SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 4, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Renwick, Freedman, Feinman, JJ.

11187 Karlo Morato-Rodriguez, Index 303634/09
Plaintiff-Respondent,

-against-

Riva Construction Group, Inc.,
Defendant,

1412 Broadway, LLC,
Defendant-Respondent,

Admit One, LLC,
Defendant-Appellant.

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Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for appellant.

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for Karlo Morato-Rodriguez, respondent.

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler and Dawn C. DeSimone of counsel), for 1412 Broadway, LLC, respondent.

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Order, Supreme Court, Bronx County (Maryann Briganti-Hughes, J.) entered August 3, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as to liability under Labor Law § 240(1) and denied defendant Admit One LLC's cross motion for summary judgment dismissing the complaint, unanimously modified, on the

law, to deny plaintiff's motion, and otherwise affirmed, without costs.

The motion court properly found that Admit One LLC's status as a tenant does not shield it from liability under Labor Law § 240(1) (*see Bush v Goodyear Tire & Rubber Co.*, 9 AD3d 252, 253 [1st Dept 2004], *lv dismissed* 3 NY3d 737 [2004]). Admit One's reliance on *Ferluckaj v Goldman Sachs & Co*, 12 NY3d 316 [2009] is misplaced, because unlike the tenant in that case, here the testimony of Admit One's vice president establishes that it selected the contractor for the work and substantially directed and controlled it. Indeed, emails provided by the architect further demonstrate that Admit One was actively engaged in the build-out.

Plaintiff demonstrated his prima facie entitlement to summary judgment on the issue of defendants' § 240(1) liability through his testimony that, at the direction of the defendants' site foreman, he used the *only* ladder on the floor, an open A-frame ladder "not too far" from the foreman's toolbox, and that while he was standing on it, the ladder became unstable, wobbled and fell, causing him to fall and sustain injury *(see Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381 [1st Dept 1996]).

In opposition, defendants raised an issue of material fact. In his affidavit, the site foreman avers that prior to

plaintiff's accident, he directed plaintiff not to use "a couple of ladders, broken-up and busted-up" and placed by the garbage bins. He further averred that "at least two A-frame sturdy ladders" were on the floor, and that he told plaintiff to "sweep the floor until a safe . . . ladder" was available. According to the foreman, upon arriving at the scene of the accident, he observed that plaintiff had used a ladder that the foreman had specifically instructed him not to use.

These competing versions of what transpired raise factual questions as to whether plaintiff was provided an adequate ladder, and, if so, whether he knew it was available and that he was expected to use it, but nevertheless unreasonably chose not to use it, thereby causing his injury *(see Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402 [1st Dept 2013]). Thus, plaintiff is not entitled to partial summary judgment on his Labor Law § 240(1) claim.

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

ENTERED: MARCH 4, 2014

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Richter, JJ.

11382 AREP Fifty-Seventh, LLC, Index 151158/12
Plaintiff-Appellant,

-against-

PMGP Associates, L.P., et al.,
Defendants-Respondents.

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Quinn McCabe LLP, New York (Todd J. DeSimone of counsel), for appellant.

Olshan Frome & Wolosky, New York (Alexander Ferrini, III of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 20, 2012, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for tortious interference with contract and prima facie tort pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

The motion court correctly dismissed the tortious interference with contract claim. To establish a claim of tortious interference with contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co. Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Although plaintiff alleges that its contractor was unable to construct a

tower crane in accordance with its contract because of defendants' refusal to remove a sidewalk bridge that encroached five feet onto plaintiff's premises, plaintiff does not allege that defendant procured a breach of contract by plaintiff's contractor (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424-425 [1996]). Contrary to plaintiff's contention, defendants may raise this argument on appeal even though it was not relied upon by the motion court (*see Matter of American Dental Coop. v Attorney-General of the State of N.Y.*, 127 AD2d 274, 279 n 3 [1st Dept 1987]).

The motion court also correctly dismissed plaintiff's prima facie tort claim. The requisite elements for a cause of action sounding in prima facie tort are (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal (*see DeMicco Bros. Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99 [1st Dept 2004]). The "plaintiff [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]" (*Epifani v Johnson*, 65 AD3d 224, 232 [2d Dept 2009] [internal quotation marks and citation omitted]). Here, plaintiff's argument that defendants were motivated by an intent to delay the construction of plaintiff's hotel which would compete with defendants' hotel

business negates the requirement of acting with disinterested malevolence (*see Benton v Kennedy-Van Saun Mfg. & Eng'g Corp.*, 2 AD2d 27, 29 [1st Dept 1956]; *see also Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]).

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

ENTERED: MARCH 4, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11430-
11430A In re Brianna R.,

A Child Under Eighteen
Years of Age, etc.,

Maribel R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Michael J. Pastor of counsel), for respondent.

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

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about October 15, 2012, which, after a fact-finding hearing, found that respondent mother neglected the subject child by failing to provide for her educational needs and by failing to provide her with adequate guardianship, reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed. Appeal from order of disposition, same court and Judge, entered on or about November 9, 2012, which released the subject child to respondent mother with petitioner agency's supervision for up to six months, dismissed, without costs, as academic.

Petitioner Administration for Children's Services (ACS) failed to establish by a preponderance of the evidence that the 15-year-old child was educationally neglected (Family Ct Act §§ 1012[f], 1046[b][1]). Although the child had an excessive amount of absences from school, such absences "do[] not, ipso facto, establish either the parental misconduct or the harm or potential harm to the child necessary to a finding of [educational] neglect under Family Ct Act 1012(f)(i)(A)" (*Matter of Giancarlo P.*, 306 AD2d 28, 28 [1st Dept 2003]). Here, the record shows that the mother faced obstacles in getting the child to attend school on a regular basis. The mother took the child to school for a period of time, but she was financially unable to escort the child to school on an ongoing basis.[1] Moreover, even when the child was present, she had a history of truancy, tardiness, leaving school early and loitering in the hallways.

The record further demonstrates that the child was defiant, violent, and had a history of lying and threatening to harm herself when the mother did not allow her to do what she wanted.

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[1] As the mother points out, while the Family Court faulted her for not providing information about her income or finances in support of her claim that she could no longer continue escorting the child to school, the court found at the same time that the mother was indigent in this proceeding. Thus, the court must have had some evidence of the mother's financial status. We note that the dissent adopts this argument, opining that the mother presented "self-serving" testimony about not having a MetroCard.

The child also suffered from mood disorder, and had continuous hallucinations that made sleep difficult. The child was eventually hospitalized, and was given a number of psychiatric diagnoses. As a result, she was prescribed medication that caused her to be drowsy and disoriented, which further exacerbated her unwillingness and inability to attend school.

