SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 10, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Renwick, Feinman, JJ.

15612 In re Jason Olivero, Index 101282/13
Petitioner-Respondent,

-against-

New York City Department of Housing
Preservation and Development, et al.,
Respondents-Appellants.

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Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for municipal appellants.

Kellner Herlihy Getty & Friedman, LLP, New York (Jeanne Williams of counsel), for Jefferson Towers, Inc., appellant.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered March 28, 2014, which granted the petition brought pursuant to CPLR article 78 to annul a determination of respondent New York City Department of Housing Preservation and Development (HPD), dated June 13, 2013, denying petitioner's application for succession rights to a Mitchell-Lama apartment, and remanded the matter to HPD for a determination of

petitioner's succession rights in light of his property interest in another Mitchell-Lama apartment, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

Supreme Court incorrectly found that there was no rational basis for HPD's determination that petitioner failed to establish that there was "emotional and financial commitment and interdependence between [himself] and the tenant/cooperator" who had permanently vacated the subject apartment (*see* 28 RCNY 3-02[p][2][ii][B][a], [b], [c], [d], [f], [g]). While there is record evidence that would support finding a family-like ("nephew") relationship between petitioner and the tenant/cooperator, it is susceptible to alternative interpretations. On the one hand, the parties had a long relationship, first as neighbors and then as co-residents. During that time, they regularly participated in family activities together, held themselves out as family members, and cared for each other, especially as the tenant/cooperator's health deteriorated. On the other hand, the evidence regarding the intermingling of finances, sharing of household expenses, and formalizing of legal obligations was wanting. While no single factor is determinative, it cannot be said that the hearing

officer's conclusion that petitioner was not a family member lacked a rational basis.

To the extent Supreme Court determined that the income affidavits (typically used to establish primary residency and duration of residency) "provide[d] a rational basis for a determination of emotional and financial commitment and interdependence," it should not have substituted its own judgment for that of the hearing officer, even if its "contrary determination [was] itself supported by the record" (*see Matter of Retail Prop. Trust v Board of Zoning Appeals of Town of Hempstead*, 98 NY2d 190, 196 [2002]).

Given that there was a rational basis for the conclusion that petitioner failed to establish family member status, we need not address his other remaining contentions, including whether there was a rational basis for the hearing officer's findings

regarding primary residency and the duration of his co-residency with the tenant/cooperator of record.

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16361 The People of the State of New York, Ind. 549/11
Respondent,

-against-

Michael Bharath,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Robert Sackett, J.), rendered March 21, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 2 ½ to 5 years, unanimously affirmed.

Defendant's argument that the verdicts acquitting him of assault and attempted assault but convicting him of third-degree weapon possession were repugnant is unpreserved (*see People v Alfaro*, 66 NY2d 985 [1985], and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Where, as here, "there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary

support in a particular case" (*People v Muhammad*, 17 NY3d 532, 540 [2011]). Even if the split verdict lacks an evidentiary basis, "factual repugnancy—which can be attributed to mistake, confusion, compromise or mercy—does not provide a reviewing court with the power to overturn a verdict" (*id.* at 545). There is no merit to defendant's suggestion that we disregard Court of Appeals precedent and apply the evidentiary test advocated by the dissenters in *Muhammad*.

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16363 Cotia (USA) Ltd., Index 158441/14
Plaintiff-Appellant,

-against-

Lynn Steel Corp., et al.,
Defendants-Respondents.

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Law Offices of Jared M. Lefkowitz, New York (Jared M. Lefkowitz of counsel), for appellant.

Fox Rothschild LLP, New York (John A. Wait of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 17, 2015, which granted defendants' motion to dismiss the complaint for lack of personal jurisdiction, unanimously affirmed, without costs.

Plaintiff, a New York company, sold and delivered four orders of steel to defendants Lynn Steel Corp. (Lynn) and Hudd Steel Corp. (Hudd), both New Jersey corporations. The president of both Lynn and Hudd was defendant William Lynch. Lynn and Hudd failed to fully pay for these deliveries, and then sold substantially all of their assets to defendant UER Metals Incorporated, a European company. Plaintiff brought claims for breach of contract and fraudulent conveyance, as well as seeking a declaration that Lynn, Hudd, UER and Lynch are all alter egos

of each other, permitting plaintiff to pierce the corporate veil. The motion court properly granted defendants' motion to dismiss the complaint on jurisdictional grounds.

