SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 23, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, DeGrasse, Richter, Clark, JJ.

13158 Richard C. Lee, et al., Index 303549/13
Plaintiffs-Appellants, 301522/11
302336/13

-against-

Dow Jones & Company, Inc.,
Defendant-Respondent.

- - - - -

Richard C. Lee,
Plaintiff-Appellant,

-against-

New York City Industrial
Development Agency, et al,
Defendants-Respondents.

- - - - -

Richard C. Lee, et al.,
Plaintiffs-Appellants,

-against-

Principal Building Services, Inc., et al.,
Defendants.

_____

Russell A. Schindler, Kingston, for appellants.

Lewis, Brisbois, Bisgaard & Smith, LLP, New York (Marsha E. Harris of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 30, 2014, which granted defendant Dow Jones & Company, Inc.'s motion to dismiss the complaint, and denied, as

moot, plaintiffs' cross motion to consolidate the three actions, unanimously reversed, on the law, without costs, the motion denied, and the cross motion granted.

In the circumstances presented, the court improperly considered affidavits and deposition testimony submitted by defendant in deciding its CPLR 3211(a)(7) motion to dismiss the complaint. CPLR 3211(a)(7) "limits [the court] to an examination of the pleadings to determine whether they state a cause of action" (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). "Modern pleading rules are 'designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one'" (*id.* at 636). Here, defendant's submissions regarding "special employment" did not negate the elements of plaintiff's complaint, which asserts common law negligence. Indeed, in their opposition papers, plaintiffs argued that since they had not yet had discovery, a motion for summary judgment was premature, and they "request[ed]" that the motion court decline to treat defendant's motion as a motion for summary judgment.

Defendant does not oppose consolidation of the three actions (*see* CPLR 602[a]; *Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337 [1st Dept 2006]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13298 The People of the State of New York, Ind. 5300/08
Respondent,

-against-

Delores Cosby,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered May 24, 2012, convicting defendant, after a jury trial, of grand larceny in the second degree, and sentencing her to a term of five years' probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). The evidence

established the elements of larceny by false pretenses, and it failed to support defendant's assertion that she was claiming funds that she honestly believed to be rightfully hers.

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13299 In re Carlos Pena, Index 100736/13
Petitioner,

-against-

Robert K. Hughes, etc., et al.,
Respondents.

_____

Traub & Traub, P.C., New York (Doris G. Traub of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondent.

_____

Determination of respondent New York City Health and Hospitals Corporation (HHC), dated January 24, 2013, terminating petitioner's employment upon a finding of gross misconduct, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered November 18, 2013), dismissed, without costs.

The determination terminating petitioner's employment at HHC's nursing home facility based on gross misconduct, i.e., inappropriate sexual contact with a resident patient in the facility, is supported by substantial evidence and is in accord with due process (*see Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). The record includes testimony by two nursing home employees who described the detailed statement

provided by the patient in an interview conducted five days after the alleged incident, the contemporaneous report of the interview, and video surveillance tapes that showed petitioner and the patient in the same areas during the relevant time. Contrary to petitioner's contention, an administrative determination can be based on hearsay evidence (*Matter of Gray v Adduci*, 73 NY2d 741 [1988]). Petitioner's due process rights to a fair hearing and cross-examination of witnesses were not violated by the admission of the hearsay statements, since the patient refused to testify despite being served with a subpoena (*see Matter of Muldrow v New York State Dept. of Corr. & Community Supervision*, 110 AD3d 425 [1st Dept 2013]; *Matter of Rispoli v Waterfront Commn. of N.Y. Harbor*, 104 AD3d 461 [1st Dept 2013]). The administrative law judge's credibility findings are entitled to deference, and there is no basis on which to

disturb those findings (*see Matter of D'Augusta v Bratton*, 259 AD2d 287 [1st Dept 1999]). Nor does the penalty of termination shock our sense of fairness (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13300-
13301 In re Elba S.,
Petitioner-Respondent,

-against-

Sadrud-Din S.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Neal D. Futerfas, White Plains, for respondent.

_____

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about October 8, 2013, which, upon the Support Magistrate's fact-finding determination, dated October 8, 2013, that respondent father willfully violated a child support order, committed him to the New York City Department of Corrections for a term of three months weekend incarceration, unless discharged by payment of a purge amount of $5,000 to the Support Collection Unit, unanimously affirmed, without costs. Appeal from the aforementioned fact-finding determination, unanimously dismissed, without costs, as taken from a nonappealable paper (Family Ct Act § 439[a]).

The Support Magistrate properly found that respondent willfully violated the order of child support. Undisputed documentary evidence established that respondent stopped paying

child support in September 2011, constituting prima facie evidence of a willful violation of the support order (*Matter of Powers v Powers*, 86 NY2d 63, 69 [1995]). In response, respondent failed to show that the violation was not willful by competent, credible evidence of his inability to make the required payments (*id* at 69-70]). While the record establishes that respondent was unemployed, he gave conflicting and evasive testimony regarding his address, income, and efforts to find employment, as well as regarding the availability or purported theft of relevant documents concerning his job search. Accordingly, there is no basis to disturb the Support Magistrate's credibility determinations (*see Matter of Bruce L. v Patricia C.*, 62 AD3d 566, 567 [1st Dept 2009], *lv denied* 12 NY3d 715 [2009]).

Moreover, "[u]nemployment alone does not establish inability to pay," especially where respondent failed to show that he used his "best efforts to obtain employment commensurate with his qualifications and experience" (*Gina C. v Augusto C.*, 116 AD3d 478, 479 [1st Dept 2014], *lv denied* __ NY3d __, 2014 NY Slip Op 74790 [2014] [citations and internal quotation marks omitted]). Rather than search diligently for employment which might allow him to afford the child support payments, the father instead

opted to depend on his brother and on public assistance, which purportedly provides him only with sufficient income to support himself and his non-subject child.

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13303 The People of the State of New York, Ind. 2390/96
Respondent,

-against-

George Harris,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Albert Lorenzo, J.), rendered on or about July 2, 2013,

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: OCTOBER 23, 2014

CLERK

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

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13304 Patricia Carnovali, et al., Index 800148/10
Plaintiffs-Respondents,

-against-

Geoffrey Sher, M.D., et al.,
Defendants-Appellants.

_____

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Samantha E. Quinn of counsel), for appellants.

Dennehy Law Firm, New York (Susan Dennehy of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered February 11, 2014, which, insofar as appealed from as limited by the briefs, denied so much of defendants' motion for summary judgment as sought dismissal of the failure to diagnose claim, unanimously affirmed, without costs.

In this action for medical malpractice, plaintiffs allege, among other things, that defendants failed to diagnose a cancerous mass in plaintiff Patricia Carnovali's pelvis while she was undergoing IVF procedures under their care, despite their knowledge that plaintiff had a history of cancer.

Defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law. The conclusory

opinion of their medical expert failed to adequately address plaintiff's allegations that defendants did not properly diagnose her cancer and that their malpractice proximately caused her injuries (*see Wasserman v Carella*, 307 AD2d 225, 226 [1st Dept 2003]). Thus, the burden never shifted to plaintiff to raise an issue of fact (*see id.* at 227).

In any event, plaintiffs raised an issue of fact by the submission of their gynecological oncologist's opinion. Plaintiffs' expert's redacted affirmation was acceptable, as the original was provided to the court (*see Grad v Hafliger*, 68 AD3d 543, 544 [1st Dept 2009]). Further, the expert rendered a nonconclusory opinion, based on evidence in the record, that a transvaginal ultrasound would have been, and was, more accurate in detecting cancer (*see Roques v Noble*, 73 AD3d 204, 207 [1st Dept 2010]). The expert's opinion that plaintiff's cancer could have been discovered earlier, while under defendants' care, was not speculative, since the expert opined that low-grade endometrial sarcoma, the type of cancer diagnosed in plaintiff, tends to grow slowly (*see Hayden v Gordon*, 91 AD3d 819, 821 [2d Dept 2012]). The experts' competing opinions on causation and

the progression of the disease present an issue of fact for a jury to decide (*see Polanco v Reed*, 105 AD3d 438, 441 [1st Dept 2013]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13305 The People of the State of New York, Ind. 2005/10
Respondent,

-against-

Jose Correa,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Anita Aboagye-Agyeman of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (John S. Moore, J.), rendered on or about October 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 [1st Dept 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: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13306 In re Five Towns Wines & Liquors, Inc., Petitioner, Index 101502/13

-against-

New York State Liquor Authority, Respondent.

