SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 20, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10167 Raul Flores, Index 400736/09
Plaintiff-Respondent,

-against-

Infrastructure Repair Service, LLC,
et al.,
Defendants-Appellants.

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Bee Ready Fishbein Hatter & Donovan, LLP, Mineola (Patrick K. Foster of counsel), for appellants.

Ginarte O'Dwyer Gonzalez Gallardo & Winograd, LLP, New York (Lewis Rosenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 29, 2012, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing plaintiff's cause of action under Labor Law § 200 as against defendant Infrastructure Repair Service, LLC (Infrastructure) and the cause of action under Labor Law § 241(6) as against both defendants, unanimously modified, on the law, to grant defendants' motion for summary judgment dismissing the cause of action under Labor Law § 241(6), and otherwise affirmed, without costs.

Plaintiff was injured when he tripped while carrying an

uncovered bucket of Monolithic Membrane 6125 EV, a hot rubberized asphalt substance, which splashed out of the container, resulting in significant burns to various body parts. At the time of his accident, plaintiff was employed by nonparty Concrete Repair Services (Concrete) for a renovation project at a facility owned by defendant United Parcel Service of America, Inc. Infrastructure, the general contractor, provided the materials and safety equipment used by Concrete's workers at the project.

Under these circumstances, the court properly denied defendants' motion for summary judgment dismissing the Labor Law § 200 claim as against Infrastructure. As the essence of plaintiff's claim is that the safety equipment provided to him was inadequate, and Infrastructure does not dispute that it provided the safety equipment plaintiff used, plaintiff may hold Infrastructure liable under Labor Law § 200 for any negligence in its provision of safety equipment shown to have contributed to his injury.

Plaintiff's Labor Law § 241(6) claim, however, should have been dismissed. The complaint alleges violations of 12 NYCRR 23-1.7(h) and 12 NYCRR 23-1.8(c), which require adequate protective equipment and apparel for workers using or handling "corrosive substances and chemicals." In support of their motion for summary judgment, defendants provided expert evidence that these

Industrial Code sections are inapplicable here, as the particular substance that injured plaintiff is not considered a corrosive substance or chemical, and plaintiff's opposition to the motion failed to adequately rebut this evidence (*cf. Lee v Lewiston Constr. Corp.*, 23 AD3d 1002, 1003 [4th Dept 2005]; *Welsh v Cranesville Block Co.*, 258 AD2d 759, 760 [3d Dept 1999]).

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: MARCH 20, 2014

CLERK

Acosta, J.P., Andrias, Moskowitz, Richter, Manzanet-Daniels, JJ.

11237 The People of the State of New York, Respondent, Ind. 307/08

-against-

Andrew Smith, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

Andrew Smith, appellant pro se.

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

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Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered October 5, 2009, convicting defendant, after a jury trial, of burglary in the third degree, robbery in the second degree, criminal impersonation in the first degree and petit larceny, and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years, unanimously modified, on the law, to the extent of vacating the burglary conviction and dismissing that count of the indictment, and otherwise affirmed.

For the reasons stated in our decision on a codefendant's appeal (*People v [Mikal] Smith*, 87 AD3d 920 [1st Dept 2011], *affd* __ NY3d __, 2014 NY Slip Op 00902 [2014]), we find that the burglary conviction was based on legally insufficient evidence. Defendant's other challenges to the sufficiency or weight of the

evidence are similar to arguments this Court rejected on the codefendant's appeal, and we find no reason to reach a different result.

We have considered and rejected defendant's pro se claims.

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

ENTERED: MARCH 20, 2014

CLERK

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

11418 In re Alini Brito, Index 100372/11
Petitioner-Respondent,

-against-

Dennis M. Walcott, etc.,
Respondent-Appellant.

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

Altman Schochet LLP, New York (Michael A. Valentine of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered June 25, 2012, which vacated an opinion and award, dated December 12, 2010, terminating petitioner's employment upon findings of misconduct, and remanded the matter for a new hearing and the imposition of a lesser penalty, unanimously modified, on the law, to reinstate the findings of misconduct, and to vacate the order directing a new hearing, and, as so modified, affirmed, without costs.

Petitioner taught Spanish at James Madison High School (JMHS) from 2003 until November 20, 2009. On Friday, November 20, 2009, she ate dinner with colleagues and returned to the school later that evening to watch a musical competition in the first floor auditorium, although she was not required to do so. During the performance, petitioner was allegedly observed in an

upstairs classroom "partially undressed (Specification 2) and "engaging in what appeared to be sexually inappropriate behavior with a colleague" (Specification 3). These actions allegedly "caused widespread negative publicity, ridicule and notoriety to [JMHS] and the New York City Department of Education (DOE) when [petitioner's] misconduct was reported in New York area news reports and papers" (Specification 4).

Where, as here, the parties are subjected to compulsory arbitration, the arbitration award must be "in accord with due process and supported by adequate evidence, and must also be rational and satisfy the arbitrary and capricious standards of CPLR article 78" (*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). "A hearing officer's determinations of credibility, however, are largely unreviewable because the hearing officer observed the witnesses and was able to perceive the inflections, the pauses, the glances and gestures - all the nuances of speech and manner that combine to form an impression of either candor or deception" (*id.* at 568 [internal quotation marks omitted]*; see also Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543 [1st Dept 2011]).

Here, Supreme Court erred in substituting its judgment for that of the hearing officer. The hearing officer's findings of misconduct on Specifications 2, 3 and 4 are supported by adequate

evidence (*see Lackow*, 51 AD3d at 567). Multiple witnesses gave interlocking and closely corroborating testimony indicating that petitioner engaged in sexual conduct with an adult colleague in a darkened and empty third-floor classroom on November 20, 2009 at about 9:00 p.m., while a student musical performance was under way in an auditorium on the main floor. There is no basis for disturbing the hearing officer's credibility determinations (*see id.* at 568).

Petitioner was accorded a full and fair hearing with notice and an opportunity to be heard (*see Harris v Department of Educ. of the City of N.Y.*, 67 AD3d 492 [1st Dept 2009]). The hearing officer did not violate petitioner's due process rights by declining, in the exercise of her discretion, to order any remedy for respondent's failure to preserve a surveillance videotape of the hallway outside the classroom (*see Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], *cert denied* 523 US 1074 [1998]). While it would have been better if the tape had been preserved, petitioner's ability to prepare a defense was not hindered by its inadvertent destruction. The camera did not record what occurred in the classroom, and numerous witnesses testified as to what transpired in the hallway. Thus, the hearing officer had a reasonable basis for declining to remedy

the spoliation (*see Cuevas v 1738 Assoc., LLC*, 96 AD3d 637, 638 [1st Dept 2012]).

We agree with Supreme Court, however, that the penalty of termination of employment is shockingly disproportionate to petitioner's misconduct (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234-235 [1974]).

"[A] result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved" (*Pell*, 34 NY2d at 234).

