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]). Further, defendant submitted its expert engineer's findings that the wooden ladder was "firmly affixed and structurally sound" and, "when fully open, . . . [was] held in the open position by gravity."

It is undisputed that neither the ladder nor the hatch door violated any specific statutory provisions, and plaintiff submitted no evidence of another type of industry-wide standard applicable to this case (*see Hotaling v City of New York*, 55 AD3d 396, 398 [1st Dept 2008], *affd* 12 NY3d 862 [2009]). Thus, whether defendant had notice of a defective condition in either the ladder or the hatch door is immaterial (*see Devlin*, 80 AD3d at 497-498).

Given the lease provisions, the evidence that there was an

overlap in ownership between defendant and the bar's corporate owner is insufficient to raise an issue of fact whether defendant was an out-of-possession landlord (*compare Brasby v Barra*, 156 AD2d 530 [2nd Dept 1989]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10960 In re Christopher Jones, Index 102706/12
Petitioner,

-against-

Raymond Kelly, etc.,
Respondent.

_____

Baker, Leshko, Saline & Blosser, LLP, White Plains (Anthony C. Saline of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

_____

Determination of respondent, dated January 19, 2012, which terminated petitioner's employment as a detective for the New York City Police Department, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered on or about September 18, 2012), dismissed, without costs.

The determination that petitioner possessed and ingested cocaine was supported by substantial evidence, including the positive random drug test results (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). There is no basis for disturbing the Hearing Officer's credibility determinations (*see Matter of Berenhaus v Ward*, 70

NY2d 436, 443-444 [1987]).

The penalty imposed does not shock our sense of fairness since respondent "is accountable to the public for the integrity of the Department" (*Trotta v Ward*, 77 NY2d 827, 828 [1991] [internal quotation marks omitted]; *see also Matter of Chiofalo v Kelly*, 70 AD3d 423 [1st Dept 2010]; *Matter of Connor v New York City Police Dept.*, 22 AD3d 425 [1st Dept 2005]).

We have considered petitioner's remaining contentions, including his concerns about the impact his termination has on his retirement benefits, and find them unavailing.

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

ENTERED: NOVEMBER 7, 2013

CLERK

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10961N In re David Sweedler, et al., Index 651019/13
Petitioners-Appellants,

-against-

DSJS, Inc.,
Respondent-Respondent.

_____

Silverman Acampora LLP, Jericho (Robert J. Ansell of counsel), for appellants.

Proskauer Rose LLP, New York (Peter J.W. Sherwin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 23, 2013, which, inter alia, denied the petition to permanently stay arbitration, unanimously affirmed, with costs.

Petitioners failed to raise an issue of fact to justify a stay of the arbitration provided for in the parties' Commission Agreement (*see Matter of Commercial Union Ins. Cos. [Pouncy]*, 120 AD2d 382 [1st Dept 1986]). Indeed, the petition is predicated solely on the fact that petitioners are not signatories to the agreement. By its own terms, the agreement is binding upon the signatory, Windpost Apparel Group, LLC "and all of its parents,

subsidiaries, affiliates and divisions." The evidence of petitioners' relationship with Windpost supports the determination dismissing the petition.

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

ENTERED: NOVEMBER 7, 2013

CLERK

CORRECTED ORDER - NOVEMBER 7, 2013

Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Gische, JJ.

10962N Aida Cuevas, Index 17673/07
Plaintiff-Appellant,

-against-

1738 Associates, L.L.C., et al.,
Defendants-Respondents.

Sobel Ross Fliegel & Stieglitz, LLP, New York (David Malach of counsel), for appellant.

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondents.

Order, Supreme Court, **Bronx** County (Barry Salman, J.), entered August 14, 2012, which granted defendants' motion for a commission to take a deposition of a nonparty witness after the note of issue was filed, unanimously dismissed, without costs, as moot.

Given that the deposition to which plaintiff objects has already taken place, and her failure to make any attempt to stay the deposition in order to maintain the status quo prior to this appeal, the appeal is dismissed as moot *(see Hughes v Farrey,* 39 AD3d 431 [1st Dept 2007]; *see also Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach,* 98 NY2d 165, 174 [2002]).

