SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 15, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Acosta, Andrias, Moskowitz, Kapnick, JJ.

15923 Hector Taveras, Index 304958/10
Plaintiff-Appellant,

-against-

1149 Webster Realty Corp., et al.,
Defendants-Respondents.

_____

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

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for 1149 Webster Realty Corp., respondent.

Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for A & K Convenience Store, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 23, 2014, which, insofar as appealed from as limited by the briefs, sua sponte dismissed the complaint as against defendant 1149 Webster Realty Corp. (Webster) and granted the motion of defendant A & K Convenience Store, Inc. (A & K) for summary judgment dismissing the complaint as against it, reversed, on the law, without costs, the sua sponte dismissal of

the complaint as against Webster vacated, and defendants' motions for summary judgment denied.

Plaintiff Hector Taveras commenced this action to recover damages for personal injuries he sustained on May 30, 2010 while exiting a convenience store located at 349 East 167th Street, in the Bronx. Plaintiff alleges in his bill of particulars that he "was caused to fall as a result of a dangerous and defective condition on the ramp leading from the public sidewalk to the entranceway of the" convenience store. The premises was owned by defendant Webster and leased to defendant A & K.

"In a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law before the burden shifts to the party opposing the motion to establish the existence of a material issue of fact" (*Hutchinson v Sheridan Hill House Corp.*, __ NY3d __, 2015 NY Slip Op 07578, *4 [2015]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Contrary to the conclusions of the dissent, we find that defendants in this case failed to meet their initial burden of establishing, prima facie, their entitlement to judgment as a matter of law by asserting that plaintiff could not identify the defect that caused him to fall. In fact, plaintiff, who

testified at his depositions through a Spanish interpreter, testified at his first deposition that upon exiting the convenience store he "stepped like on a hole," and that he "stepped on something" on the defective ramp which caused his ankle to twist and him to fall to the ground. He further testified at that deposition that "[w]hen [he] stepped, it was that [he] felt like something – - that something was not right underneath," "[l]ike [he] stepped on something not solid." That plaintiff could not initially identify the location of his accident, based upon photographs he was shown at his first deposition that depicted only the bottom portion of a door with no other identifying features, is hardly surprising and not dispositive. Upon being shown, at his second deposition, additional photographs depicting the full entrance area and front of the convenience store, plaintiff was able to definitively identify and mark with an "X" the area on the ramp which was "not leveled" and caused him to fall (*see e.g. Figueroa v City of New York*, 126 AD3d 438, 440 [1st Dept 2015] [testimony not speculative when plaintiff could not pinpoint the exact location of her fall in photographs and later clarified upon further questioning]). Plaintiff's testimony distinguishes this case from the cases cited by the dissent where this Court determined

that defendants had sustained their burden of establishing their entitlement to summary judgment as a matter of law because a jury would have to engage in "impermissible speculation to determine the cause of the accident" (*Smith v City of New York*, 91 AD3d 456, 456-457 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013] [plaintiff testified at her deposition that she had "no idea" how she tripped and fell and *she could not identify or mark on photographs the specific rise, declivity or defective condition that caused her accident*]; *see also Morrissey v New York City Tr. Auth.*, 100 AD3d 464, 464 [1st Dept 2012]).

A & K's argument that it owed no duty to plaintiff, is unavailing. As an operator of a place of public assembly, A & K is charged with providing its customers with a safe means of ingress and egress (*see Peralta v Henriquez*, 100 NY2d 139, 143 [2003]; *Masillo v On Stage, Ltd.*, 83 AD3d 74, 79 [1st Dept 2011]).

Furthermore, this Court cannot grant A & K, a nonappealing party, affirmative relief with respect to its cross claim against Webster for common-law indemnification, a ground unrelated to

those at issue on appeal (*see Hecht v City of New York*, 60 NY2d 57, 60 [1983]).

All concur except Tom J.P. and Andrias J. who dissent in a memorandum by Andrias J. as follows:

ANDRIAS J. (dissenting)

The majority reverses the dismissal of the complaint against defendants A & K Convenience Store, Inc. (A&K) and 1149 Webster Realty Corp. (Webster). Because I disagree with the majority's conclusion that defendants failed to meet their initial burden of establishing, prima facie, their entitlement to judgment as a matter of law, and because plaintiff failed to raise a triable issue of fact, I respectfully dissent.

Plaintiff alleges that he was injured when, while exiting A&K's convenience store, he twisted his ankle and fell as the result of a "dangerous and defective condition" on the ramp that led from the sidewalk to the entrance of the store. Webster owned the premises and A&K leased it.

Defendants satisfied their burden by submitting plaintiff's deposition testimony establishing that he was unable to identify the cause of his fall without speculation (*see Morrissey v New York City Tr. Auth.*, 100 AD3d 464, 464 [1st Dept 2012]; *Smith v City of New York*, 91 AD3d 456, 456-457 [1st Dept 2012], *lv denied* 21 NY3d 858 [2013]; *Ash v City of New York*, 109 AD3d 854 [2d Dept 2013]).

Plaintiff testified that he had no problems entering or exiting the store on two prior occasions, had made no complaints

about the ramp, and did not know whether anyone else had complained about it. While plaintiff stated that he "stepped like on a hole" and that he "stepped [on] something that was not fine to set down the foot," like something that was "not solid" or "correct," he conceded that he never saw what caused him to twist his ankle or trip either before or after the accident and that he "didn't see what [he] was stepping on." While plaintiff "suppose[d]" that it was the ramp that caused his fall, when asked "what about the ramp, other than supposing, makes you believe the ramp was involved in the accident," he responded, "There wasn't anything else." When asked what led him to believe that the floor was not solid, plaintiff responded, "Because I fell." Thus, defendants established prima facie that plaintiff could only speculate as to the cause of his accident (*Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 631-632 [1st Dept 2009] ["Although a plaintiff bears no burden to identify precisely what caused [his] slip and fall, mere speculation about causation is inadequate to sustain the cause of action"]; *Rodriguez v Cafaro*, 17 AD3d 658, 658 [2d Dept 2005] ["While the plaintiff testified at his deposition that the second step on the stairway was 'chipped' and that the handrail was 'loose,' a determination that these alleged defects, rather than a misstep

or loss of balance, were [the] proximate cause of the plaintiff's accident would be based on sheer speculation" [internal quotation marks omitted] [alteration in original]).

In opposition, plaintiff, whose description of his fall changed at his second deposition from that he "stepped on something that was not solid" or that was "like . . . a hole" to he "stepped on something that felt unleveled and irregular," failed to raise a triable issue of fact whether defendants' negligence was a proximate cause of his fall (*see Thompson v Commack Multiplex Cinemas*, 83 AD3d 929 [2d Dept 2011]; *Goldfischer v Great Atl. & Pac. Tea Co., Inc.*, 63 AD3d 575 [1st Dept 2009]). Plaintiff testified at his depositions that he saw no garbage, debris, holes, cracks, fractures, defects, or liquid on the ramp either before or after the fall and his submissions in opposition to the motion did not demonstrate the existence of any defect or connect it to his fall by anything other than speculation.

Plaintiff's new theory, raised for the first time on appeal, that the accident was the result of "optical confusion" should not be considered (*see Davila v City of New York*, 95 AD3d 560, 561 [1st Dept 2012]). In any event, this theory is insufficient to create a triable issue of fact, as plaintiff testified that he

was looking straight ahead and did not pay attention to the ramp (*see Franchini v American Legion Post*, 107 AD3d 432, 432 [1st Dept 2013]).

Accordingly, I would affirm the order dismissing the complaint.