Petitioner was present at the school as an audience member and not in any official capacity. The incident involved a consenting adult colleague and was not observed by any student. Before the incident, petitioner, a tenured teacher who had made

many positive contributions to the school, had an unblemished disciplinary record, and, moreover, was described by her supervisor as one of the best teachers she had ever worked with (*see Matter of Principe v New York City Dept. of Educ.*, 94 AD3d 431, 433 [1st Dept 2012] [termination disproportionate where petitioner's actions were not premeditated and petitioner had a spotless record as a teacher for five years], *affd* 20 NY3d 963 [2012]; *Matter of Riley v City of New York*, 84 AD3d 442, 442 [1st Dept 2011] [termination disproportionate where "(t)he student admitted that she sustained no physical or emotional injury as a result of the incident, and in the 15 years preceding the incident, petitioner had received not a single formal reproach"]; *Matter of Solis v Department of Educ. of City of N.Y.*, 30 AD3d 532, 532 [2d Dept 2006] [termination disproportionate "(i)n light of, among other things, the petitioner's otherwise unblemished 12-year record as a teacher"]).

While petitioner's behavior demonstrated a lapse in judgment, there is no evidence that this incident, was anything but a one-time mistake (*see Matter of Diefenthaler v Klein*, 27 AD3d 347 [1st Dept 2006] ["we find it shocking to the conscience that these long-standing and well-regarded employees have been terminated for such an isolated error of judgment"]). Of critical significance is that, unlike matters involving some form

of romantic involvement or other inappropriate conduct with a student, petitioner's engaging in what appeared to be consensual sexual conduct with an adult colleague is not in and of itself either criminal or otherwise improper. Indeed, lesser penalties have been imposed where a teacher had an ongoing relationship or engaged in inappropriate behavior with a student (*compare City School Dist. of the City of N.Y. v McGraham,* 75 AD3d 445 [1st Dept 2010] [penalty of 90-day suspension without pay and reassignment rather than termination reinstated in light of overall circumstances demonstrating the improbability of teacher engaging in similar inappropriate behavior in the future], *affd* 7 NY3d 917 [2011]; *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415 [1st Dept 2013] [six-month suspension and mandatory counseling constituted an appropriate penalty for a librarian with 20 years of service who over a three-year period had engaged in inappropriate touching of high school students that the hearing officer found was not sexual misconduct]; *Nreu v New York City Dept. of Educ.*, 25 Misc 3d 1209[A] [Sup Ct, NY County 2009] [where petitioner, who had unblemished record, was found guilty of repeated inappropriate communications with student, one-year suspension without pay did not shock one's sense of fairness]).

Nor is there is any indication in the record that

petitioner's conduct will affect her ability to teach or that she intended to inflict any damage on any student. While it is unfortunate that the incident garnered so much attention and was exploited in the media, that in and of itself does not warrant the penalty of termination (*see Matter of Ellis v Ambach*, 124 AD2d 854 [3d Dept 1986] [two-year suspension for driver education teacher who had been convicted of criminally negligent homicide in connection with a hit-and-run accident that had been widely reported in the press], *lv denied* 69 NY2d 606 [1987]).

Accordingly, we remand the matter to respondent for the imposition of a lesser penalty.

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

ENTERED: MARCH 20, 2014

CLERK

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

11419 In re Cindy Mauro, Index 100767/11
Petitioner-Appellant,

-against-

Dennis M. Walcott, etc.,
Respondent-Respondent.

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Altman Schochet LLP, New York (Michael A. Valentin of counsel), for appellant.

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

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Order, Supreme Court, New York County (Robert E. Torres, J.), entered June 27, 2012, which denied the petition to vacate findings of misconduct and restore petitioner to her teaching position, and granted respondent's cross motion to dismiss the petition and confirm the arbitration award, unanimously modified, on the law, to grant the petition and deny the cross motion to the extent of vacating the penalty of termination, and the matter is remanded for the imposition of a lesser penalty, and otherwise affirmed, without costs.

Petitioner taught French at James Madison High School (JMHS) from 2001 until November 20, 2009. On Friday, November 20, 2009, she ate dinner with colleagues and returned to the school later that evening to watch a musical competition in the first floor auditorium, although she was not required to do so. During the

performance, petitioner was allegedly observed in an upstairs classroom "partially undressed (Specification 2) and "appeared to be engaging in sexually inappropriate behavior with a colleague" (Specification 3). These actions allegedly "caused widespread negative publicity, ridicule and notoriety to [JMHS] and the New York City Department of Education (DOE) when [petitioner's] misconduct was reported in New York area news reports and papers" (Specification 4).

The hearing officer's findings of misconduct on Specifications 2, 3 and 4 are supported by adequate evidence (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). Multiple witnesses gave interlocking and closely corroborating testimony indicating that petitioner engaged in sexual conduct with an adult colleague in a darkened and empty third-floor classroom on November 20, 2009 at about 9:00 p.m., while a student musical performance was under way in an auditorium on the main floor. There is no basis for disturbing the hearing officer's credibility determinations (*see id.* at 568).

Petitioner was accorded a full and fair hearing with notice and an opportunity to be heard (*see Harris v Department of Educ. of the City of N.Y.*, 67 AD3d 492 [1st Dept 2009]). The hearing officer did not violate petitioner's due process rights by

declining, in the exercise of her discretion, to order any remedy for respondent's failure to preserve a surveillance videotape of the hallway outside the classroom (*see Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], *cert denied* 523 US 1074 [1998]). While it would have been better if the tape had been preserved, petitioner's ability to prepare a defense was not hindered by its inadvertent destruction. The camera did not record what occurred in the classroom, and numerous witnesses testified as to what transpired in the hallway. Thus, the hearing officer had a reasonable basis for declining to remedy the spoliation (*see Cuevas v 1738 Assoc., LLC*, 96 AD3d 637 [1st Dept 2012]).

The hearing officer did not violate petitioner's due process rights by admitting into evidence the transcript of the testimony given by a school safety agent at the earlier hearing of the colleague with whom petitioner was found to have engaged in misconduct (*see* CPLR 4517[a][3][iii]). It is undisputed that the school safety agent was unable to appear at petitioner's hearing because she was confined to her home under doctor's orders.

We find, however, that in light of all of the circumstances, the penalty of termination of employment is shockingly

disproportionate to petitioner's misconduct (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

"[A] result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved" (*Pell*, 34 NY2d at 234).

Petitioner was present at the school as an audience member and not in any official capacity. The incident involved a consenting adult colleague and was not observed by any student. Before the incident, petitioner, a tenured teacher, had an unblemished disciplinary record and consistently satisfactory teacher ratings (*see Matter of Principe v New York City Dept. of Educ.*, 94 AD3d 431, 433 [1st Dept 2012] [termination

disproportionate where petitioner's actions were not premeditated and petitioner had a spotless record as a teacher for five years], *affd* 20 NY3d 963 [2012]; *Matter of Riley v City of New York*, 84 AD3d 442, 442 [1st Dept 2011] [termination disproportionate where "(t)he student admitted that she sustained no physical or emotional injury as a result of the incident, and in the 15 years preceding the incident, petitioner had received not a single formal reproach"]; *Matter of Solis v Department of Educ. of City of N.Y.*, 30 AD3d 532, 532 [2d Dept 2006] [termination disproportionate "(i)n light of, among other things, the petitioner's otherwise unblemished 12-year record as a teacher"]).