First, the purchase and sale transaction, whereby this in-state plaintiff shipped goods to the out-of-state defendants, who then failed to fully pay for the goods, is "[t]he classic instance in which personal jurisdiction is found *not* to exist" (*Spencer Laminating Corp. v Denby*, 5 Misc 3d 200, 202 [Sup Ct, NY County 2004, Engoron, J.], citing *M. Katz & Son Billiard Prods. v G. Correale & Sons*, 26 AD2d 52 [1st Dept 1966], *affd* 20 NY2d 903 [1967]; *see also Glassman v Hyder*, 23 NY2d 354, 362-363 [1968]). Plaintiff has offered nothing but conclusory assertions to support long-arm jurisdiction under CPLR 302(a)(1). Plaintiff argues that there is no evidence in the record "or even a suggestion that the four contracts were the result of the mere placement of an order and delivery of goods." However, as the party seeking to assert jurisdiction, the burden belongs to plaintiff to present sufficient facts to demonstrate jurisdiction. Moreover, as a party to these transactions, plaintiff would necessarily have first-hand knowledge of any contacts between it and defendants regarding negotiations or execution of the agreements. Thus, it cannot claim that these

facts are exclusively within the knowledge of defendants. Given that this is a motion to dismiss under CPLR 3211, plaintiff contends "the correct inference to be drawn by the trial court ... would be that [defendants] would have engaged in multiple and purposeful contacts in the State of New York." That would not, however, be an inference drawn from the facts alleged, but pure speculation, based on nothing in the record.

The court also properly rejected plaintiff's assertion of jurisdiction under CPLR 302(a)(3)(ii), for an alleged tort committed without the state causing injury within the state. As to the tort committed without the state, plaintiff points to the alleged fraudulent conveyance of Lynn's and Hudd's assets to UER. This fails, however, because the "the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt" (*Barricade Books, Inc. v Langberg*, 2000 WL 1863764, *4, 2000 US Dist LEXIS 18279, *13 [SD NY 2000] [internal quotations omitted], *quoting Carte v Parkoff*, 152 AD2d 615, 616 [2d Dept 1989]); *see also Mareno v Rowe*, 910 F2d 1043, 1046 [2d Cir 1990], *cert denied* 498 US 1028 [1991]; *Magwitch, L.L.C. v Pusser's Inc.*, 84 AD3d 529, 532 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012]). Thus, this alleged tortious act did not cause injury within New York,

but in New Jersey. Plaintiff has also offered nothing but conclusory allegations that any defendant "derives substantial revenue from interstate or international commerce," as required for jurisdiction under CPLR 302(a)(3)(ii).

Plaintiff's argument that even if it has failed to demonstrate jurisdiction, the court should have granted it jurisdictional discovery, is unpreserved and we decline to address it in the interest of justice. As an alternative holding, we reject it on the merits, as plaintiff has not made a "sufficient start" to warrant such discovery (*see Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *SNS Bank v Citibank*, 7 AD3d 352, 353 [1st Dept 2004]).

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16364 In re Michael A.H.,
Petitioner-Respondent,

-against-

Rosemary H.,
Respondent-Appellant.

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Law Office of Kenneth Walsh, New York (Kenneth Walsh of counsel), for appellant.

Andrew J. Baer, New York, for respondent.

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

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Order, Family Court, New York County (Susan M. Doherty, Referee), entered on or about April 2, 2014, which denied respondent mother's motion to vacate a final order, entered upon her default, granting custody to petitioner father, unanimously affirmed, without costs.

The Family Court properly found that the mother failed to demonstrate both a reasonable excuse for her default and a meritorious defense to the father's custody petition (*see* CPLR 5015[a][1]; *Matter of Ruth R.* [*Diana P.*], 115 AD3d 531, 531 [1st Dept 2014]). The court reasonably found that, notwithstanding the mother's dental condition, she could have appeared for the custody hearing that had been scheduled for several months. The

mother's note from her doctor did not substantiate her excuse, as it failed to specify when he examined her, what serious condition she suffered from, and why she could not appear.

