SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 25, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

16220 The People of the State of New York, Ind. 3107/13
Appellant,

-against-

Steven Gonzalez,
Defendant-Respondent.

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Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

The Bronx Defenders, Bronx (Defne Ozgediz of counsel), for respondent.

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Order of the Supreme Court, Bronx County (Michael A. Gross, J.), entered on or about December 17, 2014, which granted defendant's CPL 30.30 motion to dismiss the indictment, unanimously affirmed.

Defendant was charged in a felony complaint dated June 9, 2013 with criminal possession of a weapon in the second degree and related offenses after he was found in possession of a pistol on that date. He was subsequently indicted on October 10, 2013 for criminal possession of a weapon in the second and fourth

degrees and criminal possession of a firearm.

On the night of the incident, the officer who was involved in the arrest and the recovery of the weapon filed a report requesting a laboratory examination of the gun. The People assert that on June 13, 2013, the assigned assistant requested DNA testing, but offer no documentary proof in support of this claim. In any event, the gun was not received for testing by the Medical Examiner's Office until January 17, 2014, more than seven months later. On March 28, 2014, the Medical Examiner's Office issued a report concluding that DNA testing on the gun indicated that results could be compared with DNA samples from defendant. By motion dated March 28, 2014, the People sought to compel a saliva swab from defendant in order to develop a DNA profile. Defendant opposed and filed a cross motion for a protective order on April 14, 2014.

Prior to the court's ruling on the issue, the People announced on April 21, 2014, "We can meet our burden of proof without DNA if we have to, so we can be ready on May 1 without DNA results if absolutely necessary." The court adjourned the matter to June 9, 2014, for decision on the People's motion and defendant's cross motion. The People did not object to the court's adjournment for decision, nor did they request that the

case be adjourned for trial.

On June 9, 2014, the court rendered its decision, granting the People's motion to compel defendant to provide a DNA sample, and adjourned the matter to September 15, 2014, based on the People's statement that it takes two to three months for an analysis. The sample was taken from defendant on June 13, 2014, and on August 22 2014, the ADA sent copies of the results of the DNA testing to defense counsel.

The People announced on September 15, 2014, that they had received the results of the DNA testing and that the saliva sample taken from defendant matched the swab that was collected from the gun. The case was adjourned to October 15, 2014, for hearings and trial.

By motion dated October 16, 2014, defendant moved to dismiss the indictment pursuant to CPL 30.30 and 210.20(1)(g) on the ground that the People had violated his right to a speedy trial. The People conceded 124 days, which included the five-day period from June 9, 2013, when the defendant was arraigned, to June 14, 2013, when the case was held for grand jury action, as well as the 53-day period from that date to August 6, 2013, when the case had not yet been presented to the grand jury. They also conceded that the subsequent 64-day period was chargeable to them since

they still had not presented the case to the grand jury, and that the following two-day period was also chargeable to them since they were not ready for trial.

The issue on this appeal is whether the time period during which the People were awaiting the results of DNA testing was excludable from the People's chargeable speedy trial time as an "exceptional . . . circumstance" (CPL 30.30[3][b]). Because the People failed to exercise due diligence to obtain the DNA evidence, the court correctly found that the 98-day interval between the date on which the court granted the motion to compel a DNA exemplar from defendant (June 9, 2014) and the date on which the People announced the results of that testing (September 15, 2014) was not excludable under CPL 30.30.

Pursuant to CPL 30.30(4)(g), periods of delay caused by "exceptional circumstances" are excludable from the time charged to the People; the People have the burden of proving the existence of an exceptional circumstance (*see People v Zirpola*, 57 NY2d 706 [1982]). CPL 30.30(4)(g)(i) specifically makes excludable a continuance "granted because of the unavailability of evidence material to the People's case, when the district attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will

become available in a reasonable period." Under this provision, the unavailability of DNA test results can be considered an exceptional circumstance, so long as the People exercised due diligence to obtain the results (*People v Williams*, 244 AD2d 587 [2d Dept 1997], *lv denied* 91 NY2d 899 [1998]).

Acknowledging that "[t]here is no precise definition of what constitutes an exceptional circumstance," the Court of Appeals has made clear that the exception to the rule must conform to the legislative intent of discouraging prosecutorial inaction (*see People v Price*, 14 NY3d 61, 64 [2010] [internal quotation marks omitted]); *People v Washington*, 43 NY2d 772, 774 [1977] [for delay to qualify as exceptional circumstance, the People must demonstrate that their "inability to proceed is justified by the purposes of the investigation and credible, vigorous activity in pursuing it"]; *People v Clarke*, 122 AD3d 765 [2d Dept 2014], *lv granted* 25 NY3d 950 [2015]; *People v Wearen*, 98 AD3d 535, 538 [2d Dept 2012], *lv denied* 19 NY3d 1106 [2012]; *People v Rahim*, 91 AD3d 970, 972 [2nd Dept 2012]).

Here, the firearm was recovered on June 9, 2013 (the day of defendant's arrest), and swabs from the firearm were taken that very night. Nevertheless, the OCME did not receive the swabs until January 17, 2014, more than seven months after defendant's

arrest. The People did not establish that they communicated with the OCME or otherwise attempted to obtain DNA evidence during the seven-month period. As a result of this inaction, the People did not move to compel a DNA sample from defendant until March 28, 2014, almost 10 months after his arrest. It is the responsibility of the People "to be cognizant of the progress of a particular case" (*see People v Fugguzzato*, 96 AD2d 538, 540 [2d Dept 1983], *mod on other grounds* 62 NY2d 862 [1984]).

The People's argument that the time between June 9, 2014 and September 15, 2014 should be excluded nonetheless because on April 21, 2014 they made a "plain statement of readiness" has no merit. On that date, the People merely stated that they could proceed to trial without DNA "if we have to," and that they "[could] be ready on May 1 [2014] without DNA results if absolutely necessary." They did not provide a reason for their request of a specific date of May 1. Such a conditional statement of possible future readiness is in no way a "plain statement of readiness" (*People v Kendzia*, 64 NY2d 331, 337 [1985] ["(CPL 30.30) contemplates an indication of present readiness, not a prediction or expectation of future readiness"]; *see also People v Liotta*, 79 NY2d 841, 843 [1992] ["[T]he burden rests on the People to clarify, on the record, the basis for the

adjournment"]; *compare People v Wright*, 50 AD3d 429 [1st Dept 2008] [People's unequivocal announcement of present readiness was not illusory, notwithstanding the fact that the People were still gathering forensic evidence to strengthen their case], *lv denied* 10 NY3d 966 [2008]). Indeed, on June 9, 2014, when the case was on for decision on the motions, the People were silent about their trial readiness. In response to the court's inquiry as to how long the People needed for the analysis, the ADA stated, "In my experience it's usually two or three months, Your Honor." The court then adjourned the case to September 15, 2014, "for control purposes." The People did not object to the court's adjournment, or request that the case be adjourned for trial rather than for control purposes. The People also remained silent about their trial readiness on September 15, 2014, and did not indicate that they could be ready for trial without the DNA results.

Accordingly, the People were properly charged 98 days for this period, for a total of 222 days, which is beyond the statutory period of 183 days.

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Renwick, Saxe, Moskowitz, JJ.

15 The People of the State of New York, Ind. 4552/11
Respondent,

-against-

Russell McGee,
Defendant-Appellant.

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

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

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Appeal from judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 9, 2012, as amended July 24, 2012, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of six years, held in abeyance, and the matter remanded for a *Wade* hearing on defendant's suppression motion.

Defendant argues that the court erred in denying, without a hearing, his motions to suppress the cell phone he was alleged to have stolen from the victim, and the victim's identification of defendant, which, according to the People, was the product of an "inadvertent observation" that occurred when the victim was waiting in a police car to go into the precinct and defendant was

brought to the precinct by officers. Preliminarily, it should be noted that the motion court, in denying a *Dunaway/Mapp/Wade* hearing, did not comply with the requirement of CPL 710.60(6), to "set forth on the record its findings of fact, its conclusions of law and the reasons for its determination."

The court, however, erred only in denying a *Wade* hearing. While such a hearing is not required where a court has sufficient information "to conclude, as a matter of law, that the confrontation between the witness and defendant was either unarranged, or was arranged independently of the police" (*People v Omaro*, 201 AD2d 324 [1st Dept 1994]), that was not the case here. The question whether the coincidence of the victim's presence in a police car outside the precinct and defendant's arrival at the precinct in police custody constituted a police-arranged procedure was a fact question that defendant was entitled to have resolved at a hearing (*see People v Dixon*, 85 NY2d 218, 222-223 [1995]; *see also People v Clark*, 85 NY2d 886, 888-889 [1995]).