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

ENTERED: DECEMBER 15, 2015

CLERK

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

16373 In re Lisa Reed, Index 653927/13
Petitioner-Appellant,

-against-

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

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

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered September 30, 2014, dismissing the petition to vacate and/or modify the Opinion and Award, dated October 21, 2013, which, after a hearing pursuant to Education Law § 3020-a, terminated petitioner's employment as a tenured teacher, unanimously affirmed, without costs.

The charges and specifications of incompetent and ineffective service, during three school years, are supported by adequate evidence showing that petitioner failed to plan and execute lessons, as observed on multiple enumerated dates (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]). The evidence shows that

petitioner continually refused to accept responsibility for her failure to deliver effective instruction. In particular, she failed to implement the school administration's professional development recommendations with regard to lesson planning preparation and execution, proper pacing of lessons, ensuring students stay on task, and assessing students' progress, among other things.

The penalty of termination does not shock our sense of fairness (*see Lackow*, 51 AD3d at 569).

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

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16384 The People of the State of New York, Ind. 5110/13
Respondent,

-against-

Kaliek Williams,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack 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 (Edward Mc Laughlin, J.), rendered on or about May 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 15, 2015

CLERK

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

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16385 Ronald Hernandez, Index 156852/12
Plaintiff-Respondent,

-against-

Rainbow Transit Inc., et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about September 18, 2014,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated November 16, 2015,

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16386 In re Tavon W.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Michelle R. Duprey of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Vanessa Kong of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about August 18, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree and criminal possession of stolen property in the fifth degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Appellant's "accomplice liability could reasonably be inferred from the chain of events . . ., which supports the inference that [appellant]

intentionally took part in the robbery by leading the victim . . . into a trap. [Appellant's] conduct and that of the other participant in the crime made little sense unless [appellant] was a participant" (*People v Thomas*, 113 AD3d 447, 447 [1st Dept 2014], *lv denied* 22 NY3d 1159 [2014][citation omitted]). In addition to conduct that can be reasonably interpreted as leading the victim into a trap, appellant acquired the victim's phone and passed it to an accomplice who fled with it as appellant physically prevented the victim from pursuing the accomplice.

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16387 Robert Starks, Index 115650/10
Plaintiff-Respondent,

-against-

R+L Carriers, et al.,
Defendants-Appellants.

Thompson I.G. LLC, et al.,
Defendants.

_____

Cozen O'Connor, New York (Vincent P. Pozzuto of counsel), for appellants.

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Martin Block of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered April 1, 2015, which, to the extent appealed from, denied the motion for summary judgment dismissing the complaint as to defendants R+L Carriers and R&L Carriers Shared Services, LLC (collectively R&L), unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against them. The Clerk is directed to enter judgment accordingly.

During a delivery of a crate of glass panels, a portion of the lift gate on defendant R&L's tractor-trailer failed, sending the crate to the roadway four feet below. The crate was partially broken, and some of the glass panels inside were

cracked. About ten minutes after the crate had fallen, the R&L driver left the area.

Plaintiff and his employer, who had been waiting for this delivery, proceeded to open the crate, separate the cracked glass panels, and place them on an "A-frame." During this process, plaintiff turned his back, and all the glass panels that had been stacked on the A-frame fell on his legs.

R&L demonstrated its entitlement to summary judgment by demonstrating that plaintiff's actions intervened to sever any causal connection between its original purported negligence, and the injuries allegedly sustained by plaintiff (*see Rivera v City of New York*, 11 NY2d 856, 857 [1962]).

While foreseeability is generally a question of fact for the jury, "where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law," summary judgment is appropriate (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Here, plaintiff's decision to place the glass panels on the A-frame, where they subsequently fell on him, was the sole proximate cause of his injuries (*see Blatt v Touchstone Tel. Prods.*, LLC, 95 AD3d 536 [1st Dept 2012]).

In opposition, plaintiff failed to raise a genuine issue of

material fact. Even assuming that R&L was negligent and created a dangerous condition, such a condition merely furnished the condition or occasion for the occurrence of the event rather than one of its causes (*Ventricelli v Kinney Sys. Rent A Car*, 45 NY2d 950, 952 [1978]), and was not a proximate cause of plaintiff's injuries (*see Murray v New York City Hous. Auth.*, 269 AD2d 288 [1st Dept 2000]).

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16388 The People of the State of New York, Ind. 1187/12
Respondent,

-against-

David Green, Jr.,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered September 4, 2012, 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 two to four years, unanimously affirmed.

Since defendant's objection to the court's response to a jury note was on very different grounds from the position he takes on appeal, he did not preserve his contention that the court failed to meaningfully respond to the jury's request for clarification of the relationship between constructive possession and physical proximity, and we decline to review it in the interest of justice. As an alternative holding, we find that the court properly instructed the jury that physical proximity is one

factor, among others for consideration. The court also reread the standard charges on constructive possession and the automobile presumption. Accordingly, the court responded meaningfully to the jury's question (*see People v Almodovar*, 62 NY2d 126, 131 [1984]).

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16390 The People of the State of New York, Ind. 1883/12
Respondent,

-against-

Rodney Brown,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about December 5, 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: DECEMBER 15, 2015

CLERK

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

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16391 Pursuit Investment Management, LLC, et al., Plaintiffs-Respondents,

Pursuit Capital Management, LLC, Plaintiff,

-against-

Alpha Beta Capital Partners, L.P., et al., Defendants-Appellants,

Claridge Associates, LLC, et al., Defendants.

Index 652457/13

Schulte Roth & Zabel LLP, New York (Robert M. Abrahams of counsel), for appellants.

Cane & Associates LLP, New York (Peter S. Cane of counsel), for respondents.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 28, 2014, which denied a motion by defendants Alpha Beta Capital Partners, LP and Reed Smith LLP to dismiss the complaint as asserted against them, unanimously modified, on the law, to grant the motion to the extent of dismissing the breach of contract claims of plaintiffs Pursuit Investment Management, LLC, Pursuit opportunity Fund I, L.P., and Pursuit Capital Management Fund I, L.P., and otherwise affirmed, without costs.

The motion court erred in finding that all of the plaintiffs

had asserted a claim for breach of the settlement agreement against defendants Alpha Beta and Reed Smith, since in the complaint it is sufficiently alleged that only plaintiff Pursuit Capital Management LLC suffered damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

The court should have considered defendants' claim splitting argument, despite their having failed to assert the correct subsection of CPLR 3211(a), since plaintiffs' substantial rights were not prejudiced, plaintiffs were aware of the relief being sought, and Alpha Beta and Reed Smith's mistake did not result in any action being taken against plaintiffs that would not have occurred had the proper provision been cited (*Moon v Tupler*, 110 AD3d 486 [1st Dept 2013]; CPLR 2001). However, this argument fails on the merits because the two claims are not for the same liability on the same contract (*Murray, Hollander, Sullivan & Bass v HEM Research*, 111 AD2d 63, 66 [1st Dept 1985]), they do not arise out of the same course of dealing, and involve materially different elements of proof and evidence necessary to sustain recovery (*Matter of Reilly v Reid*, 45 NY2d 24, 30 [1978] [discussing the standard for res judicata in light of the general rule against claim splitting]).

The court did not abuse its discretion is declining to stay this action under the circumstances (CPLR 2201).

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

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16393 The People of the State of New York, Ind. 3644/06
Respondent,

-against-

Lester Q. Jones,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York
Rosemary Herbert of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered January 5, 2011, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations.

The rulings challenged on appeal, and discussed separately in this decision, were proper exercises of the court's discretion. In each instance, there was no prejudice to defendant or violation of any constitutional right.
The court properly refused to give a specific instruction regarding the significance of the cooperation agreements of two

prosecution witnesses (*see People v Inniss*, 83 NY2d 653 [1994]). The charge as a whole, including an instruction regarding interested witnesses, adequately conveyed the need to scrutinize the testimony of these witnesses.