Under the circumstances, the mother was unable to control the child and, despite her best efforts, struggled to get the child to attend school regularly, as well as to her therapy and drug treatment appointments (*see Matter of Shanae F.*, 61 AD3d 403 [1st Dept 2009]; *Matter of Alexander D.*, 45 AD3d 264 [1st Dept 2007]; *see also* Education Law § 3212 [requiring every parent to send his or her school-age child to school, while specifically exempting from compliance any parent whose child is beyond his or her ability to control]). Here, as we found in *Matter of Giancarlo P.* and *Matter of Shanae F.*, we find that the mother exercised the minimum degree of care that Section 1012(f)(i) of the Family Court Act requires. Indeed, despite the many obstacles the mother faced, she took steps to ensure that the child attended school. For example, the mother explored the possibility of transferring the child to a school closer to her home in the Bronx and spoke with school personnel over the phone many times about the child's attendance. Thus, the record shows

that any impairment the child suffered was as a result of her various psychiatric and behavioral issues, rather than the mother's failure to compel her to attend school.

Significantly, neither the dissent nor ACS acknowledges that ACS itself could not control the child when she was in its custody. Indeed, from November 18, 2011 to February 14, 2012, it is undisputed that while the child was in ACS' custody, she absconded and failed to attend school. Similarly, the child's school had difficulty maintaining control of her. As noted above, the child frequently left school early even when she did attend. Thus, the evidence shows that not only was the child beyond the control of the mother, but was also beyond the control of ACS and the school.

The cases upon which the dissent relies are factually distinguishable. Contrary to ACS' and the dissent's characterizations, we based our neglect findings in those cases on more than school absences alone. For example, in *Matter of Kaila A. (Reginald A.—Lovely A.)* (95 AD3d 421 [1st Dept 2012]), this Court held that, in addition to the school absences, the "respondent had neglected the child by committing acts of domestic violence against the child's mother in the child's presence." Similarly, in *Matter of Aliyah B. (Denise J.)* (87 AD3d 943, 943 [1st Dept 2011]), this Court held that, the "mother

neglected her children by committing acts of domestic violence against the children's father in the children's presence."

Regarding that part of the court's finding of neglect based upon a 15th birthday party that the mother hosted for the child, at which the police discovered empty beer containers, there was no evidence that the child had consumed alcohol that night. To the contrary, the child denied consuming alcohol because she was taking her medication. Thus, any finding of neglect based upon that incident is speculative. To be sure, although the mother exercised poor judgment when she decided to host the party, the record contains no evidence that the child's physical, mental or emotional condition was impaired or was in imminent danger of becoming impaired as a result of this one isolated incident (*see Matter of Pria J.L. [Sharon L.]*, 102 AD3d 576 [1st Dept 2013]).

In view of the foregoing, the appeal from the order of disposition has been rendered academic (*see Matter of Shaun B.*, 55 AD3d 301, 302 [1st Dept 2008], *lv denied* 11 NY3d 715 [2009]).

All concur except Sweeny, J.P., and Saxe, J. who dissent in a memorandum by Sweeny, J.P., as follows:

SWEENY, J.P. (dissenting)

The evidence adduced before the Family Court clearly established, by a preponderance of the evidence, that Brianna is a neglected child (Family Court Act 1012[f][i][A]).

The unrefuted testimony shows that Brianna was absent from school 83 days during the 2009-2010 school year, and absent 63 days and late 5 days during the first half of the 2010-2011 school year. It is also unrefuted that her excessive absenteeism resulted in her abysmal academic performance. This is more than sufficient to establish a case of educational neglect (*Matter of Ember R.*, 285 AD2d 757, 758 [3d Dept 2001], *app denied* 97 NY2d 604 [2001]). To refute this, respondent had to show that she exercised a minimum degree of care so as not to impose a risk of impairment to the child or place the child in imminent danger of impairment (*Matter of Dyandria D.*, 303 AD2d 233 [1st Dept 2003]).

The cases cited by the majority in support of its position are inapposite to the facts and circumstances of this case. The majority properly cites *Matter of Giancarlo P.* (306 AD2d 28 [1st Dept 2003]) for the proposition that "prolonged, unexcused absence from school does not, ipso facto, establish either the parental misconduct or the harm or potential harm to the child" (*id.*). However, in *Giancarlo*, we also made a specific finding that respondent parent "was actively engaged with school

authorities in the process of securing an appropriate and specific special education placement for the child, and there is no evidence that the child's education was adversely affected by his absence from school" (*id.* at 28-29), two critical factors which are clearly missing here.

Nor does *Matter of Shanae F.* (61 AD3d 403 [1st Dept 2009]) support the majority's position. In *Shanae*, the unrefuted evidence demonstrated that respondent parent actively "sought to address the reason for the child's absences from school, which was the child's concern about a member of the school's administration, by having the child transferred to a different school," which attempts "were frustrated by the school's failure to assist her in that regard" (*id.* at 404). There is no evidence here that school and social services personnel did anything but attempt to bring Brianna's absenteeism to respondent's attention and try to offer solutions to this problem.

Likewise, *Matter of Alexander D.* (45 AD3d 264 [1st Dept 2007]) is factually distinguishable from this case. *Alexander* involved a 10-year-old autistic child with unexcused absences from school. However, unlike here, "respondent mother was actively engaged in 'securing an appropriate and specific special education placement for the child, and there is no evidence that the child's education was adversely affected by his absence from

school'" (*id.*, quoting *Matter of Giancarlo P.,* 306 AD2d 28*).*

In this case, respondent made occasional, feeble attempts to ensure that Brianna attended school. These attempts, when viewed objectively in context with Brianna's other behavioral problems, fell far short of the minimum degree of care required by statute (Family Court Act 1012[f][i]). It is uncontroverted that Brianna's education was adversely affected by her absence from school, as she was failing all subjects. Although respondent denied that she was repeatedly advised of Brianna's absences and tardiness, and that she only received two letters and no phone calls from school officials, the record clearly demonstrates otherwise. There was testimony from Brianna's school attendance officer that she sent at least 20 letters and made 50 phone calls to respondent in an effort to enlist her to get Brianna to school. Both the attendance officer and the ACS caseworker testified that they told respondent she should accompany Brianna to school. During the approximate three week time period that respondent did this, Brianna attended school. Respondent's self-serving testimony that she did not have a MetroCard and therefore could not continue to take Brianna to school is unsupported by any financial or other proof. In fact, the court found respondent's explanation of, and her attempts to downplay the extent of, Brianna's absences "completely unbelievable and

lacking in any credibility." The record is replete with numerous other examples where the court found respondent to be less than candid, and it more than adequately supports that finding.