The court correctly denied defendant's application for a *Mapp/Dunaway* hearing, as none of defendant's allegations contradicted the People's submission explaining that the officers

witnessed the crime and then pursued the observed perpetrator, who discarded the allegedly stolen cell phone in the course of his flight.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

303 The People of the State of New York, Ind. 1921N/07
Respondent,

-against-

Jose Tiburcio,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. J.), rendered March 9, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree, and sentencing him to a term of three years, unanimously affirmed.

Defendant's claim that he is entitled to relief under *People v Peque* (22 NY3d 168 [2013], *cert denied* 574 US —, 135 S Ct 90 [2014]) based on the absence of warnings, at the time of his plea, regarding the possibility of deportation is unpreserved, and we decline to review it in the interest of justice. Defendant has not established that the exception to the preservation requirement set forth in *Peque* (*id.* at 182-183) should apply. Before imposing sentence, the court specifically

warned defendant that the conviction could result in deportation, but defendant did not move to withdraw his plea. In any event, given the circumstances of the plea, it is unlikely that defendant could make the requisite showing of prejudice under *Peque* (*id.* at 198-201) if granted a hearing.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

306 31 Cornelia Properties Corp., Index 152808/13
Plaintiff-Appellant,

-against-

Joseph Lemma, et al.,
Defendants-Respondents.

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Amsterdam & Lewinter, LLP, New York (Joseph P. Mitchell of counsel), for appellant.

David E. Frazer, New York, for respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 30, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for breach of representations and warranties, fraudulent inducement, and tortious interference with contract, unanimously affirmed, without costs.

The cause of action for breach of representations and warranties as to the rent-regulatory status of an apartment, made as part of defendants' sale of a building to plaintiff, was correctly dismissed, since the representations and warranties had expired. Moreover, for public policy reasons, landlords and tenants are prohibited from making private agreements to effectively deregulate apartments (*Georgia Props., Inc. v*

Dalsimer, 39 AD3d 332, 334 [1st Dept 2007]).

The cause of action for fraudulent inducement is duplicative of the claim for breach of representations and warranties (*Glanzer v Keilin & Bloom*, 281 AD2d 371, 372 [1st Dept 2001]).

The allegations that support the claim for tortious interference are speculative and conclusory, and fail to make out all the elements of that cause of action (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035 [2d Dept 2011]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

307 In re Ali Ammar, Index 100660/14
Petitioner-Respondent,

-against-

Shola Olatoye, etc.,
Respondent-Appellant.

_____

David I. Farber, New York (Andrew Lupin of counsel), for appellant.

William E. Leavitt, New York, for respondent.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered February 13, 2015, which granted the petition to annul respondent's (NYCHA) determination, dated February 11, 2014, denying petitioner's application for succession rights as a remaining family member to the tenancy of his late grandmother, to the extent of remanding the matter to NYCHA for a new hearing, unanimously reversed, on the law, the determination confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

Supreme Court erroneously determined that petitioner's due process rights were violated and a new hearing should be held. Petitioner's contentions that he was denied due process and that NYCHA failed to accommodate his speech disability at the hearing

are not preserved for review (*see Matter of Jenkins v New York City Hous. Auth., Amsterdam Houses*, 129 AD3d 432 [1st Dept 2015]). In any event, the record demonstrates that petitioner was provided with a hearing at which he was able to testify and to present evidence, which meets the requirements of due process and substantial fairness (*see generally Mathews v Eldridge*, 424 US 319, 333 [1976]). The other evidence that petitioner wishes to explore, if available, would largely be cumulative of evidence submitted at the hearing. Provisions of the CPLR concerning sanctions for spoliation of evidence are inapplicable to this administrative proceeding (*see Matter of Hicks v New York State Div. of Hous. & Community Renewal*, 75 AD3d 127, 133 [1st Dept 2010]).

Respondent's determination that petitioner did not qualify for remaining family member status is supported by substantial evidence (*see Matter of Mallay v New York City Hous. Auth.*, 117 AD3d 597 [1st Dept 2014]). The record shows that petitioner's grandmother, the tenant of record, never obtained respondent's written consent for petitioner's occupancy (*see Matter Lieder v New York City Hous. Auth.*, 129 AD3d 644 [1st Dept 2015]). Even crediting petitioner's contention that in the summer of 2010 his grandmother requested permission for him to permanently reside

with her (although respondent has no record of such request), petitioner's occupancy was not reflected in the affidavit of income filed by his grandmother in 2010, but was shown only on the affidavit she filed five months, i.e., less than one year, before her death in 2011 (*see Matter of Weisman v New York City Hous. Auth.*, 91 AD3d 543 [1st Dept 2012], *lv dismissed* 19 NY3d 921 [2012]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

308 The People of the State of New York, Ind. 1180/13
Respondent,

-against-

Gregory Chandler,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Thomas Farber, J. at plea and sentencing), rendered September 11, 2013, as amended September 18, 2013, convicting defendant of criminal possession of stolen property in the fourth degree and possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term 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, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). During a valid common-law inquiry, defendant voluntarily consented to the officers' search of a bag (*see generally People v Gonzalez*, 39 NY2d 122, 128-131

[1976]). Regardless of whether the officers directed defendant to put his bag on the hood of a police car, such a direction would not have elevated the encounter to a seizure under the totality of circumstances (*see People v Cabrera*, __AD3d__, 2016 NY Slip Op 00011 [2016]). Moreover, the hearing evidence also supports a finding that the police had reasonable suspicion at this point in the encounter.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

309 In re Yim Toy Eng, Index 100471/14
Petitioner,

-against-

John B. Rhea, etc.,
Respondent.

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Fishman & Mallon, LLP, New York (Jennifer A. Rozen of counsel), for petitioner.

David I. Farber, New York (Nabiha Rahman of counsel), for respondent.

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Determination of New York City Housing Authority (NYCHA), dated January 2, 2014, which, after a hearing, denied petitioner's grievance seeking succession rights as a remaining family member to the tenancy of his late mother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Michael D. Stallman, J.], entered August 13, 2014), dismissed, without costs.

NYCHA's determination is rational and supported by substantial evidence, given that petitioner admitted that he did not obtain NYCHA's written consent to his occupancy of his late mother's apartment (*see Matter of Lieder v New York City Hous. Auth.*, 129 AD3d 644, 645 [1st Dept 2015]). Petitioner did not

show that NYCHA acquiesced to his occupancy, and, in any event, he may not invoke estoppel against NYCHA (*id.*). Nor do petitioner's alleged mitigating factors provide a basis for annulling NYCHA's determination (*Matter of Andrade v New York City Hous. Auth.*, 132 AD3d 598, 599 [1st Dept 2015]).

Petitioner's due process argument is unavailing; the record shows that he was ably represented by a guardian ad litem who presented evidence and argued on his behalf, and his niece's proposed testimony would not have changed the determination (*see Rentas v New York City Hous. Auth.*, 2009 NY Slip Op 30047[U], *5 [Sup Ct, NY County 2009]).

Petitioner lacks standing to assert a claim under the Americans with Disabilities Act (ADA) on behalf of his late mother (*see Rosello v Rhea*, 89 AD3d 466, 467 [1st Dept 2011]). Further, petitioner's disability claim on behalf of himself is unavailing, since he does not meet the essential eligibility requirements for admission into public housing (*see id.*; *see also*

Matter of Rivera v New York City Hous. Auth., 60 AD3d 509, 509-510 [1st Dept 2009]). Moreover, his challenge to NYCHA's denial of his mother's request in 2007 to add him as an occupant of the apartment is time-barred (*see* CPLR 217).

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

311 Fernando Espinal Lopez, et al., Index 651424/12
Plaintiffs-Respondents,

-against-

La Fonda Boricua, Inc., et al.,
Defendants,

Maygina Realty LLC,
Defendant-Appellant.

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Rafter and Associates PLLC, New York (Howard K. Fishman of counsel), for appellant.

The Altman Law Firm, PLLC, New York (Michael T. Altman of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered September 8, 2014, which, insofar as appealed from as limited by the brief, denied defendant Maygina Realty LLC's motion for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) and lost earnings claims as against it, unanimously modified, on the law, to grant the motion as to the § 241(6) claims, and otherwise affirmed, without costs.