The court properly excluded an anonymous, unsubstantiated tip regarding a possible alternative suspect. The tip lacked any indicia of reliability, and even if offered to challenge the thoroughness of the police investigation, any minimal probative value the tip may have had on that subject was outweighed by its prejudicial effect (*see People v Hayes*, 17 NY3d 46, 52-54 [2011], *cert denied* 565 US , 132 S Ct 844 [2011]). By way of contrast, when the People introduced a statement by a nontestifying declarant as background to explain police actions, it is clear that defendant had opened the door to that evidence through a line of cross-examination (*see Tennessee v Street*, 471 US 409 [1985]; *People v Reid*, 19 NY3d 382 [2012]).

The court properly denied defendant's various mistrial motions, made on the basis of evidentiary issues. In each instance, the court provided a sufficient remedy by striking offending testimony or delivering thorough instructions to the jury.

The court properly discharged an absent juror after waiting

two hours after the scheduled resumption of proceedings. Under the "bright-line" rule of *People v Jeanty* (94 NY2d 507, 515 [2000]), a juror "who is. . .more than two hours late can be conclusively presumed to be unavailable and is subject, in the court's discretion, to discharge" (*id.* at 516). Although the discharged juror arrived 15 minutes after being replaced by an alternate, the court, after interviewing the discharged juror and considering the totality of circumstances, properly adhered to its ruling and declined to reinstate the juror.

We perceive no basis for reducing defendant's sentence, or running it concurrently with his life sentence on another conviction.

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16394-
16395 In re Nabel C., Jr.,

A Child Under Eighteen Years of Age,
etc.,

Amanda R., et al.,
Respondents-Appellants,

Jackie R.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for Amanda R., appellant.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for Nabel C., Sr., appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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

_____

Order of fact-finding, Family Court, New York County (Stewart Weinstein, J.), entered on or about October 21, 2014, which, after a hearing, inter alia, determined that respondent mother and respondent father abused the subject child, unanimously affirmed, without costs.

A preponderance of the evidence supports the determination that the mother and the father abused the then seven-week-old

child by exposing him to the opiate derivatives morphine, heroin and codeine, resulting in a life-threatening condition. Petitioner agency met its prima facie burden by demonstrating that the child's condition was of such a nature that it would ordinarily not occur but for the acts or omissions of his parents or persons legally responsible for the child, and that the mother and the father were caretakers of the child at the time the exposure occurred (*see Matter of Philip M.*, 82 NY2d 238, 243 [1993]; *Matter of Benjamin L.*, 9 AD3d 153, 155 [1st Dept 2004]; Family Ct Act § 1046 [a][ii]). The evidence showed that the child lived with the mother and grandmother, and that the father visited frequently. They were the only individuals responsible for the child's care in the days prior to the opiate overdose. Furthermore, the agency's expert, a forensic toxicologist, opined without contradiction that the precise time of the child's opiate exposure could not be identified, as that would depend on numerous factors, including the amount of opiates the child had been given.

The burden having shifted, neither the mother nor the father rebutted the evidence with a showing that the exposure had to have occurred during a time when they were not with the child or by explaining how the exposure occurred. Thus, the court

correctly assigned blame to the mother, the father and the grandmother, who had been the child's exclusive caregivers during the time period preceding the overdose (*see Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 74 [1st Dept 2012]). As to the father, the court may draw a negative inference from his failure to testify (*see Matter of Jonathan Kevin M. [Anthony K.]*, 110 AD3d 606, 607 [1st Dept 2013]).

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16396 Roseann Cilente, as Trustee of the Alfonso N. Figliolia Family Trust, et al., Plaintiffs-Appellants-Respondents, Index 600313/08

-against-

Phoenix Life Insurance Company, et al., Defendants-Respondents-Appellants,

A.I. Credit Corp., Defendant.

_____

James J. Corbett, P.C., Wantagh (James J. Corbett of counsel), for appellants-respondents.

Dorsey & Whitney, LLP, New York (Christopher G. Karagheuzoff of counsel), for Phoenix Life Insurance Company, respondent-appellant.

Winget, Spadafora & Schwartzberg, LLP, New York (Michael Schwartzberg of counsel), for Winston Nesfield and Nesfield & Associates, respondents-appellants.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 9, 2014, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on their claims alleging violations of Insurance Law § 2123 and § 4226, granted so much of the cross motions of defendants Phoenix Life Insurance Company (Phoenix) and Winston Nesfield and Nesfield & Associates (collectively Nesfield) for summary judgment dismissing plaintiffs' claims alleging fraud and

fraudulent inducement, and denied so much of the cross motions of Nesfield and Phoenix for summary judgment dismissing the Insurance Law § 2123 and § 4226 causes of action, unanimously modified, on the law, to grant the cross motions to the extent of dismissing the Insurance Law § 2123 and § 4226 claims, and otherwise affirmed, with costs to plaintiffs. The Clerk is directed to enter judgment dismissing the complaint in its entirety.

Plaintiff Alfonso N. Figliolia, as part of his estate planning, sought to secure a life insurance policy that would pay his estate taxes. He obtained and placed in his Family Trust a $15 million life insurance policy from Phoenix; Nesfield was his broker. Because of the high amount of the annual premium, Figliolia sought to create a premium financing program, which he ultimately did through defendant A.I. Credit Corp.

The cash value of this policy, however, did not accrue at a sufficient enough pace to keep the policy afloat. One of the consequences of this was that A.I. Credit began to seek additional pledges of collateral to support the premium financing program. After making additional pledges of collateral, Figliolia approached Nesfield and Phoenix in an effort to restructure the policies so he would not have to pledge

additional collateral. These discussions resulted in a reduction in the face amount of the policy and the purchase of a second policy, also financed by A.I. Credit.

While this restructuring worked briefly, the cash value of the second policy again did not accumulate at a sufficient rate to keep the financing plan afloat. The essential problem with both policies was that the interest earned on the cash value did not offset the interest being charged as part of the financing program. Faced with additional collateral calls, Figliolia decided to default and this litigation ensued.

Summary judgment dismissing the fraud-based claims was properly granted. The alleged fraud was based on representations made in documents that were provided to plaintiffs after plaintiffs purchased the initial policy with Phoenix and executed the financing agreement. There is no evidence in the record indicating that the terms of the policy and financing agreement were not disclosed to plaintiffs, including the potential need for additional collateral to support the financing program (*see Orlando v Kukielka*, 40 AD3d 829, 831-832 [2d Dept 2007]).

Dismissal of the Insurance Law claims is also warranted. According to plaintiffs, in preparation of the second policy, Nesfield and Phoenix failed to comply with Insurance Law § 2123

and § 4226 and their attendant regulations (*see* 11 NYCRR 51.1 *et seq.*). The alleged noncompliance arises from the failure of Nesfield and Phoenix to provide the proper Disclosure Statements pertaining to the partial replacement of the first policy with the second, a requirement mandated by statute and regulations. Although the subject statutes provide a private right of action for an aggrieved person in instances where an insurer or broker knowingly violates any provision of the section or regulations (*see e.g. Brenkus v Metropolitan Life Ins. Co.*, 309 AD2d 1260, 1263 [4th Dept 2003]), here, Phoenix and Nesfield have established that their failure to provide this disclosure was inadvertent and not knowing, and plaintiffs have not raised a triable issue concerning their knowledge of the noncompliance with the statutes.

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

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16397 The People of the State of New York, Respondent, Ind. 570277/13 Docket 14326/11

-against-

Timothy Kennedy, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered December 17, 2012, convicting defendant, after a nonjury trial, of attempted criminal mischief in the fourth degree, and sentencing him to a conditional discharge, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. As factfinder, the court was entitled to accept those portions of a witness's testimony it found to be reliable and reject other portions. Moreover, contrary to defendant's assertion, material aspects of this witness's testimony were corroborated by that of a police officer.