Of particular note is the fact that, in cases involving fewer absences and tardiness, coupled with inadequate parental explanations for such behavior, we found that a preponderance of the evidence supported a finding of educational neglect (*see e.g. Matter of Kaila A. [Reginald A.-Lovely A.]*, 95 AD3d 421, 421 [1st Dept 2012] [59 missed days of school in a two-year period]; *Matter of Aliyah B.* (87 AD3d 943, 943-944 [1st Dept 2011] [64 out of 181 missed days and 38 late days in one school year]; *Matter of Annalize P. [Angie D.]* (78 AD3d 413, 414 [1st Dept 2010] [5 excused, 24 unexcused absences in one school year]). In each of these cases, we specifically found no reason to disturb the Family Court's credibility determinations.

The majority's rejection of the Family Court's evaluation of the evidence and credibility of the witnesses finds no support in the record. "In a matter which turns almost entirely on assessments of the credibility of the witnesses and particularly on the assessment of the character and temperament of the parent, the findings of the nisi prius court must be accorded the greatest respect" (*Matter of Irene O.*, 38 NY2d 776, 777 [1975]). While we certainly are not bound to slavishly follow the Family

Court's factual determinations and resolutions of the credibility of witnesses, such findings "are to be accorded great deference from this Court and should not be disturbed unless clearly unsupported by the record" (*Matter of Emily PP.*, 274 AD2d 681, 683 [3d Dept 2000]; *Matter of Irene O.*, 38 NY2d at 777; *Matter of Danny R.*, 60 AD3d 450 [1st Dept 2009]).

In this regard, the majority's rejection of Family Court's findings with respect to a 15th birthday party hosted by respondent is puzzling. Respondent admitted that she was the only adult present; that the party was scheduled to start at midnight and end at 2:00 a.m.; and that approximately 30 people were present, all of whom were under the age of 21. The police officer who testified at the hearing stated that at approximately 3:20 a.m. on the date of the party, he responded to respondent's apartment building on a call of "shots fired." Upon arrival, he found a male who had reportedly been attending a party and had been shot in the eye outside the building. The officer went to respondent's apartment where he was advised the party was taking place and found approximately 50 children, most of whom appeared intoxicated. He interviewed most of those present and found them to be between the ages of 14-18 years old. Most of the children interviewed by the officer had strong smells of alcohol on their breath, exhibited slurred speech and admitted that they had been

drinking alcohol. He recalled finding a large trash container filled with empty beer containers in the apartment. While he recalled seeing Brianna in the apartment, he did not speak to her and she did not appear to be intoxicated.

Although the majority correctly notes that "there was no evidence that the child [Brianna] had consumed alcohol on that night," it concludes that "any finding of neglect based upon that incident is speculative." This misreads Family Court's decision. The court found only that this incident established that "[r]espondent failed to provide Brianna with adequate supervision or guardianship under FCA §1012." The finding of neglect by Family Court was based upon the entire record, not simply the drinking incident. These findings are far from "speculative." Notably, given Brianna's acknowledged mental and emotional issues, it is beyond cavil that this incident placed her "in imminent danger of becoming impaired as a result of the failure of [her] parent . . . to exercise a minimum degree of care."

There is no question that Brianna has a number of mental and behavioral issues which require serious attention.[1] Family Court's dispositional order recognized both Brianna's issues and

[1]With respect to Brianna's behavioral issues, it is interesting to note that the Presentment Agency brought an Article 10 Petition for Neglect rather than an Article 7 Petition against Brianna as a Person In Need of Supervision.

respondent's need of assistance in dealing with them by paroling Brianna back to respondent under agency supervision. Such disposition is consistent with Family Court Act 1012(f)(i)'s requirement that a court "focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (*Nicolson v Scoppetta*, 3 NY3d 357, 369 [2004]). That is precisely what Family Court did here. The fact finding decision and dispositional order should therefore be affirmed.

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

ENTERED: MARCH 4, 2014

CLERK

Sweeny, J.P., Renwick, Andrias, Freedman, Feinman, JJ.

11469 Kristal R., an Infant by Jesenia D., Her Mother and Natural Guardian, et al., Plaintiffs-Respondents, Index 26284/03

-against-

Charles Nichter, M.D., et al., Defendants-Appellants.

Aaronson, Rappaport, Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for Charles Nichter, M.D., Taiye Apoeso, M.D., Ram Kairam, M.D., Jayaraju Raju, M.D., Bronx Lebanon Hospital Center and Montefiore Medical Center, appellants

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for New York City Health and Hospital Corporation, appellant.

Scaffidi & Associates, New York (Anthony J. Scaffidi of counsel), for respondents.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered February 21, 2012, which, to the extent appealed from as limited by the briefs, denied the motions of defendants New York City Health and Hospitals Corporation (Jacobi Hospital) and Montefiore Medical Center (Montefiore) for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

On May 17, 2001, the infant plaintiff, then five years old, suffered a generalized tonic-clonic seizure and was admitted to

Lincoln Medical and Mental Health Center. On admission, she was no longer actively seizing, but had a low grade fever and complained of a headache. All diagnostic tests, including electroencephalography (EEG), lumbar puncture, MRI and CT scan, were normal or negative. The attending pediatric neurologist ruled out bacterial meningitis, brain infection, and mycoplasma pneumonia; her assessment was "seizure associated with febrile illness most likely a complex febrile seizure." Plaintiff was administered Ativan to control seizure activity, and intravenous antibiotics, and returned to her baseline mental status. She was discharged on May 21, 2001, with a prescription for Diastat, which is used to treat immediate seizures but does not prevent future seizures or a seizure disorder from progressing.[1]

On June 4, 2001, plaintiff experienced a generalized seizure and was taken by ambulance to the emergency room at defendant Bronx Lebanon Hospital, where she continued to seize. Ativan was administered, and plaintiff returned to her baseline mental status. Bronx Lebanon did not repeat the EEG, lumbar puncture, or CT scan performed by Lincoln. Plaintiff was discharged on

[1]The action against New York City Health and Hospitals Corporation with respect to Lincoln Medical and Mental Health Center has been discontinued with prejudice.

June 5 with a working diagnosis of complex febrile seizure.[2]

On June 7, 2001, plaintiff experienced another seizure and was taken to defendant Jacobi Hospital (Jacobi), where she continued to have intermittent focal and generalized motor seizures. She was afebrile, but complained of headaches.