While petitioner's behavior demonstrated a lapse in judgment, there is no evidence that the incident was anything but a one-time mistake (*see Matter of Diefenthaler v Klein*, 27 AD3d 347, 349 [1st Dept 2006] ["we find it shocking to the conscience that these long-standing and well-regarded employees have been terminated for such an isolated error of judgment"]). Of critical significance is that, unlike matters involving some sort of romantic involvement or other inappropriate conduct with a student, petitioner's engaging in consensual sexual conduct with an adult colleague is not in and of itself either criminal or otherwise improper. Indeed, lesser penalties have been imposed

where a teacher had an ongoing relationship with or engaged in inappropriate behavior with a student (*see City School Dist. of the City of N.Y. v McGraham* 75 AD3d 445 [1st Dept 2010] [penalty of 90-day suspension without pay and reassignment rather than termination reinstated in light of overall circumstances demonstrating the improbability of teacher engaging in similar inappropriate behavior in the future], *affd* 7 NY3d 917 [2011]; *Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415 [1st Dept 2013] [six-month suspension and mandatory counseling constituted an appropriate penalty for a librarian with 20 years of service who had engaged over a three-year period in inappropriate touching of high school students that the hearing officer found was not sexual misconduct]; *Nreu v New York City Dept. of Educ.*, 25 Misc 3d 1209[A] [Sup Ct, NY County 2009] [where petitioner, who had unblemished record, was found guilty of repeated inappropriate communications with student, one year suspension without pay did not shock one's sense of fairness]).

Nor is there is any indication in the record that petitioner's conduct will affect her ability to teach or that she intended to inflict any damage on any student. While it is unfortunate that the incident garnered so much attention and was exploited in the media, that in and of itself does not warrant

the penalty of termination (*see Matter of Ellis v Ambach*, 124 AD2d 854 [3d Dept 1986][two-year suspension for driver education teacher who had been convicted of criminally negligent homicide in connection with a hit-and-run accident that had been widely reported in the press], *lv denied* 69 NY2d 606 [1987]).

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

ENTERED: MARCH 20, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11912N Tower Insurance Company of New York, Index 113336/08
Plaintiff-Appellant,

-against-

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

Robert Riccio,
Defendant.

_____

Law Office of Max W. Gershweir, New York (Joseph S. Wiener of counsel), for appellant.

Rothkrug Rothkrug & Spector, LLP, Great Neck (Simon H. Rothkrug of counsel), for respondents.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered June 27, 2013, which granted a motion by defendants NHT Owners LLC and Mallory Management Corp. (collectively NHT) for leave to amend its pleadings to assert a counterclaim for attorneys' fees, deemed the proposed amended answer annexed to the moving papers served, awarded attorneys' fees, and directed counsel to appear for an attorneys' fee hearing, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, an insurer, brought this action for a judgment declaring that it was not obligated to defend and indemnify NHT in an action that was brought by defendant Robert Riccio. NHT's answer, dated November 11, 2008, set forth a counterclaim for an

award of damages "for the defense of [this] action" and punitive damages on the basis of purported bad faith on plaintiff's part.[1] By order and judgment entered on June 24, 2010, the court declared that plaintiff was obligated to defend and indemnify NHT in the Riccio action and dismissed the counterclaim. Plaintiff was the only party to appeal from that order, which was affirmed on December 20, 2011 (90 AD3d 532 [1st Dept 2011]). NHT's proposed amended counterclaim for defense costs is impermissibly similar to the one that was dismissed by the June 24, 2010 order and judgment. Absent the application of CPLR 5015, "a court determination from which an appeal has not been taken should 'remain inviolate'" (*Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 224 [2013]). Although it invokes CPLR 5015, NHT has not even alleged the existence of any ground for relief under the statute, such as excusable default, newly discovered evidence, fraud, or lack of jurisdiction (*see* CPLR 5015[a]). Because such grounds are absent, the court's determination, which effectively

[1] This pleading refutes NHT's appellate argument that it "never before made a demand for attorney's fees [sic]."

vacates the June 2010 order and judgment, was "improper as a matter of law" (*see Matter of Huie [Furman]*, 20 NY2d 568, 572 [1967]).

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

11990 In re Nancy Wilson, Index 401475/10
Petitioner-Respondent,

-against-

New York City Police Department
License Division,
Respondent-Appellant.

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

Jerold E. Levine, Valley Stream, for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered August 20, 2012, which granted petitioner's motion to vacate a prior order denying the petition and dismissing the proceeding brought pursuant to CPLR Article 78, and granted the petition to the extent of remanding the matter to respondent for a new determination of petitioner's application for a handgun license, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

Supreme Court improperly entertained petitioner's motion to vacate its original decision denying the petition and dismissing the proceeding since the motion was, in fact, an untimely motion to reargue. In any event, there is no basis upon which to vacate the prior decision. Respondent's denial of petitioner's application for a handgun license was rationally based on

petitioner's false statements and was not arbitrary and capricious *(see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]).

It is undisputed that petitioner denied ever having been arrested, when, in fact, she was arrested in 2000, and the charges were dismissed on motion of the District Attorney. An applicant for a handgun license who was previously arrested is required to submit a certificate of disposition showing the offense and disposition of charges, as well as a detailed statement describing the circumstances of the arrest (*see* Rules of the City of NY Police Dept [RCNY] § 5-05[6]). Although petitioner's arrest was a nullity after the charges against her were dismissed (*see* Penal Law § 160.60), she was required to disclose it on the application. Her denial that she was arrested constitutes a false statement which is a sufficient ground for

the denial of the application (*see* Penal Law § 400.00; *DeMeo v Bratton*, 237 AD2d 111, 112 [1st Dept 1997]).

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

11991 Katherine Lee Boyce, Index 350556/03
Plaintiff-Appellant,

-against-

Charles Boyce,
Defendant-Respondent.

_____

Segal & Greenberg LLP, New York (Margery A. Greenberg of counsel), for appellant.

Mayerson Abramowitz & Kahn, LLP, New York (Barry R. Abbott of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about August 14, 2013, which, to the extent appealed from as limited by the briefs, summarily denied plaintiff's motion for an order modifying custody and enforcing the child support provisions of the parties' stipulation of settlement, unanimously modified, on the law, to grant the motion to the extent of remanding the matter for a hearing on the issue of the child's private school tuition, and otherwise affirmed, without costs.

Plaintiff failed to make an evidentiary showing sufficient to warrant a hearing on her custody modification request (*see Matter of Samuel A. v Aidarina S.*, 99 AD3d 420, 421 [1st Dept 2012]). The fact that the parties, who have joint decision-making authority, have different views on education or

extracurricular activities does not mean that they cannot co-parent. The parties anticipated that they may have these disagreements and provided for a procedure to deal with them in their stipulation of settlement. In the event the procedures failed, as occurred here, the parties reserved their right to resolve such matters in court.

Given the evidence of defendant's reduction in income and increased debts since the execution of the parties' agreement, Supreme Court properly found that he had reasonably withheld consent to the use of out-of-network medical providers or the child's enrollment in more than two extracurricular activities per semester. Supreme Court also properly denied plaintiff's request for reimbursement of childcare costs, since she submitted no evidence that those costs were incurred in order to enable her to work.