Defendant did not preserve his claim that the court provided inadequate remedies for certain violations of the People's disclosure obligations, and we decline to review it in the interest of justice. As an alternative holding, we find that an adverse inference sanction was sufficient to prevent any prejudice under the circumstances (*see generally People v Martinez*, 71 NY2d 937, 940 [1988]). We have considered and rejected defendant's related ineffective assistance of counsel claim.

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16398 Minelli Construction Co., Inc., Index 105989/11
Plaintiff-Appellant,

-against-

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

New York City Transit Authority,
Defendant.

_____

Law Offices of Melvin J. Kalish, PLLC, Mineola (Melvin J. Kalish of counsel), for appellant.

Rich, Intelisano & Katz, LLP, New York (Daniel E. Katz of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about February 18, 2015, which granted defendant WDF's motion for partial summary judgment dismissing that portion of the complaint's first cause of action seeking recovery of lost profits, unanimously affirmed, without costs.

The termination for convenience clause set forth in Article 28 of the parties' subcontract is enforceable, without regard to WDF's good faith, or lack thereof, in invoking it (*see Watermelons Plus, Inc. v New York City Dept. of Educ.*, 76 AD3d 973, 974 [2d Dept 2010]; *Triton Partners v Prudential Sec.*, 301 AD2d 411, 411 [1st Dept 2003]; *Big Apple Car v City of New York*,

204 AD2d 109, 111 [1st Dept 1994]).

The "automatic conversion" language set forth in Articles 26 and 28, providing for conversion of otherwise invalid default terminations into terminations for convenience, is clear on its face and also enforceable (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *see also Crewzers Fire Crew Transp., Inc. v United States*, 111 Fed Cl 148, 156 [2013] [construing substantially identical automatic conversion provision], *affd* 741 F3d 1380 [Fed Cir 2014]).

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 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16399-
16400 The People of the State of New York,
Respondent,

-against-

Abdul Taylor,
Defendant-Appellant.

Ind. 1610/09

_____

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

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

_____

Judgment, Supreme Court, New York County (Juan Merchan, J.), rendered November 20, 2009, as amended February 11 and 24, 2010, convicting defendant, after a jury trial, of attempted murder in the second degree (two counts), assault in the first degree (two counts), attempted assault in the first degree, assault in the second degree (two counts), criminal possession of a weapon in the third degree and criminal mischief in the fourth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 22 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the first-degree assault conviction under count six of the indictment and dismissing that count, and otherwise affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice except to the extent indicated. As an alternative holding, we find, except to the extent indicated, that the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the inference that defendant intended to kill two bouncers who were ejecting him from a club. Defendant repeatedly stabbed one of the bouncers in vital organs, and stabbed the other bouncer in the leg before chasing him with a knife and making a death threat that was credible in context. However, since the injuries to the club manager were clearly accidental, we exercise our interest of justice jurisdiction to vacate the corresponding conviction.

The court properly denied defendant's request for a justification charge, since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support either the objective or subjective aspects (*see People v Goetz*, 68 NY2d 96 [1986]) of that defense (*see People v Watts*, 57 NY2d 299, 301-302 [1982]). There was no reasonable view that

defendant believed, or had reason to believe, that the victims, along with their fellow club employees, were using anything more than ordinary physical force.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16401 The People of the State of New York, Ind. 2797/11
Respondent,

-against-

George Thomas,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Alejandro B. Fernandez of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot 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 2, 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: DECEMBER 15, 2015

CLERK

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

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16402 Tower Insurance Company of New York, Index 150946/13
Plaintiff-Respondent,

-against-

Leading Insurance Group Insurance Company, Ltd.,
Defendant-Appellant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Alexandra R. Kearse of counsel), for appellant.

Carroll McNulty & Kull LLC, New York (Max W. Gershweir of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered January 6, 2015, which, to the extent appealed from, granted plaintiff's motion for summary judgment declaring that its named insureds' coverage as additional insureds under defendant's policy is primary to their coverage under plaintiff's policy with respect to the underlying action, and so declared, and denied defendant's cross motion for summary judgment declaring that it had no duty to defend or indemnify the insureds in that action or, in the alternative, that the parties each had a duty to defend and indemnify in proportion to the limits of their respective policies, unanimously affirmed, with costs.

The lease agreement between plaintiff's named insureds, as landlords, and their ground-floor tenant obligated the tenant to indemnify and hold harmless landlords for any damages arising out of its use of the demised premises or the streets and sidewalks "adjacent thereto," as well as to maintain the sidewalk and curb, keeping it clear at all times, and free from snow and ice. The insurance policy issued by defendant to the tenant provided that the landlords were "also an insured, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you [the tenant]." It is clear from the lease agreement that the use of the sidewalk was included in the scope of the demised premises. Thus, defendant's additional insured endorsement covered claims arising out of a defect in the sidewalk (*see Greater N.Y. Mut. Ins. Co. v Mutual Mar. Off.*, 3 AD3d 44, 47 [1st Dept 2003]; *General Acc. Fire & Life Assur. Corp. v Travelers Ins. Co.*, 162 AD2d 130 [1st Dept 1990]; *J. P. Realty Trust v Public Serv. Mut. Ins. Co.*, 102 AD2d 68 [1st Dept 1984]), *affd* 64 NY2d 945 [1985]).

Even if the lease did not address the sidewalk explicitly, the additional insured endorsement would give the landlords coverage for accidents occurring outside the demised premises, including on abutting public sidewalks (*see ZKZ Assoc. v CNA Ins.*

Co., 89 NY2d 990 [1997]; *see also Frank v Continental Cas. Co.*, 123 AD3d 878 [2d Dept 2014]; *L&B Estates, LLC v Allstate Ins.*, 71 AD3d 834 [2d Dept 2010]).

The motion court correctly found that the coverage provided to the landlords as additional insureds under defendant's policy was primary to the coverage provided to them as named insureds under plaintiff's policy. A comparison of the "Other Insurance" clauses in the two policies shows that plaintiff's policy states that it is excess over another policy providing primary coverage for which the insured has been added as an additional insured, while defendant's policy does not.

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

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

ENTERED: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16403 The People of the State of New York, Ind. 4205/12
Respondent,

-against-

Jesus Diaz,
Defendant-Appellant.

_____

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.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about September 18, 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 15, 2015

CLERK

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

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16404 The People of the State of New York, Ind. 4886/12
Respondent,

-against-

Jose Martinez,
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 (Thomas Farber, J.), rendered on or about October 8, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: DECEMBER 15, 2015

CLERK

Tom, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

16405N Michelle Scuorzo, Index 20812/12E
Plaintiff-Respondent,

-against-

Luqman Safdar, et al.
Defendants,

Big Apple Car, Inc.,
Defendant-Appellant.

_____

Wade Clark Mulcahy, New York (Vincent F. Terrasi of counsel), for appellant.

Albert Buzzetti & Associates, L.L.C., New York (Curtis B. Gilfillan of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered July 10, 2014, which, inter alia, denied the motion of defendant Big Apple Car, Inc. (Big Apple) to change venue from Bronx County to Kings County, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff, a resident of New Jersey, alleges that she was struck by a taxi owned by Big Apple and/or defendant Ahmad and driven by defendant Safdar, when the taxi swerved to avoid an ambulance owned by either defendant Transcare Ambulance Corp. or Citywide Mobile Response Corp., which had its principal office in Bronx County. After plaintiff discontinued her action against

Citywide, which had no connection to the accident, Big Apple promptly moved to change venue to Kings County, where plaintiff had previously commenced an action against the other defendants (*see Scuorzo v Safdar*, 115 AD3d 843 [2d Dept 2014]).

