SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**FEBRUARY 9, 2016**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

15984N Gregg Dietrich, Index 305598/14
Plaintiff-Appellant,

-against-

Nicole Dietrich,
Defendant-Respondent.

_____

Law Office of Raunak Kothari, New York (Raunak Kothari of counsel), for appellant.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Bernard E. Clair of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered May 4, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion to disqualify plaintiff's attorney, and denied plaintiff's motion for unsupervised visitation and modification of the visitation schedule and to enjoin defendant from smoking inside her apartment, unanimously modified, on the law, to deny defendant's motion to disqualify plaintiff's attorney, and otherwise affirmed, without costs.

In 2014, plaintiff husband retained Aronson, Mayefsky & Sloan, LLP (AMS) as his attorneys in this action. In February 2015, he retained Preston Stutman & Partners, P.C. (PSP) to replace AMS. In March 2015, he retained attorney Raunak Kothari to replace PSP. Attorneys Bernard Clair and Steven A. Leshnower of Cohen Clair Lans Greifer & Thorpe LLP (Cohen Clair), retained on January 22, 2014, have been defendant wife's only counsel in this action.

Kothari worked at Cohen Clair's predecessor firm from 2008 to 2009 and is presently cocounsel with Deborah Lans of Cohen Clair on another, unrelated, pending matter. Lans and Leshnower have abutting offices at Cohen Clair and share the same assistant, who works on both matters. Kothari does not have his own office space suitable for client and other meetings. While the husband executed a waiver of conflict of interest in connection with Kothari's representation of him while working on another matter as cocounsel with Cohen Clair, the wife did not.

Because disqualification can affect a party's federal and state constitutional rights to counsel of his or her own choosing, the burden is on the party seeking disqualification to show that it is warranted (*Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469 [1st Dept 2013]). The court must

carefully scrutinize such requests, balancing the right to counsel of one's choice "against a potential client's right to have confidential disclosures made to a prospective attorney subject to the protections afforded by an attorney's fiduciary obligation to keep confidential information secret (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.18)" (*Mayers v Stone Castle Partners, LLC*, 126 AD3d 1, 6 [1st Dept 2015]; *see also Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131, 132 [1996]).

Applying these principles, the wife did not meet her "heavy burden" of showing that disqualification is warranted, and Supreme Court improvidently exercised its discretion when it granted her motion to disqualify Kothari (*see Mayers v Stone Castle Partners, LLC*, 126 AD3d at 5).

Kothari has never represented or consulted with the wife. His status as cocounsel on an unrelated matter with the firm of attorneys that represents the wife while representing the husband in this action does not violate any ethical or disciplinary rule. Rule 1.7 of the Rules of Professional Conduct (22 NYCRR 1200.00) is not violated, because Kothari is not concurrently representing anyone adverse to the interests of his client, the husband, who executed a conflict waiver. There is no risk that Kothari will

be representing different interests and no risk that his professional judgment will be adversely affected by his own interests.

While Rule 1.10 prohibits lawyers associated in a firm from taking on representation when any lawyer in the firm practicing alone would be prohibited from doing so, to impute such a conflict of interest to Kothari by virtue of his being cocounsel on one unrelated matter with the firm of attorneys representing the wife would be too broad a reading of the rule. It would mean that attorneys from different firms could never work together -- even on a single case-- without having the conflicts of interest of each firm imputed to the other; it would impair clients' ability to retain the lawyers of their choice. Moreover, Kothari's relationship with the wife's attorneys was "non-regular," and not the "close, regular and personal" type of relationship that could become an association for purposes of imputing conflicts of interest under Rule 1.10 (*see D.B. v M.B.*, 2013 NY Slip Op 50502[U], *7 [Sup Ct, Westchester County 2013] [internal quotation marks omitted]; *compare People v Lynch*, 104 AD3d 1062 [3d Dept 2013] [in firm of fewer than 10 attorneys, one attorney's status as of counsel extends to the other attorneys any conflict that may exist]).

Nor is there an appearance of impropriety sufficient to warrant disqualification. The wife has not shown that there is a reasonable probability that her confidential information will be disclosed to Kothari during the course of this litigation. Furthermore, the wife's concerns can be easily addressed. Her attorneys could ensure that she and Kothari are never scheduled to be in Cohen Clair's offices at the same time and could create an appropriate wall to ensure that her confidential information is not leaked. Her attorneys could also discuss these concerns with the office assistant who works on this matter and the matter in which Kothari serves as cocounsel to ensure that no confidences are breached, or they could prohibit the assistant from working on both cases.

Supreme Court had sufficient information to decide the husband's motion for expanded and unsupervised visitation without a hearing (*see Matter of Myles M. v Pei-Fong K.*, 93 AD3d 474 [1st Dept 2012]). The court properly found that the totality of the circumstances did not warrant modifying the temporary parental access schedule (*see Friederwitzer v Friederwitzer*, 55 NY2d 89, 96 [1982]). The court's determination that visitation should continue to be supervised is reasonable, given the husband's history of substance abuse and his recent positive drug test

results, and in light of the parental schedules set forth in the parties' stipulations.

In view of the wife's agreement to refrain from smoking in any room of her residence in which the child is present, the court properly declined to direct the wife not to smoke inside the residence.

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

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

16057 Kyreese L. Franklin, Index 20308/12E
Plaintiff-Appellant,

-against-

Carmen Rosa Gareyua, et al.,
Defendants-Respondents.

_____

McMahon & McCarthy, Bronx (Daniel C. Murphy of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 17, 2014, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing plaintiff's claim that he suffered a serious injury to his left shoulder within the meaning of Insurance Law § 5102(d), affirmed, without costs.

Plaintiff's appellate brief does not challenge Supreme Court's determination that defendants made a prima facie showing that plaintiff did not suffer a serious injury to his left shoulder as a result of the motor vehicle accident at issue. Defendants submitted the affirmed reports of a radiologist and orthopedic surgeon, who opined that the conditions present in his left shoulder were degenerative in nature and unrelated to any

trauma (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]). Defendants also submitted plaintiff's own medical records, which found arthrosis and no traumatic injury (*id.*). Specifically, Jeffrey N. Lang, M.D., opined in a radiological report to plaintiff's treating orthopedic surgeon that the postaccident X ray of plaintiff's left shoulder showed "no evidence of a fracture or other focal osseous abnormality" nor any evidence of "dislocation." In addition, an MRI report to plaintiff's treating orthopedic surgeon by Jack Lyons, M.D., opined that the postaccident MRI of the left shoulder, while it revealed "mild AC joint arthrosis and malalignment of the AC joint" and mild bursitis, showed "no evidence of fracture, dislocation, or bone marrow abnormalities to be suspicious for bone contusions, stress fractures, or acute trabecular microfractures." The plain import of the reports by Dr. Lang and Dr. Lyons — both of which, to reiterate, were prepared at the request of plaintiff's treating orthopedic surgeon and are included within his own medical records — is that the X ray and MRI of his left shoulder showed no evidence of traumatic injury but only of degenerative conditions such as arthrosis and bursitis.

In opposition, plaintiff failed to raise a triable issue of

fact as to causation. His treating orthopedist, Louis C. Rose, M.D., did not refute or address the findings of preexisting degeneration and lack of traumatic injury, set forth in the reports by Dr. Lang and Dr. Lyons contained in plaintiff's own medical records (as described above), nor did Dr. Rose explain why degeneration was not the cause of the left shoulder injury (*see Alvarez*, 120 AD3d at 1044; *Paduani v Rodriguez*, 101 AD3d 470, 471 [1st Dept 2012]). Given that Dr. Lang and Dr. Lyons plainly reported that no evidence of traumatic injury was found in the X ray and MRI of the left shoulder, it is immaterial that their reports did not use the word "preexisting" to describe the degenerative conditions that were detected.

The dissent, taking the position that an issue of fact exists as to whether the accident caused plaintiff's shoulder injury, does not deal with the aforementioned opinions of Dr. Lang and Dr. Lyons in plaintiff's own medical records. It appears to be the dissent's view that the support in plaintiff's medical records for the shoulder injury having a degenerative origin are of no moment because plaintiff's medical expert, Dr. Louis C. Rose, in his affirmation prepared for this litigation, offered a "diagnosis [that] . . . contrasts significantly with the one proffered by defendants' experts." However, the dissent

offers no support for its view that there is a "factual disagreement" between the defense experts and plaintiff's expert (Dr. Rose) on the diagnosis of the shoulder injury, as opposed to its etiology. Specifically, the dissent simply assumes that the defense experts' diagnosis of osteoarthritis of the AC joint and chronic impingement syndrome were inconsistent with the presence of tears to the labrum and rotator cuff, which was Dr. Rose's diagnosis. Nothing in the record supports the assumption that the conditions diagnosed by the defense experts do not result in tears to the labrum and rotator cuff.