Defendant failed to establish prima facie, with respect to the Labor Law § 240(1) claim, that the injured plaintiff was not an "employee" but a "volunteer" within the meaning of the Labor Law, notwithstanding that his employer may have agreed to perform

the work at the restaurant gratuitously (*see Daniello v Holy Name Church*, 286 AD2d 268, 269 [1st Dept 2001]; *see generally Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970 [1979]). Nor did defendant establish that plaintiff was merely cleaning, rather than performing renovation work within the meaning of the Labor Law, or that he was the sole proximate cause of the accident because of the alleged misuse of the ladder (*compare Maloney v J.W. Pfeil & Co., Inc.*, 84 AD3d 1632, 1633 [3d Dept 2011]).

The Labor Law § 241(6) claim should be dismissed. Three of the provisions upon which plaintiffs rely, relating to ladder maintenance, are inapplicable to the facts of this case (*see* Industrial Code [12 NYCRR] § 23-1.21[b][1], [b][3][ii], [b][8]), since there is no evidence that the ladder was incapable of supporting four times the maximum load, and the injured plaintiff testified that the ladder he used had locking braces, which he claimed he properly opened every time he set up the ladder. The remaining provision (12 NYCRR 23-1.21[e][2]) is not sufficiently specific to support a Labor Law § 241(6) claim (*see Croussett v Chen*, 102 AD3d 448 [1st Dept 2013]; *Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 871 [3d Dept 1998]).

As to the lost earnings claim, defendant failed to submit documentary evidence that the injured plaintiff had no income

before the accident (*see Dmytryszyn v Herschman*, 98 AD3d 715, 716 [2d Dept 2012]; *Deans v Jamaica Hosp. Med. Ctr.*, 64 AD3d 742, 744 [2d Dept 2009]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

312 The People of the State of New York, Ind. 2138/13
Respondent,

-against-

Fabian Echevarria,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and DLA Piper LLP, (US), New York (Marc A. Silverman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (James Burke, J.), rendered March 5, 2014, as amended June 19, 2014, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The court provided a meaningful and correct response to a note from the deliberating jury (*see People v Malloy*, 55 NY2d 296, 301-302 [1982], *cert denied* 459 US 847 [1982]). Defendant was charged with possession of a knife with the intent to use it unlawfully. The main issue at trial was whether, during an altercation, defendant wielded the knife with intent to use it against the complainants justifiably, and therefore lawfully. In

its main charge, the court instructed the jury accordingly (CJI2d[NY] Penal Law art 265, Intent to Use Unlawfully and Justification), but it did not add a definition of justification. During deliberations, the jury sent a note that the court reasonably interpreted as showing difficulty with the concept of justifiable use of the knife, and the court properly exercised its discretion in responding with an explanation of justification as set forth in Penal Law § 35.15(1). That definition was applicable to the issue of whether defendant's intent was lawful, and we reject defendant's arguments to the contrary. In any event, any error regarding the supplemental charge was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly exercised its discretion in denying defendant's mistrial motion, based on the prosecutor's crude attempt at a joke during summation. The court struck the comment, which was unlikely to have been taken literally by the jury or to have caused any prejudice. By failing to object, by making generalized objections, and by failing to request further relief after objections were sustained, defendant failed to preserve any other challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find that although some of the comments

were better left unsaid, there is no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

313 In re Mikalo D.,

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

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

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

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about June 17, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first, second and third degrees, and placed him on probation for 12 months, unanimously modified, on the law, to the extent of vacating the finding as to second-degree sexual abuse and dismissing that count of the petition, and otherwise affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the court's credibility determinations. The evidence supports an inference that at least one of the purposes of appellant's sexual attack on the victim was sexual gratification (*see e.g. People v Najee A.*, 26 AD3d 258 [1st Dept 2006], *lv denied* 7 NY3d 703 [2006]).

As the presentment agency concedes, the second-degree sexual abuse finding should be dismissed as a lesser included offense. However, appellant's argument for dismissal of the third-degree finding is unavailing.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

314 In re Susan Crawford, et al., Index 104275/12
Petitioners-Appellants,

-against-

New York City Department of
Information Technology and
Telecommunications,
Respondent-Respondent.

_____

David A. Schulz, New York, for appellants.

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

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Appeal from order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about March 27, 2014, which, insofar as appealed from as limited by the briefs, granted respondent's cross motion to seal the papers it filed in opposition to the CPLR article 78 petition and the papers that petitioners filed in reply, unanimously dismissed, without costs.

Petitioners' right to appeal from the order terminated with the entry of the final judgment in this proceeding (*see Matter of Aho*, 39 NY2d 241, 248 [1976]). We reject any suggestion by petitioners that the rule stated in *Matter of Aho* is inapplicable to sealing orders, such as the order at issue on appeal (*see Anonymous v Anonymous*, 251 AD2d 610 [2d Dept 1998]). Further,

the *Aho* rule is applicable even if the order appealed from does not necessarily affect the final judgment (*see Siegmund Strauss, Inc. v East 149th Realty Corp.*, 81 AD3d 260, 266-267 [1st Dept 2010], *mod on other grounds* 20 NY3d 37 [2012]). The order is a nonfinal, intermediate order, because it did not dispose of the petition seeking certain documents; the doctrine of implied severance does not apply (*see Burke v Crosson*, 85 NY2d 10, 15-17 [1995]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

315 Press Access LLC, Index 653822/13
Plaintiff-Appellant,

-against-

1800 Postcards, Inc., doing
business as 1-800 Postcards, Inc.,
Defendant-Respondent.

_____

Platzer, Swergold, Levine, Goldberg, Katz & Jaslow, LLP, New York (Steven D. Karlin of counsel), for appellant.

Berliner & Pilson, Great Neck (Richard J. Pilson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 9, 2014, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The motion court correctly determined that plaintiff's action alleging replevin was barred by the doctrine of res judicata, because plaintiff had previously brought the same replevin claim against defendant in federal court, and that claim had been litigated and decided on the merits in defendant's favor (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; *Miller Mfg. Co. v Zeiler*, 45 NY2d 956, 958 [1978]).

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 25, 2016

CLERK

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

316 The People of the State of New York, Ind. 850/13
Respondent,

-against-

Felix Martinez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Tomoeh Murakami Tse of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 7, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, and sentencing him to a term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 8 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

317 CitiMortgage, Inc., Index 380926/10
Plaintiff-Appellant,

-against-

Nigel Parris, et al.,
Defendants-Respondents,

New York City Parking Violations Bureau, et al.,
Defendants.

_____

Akerman LLP, New York (Jordan M. Smith of counsel), for appellant.

Law Office of Robert F. Zerilli, Yonkers (Robert F. Zerilli of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered May 18, 2015, which denied plaintiff's motion for summary judgment, and granted defendants Nigel Parris and Marcine Parris's cross motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, plaintiff's motion granted, defendants' cross motion denied, and the matter remanded for further proceedings.

The consolidated mortgage documents did not require plaintiff to provide defendants with a notice of default prior to foreclosure. The "Consolidation, Extension, and Modification Agreement" executed by defendants and the original lender states

that the terms set forth in the consolidated mortgage "will supersede all terms, covenants, and provisions" of the preceding mortgages. Although the original mortgage required the lender to provide defendants with a 30-day notice of default and an opportunity to cure prior to foreclosure, the consolidated mortgage did not contain such a requirement. In any event, the record establishes that plaintiff provided notice of default.

The record also establishes that plaintiff became an assignee of the note by physical delivery in March 2009; the consolidated mortgage passed to it incident to the note (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361-362 [2015]). At the very least, at the time of the notice of default, plaintiff was the lender's servicing agent, with authority to accept payment, collect the debt, and send notices of default. Defendants do not dispute this.

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

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

318 The People of the State of New York, Ind. 1521/10
Respondent,

-against-

Leibin Rodriguez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (William A. Loeb of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 11, 2011, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of five years, unanimously affirmed.

The court properly denied defendant's challenge for cause. The only ground for the challenge was that the prospective juror had expressed difficulty in keeping an open mind. However, the court carefully elicited an assurance from the panelist that he would keep an open mind and not decide the case until jury deliberations. The court, which had the opportunity to observe the panelist's demeanor, properly concluded, from the totality of his responses, that he could serve impartially (*see People v Shulman*, 6 NY3d 1, 10 [2005], *cert denied* 547 US 1043 [2006]).