Even if the mother's excuse were reasonable, the mother failed to proffer any evidence that would warrant a finding that the children's best interests would be served by denying the father's custody petition. The children had been removed from the mother's care following entry of neglect findings against her, and temporary custody was awarded to the father, who had received training to care for their special needs. The children were thriving in his care, and they expressed a strong desire to remain with him and not return to the mother. The mother failed to provide any basis for finding any change in her health or circumstances that would enable her to care for the children.

The mother failed to preserve her argument regarding the

need for an evidentiary hearing, and, in any event, the argument is unavailing (*see Matter of Cole v Cole*, 88 AD3d 1104, 1104 [3d Dept 2011]).

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16366 The People of the State of New York, Ind. 5534/12
Respondent,

-against-

Nathan Marshall,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered July 8, 2014, as amended September 12, 2014, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, with regard to trial counsel's reasoning and strategic choices (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be

addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's choice of defenses fell below an objective standard of reasonableness, or that the defense proposed by defendant on appeal had any greater chance of success than the defenses actually employed by counsel, which essentially sought to invoke the jury's unofficial power of nullification (*see People v Zayas*, 89 AD3d 610, 611 [1st Dept 2011], *lv denied* 18 NY3d 964 [2012]).

Defendant's challenge to the court's charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the charge, viewed as a whole, adequately explained larcenous intent as it related to criminal possession of stolen property.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16367-
16368 The People of the State of New York,
Respondent,

-against-

Shaun Harris,
Defendant-Appellant.

Ind. 4244/99

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

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

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 12, 2012, resentencing defendant to an aggregate term of 25 years to life, and imposing an aggregate term of five years' postrelease supervision as to certain convictions, unanimously modified, on the law, to remand for further resentencing in accordance with this decision, and otherwise affirmed.

Although the resentencing proceeding was neither barred by double jeopardy nor otherwise unconstitutional (*see People v Lingle*, 16 NY3d 621 [2011]), the court did not specify the length of postrelease supervision in its oral pronouncement of resentence, but only in written documents. This was insufficient

to comply with the procedure mandated by *People v Sparber* (10 NY3d 457, 470 [2008]). Accordingly, we remand for the correction of this error.

However, we perceive no basis for reducing the aggregate term of PRS, which was imposed on defendant's weapon possession convictions, which accompanied his conviction for a heinous first-degree murder. Since, in the event that defendant is released on parole, he will be under lifetime supervision, the question of PRS is essentially academic. Defendant acknowledges this, but argues that this is a basis for reducing the term of PRS. We reject that argument.

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16369 Pamela Blechman, Index 109263/08
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

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Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

Barasch McGarry Salzman & Penson, New York (Dominique Penson of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ellen M. Coin, J.), entered April 11, 2014, upon a jury verdict, awarding plaintiff the aggregate amount of $356,458.01, unanimously affirmed, without costs.

Defendant's argument that the jury's finding that plaintiff was negligent but that her negligence was not a proximate cause of her injury was inconsistent was not raised before the jury was discharged, and therefore is unpreserved (*see Barry v Manglass*, 55 NY2d 803, 806 [1981]). In any event, the issues were not so inextricably interwoven as to make it logically impossible to find negligence but not proximate cause (*see Bracker v New York City Tr. Auth.*, 112 AD3d 520 [1st Dept 2013]).

Nor was the verdict against the weight of the evidence in

light of the testimony of plaintiff, another passenger, and plaintiff's expert, that the gap between the train and the platform was a foot wide due to the train operator missing the 10-car marker *(see Mazariegos v New York City Tr. Auth.,* 230 AD2d 608 [1st Dept 1996]).

Under the circumstances, the amount awarded plaintiff does not deviate materially from what would be reasonable compensation (*see* CPLR 5501[c]). As a result of the accident, plaintiff sustained a broken ankle, and underwent two surgeries, an open reduction with internal fixation to repair the comminuted ankle fracture, and later, the removal of the hardware *(see e.g. Hopkins v New York City Tr. Auth.,* 82 AD3d 446 [1st Dept 2011] *Rydell v Pan Am. Equities*, 262 AD2d 213 [1st Dept 1999]; *Fishbane v Chelsea Hall, LLC*, 65 AD3d 1079 [2d Dept 2009]).

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

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16370 Anthony Waring, Index 304505/09
Plaintiff-Respondent,

-against-

Sunrise Yonkers SL, LLC,
Defendant-Appellant.