Mehler & Buscemi, New York (Francis R. Buscemi of counsel), for petitioner.

Margarita Marsico, New York, for respondent.

Determination of respondent, dated August 27, 2013, sustaining the charge of a violation of Alcoholic Beverage Control Law Section § 65(1) and imposing a $2,000 civil penalty, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shlomo Hagler, J.], entered on or about January 27, 2014), dismissed, without costs.

Respondent's finding that petitioner sold an alcoholic beverage to a person under the age of 21 in violation of Alcoholic Beverage Control Law § 65(1) is supported by substantial evidence (*see Matter of S & R Lake Lounge v New York State Liq. Auth.*, 87 NY2d 206 [1995]). The uncontroverted testimony of a police officer involved in the undercover operation was corroborated by a copy of the undercover agent's

driver's license and the marked $20 bill recovered from petitioner's retail liquor store. The officer, who knew the agent was 18 years old based on her driver's license, observed the agent enter the store and emerge approximately two minutes later carrying a paper bag with a bottle of red wine in it, after which the officer arrested a person matching the agent's description of the person who had sold her the alcohol. Petitioner's president confirmed that the person arrested at the scene was working at the store that night; he offered no evidence to contradict the officer's testimony.

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13307 The People of the State of New York, Ind. 317/13
Respondent,

-against-

Richard Abreu,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Patricia Nunez, J.), rendered on or about June 13, 2013,

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: OCTOBER 23, 2014

CLERK

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

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13308 Board of Managers of the Gansevoort Condominium, etc.,
Plaintiff-Respondent,

-against-

325 West 13th, LLC
Defendants,

Petro Real Estate Development Corporation,
Defendant-Appellant.

Index 651446/13

_____

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for appellant.

Kagan Lubic Lepper Finkelstein & Gold, LLP, New York (Jesse P. Schwartz of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered November 29, 2013, which denied Petro Real Estate Development Corporation's motion to dismiss the complaint as against it pursuant to CPLR 3211(a)(1), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against this defendant.

Defendant Petro made a prima facie showing that it was not liable for plaintiff's contract claims because it is a separate entity from the sponsor and was not a signatory to the condominum offering plan, declaration or unit purchase agreements. In

opposition, plaintiff failed to sufficiently allege that defendant was an alter ego of the sponsor. The allegations, based on information and belief, that the sponsor, a single purpose entity, was undercapitalized, dominated by defendant and intermingled its assets with defendant's, are conclusory and devoid of facts (*see 20 Pine St. Homeowners Assn. v 21 Pine St. LLC*, 109 AD3d 733, 735 [1st Dept 2013]; *First Sterling Corp. v Union Sq. Retail Trust*, 102 AD3d 490 [1st Dept 2013]; *501 Fifth Ave. Co. v Alvona LLC*, 110 AD3d 494 [1st Dept 2013]; *see also Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda. v Elman Invs., Inc.*, 117 AD3d 447, 450 [1st dept 2014]). Under the circumstances, defendant and the sponsor's use of common office space, the same telephone number and the same email account, and defendant's showcasing of the condominium units on its website is relatively insignificant (*see Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013]). Plaintiff's failure to allege that defendant operated through the sponsor as an instrument of wrongdoing is fatal to its alter ego claim (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]); the

allegation that the sponsor transferred all of the unit sale proceeds to defendant is insufficient for this purpose.

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

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13309 In re Nancy R.,
Petitioner-Respondent,

-against-

Anthony B.,
Respondent-Appellant.

_____

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

Andrew J. Baer, New York, for respondent.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 6, 2013, which committed respondent-appellant father to the New York City Department of Correction for a three-month term based upon an order of the same court and Judge, entered on or about August 13, 2013, confirming the finding of the Support Magistrate that respondent willfully violated an order, dated August 24, 2009, which directed him to make bi-weekly payments of $305.30 in child support, unanimously affirmed, without costs.

We reject respondent's contention that the matter should be remanded for a new hearing because the transcripts from the willfulness and confirmation hearings are missing. The record demonstrates that respondent never sought a reconstruction hearing prior to the appeal being perfected, even though he was

aware that the aforementioned transcripts could not be produced. Moreover, we find that respondent suffers no prejudice, because he stipulated to the accuracy of the record, which is sufficient for this Court to determine the issue of willfulness (*see Matter of Mikel B. [Carlos B.]*, 115 AD3d 1348, 1348 [4th Dept 2014]).

Review of the record demonstrates that during the underlying proceeding, respondent acknowledged the support arrears which constituted prima facie evidence that his failure to comply with the support order was willful (*see Matter of Powers v Powers*, 86 NY2d 63, 68-69 [1995]; *Matter of Maria T. v Kwame A.*, 35 AD3d 239, 240 [1st Dept 2006]; *Griffin v Griffin*, 294 AD2d 188, 188 [1st Dept 2002]). The record also demonstrates that respondent failed to offer some competent, credible evidence of his inability to make the required payments. It is undisputed that respondent lost his employment in 2009, and that he testified about his income, assets, and inability to find work. However, respondent failed to substantiate his claims with documentation, such as a signed tax return (*see Matter of John T. v Olethea P.*, 64 AD3d 484, 485 [1st Dept 2009]; *Matter of Childress v Samuel*, 27 AD3d 295, 296 [1st Dept 2006]).

Although respondent did submit a job search diary, the support magistrate, who was in the best position to evaluate his credibility, did not believe that he was diligently searching for

new employment commensurate with his qualifications and experience (*see Matter of Maria T.*, 35 AD3d at 240). Given the Family Court's broad discretion in imputing income to a parent, particularly, where, as here, there is evidence suggesting that respondent has underreported income, the magistrate's assessment that he lacked credibility should be given deference (*see Squitieri v Squitieri*, 90 AD3d 500, 500 [1st Dept 2011]).

The Family Court acted within its discretion when ordering respondent to serve a three-month term of incarceration inasmuch as it is given the authority to commit him "to jail for a term not to exceed six months" (Family Ct Act § 454[3][a]) upon its finding that he willfully failed to obey a lawful support order (*see Matter of Ana B. v Hector N.*, 100 AD3d 476, 477 [1st Dept 2012]). Lastly, in light of the proof that respondent owed $27,646.27 in support arrears, the $10,000 he was required to pay in order to purge the contempt was not unreasonable.

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13310 The People of the State of New York, Respondent, Ind. 1675/09

-against-

Keston Brown, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 10, 2011, convicting defendant, after a jury trial, of manslaughter in the second degree, assault in the second degree, and operating a motor vehicle while under the influence of alcohol, and sentencing him to concurrent terms of 5 to 15 years, 7 years, and 1 year, respectively, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. Contrary to defendant's argument, the evidence showed that he acted recklessly (*see People v Asaro*, 21 NY3d 677 [2013]; *People v Sands*, 159 AD2d 984 [4th Dept 1990]). Among other things, the evidence supported

reasonable inferences that defendant drove a van with knowledge of its extremely defective steering mechanism, that he drove it after consuming a large amount of alcohol and becoming highly intoxicated, and that after he lost control of the van due to its faulty steering he accelerated rather than braking as the van went onto a busy sidewalk, killing one pedestrian and injuring another.