However, considering the parties' agreement, which originally contemplated that the child would be attending private school, the child's long attendance at a private school the parties had chosen together, and his fondness for and outstanding performance at the school, the court should have held a hearing to determine whether defendant unreasonably refused to consent to

contribute to the costs of the child's private school education (*see* Domestic Relations Law § 240[1-b][c][7]; *Maybaum v Maybaum*, 89 AD3d 692, 697 [2d Dept 2011]).

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

11992 In re Raymond A.,
Petitioner-Respondent,

-against-

Lisa M.H.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about April 30, 2013, which, after a hearing, awarded custody of the subject child to petitioner father, unanimously affirmed, without costs.

The Family Court's determination that it was in the child's best interest to have the father awarded legal and physical custody with extensive visitation to appellant mother finds a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 171-172, 174 [1982]; *Matter of Victoria H. [Tetsuhito A.]*, 110 AD3d 636, 636 [1st Dept 2013]). The court properly considered all of the relevant factors before concluding that allowing the child to remain with the father would serve the child's best interests. The record demonstrated that the father

had been employed for the past twelve years and had stable housing. It also demonstrated that appellant had been in and out of prison with a pending criminal matter at the time of the hearing, with no income except for welfare and babysitting, and had not obtained stable housing (*see Matter of David C. v Laniece J.*, 102 AD3d 542 [1st Dept 2013]; *Matter of Nunn v Bagley*, 63 AD3d 1068, 1069 [2d Dept 2009]).

In addition, the record demonstrates that the father understands the child's special needs better than appellant. She testified that should she be awarded custody, she might have to remove the child from the special education program he had been enrolled in by the father and where he was thriving, in favor of regular day care or preschool, because those types of programs were closer to where she was residing at the time of the hearing (*see Matter of Maureen H. v Samuel G.*, 104 AD3d 470, 471 [1st Dept 2013]; *and see Matter of Liza R. v Lin F.*, 110 AD3d 513 [1st Dept 2013]). Although appellant contends that the father's weight issues have prevented him from properly caring for the child, he testified that his employer had found him physically capable to perform his job duties and the record contains no evidence that he was physically unable to work or properly care for the child.

Additionally, the record demonstrates that the father would

be able to place the child's needs first while fostering a continued relationship between appellant and their son because she and the maternal grandmother both acknowledged during the custody hearing that he had allowed them to visit the child after he was awarded temporary custody (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). There is no basis to disturb the court's credibility determinations (*see Matter of Nelissa O. v Danny C.*, 70 AD3d 572, 572 [1st Dept 2010]).

The Family Court properly determined that joint custody was not in the child's best interest because appellant herself testified that she and the father could not "always be cordial and respectable towards each other" (*see Stanat v Stanat*, 93 AD2d 114, 117 [1st Dept 1983], *lv denied* 59 NY2d 605 [1983]).

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

11993 Carlos Ramirez, Index 306487/08
Plaintiff-Appellant,

-against-

BB and BB Management Corp., et al.,
Defendants-Respondents,

John Sabatar,
Defendant.

_____

Klein Calderoni & Santucci, LLP, Bronx (Fred T. Santucci, Jr. of counsel), for appellant.

Barry, McTiernan & Moore, LLC, New York (Laurel A. Wedinger of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered November 29, 2012, which granted defendants BB and BB Management Corp., Gesher Realty Corp., and Felix Gomez's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff's failure to raise a triable issue of fact whether the assault on him was foreseeable, i.e. reasonably predictable, renders defendants' Worker's Compensation defense moot. Plaintiff's complaints regarding criminal elements in the neighborhood and the three police reports regarding an apartment robbery and two incidents of vandalism to cars parked outside the building were insufficient to show that the assault was

reasonably predictable (*see Maria T. v New York Holding Co. Assoc.*, 52 AD3d 356 [1st Dept 2008], *lv denied* 11 NY3d 708 [2008]; *Ortiz v Wiis Realty Corp.*, 66 AD3d 429 [1st Dept 2009]). Moreover, while plaintiff testified that the front door lock had been broken, he could not say for how long, and there is no evidence that defendants were notified of the broken lock.

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

11994 Ariel Roman, Index 16471/06
Plaintiff-Appellant, 83997/08
83785/11

-against-

Tishman Construction Corporation
of New York, et al.,
Defendants-Respondents,

Regional Scaffolding & Hoisting Co.,
Inc.,
Defendant.

[And Third-Party Actions]

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about July 5, 2012,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 25, 2014,

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

11995 The People of the State of New York, Ind. 3995/11
Respondent,

-against-

Ahmad B. Tucker,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Rossi 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 (Michael J. Obus, J.), rendered on or about April 12, 2012,

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

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

ENTERED: MARCH 20, 2014

CLERK

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

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

11997 Akasa Holdings, LLC, Index 650111/12
Plaintiff-Respondent,

-against-

David J. Sweet, as Trustee
for the 55 Crosby Street
Revocable Trust, et al.,
Defendants-Appellants,

55 Crosby Associates, Inc.,
Nominal Defendant.

_____

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel), for appellants.

Reed Smith LLP, New York (Casey D. Laffey of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 30, 2012, which, insofar as appealed from, granted plaintiff's motions to dismiss defendants David J. Sweet, Jane Sachs, Gene Thompson, and Patricia Thompson's counterclaim and for summary judgment declaring in its favor on its first cause of action and adjudging that defendants must follow a prescribed procedure for the nomination and election of directors to the board, and, on its second cause of action, enjoining defendants from deviating from the aforesaid procedure, and denied defendants' cross motion for summary judgment dismissing the complaint, except as to the third

cause of action, unanimously affirmed, without costs.

Plaintiff is seeking to vindicate its right as a shareholder to elect directors. Thus, its claims are individual, not derivative, claims (*see e.g. Eisenberg v Flying Tiger Line, Inc.*, 451 F2d 267, 269-270 [2d Cir 1971]).

Plaintiff's claims are not barred by the business judgment rule, which applies to decisions made by a board of directors, not by fellow shareholders (*see e.g. Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]).

Since plaintiff is suing defendants not in their capacity as directors but as shareholders, it was not required to plead that defendants committed independent tortious acts (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 47, 50 [1st Dept 2012] ["participation in a breach of contract will typically not give rise to individual *director* liability" unless the director commits an independent tort [emphasis added]).

Because plaintiff is not suing defendants as directors or officers, defendants are not entitled to indemnification pursuant to Article VII of the nominal defendant's by-laws (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 10 AD3d 573, 573 [1st Dept 2004] [allowing indemnification only for cause of action "relat[ing] to the individual defendants' status as officers or directors of the cooperative"]).

The by-laws state in plainly understood terms that the nominal defendant may have between three and seven directors and that the shareholders shall decide on the number of directors. Thus, it was entirely proper for the motion court to order that "the shareholders of [the] nominal defendant . . . are to vote on a number, between 3 and 7, of directors to serve on the Board" (*see MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]).