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

All concur except Gische and Kapnick, JJ. who dissent in a memorandum by Gische, J. as follows:

GISCHE, J. (dissenting)

I agree with the majority that it was incumbent upon plaintiff to address the issue of causation in opposition to defendants' motion. However, I dissent with respect to the majority's conclusion that plaintiff did not provide sufficient evidence to raise a question of fact as to whether the injuries were the product of a degenerative condition or causally related to the accident.

Plaintiff alleged injuries to his left shoulder following a rear-end collision in which defendants' automobile struck his vehicle while he was stopped at a red light. A day after the accident, plaintiff sought treatment with an orthopedic surgeon, Dr. Louis C. Rose, to whom he complained of shoulder, neck, and back pain. During his initial evaluation, in addition to finding range of motion limitations in plaintiff's left shoulder, Dr. Rose also noted tenderness of the AC joint and a rotator cuff insertion with impingement. Plaintiff informed Dr. Rose that he had no previous orthopedic injuries and had been active before the accident.

When plaintiff's symptoms worsened, Dr. Rose ordered an MRI, which revealed malalignment of the AC joint with impingement and

tendon bursitis. After reviewing the results of the MRI, Dr. Rose recommended that plaintiff undergo arthroscopic surgery. During the procedure performed by Dr. Rose, he observed and took intraoperative photos showing an internal derangement of the left shoulder with a partial tear of the glenoid labrum, a tear of the rotator cuff, and hypertrophic synovium with acromioplasty. Based upon his treatment of the plaintiff over a two-year period, commencing immediately after the accident, his own independent review of the MRI results, the intraoperative findings that he observed firsthand, and unimproved range of motion, Dr. Rose concluded, with a reasonable degree of medical certainty, that the left shoulder injuries were causally related to the rear-end impact of the car accident.

In the first instance, the diagnosis rendered by plaintiff's expert contrasts significantly with the one proffered by defendants' experts. While defendants' medical professionals diagnosed osteoarthritis of the AC joint and opined that the surgical findings and symptomatology were consistent with chronic impingement syndrome, Dr. Rose diagnosed tears to the labrum and rotator cuff. The parties' factual disagreement on the correct diagnosis of plaintiff's left shoulder condition necessarily

supports the varying opinions regarding causation and underscores that the issue cannot be resolved by summary adjudication. By ascribing the injuries to a different, yet equally plausible explanation (i.e., the accident), plaintiff created a triable issue of fact as to whether the accident caused a serious injury to his left shoulder (*Camacho v Espinoza*, 94 AD3d 674, 674 [1st Dept 2012]; *Caines v Diakite*, 105 AD3d 404, 404 [1st Dept 2013]). The majority posits that the defense experts' diagnoses of a degenerative condition may not be inconsistent with plaintiff's expert's findings of tears to the labrum and rotator cuff. Given defendants' experts' complete failure to reference or diagnose any tears, this conclusion is speculative.

In addition, plaintiff submitted objective medical evidence demonstrating that the onset of symptoms and range of motion limitations only occurred immediately after the accident, and have since not abated, which generally supports his expert's opinion that the accident caused the injuries (*Eteng v Dajos Transp.*, 89 AD3d 506, 507-508 [1st Dept 2011]). Contrary to the majority's view, plaintiff did not have to employ any specific language to rebut defendants' experts' findings that the injuries were preexisting and degenerative in nature in order to create an

issue of fact (*Linton v Nawaz*, 62 AD3d 434, 443 [1st Dept 2009] *aff'd* 14 NY3d 821 [2010]; *Grant v United Pavers Co. Inc.*, 91 AD3d 499, 500 [1st Dept 2012]). Given the substantial nature of the proof proffered by Dr. Rose, he was not required, as the majority suggests, to reconcile his conclusion with findings reached by two of plaintiff's radiologists who detected no signs of acute traumatic injury in the left shoulder upon initial imaging (*cf.* Alvarez v NYLL Mgt. Ltd., 120 AD3d 1043, 1044 [1st Dept 2014], *aff'd* 24 NY3d 1191 [2015]). In non conclusory terms, Dr. Rose, who was plaintiff's treating physician, attributed the injuries to an entirely different etiology by chronicling his initial examination of plaintiff the day after the accident, his consequent need for surgery, during which time Dr. Rose personally observed and repaired tears, and the persisting deficit limitations in the years since. Dr Rose's opinion that the left shoulder condition was consistent with traumatic injury resulting from the accident, signifiying an "unmistakable rejection of defendants' experts' theory is entitled to equal weight and sufficed to raise a triable issue of fact (*Linton*, 62 AD3d at 443; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

Similarly, plaintiff did not have to expressly negate the presence of degenerative findings because there was other evidence in the record that he had been asymptomatic before the accident, had denied sustaining any previous orthopedic injuries, and had provided an explanation for why defendants' experts' findings did not conclusively establish the cause of the claimed injuries (*Jeffers v Style Tr. Inc.*, 99 AD3d 576, 577 [1st Dept 2012]). To the extent that the medical evidence offered by the parties in support of their respective positions cannot be reconciled, such conflicting opinions require credibility determinations that fall within the purview of a trier of fact to resolve (*Clindinin v New York City Hous. Auth.*, 117 AD3d 628, 629 [1st Dept 2014]).

Accordingly, I would reverse the motion court's order and deny defendant summary judgment because there are issues of fact

regarding whether plaintiff's left shoulder injury was a serious injury within the meaning of the Insurance Law.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

85 The People of the State of New York, Ind. 1293/11
Respondent,

-against-

James Thomas,
Defendant-Appellant.

_____

Leonard J. Levenson, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered September 7, 2011, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of five years, unanimously affirmed.

Defendant's unpreserved challenges to the validity of his plea do not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we

decline to review them in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary (*see People v Toxey*, 86 NY2d 725 [1995]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

145 Cindy Winfield, Index 109064/11
Plaintiff-Respondent,

-against-

Monticello Senior Housing Associates,
Defendant-Appellant,

John Crawford Housing For Senior Citizens, Inc.,
Defendant.

_____

London Fischer LLP, New York (Myra Needleman of counsel), for appellant.

Frekhtman & Associates, Brooklyn (Nikhil S. Agharkar of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 9, 2015, which denied defendant Monticello Senior Housing Associates' motion for summary judgment as untimely, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying defendant's motion as untimely (*Fine v One Bryant Park, LLC*, 84 AD3d 436, 437 [1st Dept 2011]). Defendant filed its motion after the deadline set forth in the April 6, 2012 preliminary conference order. That deadline is controlling, given that there is no subsequent order or directive explicitly providing otherwise (*see Freire-Crespo v 345 Park Ave. L.P.*, 122

AD3d 501, 502 [1st Dept 2014]). The action's conversion to e-filing on February 16, 2012, approximately two months before the order, does not warrant a different result. Further, Supreme Court properly determined that defendant failed to provide good cause for its delay in moving for summary judgment (*see Brill v City of New York*, 2 NY3d 648, 652-653 [2004]).

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

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

146-
147 In re Justine N., and Others,

Children Under the Age of Eighteen Years, etc.,

Patricia M.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about December 9, 2014, which, insofar as appealed from as limited by the briefs, found that respondent mother had neglected the three eldest subject children and derivatively neglected the youngest child, and suspended all visitation with the youngest child, unanimously affirmed, without costs. Appeal from order of fact-finding, same court and Judge, entered on or about August 11, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the order of

disposition.

A preponderance of the evidence supports the court's finding that the mother neglected her three oldest children by, among other things, excluding her 15-year-old daughter from the house overnight, and engaging in bizarre behaviors indicative of paranoid ideation (*see Matter of Skye C. [Monica S.]*, 127 AD3d 603 [1st Dept 2015]; *Matter of Jason G. [Pamela G.]*, 126 AD3d 489 [1st Dept 2015]). The mother's behavior toward the three eldest children "demonstrated such a flawed understanding of her parental responsibilities" as to support a finding of derivative neglect as to the youngest child (*see Jason G.* at 490).

The court properly suspended supervised visitation with the youngest child, given a psychiatric evaluation finding that the mother's persecutory ideation and functional impairment were strongly suggestive of psychotic disorder, and in light of the

evidence that the child had nightmares and feared returning to the mother's care (*see Matter of Mia B. [Brandy R.]*, 100 AD3d 569 [1st Dept 2012]; *lv denied* 20 NY3d 858 [2013]; *Matter of Cheyenne S.*, 11 AD3d 362 [1st Dept 2004]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

148-
149 Index 110601/11

Edward Gold,
Plaintiff-Appellant,

-against-

35 East Associates LLC,
Defendant-Respondent,

Alliance Elevator Company doing business
as Unitec Elevator,
Defendant.

_____

Lisa M. Comeau, Garden City, for appellant.