The court properly exercised its discretion in denying defendant's challenge for cause to a prospective juror who noted that her grandfather had been fatally struck by a bus, which did not "cast serious doubt" on her ability to be impartial (*People v Arnold*, 96 NY2d 358, 363 [2001]; *see People v Howze*, 57 AD3d 220 [1st Dept 2008], *lv denied* 12 NY3d 758 [2009]). Moreover, she unequivocally assured the court that she would be able to "objective and compartmentalized," and would consider this case

solely based on the evidence (*see People v Lucas*, 297 AD2d 568 [1st Dept 2002], *lv denied* 99 NY2d 560 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13311- 13311A- 13311B
World Wide Power Industries, Inc., et al.,
Plaintiffs-Respondents,

-against-

Warren Azzara, et al.,
Defendants-Appellants.

Index 650280/14

Kudman Trachten Aloe LLP, New York (Paul H. Aloe of counsel), for appellants.

Wachtel Missry LLP, New York (Elliot Silverman of counsel), for respondents.

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered May 8, 2014, and May 15, 2014, which, to the extent appealed from as limited by the briefs, preliminarily enjoined defendants Azzara, Battista and Higher Power Industries, Inc. from competing against plaintiffs, and directed plaintiffs to post an undertaking, unanimously reversed, on the law, with costs, and the orders vacated. Appeal from order, same court and Justice, entered May 21, 2014, which denied defendants' motion to vacate the injunction unanimously dismissed, without costs, as academic.

The individual defendants sold their shares in plaintiff Transportation Technology, Inc. to plaintiff World Wide Power Industries, Inc. pursuant to a stock purchase agreement. In

addition to paying a sum of money at closing, plaintiffs were to make payments to said defendants, in monthly installments, in exchange for agreements not to compete. The non-compete agreements gave defendants the right to declare an event of default upon plaintiffs' non-payment of an installment, which triggered defendants' right to waive further non-compete payments and terminate the non-compete agreements. The parties obtained financing for the transaction from Webster Bank, pursuant to standby creditor agreements that gave the bank subordination rights over the other parties with respect to the loan collateral and the right to direct plaintiffs to cease making non-compete payments to defendants in the event that plaintiffs defaulted on the loan.

Plaintiffs defaulted on the loan. The bank directed them to cease making payments to defendants under the non-compete agreements, and, upon plaintiffs' non-payments, defendants waived their right to further payments and terminated the agreements. Plaintiffs sought to enjoin defendants from competing on the ground that defendants were not entitled to terminate their non-compete agreements based on the non-payment directed by the bank.

Plaintiffs failed to show a likelihood of success on the merits of their claim (*see Doe v Axelrod*, 73 NY2d 748, 751 [1988]; *Matter of Patrolmen's Benevolent Assn. of the City of New*

York, Inc. v City of New York, 119 AD3d 1 [1st Dept 2014]; *see also Scotto v Mei*, 219 AD2d 181, 184 [1st Dept 1996]). The non-compete agreements gave defendants, without qualification or condition, the right to declare an event of default upon non-payment. Neither the bank's right to a priority in collection nor its right to direct plaintiffs, in the event of a default on the loan, to cease making payments to defendants limits or modifies defendants' right to declare an event of default and terminate the non-compete agreements in the event of a non-payment.

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13312 Santos Espinal, Index 304999/12
Plaintiff-Respondent,

-against-

Volunteers of America -
Greater New York, Inc., et al.,
Defendants-Appellants.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for appellants.

Cellino & Barnes, P.C., Garden City (Gregory V. Pajak of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 2, 2013, which granted plaintiff's motion for partial summary judgment on the issue of defendants' liability for the underlying motor vehicle accident, unanimously reversed, on the law, without costs, and the motion denied.

In this action for personal injuries, it is undisputed that, as defendants' southbound vehicle attempted to make a left turn from Riverside Drive, a two-way street, onto West 88th Street, it collided with plaintiff's northbound motor scooter in the intersection. Plaintiff moved for summary judgment, arguing that defendant driver's conduct and her admission that she did not see him prior to the accident establish a violation of the Vehicle and Traffic Law (*see* Vehicle and Traffic Law § 1141). In

opposition, defendants argued that plaintiff's submissions do not establish where he was in relation to the intersection when defendant driver began to turn, or eliminate the issues of whether he was speeding and whether he used reasonable care to avoid the accident (*see Rodriguez v CMB Collision Inc.*, 112 AD3d 473 [1st Dept 2013]; *Gause v Martinez*, 91 AD3d 595 [2d Dept 2012]).

In support of the motion, plaintiff relied on a certified police accident report which contained his own statement that he did not recall what happened before the collision, and the statement of an eyewitness who said that defendant driver caused the accident by turning into oncoming traffic, but also stated that plaintiff was driving at a rate of 40 to 50 miles per hour. Plaintiff also submitted an affidavit in which he averred that he attempted to brake before the collision, and an affidavit from the eyewitness who averred that plaintiff did not appear to be going faster than the normal flow.

Since plaintiff submitted and relied on the certified police accident report containing the eyewitness's statement, he cannot now complain that defendants' reliance on favorable aspects of the statement to defeat summary judgment is improper. The inconsistencies between the statements made to the police after the accident and the affidavits submitted in support of

plaintiff's motion raise issues of fact as to whether defendant driver violated Vehicle and Traffic Law § 1141, and whether plaintiff's excessive speed or other negligence contributed to the accident precluding an award of summary judgment (*see Rodriguez*, 112 AD3d at 473; *Gause v Martinez*, 91 AD3d at 597).

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13313 In re Yan Ping Xu, Index 109534/08
Petitioner-Appellant,

-against-

The New York City Department of Health and Mental Hygiene,
Respondent-Respondent.

_____

Yan Ping Xu, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered June 13, 2013, insofar as it denied the petition to, among other things, expunge petitioner's unsatisfactory performance evaluation and reinstate her employment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously modified, on the law, to the extent of reinstating the petition, minus petitioner's whistleblower claim, and remanding the matter to respondent agency for further proceedings consistent with this decision, and otherwise affirmed, without costs.

On June 4, 2007, petitioner was hired as a "City Research Scientist I," a noncompetitive position. Under the governing Personnel Rules and Regulations of the City of New York, which by their terms "have the force and effect of law" (Personnel Rules

and Regs of City of NY [55 RCNY Appendix A] ¶ 2.2), noncompetitive employees are subject to a probationary period of six months unless another period is set by the Commissioner of the Department of Citywide Administrative Services (DCAS) (55 RCNY Appendix A ¶ 5.2.1[b]). Here, there is no evidence that, during the period of petitioner's employment, the Commissioner of DCAS had altered the default six-month probationary period for the City Research Scientist I position. To the contrary, the record contains a letter from the DCAS Commissioner expressly confirming that, "during the period June 30, 2007 to March 16, 2008," "no . . . DCAS document existed" that "provided for a civil service probationary period different than the one specified in [Personnel Rule and Regulation] 5.2.1."

In support of its contention that petitioner was subject to a probationary period of one year, respondent points to provisions of the governing collective bargaining agreement (CBA) and respondent's own termination policy. Even if the CBA could trump Personnel Rule 5.2.1(b), the CBA provision relied on by respondent does not in any way set forth a probationary period for noncompetitive employees. Although respondent's termination policy, dated March 10, 2008, does purport to provide for a probationary period of one year for City Research Scientists, as noted, Personnel Rule 5.2.1(b) provides that only the

Commissioner of DCAS, and not the head of any other agency, may set probationary periods for noncompetitive employees at something other than six months. Further, respondent has pointed to no provision of law that gives it the authority to establish a a different probationary period for noncompetitive employees in petitioner's position. Accordingly, we find that petitioner was subject to a probationary term of only six months. Upon the expiration of that six-month period, petitioner became a permanent employee.