On admission, Ativan was prescribed to control the seizures and Acyclovir for possible herpes simplex virus. Plaintiff was seizure-free overnight, with no reports of significant abnormal behavior. However, between June 9 and 10, she experienced multiple seizures and had episodes of abnormal behavior. Plaintiff was treated with Tegretol, Phospenytoin and Ativan, and the seizures were suppressed. Differential diagnoses of status epilepticus and viral encephalitis were considered.[3] On June 12, plaintiff experienced multiple seizures and abnormal behavior, and was transferred to defendant Montefiore.

On June 13, the infant plaintiff was moved to Montefiore's epilepsy unit for video EEG monitoring for evaluation of seizures

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[2]Because the claims related to the diagnosis and treatment of encephalitis, mycoplasma pneumonia and mycoplasma encephalitis were dismissed on reargument, Bronx Lebanon is not pursuing its appeal.

[3]Status epilepticus is a seizure that lasts more than 30 minutes, or multiple seizures over a 30-minute period of time in which the patient does not return to the baseline mental status between seizures.

and possible status epilepticus. After review of the EEG monitoring, the attending pediatric neurologist's assessment was: "Abnormal behavioral manifestations. Rule out frequent seizures status ... encephalitis ... collagen vascular disease ... parainfectious disorder. ... Continue Dilantin, Tegretol ... to maximize seizure management."

By June 18 the working diagnosis had changed to probable viral or parainfectious encephalopathy. On June 19, plaintiff was transferred to pediatrics. She remained on Tegretol and the anti-epileptic drug Dilantin to control her seizures, and was given a 10-day course of the antibiotic Cipro.

Plaintiff was discharged on July 3, 2001, on Tegretol. In the early morning hours of July 5, 2001, she suffered another seizure and was returned to Montefiore, where she remained overnight.

Plaintiffs allege that Jacobi and Montefiore departed from accepted medical practices by failing to properly diagnose, treat and suppress the seizure disorder between June 2001 and mid-July 2001, which caused it to progress to status epilepticus and complex partial status, leaving the infant plaintiff (plaintiff) neurologically impaired. Among other things, plaintiffs allege that with status epilepticus documented as early as June 10, it was a departure for Jacobi to wait two days to transfer plaintiff

to Montefiore for continuous video EEG monitoring, which was unavailable at Jacobi, and that Montefiore failed to timely and appropriately administer anti-seizure medications and antibiotics.

Jacobi and Montefiore made prima facie showings that they did not deviate from accepted medical practices in treating the plaintiff's seizure disorder by submitting plaintiff's medical records, deposition transcripts of physicians who treated plaintiff, and affidavits by their medical experts (*see Bacani v Rosenberg*, 74 AD3d 500 [1st Dept 2010], *lv denied* 15 NY3d 708 [2010]; *Gargiulo v Geiss*, 40 AD3d 811 [2d Dept 2007]).

Jacobi performed numerous diagnostic tests, including several MRIs & EEGs, multiple spinal taps, a CT scan, blood counts, blood and urine cultures, and cerebrospinal fluid (CSF) cultures. It administered three anti-seizure medications to plaintiff, Phosphenytoin, Tegretol, and Ativan, and monitored their levels to ensure proper dosing. Jacobi's expert opined that these tests were appropriate and that the dosage of the anti-seizure medications was adjusted appropriately to ensure that the levels of medication were within therapeutic guidelines and at sufficient levels to address plaintiff's seizure activity. He also opined that no evidence supported a diagnosis of nonconvulsive seizures at Jacobi, and that the failure to use

video EEG monitoring was not a deviation in 2001.

Montefiore prescribed Tegretol for the seizures, Dilantin and Fosphenytoin for episodes of abnormal behavior, and Haldol for delirium. With respect to plaintiffs' allegations that Montefiore failed to adequately control plaintiff's seizures, Montefiore's expert opined that these medications were appropriate and that hospital staff appropriately managed plaintiff's seizure activity. He further opined that the appropriate workup was performed to determine the cause of the seizures, including blood tests, CSF tests, EEG monitoring, a lumbar puncture, and a brain MRI, and that there were no grounds for a claim of lack of informed consent, since a reasonable person would have consented to the treatment.

Plaintiffs' expert's conclusory affirmation in opposition failed to raise factual issues whether defendants departed from accepted medical practices and, if so, whether their departures proximately contributed to the failure to timely diagnose and treat plaintiff's seizure disorder and subsequent neurological injuries (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Oestreich v Present*, 50 AD3d 522 [1st Dept 2008]; *Brown v Bauman*, 42 AD3d 390 [1st Dept 2007]). The expert's conclusion that plaintiff's medication levels at Jacobi and Montefiore were not properly adjusted was based on supposition and hindsight. Among

other things, the expert failed to explain why the levels of medication prescribed were inappropriate given the clinical presentation at the time (*see Matter of Joseph v City of New York*, 74 AD3d 440 [1st Dept 2010]).

Plaintiffs' expert opines that Jacobi failed to initiate an appropriate anti-seizure medication regimen based upon the "true diagnosis of nonconvulsive status epilepticus." However, although plaintiff received a differential diagnosis of status epilepticus on June 10, 2001, it is not until June 12, 2001, that her chart notes "complex partial status" and she was transferred to Montefiore that day. Plaintiffs' expert offered only conclusory assertions that plaintiff was having nonconvulsive seizures that would have been discovered earlier and would not have progressed to status epilepticus had Jacobi provided continuous EEG monitoring or transferred plaintiff to Montefiore sooner. The expert does not identify the actions Jacobi should have taken upon discovering the existence of nonconvulsive

seizures when it was already monitoring plaintiff's medication levels and investigating the differential diagnosis of viral encephalitis (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]).

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

ENTERED: MARCH 4, 2014

CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11728 Eutilda Whitmore, Index 17518/04
Plaintiff-Respondent,

-against-

Adriana Manta, M.D., et al.,
Defendants-Appellants.

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Dwyer & Taglia, New York (Peter R. Taglia of counsel), for Adriana Manta, M.D., Meena Tamhankar, M.D., Castle Hill Rehab and Medical Services, P.C., and Yardley Charles, M.D., P.C., appellants.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for Serge Parisien, M.D., Hospital for Joint Diseases Orthopaedic Institute and J. Serge Parisien, M.D., P.C., appellants.

Scaffidi & Associates, New York (Robert M. Marino of counsel), for respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about April 24, 2013, which granted plaintiff's motion to restore her case to the trial calendar, unanimously affirmed, without costs.

This medical malpractice action, alleging that defendants failed to properly treat an injury plaintiff sustained to her right arm in 2001, was struck from the pretrial calendar in February 2010. While plaintiff's initial motion to restore the action to the trial calendar was denied in March 2011, the court continued conferencing the remaining discovery issues until, upon

defendants' refusal to stipulate, it instructed plaintiff to make her follow-up motion to restore, in June 2012. Since there was no abandonment of the action, Supreme Court properly granted plaintiff's motion to restore.