Section 5.1.3 of the shareholders' agreement, on which defendants place much weight, merely says, "The Shareholders agree to cause the nomination for election and to vote their Shares for the election of each Shareholder (or any designee residing in the New York Metropolitan area of any such Shareholder) as a director of the Corporation, as long as each of them is a Shareholder of the Corporation." This gives each shareholder (or its designee) the right to be a director; however, it does not limit each shareholder to one director. It would have been easy enough for the shareholders' agreement or the by-laws to provide, "There shall be only one director per shareholder." However, they do not so provide, and we will not add this term (*see e.g. Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

Defendants contend that the parties who drafted the

shareholders' agreement meant for each shareholder to have an equal voice on the board. However, we are concerned "'with what the parties intended . . . only to the extent that they evidenced what they intended by what they wrote'" (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 7 [1st Dept 2012] [quoting *Rodolitz v Neptune Paper Prods.*, 22 NY2d 383, 387 (1968)]).

Defendants also point to the nominal defendant's long-standing practice of having only one director per shareholder. However, the shareholders' agreement is "clear and unambiguous on its face [and] must be enforced according to the plain meaning of its terms without consideration of extrinsic and parol evidence" (*Omansky v Whitacre*, 55 AD3d 373 [1st Dept 2008]). In any event, the nominal defendant departed from this practice during 2009-2011, when the unit now owned by plaintiff, and formerly owned by nonparties Walter and Mary Chatham, had two representatives on the board.

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

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

11998 The People of the State of New York, Respondent, Ind. 6040/09

-against-

Robert Way,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression motion; Daniel McCullough, J., at jury trial and sentencing), rendered August 3, 2011, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2½ to 5 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its resolution of alleged inconsistencies in the officers' testimony.

The court properly denied defendant's motion to suppress physical evidence, without granting a hearing, because his motion papers did not raise an issue of fact as to probable cause for

his arrest (*see People v Mendoza*, 82 NY2d 415 [1993]). Defendant's assertion that he was "not engaged in any criminal activity at the time of, or immediately prior to his arrest" did not controvert the specific information that was provided by the People concerning the basis for the arrest. Defendant did not address these allegations or raise a factual dispute requiring a hearing (*see e.g. People v Cartwright*, 65 AD3d 973 [1st Dept 2009], *lv denied* 13 NY3d 937 [2010]). In context, it was not even clear what, if any, portion of the events leading up to defendant's arrest was intended to be addressed by the phrase "immediately prior to his arrest."

Defendant failed to preserve his claim that the court should have given the jury a circumstantial evidence charge, and we decline to review it in the interest of justice. As an alternative holding, we find that no such charge was necessary, because the People's case was not based entirely on circumstantial evidence. The fact that the jury was called upon to draw inferences from the evidence did not require a circumstantial evidence charge (*see People v Roldan*, 88 NY2d 826 [1996]; *People v Daddona*, 81 NY2d 990 [1993]).

For similar reasons, we reject defendant's ineffective assistance of counsel claim. The fact that counsel did not request a circumstantial evidence charge met an objective

standard of reasonableness, and the absence of such a charge did not deprive defendant of a fair trial or affect the outcome (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

12000- Index 102196/12
12000A In re Kalpana Patel, M.D.,
Petitioner-Appellant,

-against-

Nirav Shah, etc., et al.,
Respondents-Respondents.

_____

Law Offices of Jacques G. Simon, New York (Jacques G. Simon of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Lisa D'Alessio of counsel), for respondents.

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Judgment, Supreme Court, New York County (Paul Wooten, J.), entered April 16, 2013, which denied the petition seeking, among other things, a writ of mandamus compelling respondents to dismiss an investigation against petitioner, and a writ of prohibition prohibiting respondents and their agents from acting or causing anyone else to act on the basis of any information obtained through the investigation, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 26, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Since petitioner failed to meet her burden of demonstrating a "clear legal right" to the relief sought, neither mandamus nor

prohibition is available (*see Matter of Brusco v Braun*, 84 NY2d 674, 679 [1994]; *Matter of Doe v Axelrod*, 71 NY2d 484, 490 [1988]). Petitioner argues that respondent Office of Professional Medical Misconduct (OPMC) submitted the investigation against her to an investigation committee more than 90 days after OPMC's most recent interview of her, in contravention of Public Health Law § 230(10)(a)(iii)(C). However, contrary to petitioner's argument, that provision is not strictly mandatory, given that Public Health Law § 230(10)(j), which provides for a licensee to commence an article 78 proceeding challenging OPMC's noncompliance with the 90-day limit, requires the licensee to establish that the licensee neither caused the delay nor was prejudiced by the delay, as long as OPMC meets its initial burden to explain its noncompliance (*see generally Matter of City of New York v Novello*, 65 AD3d 112, 116 [1st Dept 2009], *lv denied* 14 NY3d 702 [2010] ["(w)ith regard to provisions directing public officials to take action within certain time limits, the general rule is that such limits will be considered directory, absent evidence that such requirements were intended by the Legislature as a limitation on the authority of the body or officer"]). Moreover, mandamus and prohibition are

unavailable for the additional reason that Public Health Law § 230(10)(j) provided an adequate remedy at law (*see Matter of Doe*, 71 NY2d at 490; *Matter of DiBlasio v Novello*, 28 AD3d 339, 342 [1st Dept 2006]).

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

12001 Eunice Santana, Index 21277/12
Plaintiff-Appellant,

-against-

Danco Inc., et al.,
Defendants-Respondents,

Luisa Jiminez,
Defendant.

_____

Hausman & Pendzick, Harrison (Elizabeth M. Pendzick of counsel), for appellant.

Paganini, Cioci, Pinter, Cusumano & Farole, Melville (Joseph P. Minasi of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 25, 2013, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously modified, on the law, the motion granted as against defendants Danco Inc. and Milan Racan, and otherwise affirmed, without costs.

It is well settled that when a rear-end collision occurs, "the driver of the front vehicle is entitled to summary judgment on liability, unless the driver of the following vehicle can provide a nonnegligent explanation for the collision" (*Santana v Tic-Tak Limo Corp.*, 106 AD3d 572, 573-574 [1st Dept 2013]). Here, plaintiff met her prima facie burden by submitting an

affidavit stating that her car had come to a stop at the time that it was hit in the rear by defendant Jiminez's car. Plaintiff also submitted a certified copy of the police accident report which buttresses her sworn statement (*see Voskin v Lemel*, 52 AD3d 503 [2d Dept 2008]).

In opposition, defendant Jiminez submitted an affidavit averring that her car was also stopped before the accident, and was hit in the rear by the vehicle owned by defendant Danco and operated by defendant Racan, thereby proffering a nonnegligent explanation for her collision with plaintiff's car. Defendants Danco and Racan, however, did not submit any affidavit or other admissible evidence to raise an issue of fact as to whether there was a nonnegligent explanation for the collision. Their objection that plaintiff's summary judgment motion was premature because there had not yet been any discovery, was an insufficient basis for denying the motion since the relevant facts would be

within Racan's knowledge and they failed to explain what discovery was needed to oppose the motion (*see Soto-Maroquin v Mellet*, 63 AD3d 449 [1st Dept 2009]; CPLR 3212[f]).

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

12002 Sherritta Joyner, Index 308766/09
Plaintiff-Appellant,

-against-

Mingles Café, Inc. et al.,
Defendants,

B.P.R. 4000, LLC,
Defendant-Respondent.