As we noted in petitioner's prior appeal, the Personnel Rules and Regulations of the City of New York "provide a mechanism for 'permanent sub-managerial employees' to appeal unfavorable performance evaluations" to an "appeals board" (*Yan Ping Xu v New York City Dept. of Health*, 77 AD3d 40, 45 [1st Dept 2010], quoting 55 RCNY Appendix A ¶ 7.5.5). We further noted on the prior appeal that "petitioner sought administrative review of her negative evaluation prior to commencing suit," in the form of her "e-mail to her supervisor on May 19, 2008 requesting review of her performance evaluation and a letter to the Bureau of Human Resources on June 18, 2008, also seeking review of her performance evaluation," but "was rebuffed" and "apparently did not receive any response" (77 AD3d at 45). We thus remanded the matter to Supreme Court to determine "whether [petitioner] was

given the opportunity to avail herself of the appeals process" provided for in Personnel Rule 7.5.5 (*id.* at 46), and directed that, if on remand it were "determined that she was not, the entire proceeding should be referred back to the agency so that petitioner can be afforded the appropriate internal appeals process" (*id.*).

On remand, respondent itself has expressly confirmed that, far from permitting petitioner to "avail herself of the appeals process" (77 AD3d at 46), it instead took "no action" because of its ostensible belief that petitioner was a probationary employee who "did not have any right to appeal her evaluation or her termination." Accordingly, in accordance with our directive in the prior appeal, we once again remand the matter to respondent for implementation of the appeals process provided for in Personnel Rule 7.5.5.

The article 78 court providently exercised its discretion in declining to grant petitioner leave to serve a late notice of her whistleblower claim (*see* General Municipal Law § 50-e[5]). Petitioner's ignorance of the notice requirement is not a reasonable excuse for the delay (*see Matter of Werner v Nyack Union Free School Dist.*, 76 AD3d 1026, 1026 [2d Dept 2010]). Further, petitioner's April 2008 complaint to the New York City Department of Investigation did not give respondent actual

knowledge of the essential facts constituting the claim within the requisite time period (*see Seif v City of New York*, 218 AD2d 595, 596 [1st Dept 1995]). The article 78 court also properly found that respondent was prejudiced by the delay in serving notice, as at least one key employee had relocated to Pakistan and was difficult to reach (*see Baehre v Erie County*, 94 AD2d 943, 943 [4th Dept 1983]).

In light of our remand to respondent for further consideration of petitioner's claim of unlawful termination (less her whistleblower claim, the dismissal of which we herein affirm), we need not reach any of petitioner's remaining contentions, including those relating to her motions to strike and to compel.

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13315 Central Park Studios, Inc., et al., Plaintiffs-Respondents, Index 110490/08

Federal Insurance Company, Plaintiff-Intervenor,

-against-

Michael Slosberg, et al., Defendants,

Delos Insurance Company, formally known as Sirius America Insurance Company, Defendant-Appellant.

_____

Melito & Adolfsen, P.C., New York (S. Dwight Stephens of counsel), for appellant.

Thomas D. Hughes, New York (David D. Hess of counsel), for respondents.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered February 26, 2014, which declared that plaintiff Insurance Company of Greater New York's (INSCO) policy and defendant Delos Insurance Company's (Delos) excess policy are the same excess level and must provide co-insurance on an equal basis in the underlying personal injury action, unanimously affirmed, without costs.

Based on the language of the policies at issue, the motion court properly determined that INSCO and Delos must provide excess coverage at the same excess level and share costs equally

(*see State Farm Fire and Cas. Co. v LiMauro*, 65 NY2d 369, 375-76 [1985]). The language utilized in the Delos policy, which provides excess coverage solely to the Delos primary policy noted on its declarations page, does not negate the possibility of contribution from other insurers. More importantly, the policy does not contain an "other insurance" clause, distinguishing this case from those in which we have found that the excess policy was intended to provide coverage only after all other coverage was exhausted, including other excess policies (*see Limauro*, 65 NY2d at 375; Bovis *Lend Lease, LMB, Inc. v Greater Am. Ins. Co.*, 53 AD3d 140, 148 [1st Dept 2008]). Notably, the Delos excess policy fails to indicate its premium, another indicium of its intent to provide the insured with final tier coverage at a reduced premium (*see Bovis Lend Lease*, 53 AD3d at 148).

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13317 Robson & Miller, LLP, etc., Index 105221/11
Plaintiff-Respondent,

-against-

Walter Sakow,
Defendant-Appellant.

_____

Gordon, Gordon & Schnapp, P.C., New York (Elliot Schnapp of counsel), for appellant.

Frost & Miller, LLP, New York (Kenneth N. Miller of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 6, 2013, awarding plaintiff law firm (R&M) the total sum of $182,429.60 as against defendant (Sakow), and bringing up for review an order, same court and Justice, entered March 6, 2013, which granted R&M's motion for summary judgment on its claim for account stated to recover legal fees, unanimously affirmed, with costs.

The motion court properly concluded that the varying figures given by R&M during this litigation, as to the total outstanding fees due, did not undermine R&M's prima facie case for an account stated, inasmuch as the discrepancies were plainly attributable to the incompetence of its original attorney in drafting the motion papers on its previous motions for summary judgment, which, inter alia, did not include R&M's complete billing

invoices from the past, and records of off-sets that the parties had agreed to. The monthly invoices and records - the timely receipt of which Sakow never disputed - were never challenged by Sakow as to accuracy or reasonableness until the instant litigation was commenced years later. Such circumstances, including that Sakow continued to make payments towards the total fees accrued and billed, without reservation, belie the belated challenges to the reasonableness of the invoiced fees (*see e.g. Jaffe v Brown-Jaffe*, 98 AD3d 898 [1st Dept 2012]; *Lapidus & Assoc., LLP v Elizabeth St., Inc.*, 92 AD3d 405 [1st Dept 2012]). For similar reasons, Sakow's argument that the initial invoice related to the 2002 to 2008 fee collection period in question, dated March 7, 2002, reflected a bare, "balance forward" figure of $81,484.75 without requisite supporting time sheet information, is unavailing (*see generally Shea & Gould v Burr*, 194 AD2d 369 [1st Dept 1993]; *O'Connell & Aronowitz v Gullo*, 229 AD2d 637 [3d Dept 1996], *lv denied* 89 NY2d 803 [1996]). The record reflects that R&M represented Sakow on many legal matters since 1989, and that R&M would send regular, detailed monthly invoices to account for the fees claimed. The record also demonstrates that Sakow never denied receipt of invoices supporting the "balance forward" figure referenced in the March 7, 2002 invoice, that no objection was raised as to such

invoices, and that Sakow continued to make regular payments towards the invoices.

Sakow's argument that he was entitled to an offset for certain in-kind expenditures he outlaid in 2000 to renovate an apartment that he owned, and in which he allowed R&M's principal counsel to reside, was never pleaded and lacks corrobative documentary support, and, in any event, such proposed, unrelated offset claim would be time-barred (*see* CPLR 213[2], 203[d]).

Even assuming, arguendo, contrary to the motion court's finding, that Sakow adequately pleaded a malpractice defense claim related to the disputed fees (*see* CPLR 203[d]), it is unavailing. Sakow's factual averments fail to raise a triable issue regarding the causation element, i.e., that but-for R&M's alleged negligent conduct, Sakow's wife would have prevailed in a particular litigation at issue here, and that Sakow would not have been sanctioned therein (the sanction was overturned), or

would not have incurred legal fees to defend against the sanction (*see generally Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13318 The People of the State of New York, Ind. 6190/02
Respondent,

-against-

Norgado Vazquez,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Gregory Carro, J.), rendered March 21, 2012, resentencing defendant to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]), and we perceive no basis for reducing the term imposed.

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

ENTERED: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13319N John D. McKay, Index 155186/13
Plaintiff-Appellant

-against-

Diane Westwood Wilson, et al.,
Defendants,

Clyde & Co. US LLP, et al.,
Defendants-Respondents.

_____

John D. McKay, appellant pro se.

Fox Rothschild LLP, New York (James M. Lemonedes of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 11, 2014, which granted the motion of defendants Clyde & Co US LLP and Clyde & Co LLP (collectively Clyde & Co.) to compel arbitration and stayed the instant litigation pending the arbitration, unanimously affirmed, without costs.