Defendant's remaining arguments for disqualifying the panelist are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find them unavailing.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

319 In re Antonio Giardina, Index 100201/14
Petitioner-Appellant,

-against-

New York City Health & Hospitals Corp., et al.,
Respondents-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 16, 2014, denying the petition to annul respondents' determination, dated July 7, 2011, which abolished petitioner's City Laborer position effective July 8, 2011, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination was rationally based in the record and not arbitrary and capricious (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). Following his layoff, petitioner's union challenged the way respondents calculated the retention date of City Laborers, including petitioner. On behalf of affected

Laborers, including petitioner, the union entered into a stipulation of settlement, which petitioner personally ratified, that advanced his retention date by more than nine years and moved him from No. 49 to No. 23 on the preferred list, i.e., the list of laid-off Laborers, in order of seniority, that determined the order of any reinstatements. During petitioner's time on the list, only two vacancies occurred, and they were filled by Laborers senior to him. Petitioner does not identify any Laborer who should have been displaced by him on the list or any vacancy that occurred that he could have filled.

To the extent petitioner seeks in this proceeding to revisit the terms of the settlement agreement, his challenge is untimely under the applicable four-month limitations period (*see* CPLR 217[1]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

320-
320A Index 107838/09

National Union Fire Insurance
Company of Pittsburgh, PA,
Plaintiff-Appellant,

-against-

Compaction Systems Corporation
of New Jersey, et al.,
Defendants-Respondents.

_____

Jackson & Campbell, P.C., Washington, DC (Erin N. McGonagle of the bar of the District of Columbia, the State of Maryland and the State of California, admitted pro hac vice of counsel), for appellant.

Fox Rothschild LLP, New York (Jeffrey M. Pollock of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered August 8, 2014, which denied the motion of plaintiff, National Union Fire Insurance Company of Pittsburgh, PA (National Union), for summary judgment, and granted defendants' (collectively, Compaction) cross motion for partial summary judgment declaring that its claim for contribution from National Union's insured was outside the scope of the subject settlement agreement, unanimously affirmed, with costs. Appeal from decision, dated June 28, 2013, unanimously dismissed, without costs, as taken from a nonappealable paper.

Although a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur, that is not the case here, where there is a pending third-party claim for contribution, and Compaction has stated its intent to seek recovery from National Union in the event any judgment obtained is otherwise unrecoverable (*see Combustion Eng'g v Travelers Indem. Co.*, 75 AD2d 777, 778 [1st Dept 1980], *affd* 53 NY2d 875 [1981], citing *New York Public Interest Research Group v Carey*, 42 NY2d 527, 529-530 [1977]; *Prashker v United States Guar. Co.*, 1 NY2d 584, 591-592 [1956]; *40-56 Tenth Ave. LLC v 450 W. 14th St. Corp.*, 22 AD3d 416, 417 [1st Dept 2005]).

Nevertheless, pursuant to the plain language of the settlement agreement and release entered into between National Union and Compaction in the underlying coverage action, the claims released are those asserted against Compaction for its own acts and liability as a landfill operator and transporter (*see Hallmark Synthetics Corp. v Sumitomo Shoji N.Y.*, 26 AD2d 481, 490 [1st Dept 1966], *affd* 20 NY2d 871 [1967] ["The general rule is that where a release contains a recital of a particular claim, obligation or controversy and there is nothing on the face of the instrument other than general words of release to show that anything more than the matters particularly specified was

intended to be discharged, the general words of release are deemed to be limited thereby"] [internal quotation marks and citations omitted]).

Compaction is not precluded from asserting a third-party complaint against Carter Day Industries, Inc., as successor-in-interest to National Union's insured under the subject policies, for its proportionate share of liability, if any.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

321 The People of the State of New York, Ind. 2534/13
Respondent,

-against-

Chad Aceto, etc.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered on or about March 13, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

322N Peter Greenblum, Index 316174/12
Plaintiff-Appellant,

-against-

Gila Greenblum,
Defendant-Respondent.

_____

Law Office of Deana Balahtsis, New York (Deana Balahtsis of counsel), for appellant.

Seidemann & Mermelstein, Brooklyn (Laurie E. Mermelstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered September 9, 2014, which, inter alia, granted defendant's motion for a change of venue to Kings County, unanimously affirmed, without costs.

In this matter where issues are raised regarding the custody of the parties' children and parental access, the motion court exercised its discretion in a provident manner in granting defendant's motion for a change of venue to Kings County (*see generally Morris v Halik*, 172 AD2d 502 [2d Dept 1991]; CPLR 510[3]). The record shows that the subject children reside with defendant in Kings County; that during the duration of the marriage the family lived in Kings County; that although plaintiff commenced the divorce action in New York County, the

parties had initially agreed in their separation agreement that the action would be commenced in Kings County; that there is a family offense proceeding pending in Kings County Family Court; and that the parties have no nexus to New York County (*see e.g. Matter of Arcuri v Osuna*, 41 AD3d 841 [2d Dept 2007]).

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 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

323 The People of the State of New York, Ind. 4541/12
Respondent,

-against-

James Andrews,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered April 30, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, criminally using drug paraphernalia in the second degree, and unlawful possession of an air rifle or pistol, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. The record supports the court's conclusion that the parole officers were entitled to perform a warrantless search of defendant's apartment since their conduct was rationally and substantially related to the performance of their official duties (*see People v Huntley*, 43 NY2d 175 [1979]). Although the parole

officers were cooperating with the police, who were investigating robberies and had accompanied the parole officers during the search, the parole officers were not acting solely on behalf of the police (*see e.g. People v Lopez*, 288 AD2d 70 [2001], *lv denied* 97 NY2d 706 [2002]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

324 Grace Baker, Index 113884/11
Plaintiff-Appellant,

-against-

Roman Catholic Church of
the Holy See,
Defendant,

Holy Cross Church,
Defendant-Respondent.

_____

Taubman Kimelman & Soroka, LLP, New York (Antonette M. Milcetic of counsel), for appellant.

Leahey & Johnson, P.C., New York (Joanne Filiberti of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 25, 2014, which granted the motion of defendant Holy Cross Church for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff was allegedly injured when she tripped and fell on the stairs as she exited defendant church. Defendant submitted photographs and an expert's affidavit showing that the two-stair staircase was open and obvious and not inherently dangerous (*see Tagle v Jakob*, 97 NY2d 165 [2001]; *Franchini v American Legion Post*, 107 AD3d 432

[1st Dept 2013]). Moreover, since plaintiff was not looking down when she fell, and saw the yellow markings on the stair's riser after her fall, there is no evidence that optical confusion caused the accident (*see Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [1st Dept 2012], *lv denied* 24 NY3d 907 [2014]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's expert did not show how the stair was inherently dangerous or constituted a hidden trap (*see Burke v Canyon Rd. Rest.*, 60 AD3d 558 [1st Dept 2009]). The expert's opinion that defendant was obligated to replace the small step with a ramp and install a handrail at the location does not warrant a different determination, as he failed to set forth a violation of any specific industry-wide safety guideline in effect at the time of the church's construction more than 140 years ago and prior to the adoption of the building codes (*see Sakol v Kirsch*, 25 AD3d 523 [1st Dept 2006]).

Furthermore, even if the step configuration was actionable, plaintiff's testimony did not connect her fall to either of the alleged defects, i.e., the short step or the handrail. She testified that she fell when her foot caught on a defect in the step. She did not miss the step due to being unaware of its

existence, nor was there any testimony that she reached out for a handrail to catch her fall (*see Daniarov v New York City Tr. Auth.*, 62 AD3d 480 [1st Dept 2009]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

325 In re Wilda C.,
Petitioner-Appellant,

-against-

Miguel R.,
Respondent-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about May 20, 2015, which dismissed with prejudice the emergency petition for temporary custody of the subject child due to lack of jurisdiction, unanimously affirmed, without costs.

The court lacks jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act (Domestic Relations Law, § 76-a), since the child lives in Puerto Rico with respondent father, who was granted custody in 2009 (74 AD3d 631 [1st Dept 2010]). Since petitioner mother conceded that the child was not present in New York, and her allegations regarding an emergency were entirely unsubstantiated, the court properly determined that it could not assert temporary emergency jurisdiction (Domestic Relations Law §

76-c; *see Matter of Maura B. v Giovanni P.*, 111 AD3d 443, 444 [1st Dept 2013]). Furthermore, in the absence of jurisdiction, it was not error for the court to dismiss the petition with prejudice without conducting a hearing.