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Moore & Lee, LLP, McLean, VA (Charlie C.H. Lee of the bar of the State of Virginia, the District of Columbia, the State of Florida and the State of Washington, admitted pro hac vice, of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered September 29, 2014, after a jury trial, awarding plaintiff damages including $100,000 for past pain and suffering, $500,000 for future pain and suffering, $80,000 for past lost wages, and, as stipulated to by plaintiff, $200,000 for future lost wages and $65,000 for future medical expenses, unanimously affirmed, without costs.

On December 20, 2008, plaintiff, then 22 years old, was injured when, in the course of his employment with nonparty Sunrise Senior Living Management, Inc. (SSLM) at an assisted living facility, he slipped and fell on a snow-covered ramp leading to a storage shed. Defendant owned the property and

retained SSLM to manage it.

Defendant failed to establish that it was an out-of-possession landowner with limited liability to third persons injured on the property (*see Gronski v County of Monroe*, 18 NY3d 374 [2011]). Its management agreement with SSLM gave SSLM "complete and full control and discretion in the operation ... of the Facility" and required SSLM to "maintain the Facility ... in conformity with applicable Legal Requirements." However, defendant had "access to the Facility at any and all reasonable times for the purpose of inspection," had access to SSLM's books and records, and was required to fund operating shortfalls, and SSLM was required to report to defendant regularly and to maintain bank accounts in approved financial institutions "as agent for [defendant]."

Significantly, the management agreement requires defendant to indemnify SSLM for claims arising out of SSLM's own negligence in the performance of its duties. This agreement to indemnify is analogous to the procurement of insurance, which constitutes evidence of ownership and control (*see Leotta v Plessinger*, 8 NY2d 449, 462 [1960]; *McGovern v Oliver*, 177 App Div 167 [1st Dept 1917]). It evidences defendant's intent to be responsible for any accidents on the property. But for the fortuity of

plaintiff's being an employee who was barred from suing his employer, defendant would be responsible, through the indemnification provision, for his injuries.

The court properly refused to charge comparative fault since there is no valid line of reasoning based on the trial evidence by which a jury could rationally conclude that plaintiff was negligent (*see Cuadrado v New York City Tr. Auth.*, 65 AD3d 434, 435 [1st Dept 2009], *lv dismissed* 14 NY3d 748 [2010]). Defendant identifies neither actions that plaintiff took, such as rushing, that could be construed as negligent, nor reasonable steps that plaintiff, who wore boots while using the only available means of access to the shed, in response to a direct order, could or should have taken to avoid the happening of the accident (*see Perales v City of New York*, 274 AD2d 349 [1st Dept 2000]).

We reject defendant's argument that plaintiff failed to mitigate his damages. There is no evidence that either plaintiff's failure to fully comply with physical therapy orders or his sleeping on couches while homeless affected his recovery or contributed to his injuries (*cf. Robinson v United States*, 330 F Supp 2d 261, 275 [WD NY 2004] [physical therapist reported that plaintiff's poor attendance "had affected his progress in physical therapy"]), and there is no evidence that plaintiff, who

obtained a GED to increase his employment prospects and was looking for work, made, as defendant claims, only minimal effort to seek employment.

Plaintiff's past lost wages were established with reasonable certainty through the testimony of SSLM's executive director, Mark Weinberger (*see Estate of Ferguson v City of New York*, 73 AD3d 649 [1st Dept 2010]), which defendant did not challenge (*see Kane v Coundorous*, 11 AD3d 304, 305 [1st Dept 2004]). The future lost wages claim was also premised upon Mr. Weinberger's testimony as to plaintiff's earnings at the time of the accident, and the court's reduction of that award to $200,000 from the jury's award of $400,000, which was stipulated to by plaintiff, reflects the testimony that plaintiff will eventually be able to find employment, and is supported by the record. The award for future medical expenses, as reduced and stipulated to by plaintiff, is supported by plaintiff's doctor's testimony.