When plaintiff commenced employment with Clyde & Co., he executed an acknowledgment wherein he agreed to be bound by the policies set forth in the firm's employee handbook. Among the policies clearly set forth was the requirement that plaintiff arbitrate all claims or causes of action against the firm through a mandatory dispute resolution program. Accordingly, the motion court correctly determined that plaintiff, who is an experienced

attorney, agreed to mandatory arbitration of any claims arising from his employment and correctly stayed the instant proceeding during the pendency of the arbitration (*see generally Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

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: OCTOBER 23, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, Clark, JJ.

13320-
13321 In re Cory Reid,
[M-4597& Petitioner,
4300]

-against-

Hon. Laura A. Ward, et al.,
Respondents.

Ind. 3709/13

- - - - -

In re Cory Reid,
Petitioner,

-against-

Hon. Michael J. Obus, et al.,
Respondents.

_____

Cory Reid, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for Hon. Laura A. Ward and Hon. Michael J. Obus, respondents.

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

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The above-named petitioner having presented applications to this Court praying for orders, pursuant to article 78 of the Civil Practice Law and Rules,

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

It is unanimously ordered that the applications be and the same hereby are denied and the petitions dismissed, without costs or disbursements.

ENTERED: OCTOBER 23, 2014

CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Kapnick, JJ.

12663- Index 650205/11
12663A Rosemarie A. Herman, etc., et al.,
Plaintiffs-Appellants,

-against-

Julian Maurice Herman, et al.,
Defendants-Respondents,

J. Maurice Herman, etc., et al.,
Defendants.

_____

Law Offices of Craig Avedisian, P.C., New York (Craig Avedisian of counsel), for appellants.

Akerman LLP, New York (M. Darren Traub of counsel), for respondents.

_____

Appeals from orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 15, 2012, which granted in part and denied in part defendants J. Maurice Herman, Windsor Plaza LLC (the New York corporation), Windsor Plaza LLC (the Delaware corporation), and Mayfair York LLC's and defendant Michael Offit's motions to dismiss the complaint as against them, unanimously modified, on the law, to declare that the infant plaintiffs are entitled to claim the benefit of the infancy toll (CPLR 208), and otherwise dismissed, without costs, as moot.

The orders entered June 15, 2012 have been superseded by an order of the same court and Justice, entered on or about February

8, 2013, which granted plaintiffs' motion to renew and, upon renewal, as plaintiffs acknowledge, reinstated virtually all of the claims previously dismissed as time-barred, including certain conspiracy claims that were previously dismissed, and granted in part plaintiffs' motion to reargue, and, upon reargument, reinstated in part the derivative causes of action (__ Misc 3d __, 2013 NY Slip Op 30366[U] [Sup Ct, NY County 2013]).

Plaintiffs' main argument on appeal is that the court erred in refusing to take allegations in the complaint as true and in deeming plaintiffs' evidentiary submissions insufficient to rebut defendants' prima facie showing that the claims arising from a 1998 transaction in which defendant Maurice J. Herman is alleged to have secretly purchased plaintiff Rosemarie Herman's 50% interest in real estate at far less than fair market value, were barred by the applicable statutes of limitations. Plaintiffs are correct that the court should have credited the allegations in the complaint on this motion to dismiss pursuant to CPLR 3211(a)(5) (*see e.g. Benn v Benn*, 82 AD3d 548 [1st Dept 2011]; *New York Tel. Co. v Mobil Oil Corp.*, 99 AD2d 185, 192 [1st Dept 1984]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). However, virtually all of plaintiffs' arguments have been addressed and mooted. In its subsequent order, the court, upon renewal, credited plaintiffs' new affidavit and evidence in

concluding that it should have denied defendants' motions to dismiss on statute of limitations grounds, and it reinstated the claims relating to the 1998 transaction that had previously been dismissed as time-barred. The court also cited the 1998 Confidentiality Agreement signed by Maurice and the trustee of Rosemarie's Trusts, defendant Michael Offit, as evidence of their efforts to conceal the transaction from Rosemarie, and thus concluded that there were factual issues whether defendants were estopped to raise the statute of limitations as a defense. Thus, plaintiffs' arguments that the unavailability of the Confidentiality Agreement warranted denial of the motions pursuant to CPLR 3211(d) have also been mooted.

The superseding order, however, denied reargument as to whether the infancy toll (CPLR 208) applies, and plaintiffs therefore will not have an opportunity to address the propriety of this ruling on appeal from the subsequent order. We find that plaintiff's children are entitled to a toll for the period of infancy. A guardian ad litem was not appointed for the children until after the commencement of this litigation (SCPA 315(2)(a)(iii) ["if it appears that *there is no person in being or ascertained having the same interest*, the court shall appoint a guardian ad litem to represent or protect the persons who eventually may become entitled to the interest"]). Thus, no one

had been appointed who might have adequately represented the infant remaindermen's interests in the proceeding. Furthermore, an infant is entitled to the toll for the period of infancy, regardless of whether a representative has been appointed, or a parent or guardian has taken steps to protect the infant's rights (*see Henry v City of New York*, 94 NY2d 275 [1999]).

We have considered plaintiffs' additional arguments and find them unavailing.

The Decision and Order of this Court entered herein on June 5, 2014 is hereby recalled and vacated (*see* M-3345 decided simultaneously herewith).

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

ENTERED: OCTOBER 23, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Manzanet-Daniels, JJ.

13235-
13236 In re I-Conscious R. and Another.,

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

George S., also known
as I-Sun A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Carol Lipton, Brooklyn, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

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

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Order of fact-finding, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 22, 2009, which determined, after a hearing, that respondent father abused and neglected his daughter and derivatively abused and neglected his son, unanimously affirmed, without costs. Appeal from order of protection, same court and Judge, entered on or about March 19, 2010, unanimously dismissed, without costs, as abandoned.

Initially, we strike those portions of respondent's brief that cite to evidence from the Family Court Act § 1028 hearing, since he failed to introduce that evidence and establish its

admissibility at the fact-finding hearing (*Matter of Raymond J.*, 224 AD2d 337 [1st Dept 1996]).

Petitioner proved by a preponderance of the evidence that respondent abused his daughter (*see* Family Court Act § 1012[e][iii]; Penal Law §§ 130.35, 130.65). Medical evidence and testimony established that the six-year-old child suffered from genital herpes and that in such a young child this is highly indicative of sexual abuse. This evidence, coupled with evidence that respondent was her primary caretaker, establishes prima facie that respondent abused the child (*Matter of Philip M.*, 82 NY2d 238, 243 [1993]; Family Court Act § 1046[a][ii]). This evidence also corroborates the child's out-of-court statements that respondent sexually abused her (Family Court Act § 1046[a][vi]; *Matter of David L. Jr. [David L.]*, 118 AD3d 468 [1st Dept 2014]; *see also Matter of Dutchess County Dept. of Social Servs. [Mark B.]*, 185 AD2d 340, 341 [2d Dept 1992]).

Contrary to respondent's assertions, the child's initial disclosure, to her pediatrician, that respondent abused her was not the product of an unduly suggestive interview. As even respondent's expert acknowledged, the pediatrician asked appropriate questions, including whether anyone had touched the daughter inappropriately and, after she answered affirmatively, who had done so; even when he asked yes or no questions, the

child was able to answer no. The reliability of the disclosure is reinforced by evidence that when a social worker used the word "snuggle" in connection with her stuffed animals, the child had a strong negative reaction and said that respondent used the same word during the abuse.

Respondent failed to rebut petitioner's case with any credible explanation for his daughter's condition, including through the testimony of his expert witness, Dr. David. Family Court's credibility findings, including that Dr. David appeared not to be a neutral expert, are entitled to deference. The court properly rejected Dr. David's theory of non-sexual transmission of the genital herpes virus to the daughter from a washcloth, since even Dr. David admitted that he had never seen such a case. Dr. David's conclusion that there was insufficient evidence of sexual abuse was based entirely on his contention that the child's disclosure of abuse to her pediatrician was the product of an unduly suggestive interview and his mistaken belief that the child had made no similar disclosures to other therapists.