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

326 Malou Mananghaya, et al., Index 20191/13
Plaintiffs, 83819/13
83953/13

-against-

Bronx-Lebanon Hospital, et al.,
Defendants.

- - - - -

Napoli Transportation, Inc.,
doing business as C&L Towing
Services, Inc.,
Third-Party Plaintiff,

-against-

Aggreko, LLC,
Third-Party Defendant.

- - - - -

The Bronx-Lebanon Hospital Center,
Second Third-Party Plaintiff-Respondent,

-against-

Aggreko, LLC,
Second Third-Party Defendant-Appellant.

_____

O'Connor Reed LLP, Port Chester (Amy L. Fenno of counsel), for appellant.

Ahmuty, Demers & McManus, New York (Glenn A. Kaminska of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered January 9, 2014, which denied second third-party defendant's (Aggreko) motion to dismiss the second third-party complaint, pursuant to CPLR 3211(a)(1), (7), and (8), unanimously

affirmed, without costs.

The motion court correctly determined that the documentary evidence tendered by Aggreko - rental agreement terms and conditions unsigned by third-party plaintiff (the hospital) – did not conclusively establish a defense to the second third-party complaint as a matter of law (*see Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]).

Nor does Aggreko and the hospital's course of conduct manifest that the hospital accepted the rental agreement terms and conditions (*see Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399-400 [1977]).

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

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

327 In re Christian G. Tarantino, Index 100871/14
Petitioner-Appellant,

-against-

New York City Police Department,
et al.,
Respondents-Respondents.

The Law Office of Eliza D. Stahl, P.C., Deer Park (Eliza D. Stahl of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered December 10, 2014, denying the petition seeking to compel respondents to disclose documents pursuant to the Freedom of Information Law (FOIL), and granting respondents' cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court properly denied the petition and granted the cross motion to dismiss based on mootness. Respondents were not in possession of the materials sought in petitioner's FOIL request (*see* Public Officers Law § 89[3][a]), as respondents sufficiently established by submitting their attorney's certification to that effect (*see Matter of Rattley v New York City Police Dept.*, 96

NY2d 873 [2001]; *see also Matter of Yonamine v New York City Police Dept.*, 121 AD3d 598 [1st Dept 2014], *appeal dismissed* 25 NY3d 968 [2015]). We have considered and rejected petitioner's contention that respondents failed to preserve that argument. The court's reliance on the certification in the attorney's affirmation in this circumstance did not constitute an improper conversion of respondents' cross motion to one for summary judgment without notice pursuant to CPLR 3211(c).

The court properly denied petitioner's request for a hearing, in the absence of any "demonstrable factual basis to support his contention that the requested documents . . . were within the Police Department's control" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 279 [1996]; *see Yonamine*, 121 AD3d at 598). The court also properly denied petitioner's request for an in camera inspection, in light of respondents' nonpossession of the materials at issue.

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

328 The People of the State of New York, Ind. 3006/08
Respondent,

-against-

Kevin Wyche,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J. at suppression hearing; Edgar G. Walker, J. at plea and sentencing), rendered February 16, 2012, convicting defendant of two counts of robbery in the second degree, and sentencing him to concurrent terms of 3½ years, unanimously affirmed.

Regardless of whether defendant's waiver of appeal was enforceable, we find that the court properly denied defendant's motion to suppress identification testimony. The People overcame the presumption of suggestiveness resulting from the nonproduction of evidence of the computerized photo arrays shown to a witness (*see People v Holley*, __NY3d__, 2015 NY Slip Op 09314 [2015]). The detective's testimony about the photo manager system and the procedures he employed was substantially similar

to the testimony given in *Holley*. Defendant has not established that the clothing he wore in his photograph would cause him to be singled out, especially since the witness's description of the robber did not mention clothing.

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

329-
330 In re Barry A. Klugerman,
Petitioner-Appellant,

-against-

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

Index 653397/13

_____

Jacqueline M.H. Bukowski, New York, for appellant.

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

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered November 13, 2014, which, upon reargument, granted respondents' cross motion to dismiss the petition as time-barred and to confirm the arbitration award, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered June 18, 2014, unanimously dismissed, without costs.

The petition was filed more than 90 days after the arbitration award was delivered to petitioner's union, his designated representative; accordingly, it is time-barred (CPLR 7511[a]; *Matter of Case v Monroe Community Coll.*, 89 NY2d 438, 443 [1997]).

Even if the petition were timely, petitioner lacks standing

to seek vacatur of the arbitration award (*see Chupka v Lorenz-Schneider Co.*, 12 NY2d 1, 6 [1962], *appeal dismissed* 372 US 227 [1963]).

We dismiss the appeal from the June 18, 2014 order. That order was superseded by the order entered November 13, 2014.

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

331 In re Elissa Abreu, Index 155206/14
Petitioner-Respondent,

-against-

Barkin & Associates Real Estate, LLC, et al.,
Respondents-Appellants.

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for appellants.

Morris Duffy Alonso & Faley, New York (Arjay G. Yao, Kevin G. Faley and Barry M. Viuker of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about May 11, 2015, which granted the petition as to the causes of action for piercing the corporate veil, de facto merger, and an accounting, and so much of the cause of action for fraudulent conveyance as is based on the sale of certain assets of nonparty Barkin & Associates Realty, Inc. (Barkin Inc.), and denied the petition as to the part of the fraudulent conveyance cause of action based on Barkin Inc.'s payment of a salary to respondent Susan Barkin (Ms. Barkin), unanimously modified, on the law, to deny the petition with prejudice as to the cause of action for piercing the corporate veil and so much of the cause of action for fraudulent conveyance

as is based on the sale of certain assets of Barkin Inc., and otherwise affirmed, without costs.

Contrary to respondents' claim, petitioner was entitled to bring a special proceeding instead of a plenary action (*see O'Brien-Kreitzberg & Assoc. v K.P., Inc.*, 218 AD2d 519 [1st Dept 1995]; *Matter of WBP Cent. Assoc., LLC v DeCola*, 50 AD3d 693 [2d Dept 2008]; *Matter of Goldberg & Connolly v Xavier Constr. Co., Inc.*, 94 AD3d 1117 [2d Dept 2012]).

The court erred by granting the cause of action to pierce Barkin Inc.'s corporate veil to impose liability on Ms. Barkin, the president and sole shareholder of the corporation. Petitioner failed to show that Ms. Barkin did not observe the corporate formalities (*see P.A. Bldg. Co. v Elwyn D. Lieberman, Inc.*, 227 AD2d 277, 279 [1st Dept 1996]; *see also East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 126-127 [2d Dept 2009], *affd* 16 NY3d 775 [2011]).

The court also erred by granting so much of the cause of action for fraudulent conveyance as is based on Barkin Inc.'s sale of its telephone numbers, goodwill, and rights under a sublease to respondent Barkin & Associates Real Estate, LLC (Barkin LLC) for $20,000 (*see* Debtor and Creditor Law § 273-a). Barkin Inc.'s phone numbers, goodwill, and rights under a

sublease were of value to Barkin LLC, but petitioner failed to show that they had any value as to her (*see Stokes Coal Co., Inc. v Garguilo*, 255 App Div 281, 282 [1st Dept 1938], *affd* 280 NY 616 [1939]). Petitioner also failed to show that $20,000 was not a "fair equivalent" for the items that Barkin Inc. sold (*see* Debtor and Creditor Law § 272[a]).

The court correctly ordered a hearing as to so much of the cause of action for fraudulent conveyance as is based on Barkin Inc.'s payment of a salary to Ms. Barkin.

The court correctly held Barkin LLC liable for the judgment against Barkin Inc. under the theory of de facto merger. There was continuity of ownership (*see Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]) in that Ms. Barkin – the sole shareholder of Barkin Inc. – owned 51 units of Barkin LLC. To be sure, Ms. Barkin's daughter owned 49 units of Barkin LLC, but continuity of ownership does not mean identity of ownership (*see Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 210 [1st Dept 2015]).

The record shows that "it was the intent of [Barkin LLC] to absorb and continue the operation of [Barkin Inc.]" (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 176 [1st Dept 2013] [internal quotation marks omitted]). Moreover, the de

facto merger rule is "based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the *good will* purchased" (*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984] [emphasis added]). As noted, Barkin LLC purchased Barkin Inc.'s goodwill.