Law Office of Patrick J. Crowe, Melville (Patrick J. Crowe of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 2, 2014, dismissing the complaint, pursuant to an order, same court and Justice, entered June 13, 2014, which had granted defendant 35 East Associates LLC's motion for summary judgment dismissing the complaint against it, unanimously modified, on the law, to reinstate defendant's common-law negligence claim regarding the absence of a handrail, and otherwise affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly dismissed the negligence claim

regarding a foreign substance on the stairs where plaintiff fell. Defendant made a prima facie showing of its entitlement to summary judgment on that claim by submitting plaintiff's and his friends' deposition testimony that they did not see anything on the steps before, and did not know what caused, the fall (*see Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). In opposition, plaintiff failed to raise a triable issue of fact. While he relies on his testimony and affidavit stating that a black sticky substance caused the accident, his admission that he first noticed the substance weeks after the accident renders such proof speculative as to the existence of the substance at the time of the accident (*see Rudner v New York Presbyt. Hosp.*, 42 AD3d 357, 358 [1st Dept 2007]), and as to causation (*Taub v Art Students League of N.Y.*, 39 AD3d 259, 260 [1st Dept 2007]).

As to the claim regarding the absence of a handrail, whether or not defendant made a prima facie showing, plaintiff raised a triable issue of fact by submitting his expert's nonconclusory affidavit stating that the absence of a handrail on the right side of the stairway was a dangerous departure from good and accepted safety practices in the industry (*see Greene v Simmons*, 13 AD3d 266, 266 [1st Dept 2004]). Further, the expert's opinion,

along with deposition testimony that plaintiff had tried to reach out to grab something when he fell, raised a triable issue of fact as to whether the absence of a handrail was a proximate cause of plaintiff's injuries (*see Alvia v Mutual Redevelopment Houses, Inc.*, 56 AD3d 311, 312 [1st Dept 2008]; *Lievano v Browning School*, 265 AD2d 233, 233 [1st Dept 1999]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

150 Sloan Zakheim, Index 652752/12
Plaintiff-Appellant,

-against-

Leading Insurance Services, Inc.,
etc.,
Defendant-Respondent,

Young's Insurance,
Defendant.

_____

Alexander J. Wulwick, New York, for appellant.

Havkins Rosenfeld Ritzert & Varriale LLP, New York (Christopher G. Wosleger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 25, 2014, which denied plaintiff's motion for summary judgment, and granted defendant Leading Insurance Services, Inc.'s motion for summary judgment declaring in its favor and dismissing the complaint as against it, unanimously modified, on the law, solely to declare that defendant has no obligation to indemnify plaintiff for the amount of the judgment entered in her favor against its insured in the underlying personal injury action, and otherwise affirmed, without costs.

The complaint and the bill of particulars in the underlying action allege that plaintiff was injured at a nail salon insured

by defendant when the pedicurist cut plaintiff's foot with, as she variously described it, a razor blade, a razor-like implement, an illegal instrument or an unauthorized pedicure tool, in violation of a regulation of the Division of Licensing Services for Hairdressing and Cosmetology restricting the use of certain items in "Appearance Enhancement" (22 NYCRR 168.18). Defendant disclaimed coverage on the basis of a policy exclusion for bodily injury arising out of the violation of a statute, rule or regulation, and, in this action, established prima facie that it was not obligated to provide coverage, based on the pleadings in the underlying action (*see ABC, Inc. v Countrywide Ins. Co.*, 308 AD2d 309, 310 [1st Dept 2003]). In opposition to defendant's motion in this action, plaintiff argued that razor blades, and other sharp instruments, are not prohibited by 19 NYCRR 160.18, since the regulation only limits the use of a razor (19 NYCRR 160.18[a][2]), while prohibiting the use of "[c]redo knives" (*id.* subd [a][5]). Since the implement used by the pedicurist was not a credo knife, plaintiff argued, there was no violation of the regulation, and the exclusion from coverage is not applicable. This argument directly contradicts the sworn statements in plaintiff's verified pleadings and deposition testimony, and therefore fails to raise an issue of fact. For the same reason,

the court properly rejected plaintiff's affidavit, which attached a photograph of a credo knife, taken from the Internet, and stated that that image did not depict the object that cut her foot (*see Miller v Doniger*, 272 AD2d 73 [1st Dept 2000]).

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: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

151 RCSH Operations, LLC doing business as Ruth's Chris Steak House, Plaintiff-Appellant, Index 151125/13

-against-

Manhattan Sports Restaurants of America LLC, et al., Defendants-Respondents.

_____

Herrick, Feinstein LLP, New York (John P. Sheridan of counsel), for appellant.

Jaroslawicz & Jaros PLLC, New York (David Jaroslawicz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Peter H. Moulton, J.), entered September 11, 2014, which, to the extent appealed from, denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff failed to make a prima facie showing of its entitlement to recover under the parties' guaranty, as it did not submit sufficient evidence showing the underlying debt (*City of N.Y. v Clarose Cinema Corp.*, 256 AD2d 69, 71 [1st Dept 1998]). The affidavit from its lawyer is silent as to who read the meters, which plaintiff was required to do under the parties' sublease.

Even if plaintiff had met its burden, in opposition,

defendants raised material issues of fact. Defendants submitted four affidavits, including the affidavit submitted by plaintiff's own expert in a related case, showing that the bills plaintiff sent to defendants appear inaccurate on their face. There is at least a question of fact as to whether plaintiff read the meters incorrectly or even at all, or whether the invoices were inaccurate for some other reason.

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: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

152 The People of the State of New York, Ind. 3921/12
Respondent,

-against-

Garis Ortega,
Defendant-Appellant.

_____

Rasier & Kenniff, P.C., New York (Thomas A. Kenniff of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered January 7, 2014, convicting defendant, after a jury trial, of rape in the first and third degrees and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 11 years, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The prosecutor's race-neutral reason for the exercise of the sole challenge at issue was that she had a strong sense of familiarity with the panelist from some other situation, which she could not place, notwithstanding the panelist's negative response to the court's standard question about whether anyone knew any of the trial

participants. The prosecutor's genuine uneasiness about this situation was manifested by her efforts to investigate how she might have encountered this panelist in the past. There is no basis to disturb the court's credibility determination that this explanation for the challenge was not pretextual, a finding that is supported by the record and entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

The court properly exercised its discretion in denying defendant's mistrial motion based on the prosecution's belated disclosure of surveillance video footage. Even assuming, without deciding, that the videotape had some potential value in impeaching the victim's testimony (*see generally Brady v Maryland*, 373 US 83 [1963]), defendant had the opportunity to recall and cross-examine the victim using this evidence (*see People v Brown*, 67 NY2d 555, 559 [1986], *cert denied* 479 US 1093 [1987]), but he declined that opportunity and requested a jury instruction instead. Moreover, it is undisputed that defendant was timely provided with a detective's report and notes summarizing the contents of the video; thus, the evidence was "not suppressed by the prosecution," since timely disclosure "would not have revealed any essential information that the

defense did not already know" (*People v LaValle*, 3 NY3d 88, 110 [2004]). In any event, the court "provided a suitable remedy for any violation" of *Brady* (*People v Carusso*, 94 AD3d 529, 530 [1st Dept 2012]) by giving a jury charge, which met with defendant's satisfaction, stating that the belated disclosure had deprived defendant of the opportunity to use the video to cross-examine the victim, and by permitting counsel to make a summation argument to that effect.

Defendant did not preserve his argument that the court gave an inadequate adverse inference charge as to a destroyed 911 tape, or any of his challenges to the prosecutor's summation, and we decline to review any of these claims in the interest of justice. As an alternative holding, we find no basis for reversal. The court's adverse inference charge comported with (*People v Handy*, 20 NY2d 663 [2013]). The prosecutor's summation did not deprive defendant of a fair trial. To the extent the

record permits review, we find that defendant's claim that his counsel rendered ineffective assistance by failing to object to certain portions of the prosecutor's summation is unavailing (*see People v Cass*, 18 NY3d 553, 564 [2012]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

153 Joann R. Torres, Index 301796/12
Plaintiff-Respondent,

-against-

Benedek L. Kalmar, et al.,
Defendants-Appellants,

Gelco Corp.,
Defendant.

_____

Harris, King, Fodera & Correia, New York (Kevin J. McGinnis of counsel), for appellants.

Law Offices of Ryan Goldstein, PLLC, Bronx (Ryan S. Goldstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 15, 2015, which denied the motion of defendants Benedek L. Kalmar and Jones Lang LaSalle, Inc. for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff's contention that defendants have improperly moved a second time for summary judgment relief without requisite leave of the court is unavailing. The court had denied defendants' original summary judgment motion as "premature," "with leave to renew," pending completion of discovery (*see e.g. Maggio v 24*

*West 57 APF, LLC*, AD3d , 2015 NY Slip Op 09604, *4 [1st Dept 2015]; *Fernandez v Elemam*, 25 AD3d 752, 753 [2d Dept 2006]).