The court's finding of neglect is also supported by a preponderance of the evidence (*see* Family Court Act § 1012(f)(i)(B); *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). After being turned away by several doctors for lack of health insurance, respondent failed to take his daughter to the

emergency room, notwithstanding that she had been complaining for at least several days of itching and pain during urination, and was suffering from visible lesions. He gave no adequate explanation for his failure to obtain prompt medical attention for the child.

Based on the above evidence, the court's finding of derivative neglect is supported by a preponderance of the evidence (*see e.g. Matter of Loraida R. [Lori S.]*, 97 AD3d 925, 927 [3d Dept 2012]).

Respondent failed to establish that he received ineffective assistance of counsel (*see Matter of Asia Sabrina N. [Olu N.]*, 117 AD3d 543 [1st Dept 2014]; *Matter of Devin M. [Margaret W.]*, 119 AD3d 435, 437 [1st Dept 2014]). In particular, contrary to respondent's assertion, counsel's failure to object or seek any remedy for the admission into evidence of the pediatrician's records of the child's disclosure is not deficient representation. Those medical records are admissible (Family Court Act § 1046[a][iv]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13272 The People of the State of New York, Ind. 4308/06
Respondent,

-against-

Robert Derian,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 20, 2008, convicting defendant, after a jury trial, of manslaughter in the second degree, vehicular manslaughter in the second degree (two counts) and operating a motor vehicle while under the influence of alcohol (two counts), and sentencing him to an aggregate term of 4½ to 13½ years, unanimously affirmed.

Even if the court improvidently exercised its discretion in admitting 2 bottles of liquor as a model or demonstrative aid illustrative of testimony already in the record, (*see People v Del Vermo*, 192 NY 470, 482-483 [1908]), any such error was harmless under the circumstances. The bottles, which were identical to the bottles defendant admitted purchasing shortly

before the fatal accident, were not unduly prejudicial to the defense in view of the totality of the other evidence admitted against defendant.

Although the court erred in declining to instruct the jury that proof of legal intoxication under the Vehicle and Traffic Law was insufficient, in itself, to prove the element of recklessness required to establish second-degree manslaughter under Penal Law § 125.15, the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). The court fully instructed the jury on the statutory definition of recklessness, and there was overwhelming evidence that defendant engaged in a pattern of conduct that evinced recklessness, even in the absence of intoxication. Accordingly, there is no reasonable possibility that the jury convicted defendant of manslaughter under Penal Law § 125.15 solely on the basis of intoxication.

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13273-
13273A

Yvonne Hanratty Massaro,
Plaintiff-Appellant,

-against

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

Index 114214/11

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered August 1, 2013, dismissing the complaint, and bringing up for review an order, same court and Justice, entered May 10, 2013, which granted defendants' motion to dismiss the second amended complaint, unanimously affirmed, without costs. Appeal from aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court correctly determined that plaintiff has no viable retaliation claim. Plaintiff's prior lawsuit against defendant the Department of Education and her statements to the media in 2010 do not constitute protected speech under the First Amendment or article I, §§ 8 and 9 of the New York Constitution, as they primarily concern personal grievances, rather than

matters of public concern (*Ruotolo v City of New York*, 514 F3d 184, 188 [2d Cir 2008]). Further, plaintiff does not allege that her single "U" rating, unaccompanied by any material negative employment consequences, would "deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights" (*Zelnik v Fashion Inst. of Tech.*, 464 F3d 217, 225 [2d Cir 2006], *cert denied* 549 US 1342 [2007][internal quotation marks omitted]). In addition, plaintiff's allegations regarding causation are conclusory (*cf. Morris v Lindau*, 196 F3d 102, 110-111 [2d Cir 1999]), and there is insufficient temporal proximity between the speech and the supposedly adverse action so as to create an inference of causation (*see Clark County School Dist. v Breeden*, 532 US 268, 273-274 [2001][per curiam]).

Plaintiff failed to adequately plead discriminatory animus, which is fatal to both her age discrimination and hostile work environment claims under the State and City Human Rights Laws (HRL) (Executive Law § 290 *et seq.*; Administrative Code of City of NY § 8-101 *et seq.*). Indeed, her allegations that she was 51 years old and was treated less well than younger teachers are insufficient to support her claims (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). Her conclusory hostile work environment claims also fail because defendants' alleged behavior amounts to "no more than petty

slights or trivial inconveniences" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 79-80 [1st Dept 2009][NYC HRL]; *see also Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310-311 [2004])[NYS HRL]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13274-
13275 In re Troy B., etc.,

A Child Under the Age of
Eighteen Years, etc.

Troy D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 26, 2013, which determined that respondent father neglected the subject child, Troy B., unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's finding that respondent exposed his son to actual harm, or at least the imminent danger of harm, by permitting unsupervised contact with the mother, despite being aware of her long term, chronic and acute drug use, as well as other issues resulting in the issuance of orders of protection upon his application (*see* Family Ct Act § 1012 [f][i][B]; *Matter of Beautiful B. [Damion*

R.], 106 AD3d 665 [1st Dept 2013]; *Matter of Stephanie S. [Ruben S.])*, 70 AD3d 519 [1st Dept 2010]). Although respondent denied permitting such contact, the court credited the testimony of the mother, who admitted to the unsupervised visits. The Family Court's assessment of the credibility of the witnesses, particularly the character and temperament of the parents, is accorded great deference on appeal (*In re Irene O.*, 38 NY2d 776, 777 [1975]).

Further, the mother's testimony is supported by the testimony of the caseworker who stated that she viewed a video on the mother's cell phone showing the child playing in the park with the mother's voice audible in the background.

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13276 Jonathan Poole, Index 101096/09
Plaintiff-Appellant,

-against-

West 111th Street Rehab
Associates, et al.,
Defendants-Respondents.

_____

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Sullivan Gardener P.C., New York (Peter R. Sullivan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 24, 2013, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on his first, second, third, seventh, eighth, and ninth causes of action, unanimously modified, on the law, to dismiss the seventh cause of action, and otherwise affirmed, without costs.

The partnership agreement provides that the partnership will dissolve "upon the death of one of the General Partners." However, by continuing the business of the partnership after one general partner died in 1997, and after another died in 1998, the limited partners waived the dissolution provision, and they are estopped from invoking it now (*Matter of Birnbaum v Birnbaum*, 157 AD2d 177, 186-187 [4th Dept 1990]).

The partnership agreement provides that in the event of such dissolution the limited partners "may elect to continue the business of the Partnership." It does not require that the vote of the limited partners be unanimous. Nor does the absence of an express quorum requirement or proxy voting provision in the partnership agreement preclude proxy votes from being cast on a resolution at a partnership meeting (*see e.g. Wallace v Perret*, 28 Misc 3d 1023, 1029 [Sup Ct, Kings County 2010]).

Issues of fact exist as to whether the election of the successor general partner was valid. Moreover, issues of fact exist as to the limited partners' status. There is nothing in the record to establish that the procedures set forth in the partnership agreement for the substitution of limited partners were ever implemented. However, the partnership's decade-long practice of deeming the deceased general partner's estate to have succeeded to a limited partner's interest raises issues of fact as to whether the partnership waived the requirement of those procedures (*see Birnbaum*, 157 AD2d at 186-187).

An ambiguity exists in the certificate of limited partnership (*see Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Paragraph 12(b) requires that the deceased limited partner's estate be paid any accrued profits and his interest in the partnership be extinguished. However, paragraph 10 allows for

the transfer of the deceased limited partner's interest to another upon his death.

The appointment of a temporary receiver is "not a form of ultimate relief that can be awarded in a plenary action," but a provisional remedy (CPLR 6401[a]) or an aid in enforcing a money judgment (CPLR 5228) (*Lemle v Lemle*, 92 AD3d 494, 498 [1st Dept 2012]).