Respondents contend that petitioner is not entitled to an accounting, because she did not establish substantive liability on any of the three preceding causes of action. However, we have affirmed the grant of the cause of action of the petition alleging de facto merger.

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

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

332 MCAP Robeson Apartments Limited Partnership, et al., Plaintiffs-Appellants, Index 652629/14

-against-

MuniMae TE Bond Subsidiary, LLC, et al., Defendants-Respondents.

_____

Ferber Chan Essner & Coller, LLP, New York (Robert N. Chan of counsel), for appellants.

Gallagher Evelius & Jones LLP, Baltimore, MD (Paul S. Caiola of the bar of the State of Maryland, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 5, 2015, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7), unanimously affirmed, with costs.

The documentary evidence and the parties' unambiguous "commitment" agreement conclusively establish a defense to plaintiffs' claims (*see Daeun Corp. v A&L 444 LLC*, 62 AD3d 479 [1st Dept 2009]; *see also Leon v Martinez*, 84 NY2d 83, 88 [1994]). This action arises out of defendants' decision not to proceed to a closing on a refinance loan transaction with plaintiffs. The commitment agreement specified that the

agreement could be terminated at defendants' discretion, with notice, if the refunding closing did not occur on or before December 31, 2006. It also provided that defendants' obligation to purchase the refunding bonds was "expressly contingent" upon, among other things, the absence of any material adverse changes in the factors on which defendant borrower underwrote the transaction.

In an August 29, 2007 email, the investment officer of defendant's affiliate advised plaintiffs that the refunding terms delineated in the commitment agreement were being withdrawn, because the property's operating statements showed that the property could not perform as originally underwritten, and that defendants would refinance only on different terms. Plaintiffs responded to this email immediately by threatening litigation.

Contrary to plaintiffs' contention that defendants' email did not constitute notice of termination of the commitment agreement, plaintiffs' contemporaneous response demonstrates that they understood the email as notice of termination (*see Webster's Red Seal Publs. v Gilberton World-Wide Publs.*, 67 AD2d 339, 341 [1st Dept 1979] ["the most persuasive evidence of the agreed intention of the parties in those circumstances is what the parties did when the circumstances arose"], *affd* 53 NY2d 643

[1981]). Plaintiffs do not allege, except in conclusory terms, that defendants' exercise of their discretion was "arbitrary, irrational, or not in good faith" (*see Wathne Imports, Ltd. v PRL USA*, Inc., 63 AD3d 476, 478 [1st Dept 2009]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

333 The People of the State of New York, Ind. 758/10
Respondent,

-against-

Eugene Smith,
Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered September 4, 2013, convicting defendant, after a jury trial, of burglary in the first and second degrees and criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motion made after a police witness made an inadvertent, fleeting reference that implied defendant's parole status. The court's prompt and thorough curative instructions were sufficient to prevent any prejudice (*see e.g. People v Rubi*,

19 AD3d 139, 140 [1st Dept 2005], *lv denied* 5 NY3d 809 [2005]; *People v Branford*, 220 AD2d 203 [1st Dept 1995], *lv denied* 87 NY2d 1017 [1996]). In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

334 In re Alexandria D.,

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

Brenda D.,
Respondent-Appellant,

-against-

SCO Family of Services,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Linda Tally, J.), entered on or about October 29, 2014, which, inter alia, after a fact-finding determination of permanent neglect, terminated respondent mother's parental rights to the subject child, and transferred custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding of permanent neglect (*see* Social Services Law § 384-b[7]).

The record demonstrates that the agency exerted diligent efforts to reunite the mother and the child by referring the mother to programs for anger management and parenting skills for special needs children, for mental health therapy, and by scheduling visitation and providing her with a visiting coach to improve the quality of the visits *(see Matter of Marissa Tiffany C-W. [Faith W.],* 125 AD3d 512 [1st Dept 2015]; *Matter of Tiara J. [Anthony Lamont A.],* 118 AD3d 545 [1st Dept 2014]). Despite these diligent efforts, the mother failed to substantially plan for the child's future. The record shows that the mother did not sufficiently focus on her mental health problems, controlling her anger, and on the child's needs. The caseworker testified that the quality of the mother's visits varied and she often directed her attention to her younger children, leaving the child to her own devices. The mother also was chronically late, keeping the child waiting for as much as two hours on several occasions, and made no effort to contact the child's therapist or teachers.

A preponderance of the evidence supports the determination that it was in the best interests of the child to terminate the mother's parental rights to free the child for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child was in the same loving foster home for four years, where

her needs were met and where the foster mother wanted to adopt her. The record reflects that during that time period, the mother was not able to overcome the problems that led to the child's placement *(see Matter of Autumn P. [Alisa R.]*, 129 AD3d 519 [1st Dept 2015]). The court properly rejected the alternative of a suspended judgment as there was a lack of evidence that the brief delay would result in a different outcome and the child needed stability in her life (*id.* at 520).

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

335 Rosa Ingles, Index 303373/07
Plaintiff-Appellant,

-against-

Architron Designers and Builders, Inc.,
Defendant-Respondent.

_____

Popkin & Popkin, LLP, New York (Eric F. Popkin of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered October 15, 2014, which, to the extent appealed from as limited by plaintiff's brief, granted defendant's motion for summary judgment dismissing the complaint on the merits, unanimously affirmed, without costs.

Plaintiff alleges that she tripped and fell on a defective roadway in front of buildings located at 330 and 340 W. 28th Street, in Manhattan. Defendant made a prima facie showing that it did not perform any work at the location of plaintiff's alleged fall, by submitting, among other things, the affidavit of its vice president, who asserted that the work was performed in front of 360 W. 28th Street, and did not extend to the location where plaintiff allegedly fell (*see Melcher v City of New York*,

38 AD3d 376, 377 [1st Dept 2007]).

In opposition, plaintiff failed to raise a triable issue of fact. The permits issued to defendant allowing it to pave a maximum of 100 feet of roadway do not raise an issue of fact as to whether it actually paved that amount or whether the work it performed encompassed the area of plaintiff's fall (*see Bermudez v City of New York*, 21 AD3d 258 [1st Dept 2005]). Further, the affidavit of defendant's vice president does not contradict his deposition testimony.

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

336 The People of the State of New York, Ind. 2520/09
Respondent,

-against-

Javier Guaman,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

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Order, Supreme Court, New York County (Juan M. Merchan, J.), entered May 7, 2014, adjudicating defendant a level two sexually violent offender under the Sex Offender Registration Act, 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 only ground for departure cited by defendant is his

deportation to Ecuador. However, we reject defendant's argument that his deportation resulted in such a reduced risk to public safety as to warrant a downward departure (*see People v Zepeda*, 124 AD3d 417 [1st Dept 2015], *lv denied* 25 NY3d 902 [2015]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

337 Renaissance Housing Development Fund Corporation,
Plaintiff-Appellant,

-against-

Phoenix Construction, Inc., (now known as Phoenix Building Restorer Inc.),
Defendant,

Central Harlem Partnership Plaza, LLC, et al.,
Defendants-Respondents.

Index 155083/13

Zetlin & De Chiara, LLP, New York (James H. Rowland of counsel), for appellant.

Silverman Shin Byrne & Gilchrest PLLC, New York (Donald F. Schneider of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 31, 2014, which, to the extent appealed from as limited by the briefs, granted defendants Central Harlem Partnership Plaza, LLC, Suna/Levine Industries, Inc., and J.E. Levine Builders' (the moving defendants) motion to dismiss the breach of contract causes of action as against them, unanimously affirmed, without costs.

The breach of contract causes of action against the moving defendants are based on allegations of breaches by defendant

Phoenix Construction, Inc. Plaintiff alleges that the moving defendants breached their contractual obligations to it because the remedial work they retained Phoenix to perform was defective and because they failed to properly supervise Phoenix's work. However, plaintiff's claim to be a third-party beneficiary of the remediation contract is "conclusively dispose[d] of" by the contract's plain terms (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]). None of the duties that plaintiff claims are owed by the moving defendants can be found in the contract itself. A third-party beneficiary has no greater right to enforce a contract than the contracting parties themselves (*see e.g. AMBAC Assur. Corp. v EMC Mtge. LLC*, 39 Misc 3d 1240[A], 2013 NY Slip Op 50954[U], *8 [Sup Ct, NY County 2013], *affd* 121 AD3d 514 [1st Dept 2014]).