Moreover, plaintiff is incorrect that the motion for a commission was untimely. Pursuant to 22 NYCRR 202.21(d), the application did not have to be brought within 20 days of filing

application did not have to be brought within 20 days of filing of the note of issue (*compare* 22 NYCRR 202.21[e]). Instead, defendants had to show "unanticipated circumstances" with regard to the deposition that necessitated going forward post-note of issue. In the first instance, we note that plaintiff stipulated to the deposition taking place after the note of issue was filed, albeit much earlier than it did take place. Furthermore, it is undisputed that the witness moved to Connecticut after the filing of the note of issue, and thus a commission was necessary to obtain her testimony. As such, the standard for post-note of issue discovery was satisfied (*cf. Schroeder v IESI NY Corp.*, 24 AD3d 180 [1st Dept 2005]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10963 The People of the State of New York, Ind. 1534/06
Respondent,

-against-

Dexter Roman,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael R. Sonberg, J.), rendered January 5, 2009, convicting defendant, after a jury trial, of two counts of murder in the second degree, and sentencing him to consecutive terms of 25 years to life, unanimously affirmed.

The verdict convicting defendant of two murders, committed on separate dates, was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). As to each crime, there is no basis for disturbing the jury's credibility determinations, including its evaluation of such matters as inconsistencies in testimony, motives to falsify, and witnesses' delay in revealing information.

By failing to object, or by failing to request further

relief after the court sustained objections, delivered limiting instructions or took other curative actions, defendant failed to preserve his claims that the People improperly elicited hearsay testimony and highlighted this testimony during summation, and we decline to review them in the interest of justice. As an alternative holding, we find that the court's curative actions during testimony were sufficient to prevent any prejudice (*see generally People v Davis*, 58 NY2d 1102 [1983]), and that the challenged summation remarks accurately portrayed the testimony of the witnesses and were responsive to defense counsel's summation (*see generally People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118–119 [1992] *lv denied* 81 NY2d 884 [1993]). We likewise decline to review defendant's unpreserved constitutional claim, and in the alternative we reject it because the evidence at issue was not testimonial for purposes of the Confrontation Clause.

The court's charge on reasonable doubt conveyed the proper constitutional standards, was sufficiently balanced, and did not undermine defendant's defense (*see e.g. People v Jiovani*, 258 AD2d 277 [1st Dept 1999], *lv denied* 93 NY2d 900 [2000]; *compare People v Williams*, 5 NY3d 732 [2005]). Furthermore, the language challenged by defendant was generally similar to the pattern

instruction (CJI 2d[NY] Presumption of Innocence, Burden of Proof, Proof Beyond a Reasonable Doubt), which likewise cautions against speculation while instructing that reasonable doubt may result from a lack of convincing evidence. The court properly exercised its discretion in declining to deliver an expanded charge on eyewitness identification (*see People v Knight*, 87 NY2d 873 [1995]; *People v Whalen*, 59 NY2d 273, 279 [1983]), particularly since all the witnesses were defendant's acquaintances. Defendant's remaining claims regarding the court's final jury instructions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not fully explained by the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of his claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Counsel's

failure to make additional objections did not deprive defendant of effective assistance (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]). Defendant has not shown that counsel's failure to make these objections fell below an objective standard of reasonableness, that raising these issues would have resulted in favorable rulings from the trial court or on this appeal, or that, viewed individually or collectively, the alleged deficiencies deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10966 In re Yadori Marie F.,

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

Osvaldo F.,
Respondent-Appellant,

Edwin Gould Services for Children and Families,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

John R. Eyerman, New York, for respondent.

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 31, 2012, which denied respondent's motion to vacate an order of disposition, same court and Judge, entered on or about August 19, 2011, upon his default, inter alia, terminating his parental rights to the subject child, upon a finding of permanent neglect, unanimously affirmed, without costs.

Respondent failed to demonstrate a reasonable excuse for his failure to appear at the dispositional hearing (*see* CPLR 5015[a][1]). His contention that he was confused as to when the dispositional hearings were scheduled is belied by the record,

which shows that during both the fact-finding and the dispositional hearings, his counsel told the court that he had spoken with respondent and given him that information. Moreover, there is no evidence that respondent called his attorney, the court or petitioner agency, before or after he defaulted, to inquire about the scheduling of the proceedings (*see Matter of Giovanni Maurice D. [Wilner B.]*, 99 AD3d 631 [1st Dept 2012]).

Since respondent failed to offer a reasonable excuse for his default, we need not determine whether he offered a meritorious defense to the termination of his parental rights (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538 [1st Dept 2012]).