As to the merits of the motion, defendants established their entitlement to judgment as a matter of law by submitting evidence showing that plaintiff's vehicle struck the rear of the van defendant Kalmar was driving as he waited at a red light (*see Padilla v Zulu Servs., Inc.*, 132 AD3d 522 [1st Dept 2015]). Defendant driver also testified that two uninvolved motor vehicles were directly ahead of his van, in the same traffic lane, and that such vehicles had indicated they would be making a lefthand turn once the light changed to green.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's deposition testimony, together with sworn statements of an alleged witness to the accident, all to the effect that defendants' van had suddenly stopped at the subject intersection despite a green light in its favor, and that traffic had been moving along at approximately 30 miles per hour, with plaintiff allowing an eight-foot buffer between her vehicle and

the van just prior to the accident, failed to provide a nonnegligent explanation for the accident (*see Dicturel v Dukureh*, 71 AD3d 558 [1st Dept 2010]; *Soto-Maroquin v Mellet*, 63 AD3d 449 [1st Dept 2009]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

155 The People of the State of New York, Ind. 418/12
Respondent,

-against-

Steven Hutter,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered April 18, 2013, convicting defendant, after a jury trial, of tampering with a witness in the fourth degree, and sentencing him to a term of one year, unanimously modified, on the law, to the extent of reducing the mandatory surcharge to $175, and otherwise affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Pavao*, 59 NY2d 282, 292 [1983]). Although one of the prior convictions about which the court permitted inquiry was somewhat similar to the charged crime, the prior conviction involved dishonesty and was highly relevant to defendant's credibility.

Defendant did not preserve his claim that the indictment

should have been dismissed on the ground that the prosecutor's conduct in obtaining the testimony of witnesses violated due process (*see People v Montgomery*, 88 NY2d 1041 [1996]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Defendant has not shown that the testimony of two prosecution witnesses, each of whom received immunity, was coerced, or that defendant was aggrieved in any way by the prosecutor's allegedly coercive conduct. There is no indication that either witness was induced to falsely incriminate defendant; in any event, the circumstances of the investigation were revealed to the trial jury, which was in the best position to determine whether the prosecutor's conduct impaired the credibility of the witnesses.

Defendant also failed to preserve his challenge to the court's charge on fourth-degree witness tampering, and we likewise decline to review it in the interest of justice. As an alternative holding, we find that the charge, viewed as a whole, conveyed the proper standards (*see People v Samuels*, 99 NY2d 20, 25 [2002]).

As the People concede, defendant, who was convicted of a misdemeanor, was erroneously assessed the $300 surcharge applicable to a felony conviction.

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

156 Mohammad Saidin, Index 20497/09
Plaintiff-Appellant,

-against-

Sam Negron, et al.,
Defendants-Respondents.

_____

Mohammad Saidin, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 30, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint failed to state a cause of action against defendant City of New York under 42 USC § 1983, as plaintiff alleged only a single instance of wrongful conduct by a municipal employee without authority to make decisions regarding official policy (*see City of Oklahoma City v Tuttle*, 471 US 808, 821 [1985]; *Simpson v New York City Tr. Auth.*, 112 AD2d 89, 91 [1st Dept 1985], *affd* 66 NY2d 1010 [1985]). The conclusory allegation of wrongful hiring and training, standing alone, cannot support a section 1983 claim (*Eckardt v City of White Plains*, 87 AD3d 1049,

1052 [2d Dept 2011]).

Plaintiff abandoned his claim against the individual police officer by failing to oppose that part of the motion to dismiss the claim as against him (*see Josephson LLC v Column Fin., Inc.*, 94 AD3d 479 [1st Dept 2012]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

157 Frederick Hudson, et al., Index 100055/06
Plaintiffs,

-against-

Hahn Kook Center (USA), Inc., et al.,
Defendants.

- - - - -

[And a Third-Party Action]

- - - - -

Law Office of Alvin M. Bernstone, LLP,
Nonparty Appellant,

-against-

Ressler & Ressler, Esqs.,
Nonparty Respondent.

_____

Bernstone and Grieco, LLP, New York (Peter B. Croly of counsel), for appellant.

Ressler & Ressler, New York (Bruce J. Ressler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered June 4, 2014, which denied nonparty appellant's (Bernstone) motion to restore the action for the purpose of a hearing, pursuant to Judiciary Law § 475, to determine and fix the amount of its charging lien and, pursuant to Judiciary Law § 487, for treble damages from nonparty respondent (Ressler), unanimously reversed, on the law, without costs, and the motion granted to the extent of remanding the matter for a hearing to

determine whether Bernstone is entitled to enforce its charging lien, and, if so, the amount of the lien, and to determine whether Bernstone is entitled to treble damages.

The court erred in summarily denying Bernstone's motion to determine and fix its charging lien on the ground that Bernstone had abandoned plaintiffs by seeking to withdraw as counsel at a time when there were pending motions to dismiss the complaint for failure to comply with discovery orders (*see Klein v Eubank*, 87 NY2d 459 [1996]; *Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 126 AD3d 429 [1st Dept 2015]). The record presents issues of fact as to whether Bernstone abandoned plaintiffs or plaintiffs' own dilatory conduct in seeking new counsel was the sole cause of the dismissal. Plaintiffs signed consents to Bernstone's withdrawal as counsel, and did not dispute Bernstone's assertion that the withdrawal was necessitated by disagreements between them and counsel. At the time it sought to withdraw, Bernstone informed the court that there were motions pending, and, according to one of its attorneys at oral argument on February 26, 2013, also informed the court at that time, in an off-the-record exchange, that these motions were unopposed. Moreover, at the time it withdrew, Bernstone sought and received a stay on plaintiffs' behalf to give them time to retain new counsel.

However, approximately 3½ months after Bernstone was relieved, despite having received three adjournments of the motions, plaintiffs appeared in court without counsel, and the court granted the still unopposed motions.

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

158 Richard Caraballo, et al., Index No. 650522/14
Plaintiffs-Appellants,

-against-

The Art Students League of New York, et al.,
Defendants-Respondents.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Robert S. Smith of counsel), for appellants.

Venable LLP, New York (Michael J. Volpe and Chaim Z. Kagedan of counsel), for The Art Students League of New York, Salvatore Barbieri, Susan Matz, Thomas E. Harvey, Mary Jo Anzel, Richard Baker, Beth Burns, Macaulay Campbell, Jack Gordon, Victoria Hibbs, Jill Krutick, Kit Seider and Len Sirowitz, respondents.

Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for Broadway Trio LLC and Extell Development Company, respondents.

_____

Appeal from order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 25, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as moot.

Plaintiffs failed to apply for an injunction pending appeal – on the contrary, they moved for an enlargement of time within which to perfect the appeal – and construction is now "so far advanced that it could not be undone without undue hardship" (*Matter of Weeks Woodlands Assn., Inc. v Dormitory Auth. of the*

*State of N.Y.*, 95 AD3d 747, 753 [1st Dept 2012], *affd* 20 NY3d 919 [2012]). Plaintiffs' contention that *Weeks Woodlands* does not apply because the tower being built by defendants Broadway Trio LLC and Extell Development Company (together, Extell) is not substantially complete is without merit. *Weeks Woodlands* specifically says that "construction need not be virtually completed to render the dispute moot" (*id.* [internal quotation marks omitted]).

Contrary to plaintiffs' claim that they are not seeking to enjoin the construction project, their amended complaint sought to enjoin defendant Art Students League of New York (ASL)'s conveyance of air rights or to set it aside. The practical effect of such an injunction or setting aside would be to force Extell to demolish the construction it has accomplished to date and start over again from scratch, which would cost more than $200 million.

Plaintiffs claim that they want clarity in the interpretation of ASL's by-laws. However, courts are not in the business of rendering advisory opinions (*see Cohen v Anne C.*, 301 AD2d 446, 447 [1st Dept 2003]; *see also Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713 [1980]). Unlike the situation in *Matter of Venigalla v Nori* (11 NY3d 55 [2008]), ASL "know[s] what its

governing document is" (*id.* at 62) – it is governed by its Constitution and By-Laws, as amended.

The case at bar does not fall under the mootness exception of "recurring novel or substantial issues [that] are sufficiently evanescent to evade review otherwise" (*Matter of Citineighbors Coalition of Historic Carnegie Hill v New York City Landmarks Preserv. Commn.*, 2 NY3d 727, 729 [2004]). Based on the record, it is unlikely that ASL will sell any more air rights, let alone its building. Even if ASL were to do so, its Board of Control would have to give notice to ASL members of the vote on that issue. At that point, plaintiffs could seek a declaration that "a majority of Members entitled to vote" means a majority of allof ASL's members (both active and inactive).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

159 Alcor Life Extension Foundation, Index 113938/09
Plaintiff-Appellant,

-against-

Larry Johnson,
Defendant,

Vanguard Press, Inc., et al.,
Defendants-Respondents.