The motion court recognized that "[w]here venue is initially placed on the basis of the principal place of business [or residence] of an improper party, a motion to change venue should be granted after the action is dismissed as against the improper party" (*Halina Yin Fong Chow v Long Is. R.R.*, 202 AD2d 154, 155 [1st Dept 1994]), but denied the motion because it found that Big Apple had failed to demonstrate that Kings County was a proper venue. However, the record contains the pleadings, which establish that defendant Ahmad is a resident of Kings County. Based on the change in circumstances resulting from dismissal of the only party with any connection with Bronx County, Big Apple's

motion for a change of venue should have been granted (*see e.g. Clase v Sidoti*, 20 AD3d 330 [1st Dept 2005]).

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16406 The People of the State of New York, Ind. 1091/07
Respondent,

-against-

Maria Rodriguez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered July 12, 2012, convicting defendant, after a jury trial, of two counts of murder in the second degree, and sentencing her to concurrent terms of 25 years to life, 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 (*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. The apologetic statements counsel made at sentencing about his trial performance do not render a

postconviction motion unnecessary, especially because they are contradicted by statements counsel made in colloquies during the trial.

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 any of counsel's alleged deficiencies, as discussed further in this decision, fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

First, we conclude that defendant was not deprived of effective assistance by counsel's decision not to call a clinical psychologist to testify in support of a duress defense, a decision that counsel made after reviewing the psychologist's report on defendant and the incident (*see generally Harrington v Richter*, 562 US 86 [2011]). Notwithstanding counsel's statements at sentencing, the extensive discussions between the court and counsel at trial reflect that counsel made a sound strategic decision to challenge the reliability of the sole evidence of defendant's guilt, her written statement, rather than to call the

psychologist and defendant to testify that defendant was coerced into committing the murder, which could have opened the door to defendant's admissions to the psychologist about her participation in the killing.

Next, we find that counsel's decision not to call the psychologist to testify at the suppression hearing may have been based on a reasonable tactic of depriving the People of an opportunity for an examination before trial of the psychologist, whom counsel was still considering calling as a trial witness. Defendant has not established that counsel's decision to rest on the record at the suppression hearing was ineffective, since there is no indication that any suppression argument would have had any chance of success (*see e.g. People v Ashby*, 21 AD3d 839 [1st Dept 2005]).

We also conclude that defendant has not established that she was prejudiced by counsel's isolated mistake in eliciting a brief amount of unfavorable testimony from an expert witness (*see People v Blake*, 24 NY3d 78, 81 [2014]), or by counsel's overall manner of trying the case (*see People v Martinez*, 35 AD3d 156, 157 [1st Dept 2006], *lv denied* 8 NY3d 924 [2007]; *People v Malave*, 271 AD2d 204 [1st Dept 2000], *lv denied* 95 NY2d 836 [2000]).

Turning to defendant's arguments other than her ineffective assistance claim, we find no basis for reversal. Since defendant only sought to introduce a third party's statement to the police for the purpose of impeaching the interrogator's credibility at trial, defendant failed to preserve her claim that the statement should have been admitted to show the third party's consciousness of guilt, and she likewise failed to preserve her claim that she was deprived of her constitutional right to present a defense (*see People v Lane*, 7 NY3d 888, 889 [2006]). We decline to review these claims in the interest of justice. Were we to review them, we would find them unavailing. We also find that the court properly exercised its discretion in declining, after a suitable inquiry, to discharge a juror whose unauthorized absence from court amounted to minor misconduct under the circumstances, and did not render him grossly unqualified (*see People v Paulino*, 131 AD3d 65, 71-72 [1st Dept 2015]).

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16407 The Board of Managers of One Strivers Row Condominium, Plaintiff-Respondent, Index 153193/12

-against-

Hafeez Giwa, Defendant-Appellant.

_____

Law Office Of Jesse Hoberman-Kelly, New York (Jesse Hoberman-Kelly of counsel), for appellant.

Lasser Law Group, PLLC, New York (Stephen M. Lasser of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered May 13, 2014, which granted plaintiff's motion to confirm a Special Referee's report on attorneys' fees and late fees and directed that judgment be entered against defendant in the aggregate amount of $42,037.32, unanimously affirmed.

Although defendant paid his outstanding common charges prior to the court's determination of plaintiff's motion for summary judgment, pursuant to the bylaws of the condominium, plaintiff was still entitled to seek late charges and its reasonable attorneys' fees in connection with initiating and prosecuting this case (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491

[1989]; *Frisch v Bellmarc Mgt.*, 190 AD2d 383, 390 [1st Dept 1993]; *see also Matter of Purcell v Jefferson County Dist. Attorney*, 77 AD3d 1328 [4th Dept 2010]). The record demonstrates that defendant had an opportunity to be heard "at a meaningful time and in a meaningful manner" on the issues, and his due process rights were not violated (*Matter of Kigin v State of N.Y. Workers' Compensation Bd.*, 24 NY3d 459, 469 [2014] [internal quotation marks omitted]).

Defendant's payment in full of the outstanding common charges, while plaintiff's summary judgment motion was pending, effectively amounted to an admission that he owed the amounts sought. Thus, while plaintiff's summary judgment motion was denied as moot, it was proper for the court to send the matter to the Special Referee for a determination of attorneys' fees and late charges pursuant to the condominium bylaws.

Defendant's challenge to the amount of attorneys' fees and late fees awarded is not properly before this Court, since it was

not raised until his reply brief (*see Matter of Erdey v City of New York*, 129 AD3d 546 [1st Dept 2015]). In any event, the amount of fees awarded is supported by the record and is not unreasonable.

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16408 In re Wandy T.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about October 8, 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 criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent rather than a person in need of supervision, a disposition that would have provided a less effective and enforceable form of supervision than probation (*see Matter of Amari D.*, 117 AD3d 522 [1st Dept 2014]). Although the underlying offense was a property crime that appellant, who was

in a difficult family situation, committed against his mother, he was in need of probation supervision in light of his violence toward others, admitted drug use, truancy problems, past gang involvement, general misbehavior, and history of running away from home and from residential facilities (*see e.g. Matter of Na'Quana J.*, 50 AD3d 291 [1st Dept 2008]).

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16409-
16410 Shia Saide LaBoeuf, et al., Index 651878/13
Plaintiffs-Respondents,

-against-

Barry Saide,
Defendant-Appellant.

_____

Samuel E. Kramer, New York, for appellant.

Gage Spencer & Fleming LLP, New York (William B. Fleming of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.) entered April 16, 2014, awarding plaintiffs the aggregate amount of $997,279.24, pursuant to an order, same court and Justice, entered February 28, 2014, which granted plaintiffs' motion for summary judgment in lieu of complaint, unanimously affirmed. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs loaned defendant $800,000 in August 2009, and the loan was memorialized by a promissory note. It is undisputed that defendant never paid on the note, and so, as permitted under CPLR 3213, plaintiffs commenced this action with a summons and notice of motion for summary judgment in lieu of complaint.

Supreme Court properly granted the motion, as there is no basis to conclude that the promissory note was anything other than an instrument for the payment of money only (*see Warburg, Pincus Equity Partners, L.P. v O'Neill*, 11 AD3d 327 [1st Dept 2004]). The existence of security for the loan does not alter the essential character of the note *(see Solanki v Pandya*, 269 AD2d 189 [1st Dept 2000]).

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

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16411 In re Suzanne Bradbeer, et al., 153451/13
Petitioners-Respondents,

-against-

Eric T. Schneiderman, Attorney General
of the State of New York,
Respondent,

Fifth on the Park Condo,
Respondent-Appellant.