The motion court also correctly found that the breach of contract claims against the moving defendants are untimely. Plaintiff is merely attempting to re-characterize its untimely warranty claims arising from the offering plan as timely breach of contract claims stemming from the remediation contract. It is

undisputed that the moving defendants raised statute of limitations arguments with respect to plaintiff's warranty claims, even if they did not explicitly raise them with respect to the breach of contract claims.

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

338 Yvonne Rios, Index 306747/09
Plaintiff-Respondent,

-against-

1146 Ogden LLC, et al.,
Defendants-Appellants,

CYA Management LLC,
Defendant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Adonaid C. Medina of counsel), for appellants.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 28, 2014, which, in this action for personal injuries allegedly sustained by plaintiff when she was caused to fall in the bathroom of her apartment due to tiles falling off the wall, denied the motion of defendants 1146 Ogden LLC and New City Management, LLC for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants' contention that they are out-of-possession landlords with no duty to repair the allegedly dangerous condition is unpreserved since it is raised for the first time on appeal (*see Diarrassouba v Consolidated Edison Co. of N.Y., Inc.*,

123 AD3d 525 [1st Dept 2014]). In any event, defendants failed to make a prima facie showing that they were out-of-possession landlords who ceded possession and control to codefendant CYA Management LLC, where they leased individual apartments to CYA pursuant to individual leases, the lease to the subject unit limited the repair obligations that were CYA's responsibility and prohibited it from making any alterations, and defendants employed a live-in superintendent in the building (*see generally Bonifacio v 910-930 S. Blvd.*, 295 AD2d 86, 88-89 [1st Dept 2002]; *see Vazquez v Diamondrock Hospitality Co.*, 100 AD3d 502 [1st Dept 2012]).

Triable issues of fact also exist regarding whether defendants had notice of the allegedly dangerous condition. Defendants' general manager acknowledged that defendants employed a building superintendent who lived in the basement of the premises, and plaintiff testified that she went to the basement on a number of occasions and complained to the superintendent about the condition of the tiles. Furthermore, defendants'

general manager acknowledged that he was unaware whether defendants received any complaints regarding the dangerous condition prior to plaintiff's accident (*see Helena v 300 Park Ave.*, 306 AD2d 170 [1st Dept 2003]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

339-
340 The People of the State of New York,
Respondent,

-against-

Henry Rosa,
Defendant-Appellant.

Ind. 1694/09

Richard M. Greenberg, Office of The Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

Appeals having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, Bronx County (Megan Tallmer, J. at plea and sentencing; Efrain Alvarado, J. at resentencing), rendered August 27, 2014,

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 25, 2016

CLERK

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

Friedman, J.P., Sweeny, Saxe, Gische, JJ.

341 The People of the State of New York, Ind. 2730/13
Respondent,

-against-

Erik Colvin,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William McGuire, J.), rendered December 3, 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 25, 2016

CLERK

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

Friedman, J.P., Sweeny, Saxe, Gishe, JJ.

342-
343 Index 350197/10

Chyna Chung, etc., et al.,
Plaintiffs-Appellants,

-against-

New York City Board of Education,
Defendant-Respondent,

City of New York,
Defendant.

_____

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Amanda Sue Nichols of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered October 30, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of defendant New York City Board of Education for summary judgment dismissing the complaint as against it, and order, same court and Justice, entered May 20, 2015, which, insofar as appealable, upon renewal, adhered to the prior determination, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law, in this action where infant plaintiff sustained injuries when, while in the schoolyard during recess, another student

knocked her down while running backwards to catch a football. Defendant demonstrated that adequate supervision was provided by showing that the school had aides present to monitor the children, and instructed the students playing football that they were only to play catch, that there would be no running or tackling, and that they were to stay on their side of the yard (*see David v County of Suffolk*, 1 NY3d 525 [2003]; *Paredes v City of New York*, 101 AD3d 424 [1st Dept 2012]; *Calcagno v John F. Kennedy Intermediate School*, 61 AD3d 911 [2d Dept 2009]). Defendant also showed that the subject accident was proximately caused by the unanticipated spontaneous act of the other student colliding into infant plaintiff (*see Lizardo v Board of Educ. of the City of New York*, 77 AD3d 437, 439 [1st Dept 2010]).

In opposition, plaintiffs failed to raise a triable issue of fact. The expert affidavit she submitted "failed to establish the foundation or the source of the standards underlying the conclusion that defendant's supervision of the infant plaintiff was inadequate" (*David*, 1 NY3d at 526). Even if plaintiff's expert's experience qualified him to opine about playground safety, the opinions offered here were wholly inadequate to defeat summary judgment because they were conclusory and not expressly related to any of the evidence adduced (*Amini v Arena*

Construction, 110 AD3d 414 [1st Dept 2013]; *Bean v Ruppert Towers House. Co.*, 274 AD2d 395 [1st Dept 2000]. In addition, plaintiff, whether through her expert or otherwise, fails to raise an issue of fact about how the claimed safety violations proximately caused the infant's accident (*Decintio v Lawrence Hosp.*, 33 AD3d 329 [1st Dept]).

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

ENTERED: FEBRUARY 25, 2016

CLERK

Acosta, J.P., Renwick, Andrias, Moskowitz, JJ.

357 The People of the State of New York, Ind. 3826/12
Respondent,

-against-

Marcus Culbert,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at dismissal motion; Robert M. Stolz, J. at jury trial and sentencing), rendered November 20, 2013, as amended December 11, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of seven years, unanimously affirmed.

Defendant's motion to dismiss the indictment, based on a claim that he was deprived of his right to testify before the grand jury, was properly denied. The People fulfilled their obligation of providing defendant with a reasonable opportunity

to testify, and his failure to do so resulted from his seriously disruptive and abusive conduct, which raised valid safety concerns (*see People v Johnson*, 128 AD3d 412 [1st Dept 2015]; *People v Davis*, 287 AD2d 376 [1st Dept 2001], *lv denied* 97 NY2d 680 [2001]; *People v Dunn*, 248 AD2d 87 [1st Dept 1998], *appeal withdrawn* 93 NY2d 1002 [1999]). The People were not required to delay the grand jury proceeding in the hope that defendant's behavior might improve.

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 credibility determinations. The evidence supports the conclusion that defendant participated in a drug transaction by acting as a steerer.

In this case where the principal issue was accessorial liability, the court properly admitted expert testimony regarding the roles of participants in street level drug sales. This evidence was relevant to explain the role of a steerer and the absence of drugs or buy money on defendant's person (*see People v Jamison*, 103 AD3d 537, 538 [1st Dept 2013], *lv denied* 21 NY3d 1016 [2013]), and it came within the permissible bounds for this

type of testimony (*see generally People v Brown*, 97 NY2d 500, 505-507 [2002]). None of this testimony suggested that defendant was involved in anything larger in scale than a street-level drug operation.

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

ENTERED: FEBRUARY 25, 2016

CLERK

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

15854 In re Raharney Capital, LLC, etc., Index 160175/14
Petitioner-Appellant,

-against-

Capital Stack LLC, etc.,
Respondent-Respondent.

_____

Giuliano McDonnell & Perrone, LLP, Mineola (Nicholas P. Giuliano and Christopher R. Murray of counsel), for appellant.

Carter Ledyard & Milburn LLP, New York (Jeffrey S. Boxer of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered November 28, 2014, affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Karla Moskowitz
Rosalyn H. Richter
Barbara R. Kapnick, JJ.

15854
Index 160175/14

_____x

In re Raharney Capital, LLC, etc.,
Petitioner-Appellant,

-against-

Capital Stack LLC, etc.,
Respondent-Respondent.

_____x

Petitioner appeals from an order of the Supreme Court, New York County (Alice Schlesinger, J.), entered November 28, 2014, which granted respondent's cross motion to dismiss the petition for lack of subject matter jurisdiction.

Giuliano McDonnell & Perrone, LLP, Mineola (Nicholas P. Giuliano and Christopher R. Murray of counsel), for appellant.

Carter Ledyard & Milburn LLP, New York (Jeffrey S. Boxer and Andriy R. Pazuniak of counsel), for respondent.

RICHTER, J.