_____

The Wolff Law Firm, New York (Clifford A. Wolff of counsel), for appellant.

Miller Korzenik Sommers LLP, New York (David S. Korzenik and Terence P. Keegan of counsel), for Vanguard Press, Inc., respondent.

Iseman, Cunningham, Riester & Hyde, LLP, Poughkeepsie (Frank P. Izzo of counsel), for Scott Baldyga, respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 6, 2014, which granted defendants Vanguard Press, Inc.'s and Scott Baldyga's motions for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

As the motion court found, all the allegedly false and defamatory statements in the book written by defendant Baldyga and published by defendant Vanguard are related to plaintiff's cryogenic business, which plaintiff publicized, and, therefore,

all of those statements are subject to the actual malice standard of proof in a libel action (*see James v Gannett Co.*, 40 NY2d 415, 421 [1976]). Vanguard and Baldyga established prima facie that neither of them published the book with knowledge that the statements were false or with reckless disregard of whether or not they were false, and plaintiff offered no evidence sufficient to raise an issue of fact (*see Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 353-354 [2009]). Plaintiff's affiant had no personal knowledge of the operative events (*see* CPLR 3212[b]). As to its contention that it needs further discovery, plaintiff failed to demonstrate that facts essential to justify opposition to defendants' motions might exist but could not then be stated (*see* CPLR 3212[f]). Moreover, the record shows that plaintiff had, and failed to take advantage of, a reasonable opportunity to pursue the disclosure it now seeks.

The cause of action for aiding and abetting a breach of employment contract and certain provisions of a default judgment

was correctly dismissed (*see Hirschfeld v Daily News*, 269 AD2d 248, 249 [1st Dept 2000]).

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

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

160-
160A The People of the State of New York, Ind. 4147/11
425/12
Respondent,

-against-

Alexander Lewis,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Lawrence K. Marks, J. at hearing; Bonnie G. Wittner, J., at plea and sentencing), rendered February 28, 2012, convicting defendant, upon his pleas of guilty, of two counts of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Defendant argues that police testimony that defendant lingered near the crime scene, thereby foolishly allowing himself to be

arrested, was implausible. However, as the Court of Appeals observed long ago, "the propensity of criminals to blunder has long been recognized as a characteristic of great value in the detection of crime," and persons convicted of crimes are known to make errors that "would have seemed almost impossible in the case of a person of ordinary common sense" (*People v Becker*, 215 NY 126, 136 [1915]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Feinman, Gische, JJ.

161 The People of the State of New York, Ind. 5473/01
Respondent,

-against-

James Massey,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about October 1, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Nonwithstanding that the court incorrectly assessed 20 points under the risk factor for physical helplessness, the court properly applied the presumptive override for infliction of serious physical injury, which results in a level three adjudication independent of any point assessments.

The court properly exercised its discretion in denying defendant's request for a downward departure (*see People v*

*Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately accounted for in the risk assessment instrument or, in any event, were outweighed by the seriousness of the underlying conduct.

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

162 Robert Solomon, Index 110152/11
Plaintiff-Appellant,

-against-

Pepsi-Cola Bottling Company
of New York, Inc.,
Defendant-Respondent.

_____

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

Blank Rome LLP, New York (Anthony A. Mingione of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about April 25, 2014, which denied plaintiff's motion for renewal and reargument of defendant's motion to dismiss the complaint, unanimously affirmed, without costs, as to renewal, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Plaintiff failed to support his motion for renewal with new facts "that would change the prior determination" (CPLR 2221[e][2]).

Plaintiff's arguments addressed to the order that granted defendant's motion to dismiss are not properly before us since plaintiff failed to appeal from that order (*D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

163 The People of the State of New York, Ind. 1263/09
Respondent,

-against-

Christopher Buxo,
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 (Andrew E. Seewald 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 (Robert M. Stolz, J.), rendered December 4, 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: FEBRUARY 9, 2016

CLERK

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

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

164N Souyun Lee, Index 301394/15
Plaintiff-Appellant,

-against-

Wei-Yeh Lee,
Defendant-Respondent.

_____

Elliott Scheinberg, Staten Island, for appellant.

Bryant & Bleier, LLP, New York (Darren D. Bleier of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered on or about July 28, 2015, which awarded plaintiff pendente lite child support of $6519.66 per month, denied her applications for pendente lite maintenance, pendente lite counsel fees, and loan interest and fees, and ordered defendant to contribute 51% towards the younger child's educational expenses and both children's unreimbursed medical, camp, and sports-related expenses, unanimously modified, on the law and the facts, to vacate the award of pendente lite child support and the directive that defendant contribute 51% towards other expenses, vacate the denial of the applications for pendente lite maintenance and counsel fees, and remand the matter for further proceedings in accordance herewith, and otherwise affirmed,

without costs.

The basis for the court's imputation of income to plaintiff is unclear (*see Strauss v Saadatmand*, 89 AD3d 415 [1st Dept 2011]). The record does not support the court's conclusion that plaintiff admitted she could pay her undisputed monthly expenses of $27,405 without defendant's financial support, a finding that resulted in the court's imputation to plaintiff of 12 times that amount, $328,860, as income. Plaintiff repeatedly averred that she could not pay her monthly expenses without assistance from defendant and that, without his assistance, she would have to resort to a loan or to borrowing from the parties' daughter. As plaintiff was not employed, the record suggests that the court imputed income to her based on her earnings from a company she and defendant founded. However, plaintiff said that the company earned no income, that she could not operate it without defendant, and that she was merely a stay-at-home mother. While defendant said that plaintiff still ran the company and earned income from it into 2015 after he left, the court's calculation of plaintiff's income exceeds what even defendant claimed the company earned, and, as indicated, appears to have been driven by the court's finding that plaintiff admitted she could independently meet her expenses.

To the extent the court may have relied on a March 2015 email exchange submitted by defendant, in which plaintiff said that she paid living expenses "for the past few months" out of a corporate account, it may have failed to consider that plaintiff also said that approximately $10,000 was left in that account as of March 2015, and asked how defendant would contribute to those expenses in the future. Defendant himself acknowledged that the company was expected to have little value going forward. Accordingly, the matter must be remanded so that the court can properly consider the parties' respective incomes, or clarify its basis for imputing $328,860 in income to plaintiff.

As the court's denial of maintenance and interim counsel fees appears to be based on the same income determination, on remand, the court should reconsider, and if necessary, calculate those awards. Furthermore, as plaintiff received no maintenance award, and she averred that she can no longer meet her financial obligations without taking a loan or borrowing from the parties' 16-year-old daughter, we find that exigent circumstances warrant relief at this time (*Anonymous v Anonymous*, 63 AD3d 493, 496-497 [1st Dept 2009], *appeal dismissed sub nom Ayoub v Ayoub*, 14 NY3d 921 [2010]).

For the same reasons, defendant's pro rata contribution

towards the children's educational and other expenses – 51%, based on the parties' respective incomes – should be recalculated.

The court properly denied plaintiff's application for repayment of any loan and interest, since plaintiff submitted no proof of any actual loan taken, stating only that she was in the process of applying for a loan.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

166-
166A The People of the State of New York,
Respondent,

-against-

Michael Colon,
Defendant-Appellant.

Ind. 662/12

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered May 30, 2014, convicting defendant, upon his plea of guilty, of rape in the third degree and criminal sexual act in the third degree, and sentencing him to an aggregate term of 3 years, with 10 years' postrelease supervision, unanimously affirmed. Order, same court and Justice entered on or about July 22, 2014, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

As to the appeal from the judgment of conviction, we find that defendant did not make a valid waiver of his right to appeal, but we perceive no basis for reducing the period of

postrelease supervision.

As to defendant's civil appeal from his sex offender adjudication, the record supports the court's determination that defendant is subject to the presumptive override for a prior felony sex crime conviction, which results in a level three adjudication independent of any point assessments. 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 outweighed by the seriousness of defendant's underlying crimes and the recency of the prior felony sex crime.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

167 Julia Nunes, et al., Index 156224/13
Plaintiffs-Respondents,

-against-

Earth Relocation, Inc.,
Defendant-Appellant.

_____

Neal S. Dobshinsky, New York, for appellant.

Gregory A. Sioris, New York, for respondents.

_____

Appeal from order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 4, 2014, which, to the extent appealed from as limited by the briefs, awarded plaintiffs $42,135 for damage to their goods, deemed an appeal from judgment, same court and Justice, entered February 20, 2015, and so considered, said judgment unanimously reversed, on the law, without costs, and the matter remanded for a hearing and determination regarding the value of the damage to plaintiffs' goods.