Rosenberg Feldman Smith, LLP, New York (Richard B. Feldman of counsel), for appellant.

Tane Waterman & Wurtzel, P.C., New York (Stewart E. Wurtzel of counsel), for respondents.

Judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered July 10, 2014, vacating respondent Attorney General's determination, dated December 17, 2012, which denied the petition for the return of a down payment on a condominium, and awarding petitioners the return of their down payment, unanimously affirmed, without costs.

The court correctly found that the petition was not time-barred since it was filed within four months after the issuance of the determination by which petitioners were aggrieved (*see Matter of Cowan v Kelly*, 89 AD3d 572 [1st Dept 2011]).

The court correctly found that the determination was

arbitrary and capricious. An amendment to the offering plan contained changes to the plan that were materially adverse to the purchasers, entitling the purchasers to rescission of the purchase agreement and the return of their down payment (*see* 13 NYCRR 20.5[a][5]). Among these changes was the addition of legal and equitable remedies, including specific performance, not previously available to the sponsor (respondent Fifth on the Park Condo), in the event of a default by a purchaser. Contrary to Fifth on the Park Condo's contention, these remedies were applicable to petitioners.

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16412 The People of the State of New York, Ind. 30114/13
Respondent,

-against-

Eddie Shellman
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Anthony J. Ferrara, J.), entered on or about August 20, 2013, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the guidelines, or did not warrant a downward departure given the seriousness of the

underlying conduct, in which defendant abused his position of authority by repeatedly engaging in sexual activity with his 13-year-old dance student (*see e.g People v Brown*, 122 AD3d 536 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16413 The People of the State of New York, Ind. 1829/13
Respondent,

-against-

Daniel Ortiz,
Defendant-Appellant.

_____

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.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered on or about August 1, 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 15, 2015

CLERK

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

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16414-
16415 In re Nyheem E., and Others,

Children Under Eighteen Years of Age, etc.,

Jamila G.,
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.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the children Nyheem E. and Recco D.

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

_____

Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about July 10, 2014, insofar as it brings up for review a fact-finding order, same court and Judge, entered on or about January 16, 2014, which, to the extent appealed from as limited by the briefs, found that respondent mother had severely abused the youngest subject child, had derivatively abused the other subject children, and had neglected the three subject children by misusing drugs, unanimously

affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Petitioner agency established by clear and convincing evidence that the mother had severely abused the youngest subject child (*see* Family Ct Act § 1051[e]). In particular, there was clear and convincing evidence that the child was abused as a result of the mother's reckless or intentional acts evincing a depraved indifference to the child's life, and resulting in serious physical injuries to the child (*see* Social Services Law § 384-b[8][a][i]). The agency introduced expert medical testimony that the seven-week-old child presented at a hospital emergency room with multiple fractures to his ribs, left leg and skull, and retinal hemorrhages to both of his eyes, and that his injuries were the result of nonaccidental trauma that would ordinarily not be sustained or exist except by reason of the acts or omissions of the mother or the child's father (*see Matter of Sara B.*, 41 AD3d 170, 171 [1st Dept 2007]). The agency's evidence also showed that the mother failed to obtain prompt medical attention for the child, even though she observed that the child was in pain and was twitching (*see Matter of Amirah L.* [*Candice J.*]), 118 AD3d 792, 793-794 [2d Dept 2014]).

The agency established severe abuse by showing that the child's severe injuries were not accidental and that mother and the father were the only caretakers that had access to the child when the injuries were sustained (*see Matter of Dashawn W. [Antoine N.]*, 21 NY3d 36 [2013]; *Matter of Kaylene H.*, AD3d, 2015 NY Slip Op 08132 [1st Dept 2015]). It was not required to establish whether the mother or the father actually inflicted the injuries, or whether they did so together (*see Matter of Matthew O.* [*Kenneth O.*], 103 AD3d 67, 75-76 [1st Dept 2012]). Further, the mother's denial of fault and attempt to blame her three-year-old child for the injuries was insufficient to rebut the agency's prima facie evidence of severe abuse (*see* Family Ct Act § 1046[a][ii]; *Matter of Matthew O.*, 103 AD3d at 76; *Matter of Vivienne Bobbi-Hadiya S.* [*Makena Asanta Malika McK.*], 126 AD3d 545, 546 [1st Dept 2015], *lv denied* 25 NY3d 1064 [2015]).

Given the evidence of severe abuse inflicted by the mother upon the youngest child, the finding of derivative abuse as to the two older children was supported by a preponderance of the evidence, even absent direct evidence that the mother had actually abused them (*see Matter of Kaiyeem C.* [*Ndaka C.*], 126 AD3d 528, 529 [1st Dept 2015]).

The agency proved by a preponderance of the evidence that

the mother had neglected the subject children by misusing marijuana (*see* Family Ct Act § 1012[f][i][B]). The agency caseworker testified that the mother told her that she smoked marijuana on weekends and holidays, and the mother herself testified that she would use the drug in the home while the children were asleep (*see Matter of Christina G.* [*Vladimir G.*], 100 AD3d 454, 454-455 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). The mother failed to establish that she was voluntarily and regularly participating in a drug rehabilitative program, and therefore failed to rebut the agency's prima evidence of neglect (*see* Family Ct Act § 1046[a][iii]; *Matter of Joel S.* [*Charles C.*], 110 AD3d 442, 442 [1st Dept 2013]).

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16416 The People of the State of New York, Ind. 3130/12
Respondent,

-against-

Christopher McKinley,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered September 11, 2013, convicting defendant, upon his plea of guilty, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of five years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The police stopped defendant's van for traffic violations, smelled marijuana, saw a bag of marijuana in the van, and found two firearms during lawful searches of the van under the automobile exception (*see People v Hurtado*, 113 AD3d 411 [1st Dept 2014], *lv denied* 22 NY3d 1199 [2014]). Because the second search, conducted at the precinct, was "reasonably close in time

and place to the point of arrest, we conclude that there was no requirement that the police further delay the search to obtain a warrant" (*People v Blasich*, 73 NY2d 673, 681 [1989]; *see also People v Dixon*, 107 AD3d 530 [1st Dept 2013], *lv denied* 21 NY3d 1041 [2013]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16418- Index 350238/00
16418A-
16419B-
16419C-
16419D Henry F. Owsley, III,
Plaintiff-Respondent,

-against-

Danica Cordell-Reeh,
Defendant-Appellant.

_____

Thomas D. Shanahan, P.C., New York (Thomas D. Shanahan of counsel), for appellant.

The Law Offices of Philip A. Wellner, PLLC, New York (Philip A. Wellner of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Lori S. Sattler, J.), entered December 12, 2012, September 12, 2013, and on or about June 12, 2014, which, to the extent appealed from as limited by the briefs, denied the defendant mother a hearing on the issue of alienation, denied her discovery demands, suspended plaintiff father's child support payments, and denied her request to hold the father in contempt, unanimously affirmed, without costs. Order, same court and Justice, entered December 12, 2014, which, to the extent appealed from as limited by the briefs, denied the mother's motion to hold the father in contempt and dismiss his fraud claim, unanimously modified, on the law, to the

extent of dismissing the fraud claim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about June 17, 2013, which denied the mother's motion to reargue that part of the court's December 10, 2012 order granting the father's motion to suspend his child support to the extent of directing a hearing on the issue, and denying the mother's discovery demand, unanimously dismissed, without costs, as taken from a nonappealable paper.

The court, in its December 12, 2012 order, properly denied the mother's motion seeking a change in custody to grant her sole decision-making regarding the children's medical decisions and after school and related activities without conducting an evidentiary hearing on the issue of father's "alienation" of her from such decisions and activities involving the children. In any event, it is conceded that issues of custody are now moot.