In any event, the record supports both the termination of parental rights and the finding of permanent neglect. A preponderance of the evidence shows that it is in the child's best interests to be freed for adoption, since she has resided with the same foster family since she was a toddler and has developed a strong bond with them (*see Matter of Isabella Star G.*, 66 AD3d 536 [1st Dept 2009]). There is no evidence that at the time of the dispositional hearing respondent was ready to care for the child (*see Matter of Octavia Loretta R. [Randy McN.-Keisha W.]*, 93 AD3d 537 [1st Dept 2012]).

As to the neglect finding, the agency demonstrated by clear and convincing evidence that it made the requisite diligent efforts (*see* Social Services Law § 384-b[7][a]), and respondent failed to show that he had completed a drug and alcohol treatment program within the statutory time period or that he had consistently visited with his daughter after she entered foster care (*see Matter of Evan Matthew A.*, 91 AD3d at 539).

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

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10967 The People of the State of New York, Ind. 8657/98
Respondent,

-against-

Gregory Pope,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John P. Collins, J.), rendered March 24, 2011, resentencing defendant to a term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10968 Burnett Williams, Index 23644/05
Plaintiff-Appellant,

-against-

City of New York, et al.,
Defendants-Respondents.

_____

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

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 22, 2012, which granted the motion of defendant New York City Transit Authority (NYCTA) to correct the rate of interest on the judgment from 9% to 3% pursuant to Public Authorities Law § 1212(6), unanimously affirmed, without costs.

It is uncontested that the rate of interest against NYCTA may be no more than 3% (Public Authorities Law § 1212[6]). As defendants were found jointly and severally liable for 100% of the judgment, the proper interest rate was 3% (*see Bello v New York City Tr. Auth.*, 50 AD3d 511 [1st Dept 2008]; *Klos v New York City Tr. Auth.*, 240 AD2d 635, 638 [2d Dept 1997], *lv dismissed* 91 NY2d 846 [1997]). Moreover, defendants assert that NYCTA is bound to indemnify the City pursuant to the lease relating to the

subject property. Plaintiff does not deny this assertion, and thus, NYCTA is the real party in interest, and the court properly recalculated the interest rate at 3% (*see Ebert v New York City Health & Hosps. Corp.*, 82 NY2d 863 [1993]). Finally, as the rate of interest was not argued by the parties or decided by the court, and the rate is mandated by statute, this ministerial error may be corrected even after the underlying substantive appellate process is complete (*see Kiker v Nassau County*, 85 NY2d 879 [1995]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10970 Sylvia Phillips, Index 114886/10
Plaintiff-Respondent,

—against—

New York Daily News, et al.,
Defendants-Appellants.

_____

Matthew A. Leish, New York, for appellants.

Riconda & Garnett LLP, Valley Stream (John Riconda of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 15, 2012, which denied defendants' motion to dismiss plaintiff's complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment dismissing the complaint.

In this action for negligent infliction of emotional distress arising from defendant newspaper's publication of an article reporting on the death of a three-year old girl who was allegedly beaten by her father, the article attributed certain statements regarding the child's appearance the day before her death to plaintiff, who was a neighbor. Specifically, the article stated that plaintiff saw the child's step-mother taking her out for a walk in a stroller and described the little girl as

"hidden beneath a pile of blankets." The article quoted plaintiff as saying, "[I]t was different, the way it was wrapped . . . . She turned the stroller like she didn't want me to see the child. It disturbed me." Plaintiff denies making these statements and commenced this action claiming that following the article's publication, a street gang, of which the father and his brother were members, began to harass and threaten her, causing her to fear for her safety and to move her residence on several occasions.

The complaint fails to state a cause of action for intentional infliction of emotional distress since it fails to allege conduct that is "extreme and outrageous" (*see Goldstein v Massachusetts Mut. Life Ins. Co.*, 60 AD3d 506, 508 [1st Dept 2009]; *Berrios v Our Lady of Mercy Med. Ctr.*, 20 AD3d 361, 362 [1st Dept 2005]). Plaintiff fails to allege that defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Berrios*, 20 AD3d at 362, quoting *Sheila C. v Povich*, 11 AD3d 120, 130-31 [1st Dept 2004] [quotation marks omitted]).