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

ENTERED: MARCH 4, 2014

CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11738N In re Liberty Mutual Insurance Company, Index 18827/07
Petitioner-Appellant,

-against-

Surujdat Mohabir, et al.,
Respondents-Respondents,

Progressive Insurance, et al.,
Additional Respondents.

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Burke, Gordon & Conway, White Plains (Sami P. Nasser of counsel), for appellant.

Steven Siegel, P.C., Kew Gardens (Steven Siegel of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered November 1, 2012, which, upon renewal, granted the motion of respondents Surujdat Mohabir and Khamni Mohabir to vacate a prior order of the same court and Justice, entered on or about July 20, 2011, which permanently stayed the subject arbitration, unanimously reversed, on the law, without costs, the motion denied, and the order entered on or about July 20, 2011, reinstated.

The Mohabirs' vehicle, insured by petitioner Liberty Mutual Insurance Company (Liberty), was struck by a truck that left the scene of the accident. On July 12, 2007 and July 31, 2007, the Mohabirs sent Liberty a request for arbitration dated July 11,

2007, which Liberty received on July 13, 2007 and August 1, 2007, respectively. By petition dated August 20, 2007, Liberty moved to permanently stay the arbitration, asserting, among other things, that the offending vehicle had a policy of insurance with respondent Progressive Insurance, and was owned and driven by additional respondent Harbhajan Singh.

By order entered December 12, 2007, Supreme Court denied the petition, without prejudice, on the ground that the evidence supporting the claim was too sparse. Petitioner again sought a stay and by order entered March 6, 2008, the court, finding sufficient evidence to make out a prima facie case, stayed the arbitration pending a framed issue hearing to determine all issues of insurance coverage. By order entered July 23, 2008, the court granted petitioner's motion for leave to reargue, and upon reargument, adhered to its prior determination. Progressive and Singh appealed and this Court affirmed (68 AD3d 435 [1st Dept 2009]).

The framed issue hearing was held on June 13, 2011. By order entered July 20, 2011, the court ordered that Singh be added as a respondent and permanently stayed the arbitration. The order was allegedly served with notice of entry on February 6, 2012. On April 19, 2012, the Mohabirs moved by order to show cause to vacate the July 20, 2011 order pursuant to CPLR 5015(a)

and 5015(a)(4), arguing for the first time that Supreme Court lacked jurisdiction to stay the arbitration because the petition was untimely pursuant to CPLR 7503(c) since it was filed more than 20 days after Liberty had received the first arbitration demand.

Supreme Court erred when it granted the Mohabirs' motion, which it deemed a motion for leave to renew, and upon renewal, vacated the July 20, 2011 order and dismissed the petition to stay arbitration, on the grounds that it was untimely.

"The 20-day time limit of CPLR 7503 is construed as a period of limitation, and the courts have no discretion to waive or extend the statutory period" (*Matter of Hartford Ins. Co. [Martin]*, 16 AD3d 149, 150 [1st Dept 2005]; *see Aetna Life & Cas. Co. v Stekardis*, 34 NY2d 182, 185-186, [1974]). However, "[a] Statute of Limitations defense is waivable [by a party], and failure to raise it does not deprive the court of jurisdiction" (*Mendez v Steen Trucking*, 254 AD2d 715, 716 [4th Dept 1998]).

Under the particular circumstances of this case, respondents waived their statute of limitations defense when, after serving the request for arbitration a second time on July 31, 2007, they participated in the litigation for five years, during which time they failed to raise the CPLR 7503(c) defense in their opposition to petitioner's applications for a stay, in the prior appeal in

which this Court ordered a framed issue hearing on coverage issues, or at the framed issue hearing itself (*see Miraglia v H & L Holding Corp.* 67 AD3d 513, 515 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 766 [2010] ["Waiver of an argument will be recognized where, as here, the court had jurisdiction of the general subject matter but a contention is made after judgment that the court did not have power to act in the particular case or as to a particular question in the case" [internal quotation marks omitted]; *see also Measom v Greenwich & Perry St. Hous. Corp.*, 42 AD3d 366 [1st Dept 2007], *lv dismissed* 9 NY3d 946 [2007]).

In *Measom*, this Court, on a prior appeal, ruled that an apartment was not legally habitable for residential purposes and remanded the matter for a trial on damages. On a subsequent appeal, the defendant attempted to assert, for the first time, the affirmative defense of statute of limitations. This Court held that "[t]he affirmative defense of the statute of limitations was abandoned by defendant since it failed to raise it as an alternative ground for affirmance on the prior appeal when it was germane to this Court's determination" (*id.* at 366; *see also Dimery v Ulster Sav. Bank*, 13 AD3d 574 [2d Dept 2004], *lv denied* 5 NY3d 706 [2005], *cert denied* 547 US 1097 [2006]).

The Mohibirs' counsel's explanation that the failure to

request dismissal of the petition earlier was inadvertent is unavailing. Counsel claims that he was unaware that a new legal secretary had served the first request for arbitration until he was in the process of reviewing the file in connection with a planned appeal of the July 20, 2011 order. However, counsel does not provide a reasonable explanation as to why the demand was not discovered while reviewing the file in connection with the prior motion practice or his preparation for the prior appeal or the framed issue hearing.

Accordingly, the order entered on or about July 20, 2011, which permanently stayed the subject arbitration after the framed issue hearing, should be reinstated.

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

ENTERED: MARCH 4, 2014

CLERK

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

11857 The People of the State of New York, Respondent, Ind. 148/10

-against-

Jhonny Garcia, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 24, 2011, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the third degree, and criminal possession of a controlled substance in the third and fourth degrees, and sentencing him to an aggregate term of five years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the conviction of criminal possession of a weapon in the third degree to criminal possession of a weapon in the fourth degree, and otherwise affirmed.

The court properly denied defendant's suppression motion without a hearing. The conclusory allegations in defendant's moving papers, when considered in the context of the detailed

information provided to defendant concerning the basis for his arrest, were insufficient to create a factual dispute requiring such a hearing (*see People v Burton*, 6 NY3d 584, 587 [2006]; *People v Jones*, 95 NY2d 721, 729 [2001]). Although on appeal defendant posits a potential factual issue, he raised no such issue in his moving papers.