The court, in its order entered on or about June 12, 2014 largely confirmed the Special Referee's report, dated January 29, 2014, as to modification of child support.

The court properly affirmed the Referee's conclusion that the father established a change in circumstances warranting modification of child support. Where a child was living with one parent but subsequently chooses to reside with the other, there

has been a "substantial change" in circumstances (*see Zelnick v Zelnik*, 294 AD2d 250 [1st Dept 2002]; *see also Matter of Steven J.K. v Leah T.K.*, 46 AD3d 421, 422 [1st Dept 2007], *lv denied* 11 NY3d 703 [2008]).

In its orders entered on September 12, 2013, and December 12, 2014, the court properly found that the father did not violate earlier orders entered in 2007 cautioning the father against denigrating the mother in front of the children, or to mental health professionals by emails sent in 2011 (*see Fabrikant v Fabrikant*, 77 AD3d 594, 594-595 [1st Dept 2010]). Various statements the father made to educational and healthcare professionals regarding the mother's mental health were made in the course of the son's medical treatment and do not appear to denigrate the mother. The court, in the order entered on December 12, 2014, properly found that the father did not violate a May 7, 2003 stipulation between the parties, by the filing of the fraud action, as that stipulation, which limits the parties' public dissemination of facts underlying the lawsuit, provides an exception for in-court filings.

The court, however, in its order entered December 12, 2014, should have granted the mother's motion to dismiss the father's fraud claim, seeking recovery of allegedly fraudulently obtained

payments for add-on child care expenses, as barred by collateral estoppel. The father had a full and fair opportunity to raise the issue as early as 2012, in the course of defending his self-help withholding of child support (*Buechel v Bain*, 97 NY2d 295, 303-304 [2001], *cert denied* 535 US 1096 [2002]; *see also Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481 [1979]).

The issue of the allegedly fraudulently obtained payments was also discussed at the hearing before the Referee in 2014, but the father admitted that he had not pleaded fraud with particularity. He notes that he was proceeding pro se by the time of the January 2014 hearing, and the Referee did not allow him to introduce evidence regarding the overpayments; however, he acknowledged that he learned of the fraud during discovery as early as July 2012, when he was represented by counsel. Thus, he had a full and fair opportunity to raise the issue. Moreover, both the Referee and the motion court acknowledged that recoupment of such overpayments of add-on expenses was denied in the matrimonial action only in the absence of evidence that the mother "actively concealed" events that would have triggered cessation of the payments (*see Coull v Rottman*, 35 AD3d 198, 201 [1st Dept 2006], *appeal dismissed* 8 NY3d 903 [2007]; *see also Katz v Katz*, 55 AD3d 680, 683 [2d Dept 2008]).

Finally, to the extent that the mother seeks reversal of the order entered on or about June 17, 2013 which denied her motion to reargue certain parts of the court's December 12, 2012 order, her appeal is dismissed, as no appeal lies from denial of a motion to reargue (*Espinal v City of New York*, 107 AD3d 411, 412 [1st Dept 2013]).

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 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16419 The People of the State of New York, Ind. 135/13
Respondent,

-against-

Jose Torres,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered on or about March 12, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16420 The People of the State of New York, Ind. 4592/10
Respondent,

-against-

James Umstead,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jeremy R. Girton and Mark Zeno of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered December 20, 2012, convicting defendant of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of six years, unanimously modified, on the law and in the interest of justice, to the extent of vacating the second violent felony offender adjudication and remanding for resentencing, and otherwise affirmed.

The court properly denied defendant's suppression motion. Defendant's claim that a showup should have been suppressed as fruit of an unlawful seizure is unpreserved because counsel made no suppression arguments, and because the record does not

establish that the court "expressly decided" the same issue raised on appeal "in re[s]ponse to a protest by a party" (CPL 470.05[2]; *see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *People v Colon*, 46 AD3d 260, 263-64 [1st Dept 2007]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that the radioed description of the assailant was sufficiently detailed, given the very close temporal and spatial factors (*see e.g. People v Rampersant*, 272 AD2d 202 [2000], *lv denied* 95 NY2d 870 [2000]), so as to provide reasonable suspicion warranting an investigatory detention of defendant for prompt identification by the victim.

The court properly declined to submit attempted third-degree robbery as a lesser included offense of attempted second-degree robbery under Penal Law § 160.10(2)(a), since there was no reasonable view of the evidence, viewed most favorably to defendant, that the victim did not sustain a physical injury (*see People v Diggs*, 60 AD3d 459, 460 [1st Dept 2009], *lv denied* 12 NY3d 914 [2009]. The victim's integrated and unimpeached testimony (*see People v Negron*, 91 NY2d 788, 792-793 [1998]) established that defendant repeatedly punched him in the face, causing a bloody cut inside his mouth and substantial pain that made eating difficult, and that lasted for several days, after

which the victim visited a doctor. There is no evidence to support any inference that the victim may have exaggerated his injuries.

Defendant was improperly adjudicated a second violent felony offender, because the New Jersey statutes under which he was previously convicted were broader than the applicable New York statutes, and the lack of equivalency is plain without the need for examination of accusatory instruments. On remand, the People may allege a different prior felony conviction, if there is one, as a predicate felony.

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16421-
16422 William J. Howard, Index 104923/09
590471/11
590621/11
150641/12
Plaintiff-Respondent-Appellant,

-against-

Turner Construction Company, et al.,
Defendants-Appellants-Respondents.

- - - - -

Turner Construction Company, et al.,
Third-Party Plaintiffs-Respondents,

-against-

High Rise Fire Protection Corporation,
Third-Party Defendant-Appellant-Respondent.

- - - - -

[And Other Third-Party Actions]

_____

Thomas Torto, New York, for Turner Construction Company, A1 229 West 43rd Street Property Owner, LLC and CB Richard Ellis, Inc., appellants-respondents.

Haworth Coleman & Gerstman, LLC, New York (Richard Barber of counsel), for High Rise Fire Protection Corporation, appellant-respondent.

The Feld Law Firm, New York (John G. Korman and David L. Feld of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered December 13, 2013, which granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against defendants Turner Construction Company (Turner) and AI 229 West 43rd Street Property Owner, LLC (AI 229) (collectively, defendants),

unanimously affirmed, without costs. Order, same court and Justice, entered December 13, 2013, which, to the extent appealed from, denied so much of defendants' motion for summary judgment as sought to dismiss the Labor Law §§ 240(1) and 241(6) claims and third-party defendant High Rise Fire Protection Corporation's counterclaim for common-law indemnification as against them, and granted so much of the motion as sought to dismiss the Labor Law § 200 and common-law negligence claims as against them, unanimously modified, on the law, to grant defendants' motion as to High Rise's counterclaim, and otherwise affirmed, without costs.

Plaintiff's deposition testimony establishes that a proximate cause of his injury was his inability to open properly the 12- to 14-foot A-frame ladder from which he fell, because a pile of sheetrock was being stored on the floor where he was working (*see Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 588 [1st Dept 2013]). Thus, contrary to defendants' contention, plaintiff was not the sole proximate cause of his accident, and any negligence on his part in leaning an unopened A-frame ladder against the wall is not a defense to his Labor Law § 240(1) claim (*Torres v Monroe Coll.*, 12 AD3d 261 [1st Dept 2004]). Nor does it avail defendants that the ladder was not defective, since it is undisputed that the ladder was "unsecured" (*see e.g. McCarthy v Turner Constr., Inc.*, 52 AD3d 333 [1st Dept 2008]).

In view of the foregoing, plaintiff's Labor Law § 241(6) claim is academic (*Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617 [1st Dept 2014]).

Third-party defendant High Rise is not aggrieved by the dismissal of plaintiff's Labor Law § 200 and common-law negligence claims (*see* CPLR 5511).