Plaintiff similarly failed to properly plead a claim for prima facie tort since the complaint fails to allege that

defendants' sole motive in publishing the article was "disinterested malevolence" (*Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 332 [1983]; *Woytisek v JP Morgan Chase & Co.*, 46 AD3d 331, 331 [1st Dept 2007]) and fails to allege special damages (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). The complaint merely alleges that plaintiff suffered damages "in an amount exceeding the monetary jurisdictional limits of all lower courts which would otherwise have jurisdiction" without specifying or detailing her loss. Although her affidavit in opposition to the motion states that she "incurred moving expenses in excess of Fifteen Thousand Dollars," such "round figures, with no attempt at itemization, must be deemed to be a representation of general damages" (*Drug Research Corp. v Curtis Publ. Co.*, 7 NY2d 435, 441 [1960]; *see Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266 [1st Dept 2002]).

We disagree with the motion court's finding that plaintiff

should be accorded an opportunity to discover if defendants had "knowledge and an intent to injure her," since this addresses only one of the elements of a claim for prima facie tort and will not cure the defects in the complaint.

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10971 The People of the State of New York, Ind. 1097/11
Respondent,

-against-

Michael Everett,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about September 28, 2011,

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

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

ENTERED: NOVEMBER 7, 2013

CLERK

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

Mazzarelli, J.P., Saxe, Richter, Feinman, JJ.

10972 Jennifer Cangro, Index 104562/10
Plaintiff-Appellant,

-against-

Mary V. Rosado,
Defendant-Respondent.

_____

Jennifer Cangro, appellant pro se.

_____

Appeal from order, Supreme Court, New York County (Debra A. James, J.), entered August 9, 2012, which denied plaintiff's motion for reargument of the parties' respective motions for summary judgment, unanimously dismissed, without costs, as taken from a nonappealable paper. Plaintiff is enjoined from commencing any litigation or making any motions against defendant without the prior permission of the appropriate administrative judge.

No appeal lies from an order denying reargument (*D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]).

In light of plaintiff's extraordinary history of frivolous and abusive litigation, including this meritless action against her former guardian (*see e.g. Cangro v Cangro*, 288 AD2d 417 [2d

Dept 2001]; *Cangro v Solomon*, 2010 NY Slip Op 31980U [Sup Ct NY County 2010], *vacatur denied* 2011 NY Slip Op 87844U [1st Dept 2011], *appeal dismissed, lv dismissed* 19 NY3d 990 [2012]), plaintiff is restrained from commencing further proceedings against her without prior judicial permission.

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10973 In re San Miguel Auto Repair Corp., et al., Petitioners,

-against-

State of New York Department of Motor Vehicles, et al., Respondents.

Index 260206/12

_____

Mary Beth Macina, Yonkers, for petitioners.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondents.

_____

Determination of respondents, dated October 25, 2011, which affirmed a decision of the Administrative Law Judge (ALJ) revoking the inspection station license of petitioner San Miguel Auto Repair Corp. (San Miguel), and imposing a civil fine in the amount of $15,500, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Kenneth L. Thompson, Jr., J.], entered on or about September 26, 2012), dismissed, without costs.

Respondents' determination is supported by substantial evidence, including the testimony of an automotive facilities inspector, who stated that San Miguel had fraudulently certified

that it had conducted emissions inspections on 31 vehicles (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The fact that respondents charged San Miguel with either using a clean vehicle or an electronic device to perform the "clean scans," in order to produce false passing emissions, did not render the allegations speculative. Rather, the investigator unequivocally testified that the 31 vehicles at issue had identical digital fingerprints and communication protocols, despite consisting of different makes and models.

Petitioner Andres Moncion's alleged lack of awareness of the misconduct of a certified inspector at San Miguel does not relieve petitioners of the responsibility for inspection activities conducted at the facility (*see* 15 NYCRR 79.8[b]; 15 NYCRR 79.17[c][1]; *see also Matter of Weston v Adduci*, 140 AD2d 444 [2d Dept 1988]).

The ALJ's efforts here "to clarify issues [and] develop facts" do not evidence bias or act to deprive petitioners of their due process rights (*Matter of Somma v Jackson*, 268 AD2d 763, 764 [3d Dept 2000]).

The penalty imposed in connection with 31 separate violations of "clean scanning" vehicles occurring over a two

month period does not shock our sense of fairness (*see Matter of Cipry Auto., Inc. v New York State Dept. of Motor Vehs.*, 72 AD3d 816 [2d Dept 2010]; *Matter of Heydari v Jackson*, 237 AD2d 763 [3d Dept 1997], *lv denied* 90 NY2d 802 [1997]).