Plaintiff sustained two bulging cervical discs and three lumbar herniations with impingement, and experienced only limited improvement from physical therapy and epidural injections. He is still in treatment for his injuries, which are permanent, he suffers daily pain and will require surgery and/or a spinal cord stimulator and continuing pain management, and he must restrict

his activities, although he may perform sedentary work. These circumstances support the $100,000 award for past pain and suffering, as well as the $500,000 award for future pain and suffering, over the course of 31 years (*see Rutledge v New York City Tr. Auth.*, 103 AD3d 423 [1st Dept 2013]; *James v Farhood*, 96 AD3d 503 [1st Dept 2012]).

We reject defendant's remaining contention, i.e., that plaintiff's counsel's comments in summation warrant a new trial.

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16371 The People of the State of New York, Ind. 1058/11
Respondent,

-against-

Macquon Fashaw,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Jenny C. Wu of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 15, 2012, convicting defendant, after a jury trial, of assault in the first degree, two counts of robbery in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 18 years, 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, 349 [2007]). We find no basis to disturb the jury's determinations concerning identification. The victim had a sufficient opportunity to observe defendant and made a reliable identification. The jury could also have reasonably concluded that the remaining evidence tended to corroborate rather than

undermine the victim's testimony.

The court properly exercised its discretion in admitting certain entries from defendant's Facebook account, because the jury could have reasonably inferred that they made reference to this case, and that they tended to show a consciousness of guilt (*see generally People v Yazum*, 13 NY2d 302 [1963]). The court provided a thorough jury instruction on the proper weighing of such evidence. There was nothing in the content of these entries that was unduly prejudicial, and the probative value of this evidence outweighed any prejudicial effect.

Although the court found that there was a violation of *Payton v New York* (455 US 573 [1980]), the record supports the court's determination that defendant's oral and videotaped statements were attenuated from any illegality (*see Brown v Illinois*, 422 US 590, 602-604 [1975]; *People v Harris*, 77 NY2d 434 [1991]). There was an interval of several hours between defendant's arrest and the interrogation, which was conducted at the precinct after he had been given something to eat and drink and left alone for a time, and after *Miranda* warnings were given. The record also supports the court's finding that, although the police ultimately made an unlawful entry, there was no flagrant misconduct, because the detectives attempted a peaceful, consensual entry, for which a warrant is unnecessary, and events ensued that caused them to fear for their safety. Defendant's

videotaped statement was even further attenuated, since it was made six hours later at a different location to a different interviewer. In any event, any error in the admission of this evidence was harmless.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16372 In Re Devontee I.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about October 30, 2014, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent rather than a person

in need of supervision in light of his violence toward his mother and his pattern of serious misconduct in and out of school (*see e.g. Matter of Jade Q.*, 41 AD3d 327 [1st Dept 2007]).

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16374 The People of the State of New York, Ind. 4455/05
Respondent,

-against-

Sonny Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

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Order, Supreme Court, New York County (Bruce Allen, J.), entered on or about January 13, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supported the court's assessment of 15 points for defendant's history of substance abuse in light of proof showing his extensive use of alcohol and marijuana for a period 12 years, which included the time when he

abused the victim (*see People v Palmer*, 20 NY3d 373, 377-379 [2013]). Defendant's substance abuse went well beyond social or occasional use.

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16375 The People of the State of New York, Ind. 482/13
Respondent,

-against-

Donnell McCullum,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jeffrey A. Wojcik of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eduardo Padro, J.), rendered on or about September 11, 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: DECEMBER 10, 2015

CLERK

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

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16377 Alex Grafov, Index 110620/08
Plaintiff-Appellant,

-against-

Chelsea Bicycles Corporation,
Defendant-Respondent,

"John Doe" Manager,
Defendant.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

DeSena & Sweeney, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 14, 2014, which, upon plaintiff's motion to renew and reargue, denied renewal, granted reargument, and, upon reargument, adhered to the original determination granting the motion of defendant Chelsea Bicycles Corporation for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion to renew was properly denied since plaintiff pointed to no newly discovered facts that would change the court's prior determination (*see* CPLR 2221[e][2]). In addition, upon granting reargument, the court appropriately adhered to the

terms of its initial order, as plaintiff presented no basis to conclude that the court overlooked or misapprehended any applicable law or facts (*see Pezhman v Chanel, Inc.*, 126 AD3d 497 [1st Dept 2015]; CPLR 2221[d][2]). Indeed, there was no basis to impose liability on defendant for the actions of its employee in allegedly assaulting plaintiff. Defendant demonstrated that it had no notice that its employee had a propensity for violent behavior, and the employee's alleged assault upon plaintiff was clearly not within the scope of the employee's duties (*see Vicuna v Empire Today, LLC,* 128 AD3d 578 [1st Dept 2015]).