_____

Bailly and McMillan, LLP, White Plains (Keith J. McMillan of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered January 14, 2013, which, insofar as appealed from as limited by the briefs, granted the motion of defendant B.P.R. 4000, LLC (BPR) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant BPR, the owner of the subject premises, established its entitlement to judgment as a matter of law in this action where plaintiff allegedly tripped and fell while walking to the bathroom in the nightclub operated by defendants Mingles Café, Inc. and Mingles, Inc. BPR submitted its lease with Mingles showing that it had no contractual duty to maintain or repair the demised premises, but retained only a limited right

to reenter and repair where tenant failed to maintain the premises, and by demonstrating that the cracked floor tile and alleged inadequate lighting were not significant structural or design defects which violated specific statutory safety provisions (*see Kittay v Moskowitz*, 95 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Bethea v Weston House Hous. Dev. Fund Co.*, Inc., 70 AD3d 470, 471 [1st Dept 2010]; *Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107, 108 [1st Dept 2003]; *Couluris v Harbor Boat Realty, Inc.*, 31 AD3d 686 [2d Dept 2006]).

In opposition, plaintiff failed to raise a triable issue of fact. The record shows that she submitted only alleged violations of general safety provisions, or lighting codes (*see e.g. Kittay* at 452).

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: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

12003 Osprey Partners, LLC, Index 600862/10
Plaintiff-Respondent,

-against-

The Bank of New York Mellon Corporation, et al.,
Defendants-Appellants.

_____

Proskauer Rose LLP, New York (Stephen L. Ratner of counsel), for appellants.

Balber Pickard Maldonado & Van Der Tuin, PC, New York (Roger J. Maldonado of counsel), and Law Offices of Leland W. Hutchinson, Chicago, IL (Leland W. Hutchinson of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 11, 2013, which granted plaintiff's motion for summary judgment on its breach of contract claim to recover contingent payments arising from defendants' use of its investment portfolio accounting software, and denied defendants' cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, plaintiff's motion denied and defendants' cross motion granted. The Clerk is directed to enter judgment accordingly.

Under well-established principles of contract interpretation, agreements are generally construed in accord with the parties' intent (*Slatt v Slatt*, 64 NY2d 966, 967 [1985]), and

the best evidence of the parties' intent is "what they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Thus, where the terms of a contract are clear and unambiguous, "the intent of the parties must be found within the four corners of the document" (*ABS Partnership v AirTran Airways*, 1 AD3d 24, 29 [1st Dept 2003]), and extrinsic evidence is not to be considered (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163 [1990]).

In view of the foregoing principles, we find that paragraph 2.06 of the subject agreement contemplates "use" of the subject software to apply only where actual portfolio accounting had been performed on actual existing customer accounts loaded on the software in a production environment for customer access. It does not apply to accounts that were loaded merely to test the functionality of the software or mistakenly loaded accounts.

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

12004 The People of the State of New York, Respondent, Ind. 1703/09

-against-

Adolphus Hamilton, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered January 13, 2012, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved 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]). There is no basis for disturbing the jury's credibility determinations. The People disproved defendant's justification defense beyond a reasonable doubt (*see e.g. People v Wimberly*, 19 AD3d 518 [2d Dept 2005], *lv denied* 5 NY3d 811 [2005]).

Although defendant asked the court to delete the concept of duty to retreat (*see* Penal Law § 35.15[2][a]) from its justification charge, he did so on a different ground from the ground he asserts on appeal, and never asserted that there was a factual issue regarding whether the homicide occurred in his dwelling. Accordingly, his present challenge to the court's charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we conclude that there was no reasonable view of the evidence upon which to relieve defendant of the duty to retreat pursuant to Penal Law § 35.15(2)(a)(I), and no factual issue in this regard requiring submission to the jury. In any event, any error in the court's justification charge was harmless (*see People v Petty*, 7 NY3d 277, 285-286 [2006]).

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

ENTERED: MARCH 20, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

12005 The People of the State of New York, Respondent, Ind. 3853/10

-against-

Dennis Pertsyuk, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at plea; Patricia Nunez, J. at sentencing), rendered on or about August 15, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [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 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12008- Ind. 2486/10
12008A The People of the State of New York, 1585/11
Respondent,

-against-

John Lasso,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schumann-Ortega of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 9, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a term of one year, and judgment, same court and Justice, rendered February 8, 2012, as amended February 10, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a concurrent term of one year, unanimously affirmed.

With regard to the 2011 judgment, the court properly exercised its discretion in denying defendant's newly-retained attorney's request for an adjournment to permit further preparation for sentencing, and that ruling did not deprive

defendant of effective assistance of counsel (*see e.g. People v Chappotin*, 56 AD3d 327 [1st Dept 2008], *lv denied* 11 NY3d 923 [2009]). Under the circumstances, the new attorney was sufficiently familiar with the case and made appropriate sentencing arguments. There is no reason to believe that if the new attorney had received more time to prepare, he could have persuaded the court to impose a more lenient sentence, or could have taken any other actions for his client's benefit (*see e.g.* (*see People v Krasnovsky*, 45 AD3d 446 [1st Dept 2007], *lv denied* 10 NY3d 767 [2008]).

In light of this determination, there is no basis for reversal of the 2012 judgment.

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12009 Francisco Navarro, Index 107174/10
Plaintiff-Respondent,

-against-

H. Heiden, LLC,
Defendant-Appellant.

_____

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

Gorayeb & Associates, P.C., New York (Roy A. Kuriloff of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered August 8, 2013, which denied defendant's motion 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.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was injured when he slipped and fell on the wet exterior stairs of defendant's building. Defendants submitted evidence showing that it neither created nor had notice of the allegedly dangerous condition that caused plaintiff's fall. Plaintiff, a porter at the building, testified that he had never complained to anyone about the alleged defective staircase and defendant showed that there had

been no complaints about the staircase before the accident (*see e.g. Cruz v Montefiore Med. Ctr.*, 45 AD3d 355 [1st Dept 2007]).

Plaintiff's opposition failed to raise a triable issue of fact as to whether defendant had notice of the allegedly defective condition. Plaintiff's opposition consisted of affidavits from himself and his expert to the effect that, as alleged in his bill of particulars, the surface of the staircase had become worn and slippery (*see id.*). The expert did not perform slip resistance testing on the stairs and otherwise addressed issues that were not material to plaintiff's claims (*see e.g. Sanders v Morris Hgts. Mews Assoc.*, 69 AD3d 432 [1st Dept 2010]; *Contreras v Zabar's*, 293 AD2d 362 [1st Dept 2002]).

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12010 In re Julia C. C., etc.,
and Others,

Children Under the Age
of Eighteen Years, etc.,

Christopher Jonathan S.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about January 9, 2013, insofar as it found, after a fact-finding hearing, that respondent neglected the subject children, unanimously affirmed, without costs.

Family Court's neglect finding against respondent based on his infliction of excessive corporal punishment on the children is supported by a preponderance of the evidence (*see Matter of Deivi R. [Marcos R.]*, 68 AD3d 498 [1st Dept 2009]). The children's out-of-court statements that respondent had a history of violence against them, including one child's account of

respondent's punching him in the face and leaving scratches on his back, were cross-corroborated by the others' statements, by their statements to petitioner agency's caseworkers, and by a caseworker's observations of the scratches on the child who said he was punched and scratched (*see Matter of Tiara G. [Cheryl R.]*, 102 AD3d 611 [1st Dept 2013], *lv denied* 21 NY3d 855 [2013]).