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: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10975- Index 152409/12
10976 American Transit Insurance Company, 152413/12
Plaintiff-Appellant,

-against-

Keyana Lucas, et al.,
Defendants,

Sky Acupuncture, P.C.,
Defendant-Respondent.

- - - - -

American Transit Insurance Company,
Plaintiff-Appellant,

-against-

Tashuana Lucas, et al.,
Defendants,

Sky Acupuncture, P.C.,
Defendant-Respondent.

_____

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Law Offices of Melissa Betancourt, P.C., Brooklyn (Sam Lewis of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about February 26 and 28, 2013, which, to the extent appealed from as limited by the briefs, in the respective actions regarding the injured claimants Keyana Lucas and Tashuana Lucas, denied plaintiff's motions for summary judgment seeking

declarations of noncoverage for no-fault benefits as against defendant-respondent Sky Acupuncture, P.C., unanimously reversed, on the law, without costs, the motions granted, and it is declared that plaintiff owes no coverage obligation to Sky Acupuncture, P.C. for no-fault benefits for the injured claimants.

The failure to attend duly scheduled medical exams voids the policy ab initio (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2012]). Accordingly, when defendants' assignors failed to appear for the requested medical exams, plaintiff had the right to deny all claims retroactively to the date of loss, regardless of whether the denials were timely issued (*see* Insurance Department Regulations [11 NYCRR] § 65-3.8[c]; *Unitrin*, 82 AD3d at 560).

"'[A] properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is not enough to rebut this presumption'" (*Matter of Ariel Servs., Inc. v New York City Envtl. Control Bd.*, 89 AD3d 415, 415 [1st Dept 2011]). "The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly

addressed and mailed" (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2d Dept 2001]).

Plaintiff submitted competent evidence that the notices scheduling the claimant's medical examinations were mailed, as well as the failure to appear, based on the sworn affidavits of the scheduled examining physician and his employee (*see American Tr. Ins. Co. v Solorzano*, 108 AD3d 449, 449 [1st Dept 2013]). Contrary to defendants' contention, the affidavits were not conclusory, as they established personal knowledge, the employee's role in the physician's no-fault department, and the physician's personal knowledge of the office procedures when a claimant failed to appear for a medical exam (*cf. First Help Acupuncture, P.C. v Lumbermens Mut. Ins. Co.*, 9 Misc 3d 1127[A], *3 [Civ Ct, Kings County 2005], *affd* 14 Misc 3d 142[A] [App Term, 2d Dept 2007]).

There is no requirement to demonstrate that the claims were timely disclaimed since the failure to attend medical exams was an absolute coverage defense (*see New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 593 [2011]; *Unitrin Advantage Ins. Co.*, 82 AD3d at 560).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10977-
10978 In re Will V.,

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

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Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Shannon R. Ashford of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County, (Allen G. Alpert, J. at fact-finding hearing; Sidney Gribetz, J. at disposition), entered on or about January 10, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the third degree, grand larceny in the fourth degree and assault in the third degree, and placed him on enhanced supervised probation for a period of 15 months, unanimously affirmed, without costs. Appeal from fact-finding order, same court (Allen G. Alpert, J.), entered on or about November 28, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the order of

disposition.

While the better practice would have been to adjourn the matter for one day, especially where the Presentment Agency joined the request for an adjournment, based on this record the court did not violate appellant's right to be present when it ordered a portion of the fact-finding hearing to continue in appellant's absence. The record establishes that although appellant was aware of the time and date for his continued fact-finding hearing, at which a civilian witness was scheduled to testify, appellant chose to be elsewhere. Accordingly, this constituted a deliberate absence, resulting in a forfeiture of the right to be present (*see People v Sanchez*, 65 NY2d 436, 443-444 [1985]). We note that appellant did not appear in court until the next day, and offered no explanation for his absence (*compare Matter of Joelin V.*, 107 AD3d 511 [1st Dept 2013]).

The record demonstrates that appellant's counsel, whose ability to conduct a defense was impaired by her client's absence, pursued a "protest strategy" (*People v Aiken*, 45 NY2d 394, 399 [1978]) or "strategy of silence" (*United States v Sanchez*, 790 F2d 245, 254 [2d Cir 1986], *cert denied* 479 US 989 [1986]). We conclude that counsel's strategic decisions regarding nonparticipation during appellant's absence were

objectively reasonable, and did not cause appellant any prejudice (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). We have considered and rejected appellant's remaining claims of ineffective assistance.