The parties entered into a shipping agreement in which plaintiffs valued their household goods to be stored and shipped by defendants, through a third-party carrier, at $42,135. Plaintiffs engaged defendant to procure insurance on their behalf in that same amount. Plaintiffs' goods, which were stored in

defendant's warehouse prior to shipping, suffered considerable damage during Hurricane Sandy. Plaintiffs discovered that defendant had not obtained insurance for their goods, in violation of the parties' agreement. Plaintiffs retrieved from defendant's warehouse those goods that were not damaged, and shipped them through another carrier.

After plaintiffs moved for summary judgment, defendant admitted liability, but contested plaintiffs' damages. Plaintiffs claim that they are entitled to the full "replacement value" of their goods, which they valued in their insurance application at $42,135. However, plaintiffs may not recover for those goods that were never damaged, and which they retained. Because it is unclear which goods were undamaged and salvaged by plaintiffs, issues of fact preclude summary judgment as to the value of the damage to plaintiffs' property (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

168-
169-
170-
171 In re Dante W.,

A Child Under the Age of Eighteen Years, etc.,

Norman W.,
Respondent-Appellant,

Commissioner of Social Services of the City of New York,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

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

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

_____

Order, Family Court, Bronx County (Erik S. Pitchal, J.), entered on or about February 5, 2014, which, after a fact-finding hearing, determined that respondent father neglected the subject child, unanimously affirmed, without costs. Appeal from permanency orders, same court and Judge, entered on or about June 4, 2014, mandating that the father submit to a mental health evaluation and comply with treatment recommendations, complete an alcohol rehabilitation program and any required aftercare, and

complete a special needs parenting course, continuing the suspension of visitation until a licensed clinician recommended and the child agreed to contact with the father, and directing the agency to make reasonable efforts to refer the father for the services; entered on or about January 26, 2015, directing the agency to make the previously ordered referrals for the father, and providing a procedure for the father to correspond and engage in family therapy with the child; and entered on or about February 4, 2015, continuing the prior orders concerning the referrals and suspension of visitation, unanimously dismissed, without costs, as moot.

The court properly found that ACS proved neglect by a preponderance of the evidence. The father neglected the child through the use of excessive corporal punishment and misuse of alcohol to the point that he lost control of himself and injured the child, based on the testimony of the caseworker and the foster mother concerning the child's statements to them and their observation of bruises on the child, and the testimony of the neighbor who witnessed an incident between the father and the child. The child's out of court statements were properly corroborated (*see* Family Court Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 118 [1987]).

The father's challenge to the permanency orders is dismissed as moot because the orders expired on their own terms *(see Matter of Kayvonne S.*, 294 AD2d 118 [1st Dept 2002]). In any event, given the fact-finding determinations, referrals for appropriate services and suspension of visitation were warranted.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

172 Lamont Stanley, et al., Index 307059/13
Plaintiffs-Appellants,

-against-

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

_____

Law Office of Andrew C. Laufer, PLLC, New York (Andrew C. Laufer of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered October 15, 2014, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The doctrine of res judicata bars this action alleging violations of 42 USC §§ 1983 and 1985 stemming from plaintiffs' arrest in 2011. Plaintiffs could have raised their current claims in their prior action, which involved the same incident

and parties (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]). Although one of plaintiffs' claims was not dismissed on the merits in the prior action, they did not pursue that claim in this action.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

173 Dennis Paterra, Index 303716/10
Plaintiff-Appellant,

-against-

Arc Development LLC, et al.,
Defendants-Respondents.

_____

Paul G. Vesnaver PLLC, Rockville Centre (Brian D. Primes of counsel), for appellant.

McGaw, Alventose & Zajac, Jericho (Ross P. Masler of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about September 8, 2014, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of liability on his Labor Law §§ 241(6) and 200 and common-law negligence claims as against defendants Arc Development LLC and Riverdale Heights LLC, unanimously affirmed, without costs.

Defendants were entitled to dismissal of all of plaintiff's Labor Law claims, since plaintiff asserted the Labor Law claims for the first time in his bill of particulars, and failed to allege them in his complaint (*see Castleton v Broadway Mall Props., Inc.*, 41 AD3d 410, 411 [2d Dept 2007]; *Webster v Supermarkets Gen. Corp.*, 209 AD2d 405 [2d Dept 1994]). The

purpose of the bill of particulars is to amplify the pleadings (*see Kolb v Beechwood Sedgewick LLC*, 78 AD3d 481, 482 [1st Dept 2010]), and "may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint" (*Alami v 215 E. 68th St., L.P.*, 88 AD3d 924, 926 [2d Dept 2011]). Nor may the bill of particulars "add or substitute a new theory or cause of action" (*Melino v Tougher Heating & Plumbing Co.*, 23 AD2d 616, 617 [3d Dept 1965]).

Plaintiff's common-law negligence claim, which was pleaded in the complaint, was properly dismissed. There is no evidence that defendants supervised or controlled plaintiff's work or had actual or constructive notice of the alleged defective condition over which plaintiff tripped (*see Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 596 [1st Dept 2010]).

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: FEBRUARY 9, 2016

CLERK

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

174-
174A Index 150256/14

Kucker & Bruh, LLP,
Plaintiff-Respondent,

-against-

Janusz Sendowski,
Defendant-Appellant,

4143 CA LLC,
Defendant.

_____

SLG PC, New York (David Spiegelman of counsel), for appellant.

Kucker & Bruh, LLP, New York (Nativ Winiarsky of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Ellen M. Coin, J.), entered September 9, 2014, which recalled and amended its prior order, entered August 19, 2014, inter alia, granting plaintiff summary judgment against defendant Janusz Sendowski on the third and seventh causes of action, and directed the Clerk of the Court to sever and enter judgment in favor of plaintiff on said causes of action, deemed appeal from judgment, same court and Justice, entered September 18, 2014, awarding plaintiff the total sum of $179,157.24 as against said defendant, and, as so considered, unanimously affirmed, with costs. Appeal from August 19, 2014 order, unanimously dismissed, without costs, as

superseded.

Plaintiff law firm established entitlement to summary judgment on its claim for an account stated by production of documentary evidence showing that defendant received and retained invoices without objection (*see Rosenman Colin Freund Lewis & Cohen v Edelman*, 160 AD2d 626 [1st Dept 1990], *lv denied* 77 NY2d 802 [1991]). Plaintiff has also shown the partial payment of bills (*see Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]). Defendant's "bald allegations of oral protests were insufficient to raise a triable issue of fact as to the existence of an account stated" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]).

Plaintiff's failure to comply with the rules on retainer agreements (22 NYCRR 1215.1) does not preclude it from suing to recover legal fees under such theories as services rendered, quantum meruit, and account stated (*see Roth Law Firm, PLLC v Sands*, 82 AD3d 675 [1st Dept 2011]).

The motion court properly amended its prior order to sever the third and seventh causes of action and direct judgment in favor of plaintiff, as requested in the complaint and plaintiff's motion for summary judgment.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

175 The People of the State of New York, Ind. 5728/12
Respondent,

-against-

Felix Whetstone,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Felix Whetstone, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.) rendered January 22, 2014, convicting defendant, after a jury trial, of sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to a term of six 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]). There is no basis for disturbing the jury's evaluation of expert testimony, which established that the DNA evidence at issue was reliable, and that defendant's DNA was deposited on the victim's clothing during the sexual attack rather than on some hypothetical occasion. In addition, although

the victim could not identify defendant, he generally matched the victim's description of her attacker.

Defendant failed to preserve his challenge to the court's charge, and we decline to review it in the interest of justice. As an alternative holding, we find that even assuming the challenged language about two inferences should have been avoided, the charge as a whole, which included thorough instructions on such subjects as the presumption of innocence, the People's burden of proof, reasonable doubt and circumstantial evidence, conveyed the proper standards (*see People v Samuels*, 99 NY2d 20, 25 [2002]; *People v Cooper*, 233 AD2d 267 [1st Dept 1996], *lv denied* 89 NY2d 984 [1997]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

176 Marzia Frassinelli, et al., Index 118093/09
Plaintiffs-Respondents, 590777/10
590101/13

-against-

120 East 73rd Street Corp., et al.,
Defendants-Appellants,

Ragno Boiler Maintenance, Inc.,
Defendant,

Tiffany Heating Services, Inc.,
Defendant-Respondent.

- - - - -

120 East 73rd Street Corp., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Ragno Boiler Maintenance, Inc.,
Third-Party Defendants,

Tiffany Heating Services, Inc.,
Third-Party Defendant-Respondent.

- - - - -

[And a Second Third-Party Action]

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Tracy P. Hoskinson of counsel), for appellants.