The court properly denied defendant's challenge for cause to two prospective jurors who initially expressed a bias towards believing a police officer over other witnesses. The court took appropriate corrective action (*see People v Bludson*, 97 NY2d 644, 645-646 [2001]) by promptly instructing the jury panel on determining a witness's credibility and treating an officer's testimony the same as other testimony. Both of the panelists at issue then gave unequivocal assurances that they would follow these instructions. When viewed in context, a panelist's use of the word "try" did not render his assurance equivocal (*see e.g. People v Shulman*, 6 NY3d 1, 28 [2005], *cert denied* 547 US 1043 [2006]; *People v Rivera*, 33 AD3d 303 [2006], *affd* 9 NY3d 904 [2007]).

The court properly admitted into evidence a lock and set of keys that were relevant to the issue of constructive possession. These items were nonfungible and had identifying characteristics, and there was testimony that they had not been altered.

Accordingly, there was a sufficient foundation for receiving these items notwithstanding any gaps in the chain of custody (*see generally People v Connelly*, 35 NY2d 171, 174 [1974]). Defendant's challenges to this evidence go to weight rather than admissibility, particularly to the extent they raise credibility issues. In any event, the physical items were essentially cumulative to testimony that the police recovered keys from defendant and observed that one of the keys fit the lock in question.

Defendant did not preserve his challenge to the legal sufficiency of the second-degree weapon possession count that required proof of unlawful intent, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence warranted the conclusion that defendant intended to use the weapon unlawfully against another person.

As the People concede, defendant's conviction of criminal possession of a weapon in the third degree was not supported by sufficient evidence, in that it was based on a prior conviction that was a violation rather than a crime.

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

ENTERED: MARCH 4, 2014

CLERK

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

11858 Luis Molina, Index 303734/09
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

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Steve S. Efron, New York, for appellant.

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

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Judgment, Supreme Court, Bronx County (Robert E. Torres, J.), entered on or about July 25, 2012, which, to the extent appealed from as limited by the briefs, following a jury verdict, awarded plaintiff total compensatory damages of $2,610,000, including $600,000 for past pain and suffering, and $1,300,000 for future pain and suffering over 27 years, unanimously modified, on the facts, to vacate the award for future pain and suffering and remand the matter for a new trial solely on the issue of such damages unless plaintiff, within 30 days of service of a copy of this order, with notice of entry, stipulates to reduce the award of damages for future pain and suffering to $800,000 and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

The jury's award is supported by testimony from plaintiff,

his son, and a cleaner employed by defendant, that debris on the stairs of the subway station was a recurring condition, of which defendant was aware, that was left unaddressed *(see Kelsey v Port Auth. of N.Y. & N.J.*, 52 AD2d 801 [1st Dept 1976]). Defendant did not demonstrate that a reasonable cleaning schedule was established and followed prior to plaintiff's accident, as its employee testified only that she cleaned the steps where plaintiff fell two days before the accident, there was no evidence of additional cleaning thereafter, and no cleaning log was admitted into evidence establishing that the routine cleaning schedule was adhered to (*see Williams v New York City Hous. Auth.*, 99 AD3d 613 [1st Dept 2012]; *accord Harrison v New York City Tr. Auth.*, 94 AD3d 512, 514 [1st Dept 2012]).

We find that, to the extent indicated, the award for future pain and suffering deviates materially from what is reasonable compensation under the circumstances.

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

ENTERED: MARCH 4, 2014

CLERK

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

11859 Leticia Delgado, et al., Index 350568/08
Plaintiffs-Respondents,

-against-

Gloria Murray, et al.,
Defendants-Appellants,

Mercy Midwives, et al.,
Defendants.

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Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for appellants.

Pegalis & Erickson, LLC, Lake Success (Stephen E. Erickson of counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 23, 2012, which denied the motion of defendants Gloria Murray, CNM and St. Barnabas OB/GYN, P.C. to set aside the jury verdict, awarding plaintiffs $20,000 for past pain and suffering, $600,000 for future pain and suffering for 20 years, and $380,000 in future lost earnings for 38 years, unanimously modified, on the facts, the award for future pain and suffering vacated, and the matter remanded for a new trial solely on the issue of damages for future pain and suffering, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to reduce that award to $300,000, and to the entry of an amended judgment in accordance therewith, and

otherwise affirmed, without costs.

The jury's verdict that defendant Murray departed from good and accepted medical practice during the delivery of the infant plaintiff and that such departure was a substantial factor in causing his injuries, was supported by legally sufficient evidence and was not against the weight of the evidence (*see generally McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 205-206 [1st Dept 2004]). The opinions of plaintiffs' experts that Murray used excessive lateral traction to deliver the infant, who suffered from shoulder dystocia, were not based solely on the fact that he suffered from a permanent brachial plexus injury. Although defendants' expert reached a different conclusion concerning causation, the jury was free to accord more weight to the testimony of plaintiffs' experts (*see Torricelli v Pisacano*, 9 AD3d 291 [1st Dept 2004], *lv denied* 3 NY3d 612 [2004]).

The trial court did not improvidently exercise its discretion in precluding evidence of plaintiff's expert's prior censure, by a private organization, for providing false testimony. Defendants failed to establish that the censure, for conduct which the expert denied, had sufficient evidentiary value and "some tendency to show moral turpitude to be relevant on the credibility issue" (*Badr v Hogan*, 75 NY2d 629, 634 [1990]).

The infant plaintiff sustained mild Erb's palsy, shows no appreciable difference in strength between his right and left arm, has a difference in arm length of 3/4" which will continue to grow as he gets older, and may need future surgery to correct contractures. Under these circumstances, we find that the award for future pain and suffering deviates materially from reasonable compensation to the extent indicated (CPLR 5501[c]; *compare Sankar v Jamaica Hosp. Med. Ctr.*, 68 AD3d 844 [2d Dept 2009]; *Abdelkader v Shahine*, 66 AD3d 615 [2d Dept 2009]; *Charles v Day*, 289 AD2d 190 [2d Dept 2001]).

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

ENTERED: MARCH 4, 2014

CLERK

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

11860 The People of the State of New York, Respondent, Ind. 5757/10

-against-

John D. Williams, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered on or about December 20, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [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: MARCH 4, 2014

CLERK

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

11861 Lauren Bisk, Index 108860/07
Plaintiff-Appellant,

-against-

Cooper Square Realty, Inc., et al.,
Defendants-Respondents,

North Fork Bank, et al.,
Defendants.

_____

Lauren Bisk, appellant pro se.