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

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13277 Brian K. Williams, Index 8006/07
Plaintiff-Respondent,

-against-

Irina Belova,
Defendant,

America's Wholesale Lender,
Defendant-Appellant.

_____

Delbello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Bradley D. Wank of counsel), for appellant.

Joseph A. Altman, Bronx, for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on April 6, 2012, which, inter alia, denied defendant America's Wholesale Lender's motion for a money judgment against plaintiff, unanimously modified, on the law, to the extent of granting said defendant a money judgment in the amount of $63,099.40, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

The so-ordered stipulation, dated January 14, 2008, executed by counsel, constitutes a binding contract which requires plaintiff to make monthly use and occupancy payments to America's Wholesale Lender (AWL), which lender issued two mortgages against property owned and/or occupied by plaintiff (*see* CPLR 2104). While these payments were to be made to AWL's counsel, there were

no restrictions on AWL's use of the moneys, which were not required to be placed in escrow. To the contrary, the payments were to be made "on account of the mortgage indebtedness."

As plaintiff does not dispute the validity of the stipulation, or deny that the stipulation unequivocally required him to make monthly use and occupancy payments, he provides no basis to avoid the ramifications of noncompliance (*see Hallock v State of New York*, 64 NY2d 224 [1984]). However, the court correctly found that plaintiff's obligation to make such payments began with execution of the stipulation and was not retroactive.

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13278 The People of the State of New York, Respondent, Ind. 3790/10

-against-

Nathaniel Gregory, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered September 27, 2011, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of two years, with three years' postrelease supervision, unanimously affirmed.

The record establishes that defendant made a valid waiver of his right to appeal. Accordingly, this waiver forecloses review of defendant's suppression and excessive sentence claims.

Regardless of whether defendant made a valid waiver of his right to appeal, we conclude, based on our review of the relevant

confidential search warrant documents and minutes, that the warrant was lawfully issued, and we perceive no basis for reducing the period of postrelease supervision.

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13279 In re Darren Desmond W.,

A Child Under the Age of
Eighteen Years, etc.

Nirandah W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

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

_____

Appeal from order of fact-finding and disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about August 6, 2013, which, upon inquest after respondent's default at the fact-finding hearing, determined that respondent had neglected the subject child, transferred custody of the child to the Commissioner of Social Services until the next permanency hearing, and approved the agency's permanency plan for adoption, unanimously dismissed, without costs.

The order was entered upon respondent's default and is therefore not appealable (*see* CPLR 5511; *Matter of Julien Javier F. [Christina F.]*, 110 AD3d 562 [1st Dept 2013]).

In any event, the finding of derivative neglect is supported by a preponderance of the evidence (Family Court Act §§ 1012[f][i][B]; 1046[a][i], [b][i]). A one-year suspended judgment terminating respondent's rights to two of her other children was entered less than a year and a half before the filing of the instant petition. The underlying conditions that went unfulfilled, resulting in the prior neglect findings - that respondent obtain a source of income, provide adequate housing and medical care for the children, and comply with her service plan - remained unfulfilled (*see Matter of Niya Kaylee S. [Yolanda R.]*, 110 AD3d 460 [1st Dept 2013]). Family Court properly conformed the petition to the proof (Family Court Act § 1051[b]), which supported a finding of direct neglect of the subject child by abandonment. The court did not err in drawing a negative inference against respondent for her failure to appear at the hearing (*see Matter of Commissioner of Social Servs. v Phillip De G.*, 59 NY2d 137, 141 [1983]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13280 The People of the State of New York, Ind. 2221/08
Respondent,

-against-

Naseka Browne,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Eugene Oliver, Jr., J.), rendered on or about October 17, 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: OCTOBER 23, 2014

CLERK

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

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13281 In re Justin Martinez, Index 103814/12
Petitioner-Appellant,

-against-

The New York City Department
of Buildings,
Respondent-Respondent.

_____

Casella & Casella, LLP, Staten Island (Ralph P. Casella of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 2, 2013, denying the petition to annul respondent's determination, dated May 31, 2012, which denied petitioner's application for a master fire suppression piping contractor license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's denial of petitioner's application for a master fire suppression piping contractor's license was not arbitrary and capricious (*see Matter of Tsamos v Department of Citywide Admin. Servs.*, 107 AD3d 604 [1st Dept 2013]; *Matter of Padmore v New York City Dept. of Bldgs.*, 106 AD3d 453 [1st Dept 2013]). The submissions accompanying the application established that petitioner had not had the requisite seven years of full-time

work experience (*see* Administrative Code of the City of New York § 28-410.4.1[1]; 1 RCNY § 104-01[c]).

In light of the foregoing, we do not reach petitioner's remaining contention.

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13285 The People of the State of New York, Respondent, Ind. 5819/10

-against-

Soma Sengupta,
Defendant-Appellant.

_____

Law Offices of James Kousouros, New York (James Kousouros of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 27, 2013, convicting defendant, after a nonjury trial, of criminal possession of a forged instrument in the second degree (three counts), offering a false instrument for filing in the first degree (two counts) and conspiracy in the fifth degree, and sentencing her to an aggregate term of five years' probation, unanimously modified, on the law, to the extent of reducing the forged instrument convictions to third-degree criminal possession of a forged instrument, and remanding for resentencing on those convictions, and otherwise affirmed.

The evidence was legally insufficient to support the convictions of second-degree criminal possession of forged instrument under Penal Law § 170.25, which requires proof of possession of a forged instrument of a kind specified in Penal

Law § 170.10. None of the forged reference letters defendant submitted in support of her application to become a barrister in the United Kingdom was a "[a] deed, will, codicil, contract, assignment, commercial instrument, credit card ... or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status" (Penal Law § 170.10(1)). Although a phrase such as "other instrument" is "susceptible of a wide interpretation," under the ejusdem generis canon of construction, it "becomes one limited in its effect by the specific words which precede it" (*People v Illardo*, 48 NY2d 408, 416 [1979] [construing phrase "other similar justification" contained in Penal Law § 235.15[1]). Nevertheless, the evidence established the lesser included offense of third-degree possession, and we reduce the conviction accordingly (*see* CPL 470.15[2][a]).

The remaining convictions were based on legally sufficient evidence and were 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 determination that defendant acted with the requisite intent to commit first-degree offering a false instrument for filing (*see* Penal Law § 175.35). The evidence supports the inference that when defendant, who was then a New York attorney, knowingly submitted attorney registration

statements to the Office of Court Administration containing false information, she did so with the intent to defraud that agency, within the meaning of the statute. The intent requirement was satisfied by defendant's intent to cause the agency to maintain incorrect information in its files, notwithstanding that this was intended, in turn, to further her ultimate goal of defrauding the British bar admission authorities. The court's explanation of its verdict on these charges was entirely consistent with this conclusion, and defendant's argument to the contrary is unavailing.

We have considered and rejected defendant's remaining arguments, including those addressed to the proof of conspiracy, the territorial jurisdiction of New York, and the court's alleged constructive amendment of the indictment.

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13286 In re Probate Proceeding, Index 2399/10
Will of Soilo Velasquez,
Deceased.

- - - - -

Rosemary Velasquez,
Proponent-Appellant,

-against-

Vivian Velasquez, et al.,
Objectants-Respondents.

_____

Lawrence James, New York, for appellant.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for respondents.

_____

Order, Surrogate's Court, Bronx County (Nelida Malave-Gonzalez, S.), entered August 29, 2013, which denied proponent's motion for summary judgment dismissing the objections filed by objectants, and to admit to probate an instrument dated June 6, 2010, unanimously affirmed, without costs.