Law Office of Bryan J. Swerling, P.C., New York (Bryan J. Swerling of counsel), for Marzia Frassinelli and Alberto Conti, respondents.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Jeremy M. Buchalski of counsel), for Tiffany Heating Services, Inc., respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.),

entered August 13, 2015, which, to the extent appealed from as limited by the briefs, denied the motion of defendants 120 East 73rd Street Corp., Ocram, Inc., and Ocram Holding, Inc. (collectively Ocram) for summary judgment dismissing the complaint as against them, and granted the motion of defendant Tiffany Heating Services, Inc. (Tiffany) for summary judgment dismissing the complaint and all cross claims as against it, unanimously modified, on the law, to grant Ocram's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Ocram established entitlement to judgment as a matter of law, in this action where plaintiff Marzia Frassinelli alleges that she was injured when she was scalded by water while showering. Ocram submitted evidence showing that the boiler system in the building was regularly inspected, and there was no prior notice of fluctuating water temperatures (*see Flores v Langsam Prop. Servs. Corp.*, 63 AD3d 502 [1st Dept 2009], *affd* 13 NY3d 811 [2009]). In opposition, plaintiffs failed to raise a triable issue of fact. Reliance on the 1968 Building Code and 2008 Plumbing Code is misplaced, since the building was not subject to those codes, and there is no support for plaintiffs' claim that the bathroom was negligently designed. Furthermore,

the opinions proffered by plaintiffs' expert were conclusory and insufficient to raise a triable issue of fact (*see generally Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9 [2005]).

Dismissal of the action as against Tiffany was warranted because there is no evidence that Tiffany was in any way negligent where it was not under a contract to maintain the boiler, nor did it perform any work on the boiler prior to the accident. It is uncontested that there were no issues with the boiler for over a month after Tiffany performed an annual inspection of the boiler, and while plaintiffs' expert inspected the valve that allegedly failed, he did not point to any defect in the valve that could have caused a sudden temperature fluctuation.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

177 Edward Tyler Nahem Fine Art, L.L.C., Index 651137/10
Plaintiff-Appellant,

-against-

Alberto Barral,
Defendant-Respondent.

_____

Cahill Partners LLP, New York (John R. Cahill of counsel), for appellant.

Trachtenberg Rodes & Friedberg LLP, New York (Stephen Arena of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 4, 2014, which, insofar as appealed from as limited by the briefs, after a nonjury trial, denied the causes of action for piercing the corporate veil and fraud, unanimously affirmed, without costs.

The record amply supports the trial court's findings, based in part on credibility determinations (*see 300 E. 34th St. Co. v Habeeb*, 248 AD2d 50, 54 [1st Dept 1997]), that defendant did not improperly use company funds for personal expenses, did not fail to adhere to corporate formalities, and did not significantly undercapitalize the company during its operation. Even if defendant's multiple ATM cash withdrawals from the company's bank account amounted to undercapitalization for the purpose of

avoiding payment on a prior default judgment against the company, as plaintiff argues, it alone would be insufficient to justify piercing the corporate veil (*see Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511 [1st Dept 2009]). Further, the evidence does not compel a finding that defendant made the withdrawals for the purpose of leaving the corporation judgment proof or to perpetrate a wrong against plaintiff (*see James v Loran Realty V Corp.*, 85 AD3d 619 [1st Dept 2011], *affd* 20 NY3d 918 [2012]).

The record also supports the court's findings, which rest largely on credibility determinations, with respect to the fraud claim. Although defendant's representations as to good title to the artwork all proved to be false, and the evidence supports a finding that plaintiff reasonably relied on them, to its detriment, in purchasing the artwork, the record does not sufficiently establish the requisite scienter (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The evidence does not show that defendant had reason to doubt the

veracity of its representation that the artwork was imported lawfully but failed to investigate before making it (*see State St. Trust Co. v Ernst*, 278 NY 104, 112 [1938]; *Serio v PricewaterhouseCoopers LLP*, 9 AD3d 330, 331 [1st Dept 2004]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

178 Danielle Fasano, as Administratrix of the Goods, Chattels and Credits which were of Mary Ann Fasano, Deceased,
Plaintiff-Respondent,

-against-

Euclid Hall Associates, L.P., et al.,
Defendants-Appellants-Respondents.

- - - - -

Euclid Hall Associates, L.P., et al.,
Third-Party Plaintiffs-Appellants-Respondents,

-against-

Unitec Elevator Company,
Third-Party Defendant-Respondent-Appellant.

Index 402177/08
590852/08

_____

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg and Steven B. Prystowsky of counsel), for appellants-respondents.

Geringer & Dolan LLP, New York (Pauline A. Mason of counsel), for respondent-appellant.

The Edelsteins, Faegenburg & Brown, LLP, New York (Paul J. Edelstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 16, 2014, which, to the extent appealed from as limited by the briefs, denied the motion of third-party defendant Alliance Elevator Company s/h/a Unitec Elevator Company for summary judgment dismissing the complaint, and denied

defendants/third-party plaintiffs' (together, Euclid) motion for summary judgment dismissing the complaint and, in the alternative, for conditional summary judgment on its common-law indemnification claim against Alliance, unanimously reversed, on the law, without costs, and the motion and cross motion for summary judgment dismissing the complaint granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that decedent sustained personal injuries when she tripped and fell over a misleveled elevator located in a building owned and managed by defendants. Defendant Euclid Hall Associates, L.P. had entered into a full service contract with Alliance for the building's four elevators.

Euclid and Alliance made a prima facie showing of the lack of a misleveling defect and of the lack of their prior notice of the alleged condition (*see Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458-459 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's claim of prior notice was vague, speculative, and conclusory (*see Narvaez v New York City Hous. Auth.*, 62 AD3d 419, 420 [1st Dept 2009], *lv denied* 13 NY3d 703 [2009]; *Clark v New York City Hous. Auth.*, 7 AD3d 440, 440 [1st Dept 2004]). Further, plaintiff's expert's opinion was speculative and

conclusory, and lacked evidentiary foundation (*see Luciano v Deco Towers Assoc. LLC*, 92 AD3d 606, 606 [1st Dept 2012]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714-715 [1st Dept 2005]).

The doctrine of res ipsa loquitur does not apply to Euclid, because it ceded all responsibility for the daily operation, repair, and maintenance of the elevator to Alliance (*see Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 162 [1st Dept 2015]; *Hodges v Royal Realty Corp.*, 42 AD3d 350, 352 [1st Dept 2007]). Nor is the doctrine applicable to Alliance, since the accident could have occurred in the absence of negligence (*Meza v 509 Owners LLC*, 82 AD3d 426, 427 [1st Dept 2011]).

Given the foregoing determination, we need not reach Euclid's request for alternative relief.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

181 The People of the State of New York, Ind. 815/12
Respondent,

-against-

Tamel Dixon,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J. at hearing; Jill Konviser, J. at jury trial and sentencing), rendered April 12, 2013, convicting defendant of robbery in the third degree, grand larceny in the fourth degree, tampering with physical evidence and resisting arrest, and sentencing him to an aggregate term of two to six years, unanimously affirmed.

The court properly denied defendant's motion to suppress a showup identification. The prompt showup was not unduly suggestive under the totality of circumstances. As police officers and a victim drove toward the location where defendant was being held by other officers, an officer using a tracking application to locate the victim's stolen phone remarked that they were "close," or "getting closer." This did not necessarily

inform the victim that she was about to see the person who had her phone, and the victim did not learn about the recovery of her phone from defendant until after she had made an identification. In any event, "[i]nherent in any showup is the likelihood that an identifying witness will realize that the police are displaying a person they suspect of committing the crime, rather than a person selected at random" (*People v Gatling*, 38 AD3d 239, 240 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]).

The court also properly denied defendant's motion to suppress a lineup identification made by another victim. The record, including a lineup photograph, supports the hearing court's finding that even though defendant was the youngest participant, the lineup participants were sufficiently similar in appearance that defendant was not singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

Defendant did not preserve his other claims regarding the lineup, or his challenges to the evidence supporting the tampering conviction, to the prosecutor's summation, and to the

court's charge, and we reject defendant's various arguments with respect to the need for preservation. We decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

182 Rakuten Bank, Ltd., formerly known as Ebank Corporation,
Plaintiff-Appellant,

-against-

Royal Bank of Canada, et al.,
Defendants-Respondents.

Index 652057/13

Lewis Baach PLLC, New York (Bruce R. Grace of counsel), for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Michael J. Dell of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about January 26, 2015, which, among other things, granted defendants' motion to dismiss the complaint on the basis of forum non conveniens, unanimously affirmed, without costs.