Plaintiff's arguments in support of reinstating his Labor Law § 200 and common-law negligence claims are unpreserved for appellate review, since he failed to oppose the part of defendants' motion that sought summary dismissal of those claims (*see Lally v New York City Health & Hosps. Corp.*, 277 AD2d 9, 10 [1st Dept 2000], *appeal dismissed* 96 NY2d 896 [2001]). In any event, dismissal is warranted, since plaintiff's injury was caused by the manner and means of his work, including the equipment he used, and plaintiff was supervised solely by his employer's foreman. The daily presence of one of Turner's superintendents exercising "general supervisory authority at the work site" is insufficient to warrant the imposition of liability under Labor Law § 200 on Turner (*Vaneer v 993 Intervale Ave. Hous. Dev. Fund Corp.*, 5 AD3d 161, 163 [1st Dept 2004]).

High Rise's counterclaim for common-law indemnification must be dismissed because, as indicated by the dismissal of plaintiff's Labor Law § 200 and common-law claims, there is no evidence that defendants

were negligent or exercised actual supervision or control over the injury-producing work (*Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16423 The People of the State of New York, Ind. 3695/10
Respondent,

-against-

Christopher Daniels,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (William McGuire, J. at dismissal motion; Ralph Fabrizio, J. at jury trial and sentencing), rendered June 20, 2013, convicting defendant of assault in the first degree, and sentencing him to a term of 15 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, 348-349 [2007]). Defendant inflicted severe stab wounds which, among other things, penetrated the victim's lung and caused a dangerous leakage of air. There was nothing speculative about the People's medical expert's opinion that these injuries created a substantial risk of death. Accordingly,

the element of serious physical injury was satisfied (*see* Penal Law § 10.00[10]; *People v Rodriguez*, 2 AD3d 284, 285 [1st Dept 2003], *lv denied* 2 NY3d 745 [2004]; *People v Gordon*, 257 AD2d 533 [1st Dept 1999], *lv denied* 93 NY2d 899 [1999]).

The court properly declined to submit third-degree assault as a lesser included offense. There was no reasonable view of the evidence, viewed most favorably to defendant, that he only struck the victim with his fists, while the stab wounds were inflicted by an unidentified man at the scene. The victim's integrated and unimpeached testimony (*see People v Negron*, 91 NY2d 788, 792-793 [1998]) was that the unidentified man stood 10 to 15 feet away during the attack, and never participated.

The court properly denied defendant's motion to dismiss the indictment, alleging denial of his right to testify before the grand jury. The record establishes that the People afforded defendant a reasonable opportunity to testify by, among other things, repeatedly adjourning the grand jury presentation over a period of several weeks in order to accommodate him (*see e.g. People v Watkins*, 40 AD3d 290, 290-91 [1st Dept 2007], *lv denied* 9 NY3d 870 [2007]; *People v Brown*, 32 AD3d 737 [1st Dept 2006], *lv denied* 8 NY3d 844 [2007]).

The court properly exercised its discretion in receiving evidence that approximately a month before the charged crime there was an

altercation involving the victim, the victim's cousin, defendant and other persons, in which a person other than defendant shot the victim's cousin. This evidence helped to explain why defendant suddenly attacked the victim a month later, and bears on the victim's ability to identity defendant as his attacker as well. Accordingly, this evidence "was relevant for . . . purpose[s] other than defendant's criminal propensity" (*People v Leeson*, 12 NY3d 823, 826-27 [2009]), and any prejudice was minimized by the court's thorough instructions, both during the testimony of the complaining witness and in the court's charge to the jury.

At sentencing, defendant was not deprived of effective assistance of counsel by the position counsel took on defendant's procedurally defective and patently meritless pro se motion. We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16424 The People of the State of New York, Ind. 4943/12
Respondent,

-against-

Nicola Authers,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered May 22, 2014, convicting defendant, after a nonjury trial, of robbery in the third degree, and sentencing her to a term of five years' probation, 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, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supports the conclusion that when defendant used force against a store security guard, her intent was, at least in part, to overcome the guard's resistance to defendant's retention of stolen property (*see People v Gordon*, 23 NY3d 643, 649-651 [2014]). While still in possession of stolen merchandise, defendant threatened to throw hot coffee at the guard if

she did not get out of the way. The record does not support defendant's claim that she was surrendering the stolen goods and merely trying to escape; instead, it supports a reasonable inference that her intent, in using force, was to make her escape with at least some of the merchandise.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16425-
16426 In re Justin W.,

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

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for presentment agency.

_____

Orders of disposition, Family Court, Bronx County (Peter F. Passidomo, J.), entered September 17, 2013, which adjudicated appellant a juvenile delinquent upon fact-finding determinations that he committed acts that, if committed by an adult, would constitute two counts of attempted robbery in the second degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's findings were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence

established that appellant took part in two attempts to rob the victim. Appellant's participation included, among other things, going through the victim's pockets in each incident.

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

ENTERED: DECEMBER 15, 2015

CLERK

Friedman, J.P., Andrias, Gische, Kapnick, JJ.

16427N Lori A. Bores, Index 156545/13
Plaintiff-Appellant,

-against-

William G. Bores,
Defendant-Respondent.

_____

Andrew C. Risoli, Eastchester, for appellant.

Nicholas J. Ferrar, Garden City, for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered on or about May 22, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion (1) to be appointed as a temporary receiver of the marital property, (2) for a money judgment against plaintiff in the amount of $6,401.82 for unreimbursed medical expenses, and (3) for legal fees in the amount of $3,500; and denied plaintiff's cross motion for downward modification of her child support obligation, unanimously affirmed, without costs.

Plaintiff's argument that the motion court improperly appointed defendant as a receiver to effectuate a sale of the marital residence has been rendered academic by defendant's unrefuted claim that the residence was sold during the pendency of this appeal (*see Matter of Huntington Hebrew Congregation of Huntington v Tanenbaum*, 62 AD3d 704, 705 [2d Dept 2009], *lv dismissed in part, denied in part* 13 NY3d 854

[2009]). In any event, the appointment was proper, given plaintiff's obstruction and delaying tactics (*Stern v Stern*, 282 AD2d 667, 668 [2d Dept 2001]), and given the "acrimonious relationship between the parties" (*Lutz v Goldstone*, 42 AD3d 561, 563 [2d Dept 2007]).

The motion court properly awarded $6,401.82 to defendant for the unreimbursed medical expenses of the parties' infant child. The parties' judgment of divorce specifically provided that plaintiff would contribute 52.5% of the unreimbursed medical expenses, and she failed to do so. She also failed to dispute the amount owed.

Plaintiff failed to show a substantial change in circumstances to warrant a downward modification of her child support obligation (Domestic Relations Law § 236B[9][b][2][i]; *Matter of Parascandola v Aviles*, 59 AD3d 449, 450 [2d Dept 2009]). Plaintiff's monthly income had actually increased from the time of the initial child support determination, and she failed to show that her overall claimed expenses had significantly changed from that time. We decline to consider her challenges to the Referee's initial child support recommendation, since she never appealed from the order confirming the Referee's report, nor did she appeal from the judgment of divorce, which incorporated the order (*see Angel v O'Neill*, 114 AD3d 486, 486 [1st Dept 2014], *lv dismissed in part, denied in part* 24 NY3d 933 [2014]).

The motion court's award of counsel fees to defendant in the amount of $3,500 was reasonable and a provident exercise of its discretion (*see* Domestic Relations Law § 238; *Roiphe v Roiphe*, 98 AD2d 676, 676 [1st Dept 1983]), particularly given the validity of defendant's enforcement motion and plaintiff's failure to offer, in most instances, any valid defenses to defendant's multiple claims of nonpayment.

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 15, 2015

CLERK