Appellant did not preserve his challenge to the sufficiency of the evidence supporting the physical injury element of third-degree assault, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The victim sustained swelling to his eye that lasted for three to four days. In addition, his jaw, which he iced twice a day for four days, was swollen for a week and caused him difficulty in eating and talking. This provided ample evidence of physical injury (*see generally People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10980 In re Aisha Brown, Index 114039/11
Petitioner-Appellant.

-against-

City of New York, et al.,
Respondents-Respondents.

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 19, 2012, denying the petition to, inter alia, annul the determination of respondent New York City Department of Education (DOE) to terminate petitioner's probationary employment effective July 31, 2010 and to affirm petitioner's unsatisfactory rating (U-rating) for the 2009-2010 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously modified, on the law, the petition granted to the extent of annulling the U-rating, and otherwise affirmed, without costs.

There is no dispute that the termination of petitioner's probationary employment went into effect on July 31, 2010, but that she did not initiate the instant proceeding until December

14, 2011, well after the expiration of the four-month statute of limitations period (*see* CPLR 217[1]). Accordingly, insofar as the petition challenges her termination, it is untimely (*see Kahn v New York City Dept. of Educ.*, 18 NY3d 457, 462 [2012]). However, the petition is timely to the extent it challenges the issuance of the 2009-2010 annual U-rating, since that determination did not become final until DOE affirmed it on January 27, 2012.

The evidence shows that following petitioner's first year as a probationary special education teacher in 2008-09, she received a satisfactory rating and also received a satisfactory review for her teaching during the summer 2009 session. Petitioner was not assigned a coach until the third month of the 2009-2010 school year, and the principal informally observed her teaching for the first time at the end of January 2010, the day after petitioner had asked for help and complained that her literacy coach was ineffective. Pursuant to the principal's January 28, 2010 observation of her literacy class, petitioner received a written evaluation generally criticizing her for failing to have a daily lesson plan. The principal formally observed petitioner's literacy lesson on March 2, 2010, and again rated it unsatisfactory, but, petitioner was not provided with the post-

observation written evaluation until June 7, 2010. The report listed a litany of criticisms, none of which centered on the deficiencies noted in the informal observation. Petitioner was again formally observed by the assistant principal on June 16, 2010, and the written evaluation, provided to petitioner on June 24th, noted many of the same deficiencies indicated in the June 7th report. The principal issued the 2009-10 annual professional performance review on June 22, 2010, rating petitioner unsatisfactory for the year, and recommending discontinuance of her probationary employment.

Petitioner invoked DOE's administrative procedures to appeal the U-rating and the Chancellor's Committee held a hearing, but DOE did not issue a final decision for more than year, which prompted the filing of the instant proceeding. In the meantime, DOE ultimately issued its final determination in which it affirmed the U-rating and in doing so, it refused to adopt the recommendation of the Chancellor's Committee, which was to sustain petitioner's appeal and reverse the U-rating.

Under the circumstances presented, we find that the U-rating should be annulled. The record shows that upon timely receipt of the written report pertaining to the January 2010 observation, petitioner implemented its recommendations, and the deficiency

was not noted in the subsequent formal observations. In addition, the principal failed to provide the written evaluation of the March 2nd formal observation for more than three months, and it was received at the end of the school year when there was little time to implement the multiple recommendations. Petitioner's next formal observation came only nine days after receiving the report of the March observation and, not surprisingly, the results indicated that she had not implemented the suggestions.

In view of the foregoing, we find that the deficiencies in the rating of petitioner were not merely technical, but undermined the integrity and fairness of the entire review process (*see Matter of Kolmel v City of New York*, 88 AD3d 527, 529 [1st Dept 2011]; *Matter of Blaize v Klein*, 68 AD3d 759 [2d Dept 2009]; *compare Matter of Cohn v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 102 AD3d 586 [1st Dept 2013).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10982-
10982A In re Abu I.,
Petitioner-Appellant,

-against-

Zaratu I.,
Respondent-Respondent.

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Andrew J. Baer, New York, for appellant.

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Orders, Family Court, Bronx County (David B. Cohen, J.), entered on or about November 30, 2012, which, after a fact-finding hearing, respectively, dismissed with prejudice the petition alleging family offenses against respondent, and ordered a full order of protection against petitioner, unanimously affirmed, without costs.