In the complaint, plaintiff alleges that defendants fraudulently induced it to purchase certain notes by misrepresenting the credit quality of the notes and their underlying collateral. The motion court weighed the relevant factors and providently exercised its discretion in determining that the action lacks a substantial New York nexus (*see* CPLR 327[a]; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479

[1984], *cert denied* 469 US 1108 [1985]; *Matter of Alla v American Univ. of Antigua, Coll. of Medicine*, 106 AD3d 570, 570 [1st Dept 2013]). Plaintiff's allegation that the marketing and design of the notes was done, in part, by employees of defendant RBC Capital, the only New York-based defendant, is not enough to overcome the factors weighing in favor of dismissal, including the fact that all aspects of the actual sale of the notes occurred outside New York (*see Hanwha Life Ins. v UBS AG*, 127 AD3d 618, 619 [1st Dept 2015] [New York forum was inconvenient where, among other things, the transaction at issue occurred outside New York], *lv denied* 26 NY3d 912 [2015]; *cf. Hong Leong Fin. Ltd.* (*Singapore*) *v Morgan Stanley*, 44 Misc 3d 1231[A], 2014 NY Slip Op 51396[U], *5-6 [Sup Ct, NY County 2014], *affd* 131 AD3d 418 [1st Dept 2015] [New York was a convenient forum where, among other things, most of the allegedly fraudulent activity was conducted in New York by only New York-based defendants]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

184 The People of the State of New York, Ind. 1020/13
Respondent,

-against-

Christopher P.,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered September 5, 2014, as amended September 11, 2014, convicting defendant, upon his plea of guilty, of robbery in the first degree, adjudicating him a youthful offender, and sentencing to a term of 1⅓ to 4 years, to run consecutively to a sentence imposed in Bronx County on May 5, 2014, unanimously modified, on the law, to the extent of directing that the sentence run concurrently with the Bronx sentence, and otherwise affirmed.

By adjudicating defendant a youthful offender and sentencing him to a term of 1⅓ to 4 years, to run consecutively to a sentence of one to three years on another YO adjudication, the court effectively imposed an aggregate term in excess of four

years for two YO adjudications. The imposition of consecutive terms with an aggregate term of more than the normal YO maximum of four years "is inconsistent with the underlying concept of youthful offender treatment and it is unrealistic to conclude that one eligible for such treatment requires prolonged confinement to achieve the objectives of the legislation" (*People v David H.*, 70 AD2d 205, 207 [3d Dept 1978]; *accord People v Jorge N.T.*, 70 AD3d 1456, 1457-1458 [4th Dept 2010], *lv denied* 14 NY3d 889 [2010]; *People v Matthew John G.*, 60 AD2d 919 [2d Dept 1978]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

185 Elsa O'Reilly, Index 101201/13
Plaintiff-Appellant,

-against-

Conrad Peter Keene, et al.,
Defendants,

Tribeca Lending Corp.,
Defendant-Respondent.

_____

Maloney Law Group PLLC, New York (Andrew Maloney of counsel), for appellant.

Berkman, Henoch, Peterson, Peddy & Fenchel, P.C., Garden City (Thomas Hooker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered November 6, 2014, which, to the extent appealed from as limited by the briefs, granted defendant Tribeca Lending Corp.'s (Tribeca) motion to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7), seeking quiet title against it, unanimously affirmed, without costs.

The complaint fails to state a claim for quiet title. Plaintiff has not sufficiently alleged her interest in the property, and the record reflects that title passed to defendant Keene in 2006 via a quitclaim deed, which did not contain any substantive deficiency (RPAPL 1515 [1][b]; *East 41st St. Assoc. v*

*18 E. 42nd St.*, 248 AD2d 112, 114 [1st Dept 1998]). Given the validity of the 2006 quitclaim deed, plaintiff's later attempt to convey the property to herself via a correction deed also fails because, inter alia, "a deed from an entity that does not possess title . . . is inoperative as a conveyance" (*see e.g. Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 25 [1st Dept 2011]; Real Property Law § 245). In any event, Tribeca's interest in the property, as a bona fide encumbrancer, is protected against plaintiff's claim (Real Property Law § 266; *Miller-Francis v Smith-Jackson*, 113 AD3d 28, 34 [1st Dept 2013]). 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: FEBRUARY 9, 2016

CLERK

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

186 Sandra Hazel, Index 110829/07
Plaintiff-Respondent,

-against-

Thomas A. Colon, Jr., et al.,
Defendants-Appellants.

_____

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for appellants.

Jacoby & Meyers, LLP, Newburgh (Lawrence D. Lissauer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 1, 2014, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint for failure to address the issue of a 90/180-day serious injury under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants correctly contend that they addressed plaintiff's claim of a serious injury in the 90/180-day category. Moreover, they established prima facie that plaintiff did not sustain a serious injury of that type by submitting evidence that the injuries she allegedly sustained were not caused by the motor vehicle accident. Plaintiff's own medical records showed that she had preexisting injuries to her cervical and lumbar spines

resulting from earlier work-related accidents, and defendants' orthopedic surgeon opined that plaintiff's right knee injury was degenerative and not traumatic in nature (*see Chaston v Doucoure*, 125 AD3d 500 [1st Dept 2015]; *Galarza v J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488 [1st Dept 2014]; *Santos v Perez*, 107 AD3d 572 [1st Dept 2013]).

However, in opposition, plaintiff raised a triable issue of fact as to causation in connection with the injury to her right knee. During surgery, her treating orthopedic surgeon observed injuries to her right knee that were traumatically induced and causally related to the accident (*see Mejia v Ramos*, 124 AD3d 449 [1st Dept 2015]; *James v Perez*, 95 AD3d 788 [1st Dept 2012]). Plaintiff was entitled to rely upon the surgeon's postoperative report, because the report was referenced and relied upon by defendant's experts (*Amamedi v Archibala*, 70 AD3d 449 [1st Dept 2010], *lv denied* 15 NY3d 713 [2010]).

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

187 The People of the State of New York, Ind. 161/95
Respondent,

-against-

Luke Steele,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about September 11, 2014, which adjudicated defendant a level three 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 risk assessment instrument or outweighed by aggravating factors. Among other things, the very serious underlying offense, and defendant's prior record, demonstrate a propensity to commit crimes against children.

To the extent that, in the context of requesting a departure, defendant challenges certain point assessments, we find those claims to be unavailing. In any event, defendant qualifies as a level three offender based on undisputed points.

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

ENTERED: FEBRUARY 9, 2016

CLERK

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

189-
190 The People of the State of New York
Respondent,

-against-

Haslee Burrus,
Defendant-Appellant.

Ind. 1769/12
2429/12

---

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

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

---

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered October 16, 2012,

Said appeals 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: FEBRUARY 9, 2016

CLERK

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

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

191N In re Wardell Richardson, Index 300498/14
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

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

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered April 4, 2014, which denied petitioner's application for an order permitting him to file a late notice of claim on respondent New York City Housing Authority (NYCHA) and deeming the annexed notice of claim timely served nunc pro tunc, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, and the application granted.

After petitioner's counsel realized that respondent NYCHA, not the City of New York, owned the property abutting the badly broken sidewalk where petitioner's accident occurred, petitioner sought an extension of time to file a notice of claim under General Municipal Law § 50-e(5). That statute confers upon the court "the discretion to determine whether to grant or deny leave

to serve a late notice of claim within certain parameters" (*Matter of Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]). The factors to be considered by the court include: whether the failure to identify the proper party was an "excusable error," whether the public corporation received "actual knowledge of the essential facts constituting the claim" within 90 days of the accident or "a reasonable time thereafter," and whether the delay "substantially prejudiced" the public corporation's ability to defend the claim on the merits (General Municipal Law § 50-e[5]). The notice of claim requirement "is not intended to operate as a device to frustrate the rights of individuals with legitimate claims," but to protect the public corporation from "unfounded claims" and ensure that it has an adequate opportunity "to explore the merits of the claim while information is still readily available" (*Matter of Porcaro* at 357- 358).

While the error of petitioner's counsel concerning the identity of the responsible public corporation does not provide a reasonable excuse for the delay in giving notice (*see Lugo v New York City Hous. Auth.*, 282 AD2d 229 [1st Dept 2001]; *Seif v City of New York*, 218 AD2d 595 [1st Dept 1995]), "the absence of a reasonable excuse is not, standing alone, fatal to the

application" (*Porcaro* at 358; *see Pendley v City of New York*, 119 AD3d 410 [1st Dept 2014]; *Fredrickson v New York City Hous. Auth.*, 87 AD3d 425 [1st Dept 2011]). Although NYCHA did not receive actual notice of the accident until the petition was served, it did not contest petitioner's assertion that the condition of the badly broken sidewalk remains unchanged since the time of the accident and that there were no witnesses to the accident, so that NYCHA will not be substantially prejudiced by the eight-month delay in providing notice (*see Pendley* at 410; *Fredrickson* at 425; General Municipal Law § 50-e[5]). NYCHA's conclusory claim that the "passage of time may affect the availability or memories of potential witnesses is insufficient to establish prejudice" (*Matter of Rivera v City of New York*, 127 AD3d 445, 446 [1st Dept 2015]). In light of the policies underlying General Municipal Law § 50-e(5), which is to be

liberally construed to achieve its remedial purposes (*Matter of Thomas v City of New York*, 118 AD3d 537, 538 [1st Dept 2014]), we exercise our discretion to grant the petition.

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

ENTERED: FEBRUARY 9, 2016

CLERK