Since respondent never moved to dismiss the petitions against him pursuant to Family Court Act § 1051(c), his argument that Family Court should have dismissed them is not preserved for our review. In any event, there is no basis for dismissing the petitions.

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12011 Sandra Piedrabuena Abrams, Index 110329/09
Plaintiff-Appellant,

-against-

Danielle Pecile,
Defendant-Respondent.

_____

McCue Sussmane & Zapfel, P.C., New York (Kenneth Sussmane of counsel), for appellant.

Thompson Wigdor LLP, New York (David E. Gottlieb of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 31, 2012, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the amended complaint, unanimously modified, on the law, to deny the motion as to the causes of action for conversion, replevin, and intentional infliction of emotional distress, and otherwise affirmed, without costs.

The motion court should not have dismissed plaintiff's conversion and replevin claims on the ground that her husband owned the compact disc (CD) and photographs at issue. Plaintiff has a possessory right or interest in the property (*see generally Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *Pivar v Graduate School of Figurative Art of N.Y. Academy of Art*, 290 AD2d 212, 213 [1st Dept 2002]), and there is evidence that defendant has interfered

with that right by refusing a demand for the goods (*see State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002]; *McGough v Leslie*, 65 AD3d 895, 896 [1st Dept 2009]) and by "intermeddling with [the property], beyond the extent of the authority conferred" (*Laverty v Snethen*, 68 NY 522, 524 [1877]). Even if it were necessary for plaintiff to own the property, the photographs are marital property (*see* Domestic Relations Law § 236[B][c]-[d]), so plaintiff is a joint owner. Further, plaintiff's affidavit in opposition to defendant's motion at a minimum creates an issue of fact as to whether the CD containing the digital files of the photographs is marital property. It was not necessary for plaintiff to personally demand that defendant return the property; it sufficed that she asked her husband to tell defendant's attorney to return her pictures and that her husband complied (*cf. Boston Concessions Group v Criterion Ctr. Corp.*, 250 AD2d 435 [1st Dept 1998] [plaintiff's *representatives* never demanded that defendant return the allegedly converted equipment]). Nor is it fatal that the parties agreed, after plaintiff commenced this action, that a neutral third party would maintain possession of the CD, USB drives, and photographs pending any subsequent litigation. Since defendant possessed those items at the time plaintiff commenced this action, her

replevin claim is valid (*see Sinnott v Feiock*, 165 NY 444, 450 [1901]).

The motion court properly dismissed the trespass to chattels claim because, at her deposition, plaintiff admitted she was not claiming that defendant had damaged any of the images (*see "J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215 [1st Dept 2005]; *see also Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]).

It was premature to dismiss the intentional infliction of emotional distress claim, given that defendant had not yet been deposed. Plaintiff cannot establish the elements of her claim without deposing defendant. Indeed, plaintiff does not know the universe of persons to whom defendant showed her "personal and revealing photographs" (*Abrams v Pecile*, 84 AD3d 618, 618 [1st Dept 2011]). "Summary judgment is not justified where the existence of essential facts depends upon knowledge exclusively within the possession of the moving party and which might well be

disclosed by . . . examination before trial" (*Baldasano v Bank of N.Y.*, 199 AD2d 184, 185 [1st Dept 1993]).

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12013-
12014 Index 17251/99

Daljit Kumar, et al.,
Plaintiffs-Appellants,

-against-

William Farber, Executor of the
Estate of Janice H. Levin, deceased,
et al.,
Defendants-Respondents,

Tri-Star Patrol Service, et al.,
Defendants.

[And a Third-Party Action]

_____

Law Office of Neil R. Finkston, Great Neck (Neil R. Finkston of counsel), for appellants.

Lewis Johs Avallone Aviles, LLP, Islandia (Brian Brown of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 21, 2013, insofar as appealed from as limited by the briefs, dismissing the complaint as against defendants-respondents, pursuant to an order, same court and Justice, entered December 11, 2012, which, inter alia, granted respondents' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Appeal from above order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Respondents established their entitlement to judgment as a

matter of law by submitting evidence showing that the criminal assault upon plaintiff Daljit Kumar by an unknown assailant was unforeseeable (*see Maria T. v New York Holding Co. Assoc.*, 52 AD3d 356, 358 [1st Dept 2008], *lv denied* 11 NY3d 708 [2008]).

Plaintiffs' opposition failed to raise a triable issue of fact. Plaintiffs failed to present competent evidence of past criminal activity of the same or similar type sufficient to warrant the security measures suggested by them, including a stationed guard at the bank's branch and an outdoor CCTV security system at the mall (*see Williams v Citibank*, 247 AD2d 49 [1st Dept 1998], *lv denied* 92 NY2d 815 [1998]). Although three prior robberies had taken place at other stores in the mall, two had occurred three years earlier and the third occurred inside a supermarket. None of those prior robberies involved the type of planned ambush on the injured plaintiff, who the robbers knew was at the bank to make a large deposit. Similarly, a prior attempted robbery committed by an individual who attempted to access the bank's night deposit box by ramming it with a stolen construction vehicle is not of a similar type of crime such to make this crime foreseeable. Nor was the crime foreseeable because the shopping mall was partially located within Bronx

County, an alleged "high crime" neighborhood (*see Coronel v Chase Manhattan Bank*, 19 AD3d 310 [1st Dept 2005], *affd* 8 NY3d 838 [2007]).

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12016 The People of the State of New York, Respondent, Ind. 5821/11

-against-

Elliot Carter, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 2, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [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 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12018 Growbright Enterprises, Inc., Index 650596/10
Plaintiff-Respondent,

-against-

Sam Barski, et al.,
Defendants-Appellants.

_____

The Bernstein Law Firm, Brooklyn (Michael I. Bernstein of counsel), for appellants.

Sam P. Israel, P.C., New York (Sam P. Israel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 7, 2012, which, after a hearing, found that plaintiff had standing to bring the action, unanimously affirmed, with costs.

Plaintiff's standing is predicated upon an alleged oral assignment between itself and its affiliate, nonparty Trade Deals Pte., Ltd. (*see M.S. Textiles v Rafaella Sportswear*, 293 AD2d 261 [1st Dept 2002]). The motion court found that an oral assignment between plaintiff and Trade Deals could be effected by the 99% owner of the companies, who actively managed both businesses,

without the participation of others (e.g. shareholders or directors). This finding was based on the court's determination that the owner, who testified, inter alia, that plaintiff's recovery in this action would be shared with Trade Deals, was credible; that determination is entitled to deference.

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12022 Linda A. Foreman, Index 304720/10
Plaintiff-Appellant,

-against-

Jihad Skeif,
Defendant-Respondent,

Ira H. Foreman,
Defendant.

_____

Finger & Finger, a Professional Corporation, White Plains (Daniel S. Finger of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Dennis J. Monaco of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 4, 2013, which granted defendant Jihad Skeif's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Skeif presented unrefuted evidence that the vehicle operated by codefendant Ira H. Foreman made a left turn across the path of Skeif's oncoming vehicle in violation of Vehicle and Traffic Law § 1141, and that he applied his brakes, but could not avoid the collision (*see Griffin v Pennoyer*, 49 AD3d 341, 341-342 [1st Dept 2008]). Skeif properly supported his motion with admissible

evidence by submitting the parties' deposition transcripts (*see Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]).