Lewis Brisbois Bisgaard & Smith LLP, New York (Ellen E. Mooney of counsel), for Cooper Square Realty, Inc., respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (William F. Cusack III of counsel), for Boulevard Housing Corp., and Edward Vincent, respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 26, 2012, which granted a motion by pro se plaintiff's former counsel Meister Seelig and Fein to the extent of directing it to pay $14,000 it was holding in escrow to Travelers Bond and Financial Products, the insurer of defendant Cooper Square Realty Inc., granted Cooper Square's cross motion to compel Meister Seelig to release the $14,000 to Travelers, and denied plaintiff's motion to retain a portion of the $14,000 as liquidated damages or to rescind the settlement agreement, unanimously affirmed, without costs.

The court properly denied plaintiff's request to rescind the settlement agreement where plaintiff failed to show that defendants' delay of two days in making full payment on the settlement agreement was a material and willful breach, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract (*see Callanan v Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 199 NY 268, 284 [1910]; *Lasker-Goldman Corp. v City of New York*, 221 AD2d 153 [1st Dept 1995], *lv dismissed* 87 NY2d 1055 [1996]). This minor delay in full payment is immaterial in light of the fact that there is no indication in the agreement that time was of the essence with respect to the payment of the settlement amount (*see Luo v Main St. Assoc.*, 212 AD2d 675 [2d Dept 1995], or other special circumstances surrounding the execution of the agreement indicating as much (*see Whitney v Perry*, 208 AD2d 1025 [3d Dept 1994]). Nor did plaintiff show that the delays in payment were willful.

Given the absence of a contractual provision providing that defendants would be in default upon failure to make full payment upon the specified date or providing for liquidated damages in the event of any delay in payment, the court properly denied

plaintiff's request to retain a portion of the $14,000 held in escrow that constituted an inadvertent overpayment of the settlement amount owed by defendants and was properly returnable to the insurance company that made the overpayment.

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

ENTERED: MARCH 4, 2014

CLERK

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

11862 In re Jose P.,

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.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 28, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute attempted criminal sexual act in the first and third degrees, attempted sexual abuse in the first degree, sexual abuse in the third degree, and forcible touching, and placed him on probation for a period of 12 months, unanimously modified, on the law, to the extent of vacating the findings as to attempted criminal sexual act in the third degree and attempted sexual abuse in the first degree and dismissing those particular counts of the petition, and otherwise 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 counts indicated should have been dismissed as lesser included offenses. We have considered and rejected appellant's remaining claims regarding the fact-finding determination.

Probation 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]). Among other things, the underlying incident was a violent sexual attack, the record demonstrated that appellant was in need of a treatment program that could not be completed within the six-month duration of an adjournment in contemplation of dismissal, and there was little or no indication that appellant and his mother would voluntarily cooperate with treatment in the absence of court supervision.

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

ENTERED: MARCH 4, 2014

CLERK

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

11868-
11868A-
11868B The People of the State of New York,
Respondent,

-against-

Luis Robles,
Defendant-Appellant.

Ind. 2362/04
4265/04

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered December 2, 2004, convicting defendant, upon his pleas of guilty, of two counts of attempted criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony offender, to concurrent terms of 1½ to 3 years, and order, same court and Justice, entered on or about March 7, 2007, which denied defendant's CPL 440.20 motion to set aside the sentences, unanimously affirmed.

Initially, we reject the People's argument that this appeal has been rendered moot by the fact that defendant has completed his entire sentence. Defendant is not challenging the length of his sentence. Instead, he is challenging the use of his federal conviction as a predicate felony. Such a determination has

potential consequences (*see* CPL 400.21[8] [subsequent use of finding]).

The court properly sentenced defendant as a second felony offender because his prior federal conviction under the Hobbs Act (18 USC § 1951), which criminalizes the interference with commerce by robbery or extortion, was the equivalent of a New York felony (*see People v Muniz*, 74 NY2d 464 [1989]). Defendant argues that the Hobbs Act is broader than the New York extortion statute (Penal Law § 155.30[6]) because the federal statute encompasses the taking of property by threatening to damage property in the future. However, under the New York statute, larceny by extortion may be committed by threatening to damage property at any time, whether immediately or in the future (Penal Law § 155.05[2][e][ii]), and we find nothing in the statutory scheme to compel a conclusion that only an immediate threat would suffice. We have considered and rejected defendant's remaining arguments.

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

ENTERED: MARCH 4, 2014

CLERK

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

11871 Orly Genger, etc., Index 109749/09
Plaintiff-Respondent,

-against-

Dalia Genger, et al.,
Defendants-Appellants,

D & K GP LLC,
Defendant.

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Pedowitz & Meister, L.L.P., New York (Robert A. Meister of counsel), for Dalia Genger, appellant.

Morgan, Lewis & Bockius LLP, New York (John Dellaportas of counsel), for Sagi Genger and TPR Investment Associates, Inc., appellants.

Judith Lisa Bachman, New City, for Leah Fang, appellant.

Zeichner Ellman & Krause LLP, New York (Yoav M. Griver of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 31, 2013, which, insofar as appealed from, denied the motions of defendants TPR Investment Associates, Inc. (TPR) and D & K GP LLC (D&K GP) to amend their answers and for summary judgment dismissing the claims against them, granted plaintiff's cross motion for sanctions against TPR, D&K GP, defendant Dalia Genger (Dalia), and defendant Sagi Genger (Sagi), sanctioned defendant Leah Fang (Fang), and denied Fang's motion for summary judgment dismissing the claims against her, unanimously modified,

on the law and the facts, to delete the sanctions against Dalia, Sagi, and Fang, and to grant Fang's motion for summary judgment dismissing the claims against her, and otherwise affirmed, without costs.

Contrary to the motion court's statement, plaintiff did not cross-move for sanctions against Fang. Furthermore, Fang did not disobey the 2010 and 2011 injunctions – she resigned as trustee of indirect plaintiff the Orly Genger 1993 Trust (Orly's Trust) in January 2008 and had nothing to do with the 2011 and 2012 settlements challenged by plaintiff. Hence, there was no basis for sanctioning Fang.

Plaintiff's *cross* motion for sanctions was improper as against Dalia and Sagi, who were not movants (*see e.g. Kershaw v Hospital for Special Surgery*, __ AD3d __, 978 NYS2d 13, 22 [1st Dept 2013]).

TPR and D&K GP contend that they should not have been sanctioned because they did not violate the 2010 and 2011 injunctions. This argument is unavailing. Assuming, arguendo, that the 2010 order merely enjoined transfers, sales, pledges, assignments, or other dispositions of TPR shares (as opposed to transfers, etc., of the Orly Trust's interest in double-derivative plaintiff D&K LP), Orly's Trust disclaimed any interest in any shares of TPR via the settlement agreements.