A fair preponderance of the evidence supports the court's finding that petitioner committed acts that would constitute assault in the third degree, menacing in the second and third degrees, and criminal obstruction of breathing or blood circulation (*see* Family Court Act §§ 812; 832). The court's

credibility determinations are supported by the record and therefore entitled to deference (*see Matter of Creighton v Whitmore*, 71 AD3d 1141 [2d Dept 2010]).

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

ENTERED: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10983N Epstein Becker & Green, P.C., Index 102458/10
Plaintiff-Respondent,

-against-

Amersino Marketing Group, LLC, et al.,
Defendants-Appellants.

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Kevin Kerveng Tung, P.C., Flushing (Kenji Fukuda of counsel), for appellants.

KLG Luz & Greenberg LLP, New York (Luke Tynan of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 6, 2012, which, insofar as appealed from as limited by the briefs, in this action for unpaid legal fees, granted plaintiff law firm's motion for summary judgment in the principal amount of $87,995.34, and denied defendants' cross motion for summary judgment dismissing the claim insofar as asserted against Wang individually, or, alternatively, seeking a hearing to determine the reasonableness of the fees, and Wang's portion of those fees, unanimously affirmed, with costs.

The record establishes plaintiff's entitlement to recover the unpaid legal fees that arose from its representation of defendants in two underlying actions. Contrary to defendants' contention, the subject retainer agreement governs plaintiff's

work on both underlying matters. In compliance with 22 NYCRR 1215.1, which mandates that retainer agreements contain an "explanation of the scope of the legal services to be provided" (22 NYCRR 1215.1[b][1]), the agreement specifies that plaintiff's services "will include legal representation and advice with respect to specific matters that you refer to the Firm." Although defendants initially sought plaintiff to represent them in only one of the underlying actions, it is undisputed that they requested plaintiff's services with respect to the other action, shortly thereafter. Plaintiff's representation of defendants in the latter matter therefore falls within the ambit of the retainer.

Defendants' contention that individual defendant Wang could not be held personally liable for the legal fees, because the retainer was silent as to his personal guaranty of payment, is unavailing since Wang signed the retainer not only as the owner of defendant Amersino Marketing Group, LLC, but also individually (*compare Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd* 19 NY3d 511 [2012]). Also unavailing is defendants' argument that Wang should be held liable for only the portion of the work done specifically on his behalf in his individual capacity. Wang and Amersino were sued jointly and

severally, and Wang admitted that he would have been liable for the judgment if Amersino failed to pay. Accordingly, all legal work benefitted Wang and Amersino equally.

The court properly declined to grant defendants' request for a hearing on the reasonableness of the fees, where defendants did not object to the invoices when they received them or within a reasonable time thereafter, establishing an account stated (*see Jaffe v Brown-Jaffe*, 98 AD3d 898, 899 [1st Dept 2012]).

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: NOVEMBER 7, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Feinman, JJ.

10984N Arnold Rossman, Index 108350/11
Plaintiff-Appellant,

-against-

Windermere Owners LLC, et al.,
Defendants-Respondents.

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Marc Bogatin, New York, for appellant.

Cullen & Troia, P.C., New York (Wayne L. DeSimone of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 20, 2013, which denied plaintiff's motion to dismiss defendants' counterclaim for attorneys' fees, unanimously reversed, on the law, with costs, and the motion granted.

"Under the general rule, attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). Here, the lease agreement between the parties provided for reimbursement of legal fees and costs of the prevailing party in an action or proceeding between the landlord and tenant for non-payment of rent or recovery of possession of the apartment.

A lease rider made the tenant liable for the landlord's actual attorneys' fees, costs and disbursements in an action brought by the landlord, arising from the tenant's breach of the lease.

Neither of these provisions applies to the instant action. The lease rider is inapplicable because this action was not initiated by the landlord. The lease provision also does not apply because plaintiff tenant was seeking monetary damages for alleged rent overcharges, a declaratory judgment that he was a rent-stabilized tenant entitled to a two-year stabilized lease at a lawful rent, and an injunction enjoining defendants from taking any steps to evict him. Defendants have not asserted that plaintiff breached the lease agreement or that he was not a lawful resident in possession of the apartment, when the action was commenced. Consequently, neither party was seeking to recover possession of the apartment.

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

ENTERED: NOVEMBER 7, 2013

CLERK