Plaintiff, a passenger in Foreman's vehicle, failed to raise a triable issue of fact. She failed to submit any evidence supporting her claim that Skeif could have avoided the accident by paying proper attention (*see Cadeau v Gregorio*, 104 AD3d 464, 465 [1st Dept 2013]). Moreover, there is no evidence in the record that Skeif was speeding or was otherwise negligently operating his vehicle (*see id.*).

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12024-
12025 Index 117115/07

Mirella Salemi,
Plaintiff-Respondent,

-against-

Gloria's Tribeca Inc., etc.,
et al.,
Defendants,

Gloria Tribecamex Inc., et al.,
Defendants-Appellants.

_____

Steve S. Efron, New York, for appellants.

Derek T. Smith Law Group, New York (William G. Kaupp of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered December 5, 2012, awarding plaintiff damages in the principal amount of $1.6 million, comprised of $400,000 in compensatory damages for emotional distress, and $1.2 million in punitive damages, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 28, 2012, which denied defendants' motion to set aside or reduce the jury verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The record evidence, which is extensive and corroborated by multiple witnesses, amply supports the jury's verdict that, in violation of the New York City Human Rights Law (City HRL),

plaintiff's employer, defendant Edward Globokar, the principal of Gloria's Tribecamex Inc., which owned the restaurant where plaintiff worked as chef and manager, discriminated against her based on her religion and sexual orientation by, amongst other things, holding weekly prayer meetings at the restaurant where plaintiff worked which the staff viewed as mandatory, fearing that they would lose their jobs if they did not attend, repeatedly stating that homosexuality is "a sin," and that "gay people" were "going to go to hell" and generally subjecting her to an incessant barrage of offensive anti-homosexual invective (*see* NYC Admin Code § 8-107[a]). Additional evidence demonstrated that as a result of Globokar's improper conduct, plaintiff was retaliated against for objecting to his offensive comments, choosing not to attend workplace prayer meetings, and refusing to fire another employee because of his sexual orientation (*see* NYC Admin Code § 8-107[7]; *Fletcher v The Dakota, Inc.*, 99 AD3d 43, 51-53 [1st Dept 2012]), and was constructively discharged (*see Albunio v City of New York*, 67 AD3d 407, 408 [1st Dept 2009], *affd* 16 NY3d 472 [2011]).

The trial court correctly instructed the jury that "[d]iscrimination on the basis of sexual orientation or religion must be beyond what is considered petty slights and trivial inconveniences" (*see Williams v New York City Hous. Auth.*, 61

AD3d 62, 80 [1st Dept], *lv denied* 13 NY3d 702 [2009]). Defendants' argument that the trial court should instead have charged the jury based on the New York State Human Rights Law's more restrictive "severe and pervasive" standard is without merit (*see id.; Zakrzewska v New School*, 14 NY3d 469, 480-481 [2010]). Defendants argument that, in order to protect Globokar's right to express his religious views, the trial court should have also charged the jury on the substance of City HRL § 8-107(2)(d)(3), is similarly meritless, since this provision is designed to avail victims of employment discrimination, not perpetrators of discrimination. In any event, the trial court properly protected Globokar's First Amendment rights by instructing the jury that he had "a right to express his religious beliefs and practice his religion, provided that he does not discriminate against his employees based on religion or sexual orientation."

The award of compensatory damages does not materially deviate from awards for emotional distress rendered in similar cases (*see Albunio*, 67 AD3d 407; *McIntyre v Manhattan Ford, Lincoln-Mercury*, 256 AD2d 269, 270-271 [1st Dept 1998], *app dismissed* 93 NY2d 919, *lv denied* 94 NY2d 753 [1999]).

Given the extensive evidence of defendants' discriminatory conduct, we do not find that the punitive damages award was

grossly excessive (*see Nardelli v Stamberg*, 44 NY2d 500, 503 [1978]; *McIntyre*, 256 AD3d at 269, 271; *Hill v Airborne Freight Corp.*, 212 F Supp 2d 59, 74, 77 [ED NY 2002]).

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: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12026 Gray Line New York Tours, Inc., et al., Plaintiffs-Appellants, Index 114496/09

-against-

Big Apple Moving & Storage, Inc., Defendant-Respondent,

Salvador Skerret, Defendant.

[And a Third-Party Action]

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Law Offices of Christopher P. DiGiulio, P.C., New York (William Thymius of counsel), for appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered September 6, 2013, which, insofar as appealed from, denied plaintiffs' motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiffs established entitlement to judgment as a matter of law on the issue of liability in this action where plaintiffs' stopped tour bus was struck in the rear by a truck owned by defendant Big Apple Moving & Storage and driven by defendant Skerret, who was an employee of Big Apple (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Santana v Tic-Tak Limo Corp.*, 106 AD3d 572, 573-574 [1st Dept 2013]).

In opposition, Big Apple raised a triable issue of fact as to whether Skerret had permission to use the subject vehicle on a personal errand after business hours (*see Murdza v Zimmerman*, 99 NY2d 375, 380-381 [2003]; Vehicle and Traffic Law § 388[1]). Although Skerret stated that he was not required to obtain permission to use the truck for personal purposes, Big Apple's owner disputed this claim and stated that he never provided Skerret with permission to use the truck that day. Furthermore, Big Apple's dispatcher stated that she told Skerret not to use the truck that day because it was experiencing brake problems. Such conflicting testimony should be resolved by a trier of fact (*see Leon v Citywide Towing, Inc.*, 111 AD3d 464 [1st Dept 2013]).

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

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12027 The People of the State of New York, Respondent, Ind. 3103/11

-against-

Carolyn Reed, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered January 10, 2012, as amended January 17, 2012, convicting defendant, upon her plea of guilty, of grand larceny in the third degree, and sentencing her, as a second felony offender, to a term of two to four years, unanimously affirmed.

Since defendant was sentenced to a term of incarceration of longer than 60 days (*see* Penal Law § 60.35[8]), she is required to seek relief from her mandatory surcharge payments by way of a CPL 420.10(5) motion for resentencing. Defendant's claims that she was entitled to a financial hardship hearing pursuant to CPL 420.40, and that the hearing should have been held at the time of his sentencing, are not supported by the applicable statutes. Rather, any application for relief from defendant's surcharges is

to be entertained in postsentence proceedings (*see People v Bradley*, 249 AD2d 103 [1st Dept 1998], *lv denied* 92 NY2d 923 [1998]; *People v Wheeler*, 244 AD2d 277 [1st Dept 1997]).

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

ENTERED: MARCH 20, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12030 Index 382325/09
[M-772] In re 680 East Fordham Road Corp., et al.
Petitioners,

-against-

Hon. Lucindo Suarez, etc., et al.,
Respondents.

_____

Dominick Sorrentino, Valhalla, for petitioners.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for State respondent.

Anthony L. Verrelli, Bronx, respondent pro se and for Sose Realty LLC, respondent.

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The above-named petitioners having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: MARCH 20, 2014

CLERK