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: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16378 The People of the State of New York, Ind. 539/13
Respondent,

-against-

Quincy Welch,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rene K. Uviller, J.), rendered on or about October 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: DECEMBER 10, 2015

CLERK

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

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16379 Jamel Moore, Index 452166/13
Plaintiff-Appellant,

-against-

New York City Housing Authority,
et al.,
Defendants-Respondents.

Seymour W. James, Jr., The Legal Aid Society, New York (Sarah R. Robinson of counsel), for appellant.

David Farber, New York City Housing Authority Law Department, New York (Jane E. Lippman of counsel), for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered July 17, 2014, which, in this hybrid action and CPLR article 78 proceeding, granted defendants' motion to dismiss the complaint asserting claims for violation of Federal, State, and City anti-discrimination laws, and seeking, inter alia, to annul the determination to terminate plaintiff's tenancy, unanimously affirmed, without costs.

Substantial evidence supports the finding that plaintiff violated his lease, agency rules and was a nondesirable tenant (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]; *Matter of Hobbs v New York City Hous. Auth.*, 128 AD3d 582 [1st Dept 2015]). The record shows, among

other things, that plaintiff started a fire inside his apartment and barricaded himself inside placing himself and others at risk. Defendants permissibly refused to accommodate plaintiff by continuing his tenancy subject to probationary monitoring of his mental health treatment (*see Hobbs* at 583; *Matter of Canales v Hernandez*, 13 AD3d 263 [1st Dept 2004]).

Under the circumstances presented, the termination of plaintiff's tenancy does not shock our sense of fairness (*see Hobbs* at 583).

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

ENTERED: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16380 The People of the State of New York, Ind. 176/12
Respondent,

-against-

Jose P.,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about March 20, 2014,

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: DECEMBER 10, 2015

CLERK

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

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16381-
16382 The People of the State of New York,
Respondent,

-against-

Nadia Jaffal,
Defendant-Appellant.

Ind. 1396/13
SCI 4120/13

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered October 15, 2013, as amended October 29, 2013, convicting defendant, upon her plea of guilty, of burglary in the third degree (three counts) and grand larceny in the fourth degree, and sentencing her, as a second felony offender, to an aggregate term of four to eight years, and also convicting defendant, upon her plea of guilty, of burglary in the third degree, and sentencing her, as a second felony offender, to a concurrent term of two to four years, unanimously affirmed.

We perceive no basis for reducing the sentence imposed under the indictment.

As to the conviction by superior court information, application by appellant's assigned 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 nonfrivolous points which could be raised on this appeal as to that conviction.

Pursuant to CPL 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 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: DECEMBER 10, 2015

CLERK

Mazzarelli, J.P., Richter, Manzanet-Daniels, Kapnick, JJ.

16383N In re Allstate Property and Casualty Insurance Company, Petitioner-Appellant, Index 653879/13

-against-

New Way Massage Therapy P.C., as assignee of Nancy Febus, Respondent-Respondent.

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Bruno, Gerbino & Soriano, LLP, Melville (Mitchell L. Kaufman of counsel), for appellant.

The Geller Law Group, P.C., Brooklyn (Abraham J. Meir of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about April 2, 2014, which denied the petition to vacate the award of the master arbitrator, and confirmed the award, unanimously affirmed, with costs.

Whether or not the fee-sharing arrangement at issue constitutes unprofessional conduct (*see* 8 NYCRR 29.1[b][4]), it does not constitute a defense to a no-fault action (*compare State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313 [2005] ["insurance carriers may withhold payment for medical services provided by fraudulently incorporated enterprises to which patients have assigned their claims"]). It is solely a matter for the

appropriate state licensing board (*see e.g. Necula v Glass*, 231 AD2d 457 [1st Dept 1996]; *see also H & H Chiropractic Servs., P.C. v Metropolitan Prop. & Cas. Ins. Co.*, 47 Misc 3d 1075, 1078 [Civ Ct, Queens County 2015]).

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

ENTERED: DECEMBER 10, 2015

CLERK