It is true that the October 2011 settlement predated the December 2011 injunction; however, the parties to the settlement amended and restated their agreement in March 2012, i.e., after the injunction. The 2011 order enjoined Sagi, TPR, and Dalia "from making demands upon and using or spending the proceeds derived from the purported sale by TPR . . . to [nonparty] Trump Group . . . of . . . the Orly Trust[']s shares of nonparty Trans-Resources, Inc. (TRI)] . . ., pending the determination by a court of competent jurisdiction [of] the beneficial ownership of such shares." The promissory note which is a part of both settlement agreements – and which replaced a note that D&K LP had given in 1993 (the 1993 Note) – provides that the principal and accrued interest shall be due "[i]mmediately upon [Orly's Trust]'s receipt of the proceeds from the sale of [its] TRI shares."

In sum, the motion court properly found that TPR and D&K GP had disobeyed "a lawful mandate of the court" (Judiciary Law § 753[A][3]) and properly ordered them to pay plaintiff's attorneys' fees (*see Davey v Kelly*, 57 AD3d 230 [1st Dept 2008]).

It was a provident exercise of the IAS court's discretion to deny TPR's and D&K GP's motions to amend their answers to add the defense of release because the proposed amendment lacked merit (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404,

405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]).

When a fiduciary has a conflict of interest in entering a transaction and does not disclose that conflict to his/her principal, the transaction is "voidable at the option of" the principal (*Wendt v Fischer,* 243 NY 439, 443 [1926]). Moreover, "an agent cannot bind his principal . . . where he is known to be acting for himself, or to have an adverse interest" (*Manhattan Life Ins. Co. v Forty-Second St. & Grand St. Ferry R.R. Co.,* 139 NY 146, 151 [1893]).

In June 2009, plaintiff brought a petition in Surrogate's Court to remove Dalia as trustee of Orly's Trust and to surcharge her. On July 2, 2009, plaintiff – on behalf of herself, her trust, and D&K LP – demanded that TPR return certain TPR shares which D&K LP had pledged and on which TPR had foreclosed. On July 7, 2009, plaintiff commenced the instant action against Dalia, Sagi, TPR, and D&K GP; she alleged, inter alia, that the Gengers never meant for the 1993 Note – which was replaced by the note created in conjunction with the settlement agreements – to be enforced.

Under these circumstances, Dalia – as trustee of Orly's Trust – had a conflict of interest in releasing herself as part of the October 2011 and March 2012 settlement agreements. Also, it is clear that plaintiff will want to void the settlement

agreements (in which Orly's Trust disclaims any interest in TPR) and the related promissory note (in which Orly's Trust agrees to pay $4 million upon receipt of the proceeds of the sale of its TRI shares, which plaintiff did not want sold in the first place).

Because the release is voidable at plaintiff's option, and because she will want to void it, the motion court properly denied TPR's and D&K GP's motions to amend their answers to add the defense of release, TPR's and D&K GP's motions for summary judgment dismissing the claims against them based on the release, and so much of Fang's motion as sought summary judgment dismissing the claims against her based on the releases contained in the 2011 and 2012 settlement agreements.

Fang moved for summary judgment based on additional releases given to her by Dalia (as trustee of Orly's Trust) in December 2007 and January 2008. The IAS court should have granted this branch of Fang's motion based on the releases that Dalia gave her.

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

ENTERED: MARCH 4, 2014

CLERK

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

11872 Linly Prince, Index 304424/11
Plaintiff-Appellant, 84052/11

-against-

Othiamba N. Lovelace,
Defendant-Respondent.
- - - - -
[And A Third-Party Action]

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Gana LLP, New York (Adam Gana of counsel), for appellant.

Adams, Hanson, Rego, Carlin, Kaplan & Fishbein, Yonkers (Jeffrey A. Domoto of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 7, 2013, which granted defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to establish prima facie that plaintiff did not suffer a serious injury to his right knee as a result of the accident. Defendant's expert orthopedist did not measure the range of motion of the knee, and failed to identify any tests that were done to support his conclusion that any injuries had resolved (*see Lamb v Rajinder*, 51 AD3d 430 [1st Dept 2008]). He stated that he could not comment on whether there was any

preexisting knee pathology but that he "suspect[ed]" degenerative changes; this statement is too equivocal to satisfy defendant's burden on the issue of causation (*see Glynn v Hopkins*, 55 AD3d 498 [1st Dept 2008]). Defendant's expert chiropractor measured an apparently minor limitation in range of motion of the knee and stated that there was a causal relationship based on the history provided, but declined to provide an opinion regarding plaintiff's disability "as it relates" to the right knee injury and surgery, deferring to "the appropriate specialist."

Even assuming that defendant made a prima facie showing, plaintiff raised an issue of fact by proffering the report of his treating physician, who performed arthroscopic surgery to repair lateral and medial meniscus tears of the right knee, which were shown on MRI film (*see Lopez v Abayev Tr. Corp.*, 104 AD3d 473 [1st Dept 2013]). The physician opined, based on his review of the MRI, his operative findings, and plaintiff's history, that plaintiff suffered an injury causally related to the accident and that he suffered permanent limitations in range of motion and other continuing symptoms (*see Daniels v S.R.M. Mgt. Corp.*, 100 AD3d 440 [1st Dept 2012]).

Plaintiff having met his threshold burden based on evidence that he suffered serious injury to his right knee, we need not

address whether the claimed cervical and lumbar injuries are also sufficient to meet the no fault threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

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

ENTERED: MARCH 4, 2014

CLERK

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

11874N Specialists Entertainment, Inc., Index 158017/12
Plaintiff-Respondent,

-against-

Alecia Moore, previously known as Pink, et al.,
Defendants-Appellants,

- - - - -

Recording Industry Association of America,
Amicus Curiae.

_____

Dechert LLP, New York (Benjamin E. Rosenberg of counsel), for appellants.

Motta & Krents, New York (Anthony Motta of counsel), for respondent.

Cowan, Liebowitz & Latman, P.C., New York (Thomas Kjellberg of counsel), for amicus curiae.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about September 20, 2013, which, to the extent appealed from, granted plaintiff's cross motion to amend its complaint to add a claim for breach of contract as a third-party beneficiary as against defendant Sony Music Holdings, Inc., unanimously reversed, on the law, without costs, the cross motion denied, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff cannot assert a claim as a third-party beneficiary of a letter agreement between defendants Moore and Sony. The

agreement, requesting and authorizing Sony to deduct a portion of royalties payable to Moore and to pay them directly to plaintiff, by its express terms, negates any intent to permit enforcement by third-parties (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2000]; *Board of Mgrs. of Alexandria Condominium v Broadway/72nd Assoc.*, 285 AD2d 422, 424 [1st Dept 2001]).

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

ENTERED: MARCH 4, 2014

CLERK