"Before admitting a will to probate the court must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its execution" (SCPA 1408[1]. The burden of demonstrating that a will was duly executed lies with the proponent (*see Matter of Falk*, 47 AD3d 21, 26 [1st Dept 2007], *lv denied* 10 NY3d 702 [2008]). Upon a showing of due execution, the burden shifts to the objectant "to

produce evidentiary proof in admissible form to rebut the presumption and raise a material issue of fact" (*Matter of Halpern*, 76 AD3d 429, 432 [1st Dept 2010], *affd* 16 NY3d 777 [2011]).

Here, the court correctly found that the affidavits of decedent's friend and his great nephew were sufficient to raise an issue of fact as to whether the decedent could have been in New Jersey at the time the June 6, 2010 instrument was purportedly executed. Where, as here, there are issues as to whether the will was executed at the time and place claimed, and whether the will offered for probate was indeed the decedent's last will and testament, the matter should be submitted to a trier of fact *(see Matter of Walter*, 283 App Div 745 [2d Dept 1954]; *Matter of Quinn*, 282 App Div 1049 [2d Dept 1953]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13287 Cristina Flores, as Administratrix of the Goods, Chattels and Credits of the Estate of Samantha R. Gonzalez, Plaintiff-Respondent, Index 303858/11

-against-

Gjelosh Nikac, et al., Defendants-Appellants.

_____

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

Joshua Annenberg, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 16, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the common-law negligence cause of action, unanimously affirmed, without costs.

Defendants' initial moving papers failed to establish prima facie that they were not negligent in connection with the decedent's death.

It was only in reply to plaintiff's opposition to the motion that defendants raised arguments specifically addressing plaintiff's allegations, their duty under the common law, and the evidence in the record (for example, they contend that defendant Nina Nikac cannot be held liable for the decedent's death because

she was not the owner of the building). Since these arguments were not timely raised, we do not consider them (*see Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 561-562 [1st Dept 1992]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13288 The People of the State of New York, Dkt. 38117C/12
Respondent,

-against-

Joel Munoz,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered August 27, 2012, convicting defendant, upon his plea of guilty, of disorderly conduct, and sentencing him to a conditional discharge, unanimously reversed, on the law, the plea vacated and the complaint dismissed in the interest of justice.

There is nothing in the record to indicate that defendant understood, and waived, any of his constitutional rights under *Boykin v Alabama* (395 US 238 [1969]). Defendant said nothing on the record during the proceedings, defense counsel simply stated that defendant wished to accept the plea and sentence offered by the People, and the court stated that the plea was accepted. The court did not ask any questions of defendant or defense counsel, including whether defendant had discussed with counsel the

consequences of pleading guilty. Accordingly, we find the plea to be defective (*see People v Tyrell*, 22 NY3d 359, 364 [2013]; *People v Harris*, 61 NY2d 9, 16-19 [1983]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13289 The People of the State of New York, Ind. 2451/10
Respondent,

-against-

Leroy Fair,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler 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 (Ronald A. Zweibel, J.), rendered on or about February 16, 2011,

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

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

ENTERED: OCTOBER 23, 2014

CLERK

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

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13292 The People of the State of New York, Ind. 5127/10
Respondent,

-against-

Carlos Maurau, also known
as Carlos A. Mourao,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered June 27, 2011, convicting defendant, after a jury trial, of attempted robbery in the first degree, and sentencing him to a term of 4 years, unanimously affirmed.

The court properly permitted the People to introduce evidence that bags defendant was carrying at the time of this knifepoint attempted robbery of a jewelry store, and at the time of his arrest immediately thereafter, contained certain items, including a hammer and a ski mask, that could reasonably be viewed as evincing preparation for the commission of a robbery. Initially, we note it was not unlawful to possess these items, despite their sinister connotations (*see People v Flores*, 210 AD2d 1 [1st Dept 1994], *lv denied* 84 NY2d 1031 [1995]). In any

event, regardless of whether the ordinary test of relevance, or the special balancing test for uncharged crimes evidence under *People v Molineux* (168 NY 264 [1901]) should apply, we find that the evidence satisfied either test, as did the court's conclusions, both implicit and explicit.

The items at issue did not constitute evidence of general propensity to commit robberies, but evidence that at the specific time and place in question, defendant had equipped himself with the means of committing the particular charged robbery (*see People v Del Vermo*, 192 NY 470, 481-482 [1908]). Even though defendant never actually used them, the items could have been used in the commission of the crime, and were recovered upon defendant's apprehension shortly after the incident. Accordingly, these items served to complete the narrative of the criminal transaction, were probative of the material issue of intent, and tended to refute defendant's innocent explanation for the events that occurred in the jewelry store (*see People v Alfaro*, 19 NY3d 1075, 1076 [2012]; *see also People v Medina*, 37 AD3d 240, 242 [1st Dept 2007], *lv denied* 9 NY3d 847 [2007]).

In any event, any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). While some of the items that were found in defendant's bags may have had only a tenuous relevance, there is

no significant probability that the result would have been different if the court had excluded them.

We have considered and rejected defendant's contentions regarding the scope of our review of the trial court's ruling (*see People v Garrett*, __NY3d__, 2014 NY Slip Op 04876, *5, n 2 [2014]; *People v Alfaro*, 19 NY3d at 1076-1077).

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13295 The People of the State of New York, Respondent, Ind. 1697/12

-against-

Iliana Juarez, Defendant-Appellant.

_____

Seymour W. James, Jr., 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 August 1, 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 [1st Dept 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: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13296N Eileen Ryan-Avizienis, Index 300350/13
Plaintiff-Respondent,

-against-

JBEW Bar Corp.,
Defendant-Appellant,

Dicaralli Corp.,
Defendant.

_____

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for appellant.

John Cucci, Jr., Blue Point, for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 18, 2013, which denied defendant-appellant's motion for a change of venue from Bronx County to Suffolk County pursuant to CPLR 510 (3), unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, and the motion granted.

Plaintiff, a resident of Suffolk County, seeks to recover damages for injuries she sustained when she fell while exiting the Patchogue Pubbery, a bar located in Suffolk County. The bar is operated by defendant-appellant JBEW Bar Corp., whose principal place of business is in Suffolk County. Venue was placed in Bronx County based on the alleged principal place of business of defendant Dicaralli Corp., the owner of the premises

leased to JBEW Bar.

JBEW Bar met its initial burden in support of the motion by submitting the affirmation of its counsel, who had contacted two nonparty witnesses – a former employee who was working on the night of the accident and a Village of Patchogue inspector – and averred that they were both willing to testify, the nature of their proposed testimony, and the manner in which they would be inconvenienced if they were required to travel from Suffolk County, where they live and work, to Bronx County (*see Jacobs v Banks Shapiro Gettinger Waldinger & Brennan, LLP*, 9 AD3d 299 [1st Dept 2004]; *Cardona v Aggressive Heating*, 180 AD2d 572 [1st Dept 1992]). The fact that plaintiff received medical treatment in Suffolk County after the accident also favors transfer of venue (*see Lopez v Chaliwit*, 268 AD2d 377 [1st Dept 2000]).

In opposition, plaintiff did not identify any factors of convenience that justify retention of venue in Bronx County (*see Stonestreet v General Motors Corp.*, 201 AD2d 350 [1st Dept 1994]). The alleged location of defendant Dicaralli's principal executive office in Bronx County, is an insufficient basis to deny the motion, in the face of defendant JBEW's showing of

inconvenience (*see Lloyd v National Propane Corp.*, 271 AD2d 202 [1st Dept 2000]; *Tricarico v Cerasuolo*, 199 AD2d 142, 143 [1st Dept 1993]).

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

ENTERED: OCTOBER 23, 2014

CLERK

Friedman, J.P., Sweeny, Acosta, Saxe, Manzanet-Daniels, JJ.

13297 In re Rodney Watts, Ind. 2853/13
[M-4056] Petitioner, 871/14

-against-

Hon. Robert Stolz, etc., et al.,
Respondents.

_____

Rodney Watts, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Robert Stolz, respondent.

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

_____

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

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

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

ENTERED: OCTOBER 23, 2014

CLERK