In this appeal, we are asked to determine whether a New York court has the power to order the dissolution of a limited liability company that operates in this state, but was formed under the laws of another state. We conclude, consistent with decisions from the Court of Appeals, this Court, and our sister departments of the Appellate Division, that the courts of this state do not have subject matter jurisdiction to judicially dissolve a foreign business entity. Instead, the decision as to whether dissolution is appropriate lies with the courts of the state in which the entity was created.

Petitioner Raharney Capital, LLC (Raharney) is a Delaware limited liability company, and respondent Capital Stack, LLC (Capital Stack) is either a New York or a Nevada limited liability company. Raharney and Capital Stack each has its principal place of business in New York County, and each company has a sole member residing in New York. In September 2012, the principals of Raharney and Capital Stack agreed to embark upon a joint venture to act as a news source and forum for the nontraditional business finance industry. In furtherance of their endeavor, Raharney and Capital Stack formed Daily Funder, LLC (Daily Funder), a limited liability company organized under the laws of Delaware, with its sole place of business in New York

County.[1] Raharney and Capital Stack each own a 50% interest in Daily Funder and have equal membership and management rights in the company. Daily Funder does not have a written operating agreement.

In October 2014, Raharney brought a petition seeking an order judicially dissolving Daily Funder pursuant to section 18-802 of Delaware's Limited Liability Company Act. According to Raharney, the members of Daily Funder were unable to agree upon their respective roles and duties, the terms of an operating agreement, and the terms for withdrawal of either member. Raharney alleged that the parties were hopelessly deadlocked, and that it was not reasonably practicable for the company to continue operating. Raharney sought a judgment dissolving Daily Funder, and compelling its members to wind up the company's affairs and to execute the necessary documents to effect the dissolution of the company. Capital Stack cross-moved to dismiss the petition for lack of subject matter jurisdiction and for failure to state a claim. The motion court granted Capital

[1] Raharney names two different Capital Stack entities in the alternative as respondent, one formed in Nevada and one formed in New York. Raharney contends that the two entities are alter egos of each other and that it is unclear which is the member of Daily Funder. Capital Stack contends that the Nevada entity is Daily Funder's member, and that the New York entity has been dormant for several years and was recently dissolved.

Stack's motion to the extent of dismissing the proceeding on jurisdictional grounds. Raharney appeals, and we now affirm.

In *Vanderpoel v Gorman* (140 NY 563, 571-572 [1894]), in discussing the distinction between domestic and foreign corporations, the Court of Appeals expressed its view that a corporation could only be dissolved by the state that created it, and that courts in New York could not dissolve a foreign corporation (*see also Sokoloff v National City Bank of N.Y.*, 239 NY 158, 167 [1924] [government of Russia could not dissolve a corporation formed under New York laws]; *Merrick v Van Santvoord*, 34 NY 208, 222 [1866] ["a corporate franchise granted by one State, cannot be revoked or annulled by the courts of another"]). This Court echoed that sentiment in *Miller v Barlow* (88 App Div 529, 533 [1st Dept 1903], *revd on other grounds* 179 NY 294 [1904]), where we observed that "neither the Legislature nor the courts of this State would have the power to dissolve a corporation organized under the laws of another State." Likewise, in *Tosi v Pastene & Co.* (34 AD2d 520, 520 [1st Dept 1970]), we found that, although allegations of mismanagement of a foreign corporation would allow the plaintiff to obtain some unspecified relief, they "may not entitle the court to direct a dissolution of the foreign [entity]."

The other departments of the Appellate Division that have

addressed this issue have concluded that courts in New York do not have subject matter jurisdiction to dissolve an out-of-state foreign entity. In *Rimawi v Atkins* (42 AD3d 799 [3d Dept 2007]), the plaintiffs commenced an action against Quik-Flight, a Delaware limited liability company that operated an air charter service in New York. The complaint included a cause of action seeking judicial dissolution of Quik-Flight. The defendants moved to dismiss the dissolution cause of action, and Supreme Court denied the motion. On appeal, the Third Department reversed and held that New York courts lack subject matter jurisdiction over the dissolution claim (*id.* at 801). Similarly, in *Matter of MHS Venture Mgt. Corp. v Utilisave, LLC* (63 AD3d 840, 841 [2d Dept 2009], the Second Department concluded that "[a] claim for dissolution of a foreign limited liability company is one over which the New York courts lack subject matter jurisdiction" (*see also Matter of Porciello v Sound Moves*, 253 AD2d 467 [2d Dept 1998]; *Matter of Warde-McCann v Commex, Ltd.*, 135 AD2d 541 [2d Dept 1987]; *Appell v LAG Corp.*, 2006 NY Slip Op 30602[U] [Sup Ct, NY County 2006], *affd* 41 AD3d 277 [1st Dept 2007]).

The overwhelming majority of courts outside New York have come to the same conclusion (*see* P. G. Guthrie, Annotation, *Dissolving or Winding Up Affairs of Corporation Domiciled in*

Another State, 19 ALR3d 1279, § 3[a] [collecting cases]). For example, in *Young v JCR Petroleum, Inc.* (188 W Va 280, 283-284, 423 SE2d 889, 892-893 [1992]), the court, interpreting certain state statutes, held that West Virginia courts have no jurisdiction to dissolve foreign corporations. To conclude otherwise, the court reasoned, would run afoul of the Full Faith and Credit clause of the United States Constitution, which "requires each state to respect the sovereign acts of the other states[,]" including "[t]he creation and dissolution of a corporation" (188 W Va at 283, 423 SE2d at 892; *see also Lueker v Rel Tech Group, Inc.*, 24 Va Cir 197, 200 [Va Cir Ct 1991] [a corporation could not be involuntarily dissolved "except by the act of a sovereign power by which it was created"]; *Spurlock v Santa Fe Pacific R.R. Co.*, 143 Ariz 469, 482, 694 P2d 299, 312 [Ariz Ct App 1984] ["The respective supremacies of the state and national governments in their particular spheres must be observed in regard to their power to create and destroy corporations. Neither may terminate the existence of a corporation of the other"], *cert denied* 472 US 1032 [1985]; *Kirby Royalties, Inc. v Texaco Inc.*, 458 P2d 101, 103 [Wyo 1969]; *State v Dyer*, 145 Tex 586, 591, 200 SW2d 813, 815 [Tex 1947]).

We agree with the near-universal view that the courts of one state do not have the power to dissolve a business entity formed

under another state's laws.[2] Because a business entity is a creature of state law, the state under whose law the entity was created should be the place that determines whether its existence should be terminated (*see* 17A Fletcher, Cyclopedia of Corporations § 8579 [2015] ["the state or country that grants the corporation its franchise has exclusive and supreme power to withdraw it and to forfeit the corporate charter or dissolve the corporation"]; 19 Am Jur 2d, Corporations § 2335 ["The existence of a corporation cannot be terminated except by some act of the sovereign power by which it was created"]).

We recognize that in *Matter of Hospital Diagnostic Equip. Corp. [HDE Holdings-Klamm]* (205 AD2d 459 [1st Dept 1994]), this Court, in a brief memorandum decision, rejected a challenge to the court's jurisdiction to dissolve a foreign corporation. We now conclude that *Hospital Diagnostic* should no longer be followed in light of the principles enunciated by the Court of Appeals in *Vanderpoel*, *Sokoloff* and *Merrick*, and by this Court in *Miller* and *Tosi*. *Hospital Diagnostic* also cannot be reconciled with the rulings of the other departments of the Appellate Division and the overwhelming weight of authority from other

[2] Although this proceeding involves a limited liability company, we perceive no reason why the rule should be any different for corporations, partnerships and other business entities.

jurisdictions.

The short decision in *Hospital Diagnostic* relies solely on a citation to *Broida v Bancroft* (103 AD2d 88 [2d Dept 1984]), a shareholder derivative action that did not involve a request for corporate dissolution. In *Broida*, the court concluded that jurisdiction could be exercised over an action involving the internal affairs of a foreign corporation doing business in New York, unless New York was an inappropriate or inconvenient forum (*id.* at 91-92; *see Hart v General Motors Corp.*, 129 AD2d 179, 185-186 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987]). Although we do not quarrel with that proposition, we believe that judicially dissolving a foreign business entity is entirely distinct from resolving a dispute over its internal affairs (*see Rimawi v Atkins*, 42 AD3d at 801 [distinguishing between derivative claims involving internal affairs of a foreign corporation, for which there is subject matter jurisdiction, and a dissolution claim, for which there is not]). An order of dissolution from a New York court would infringe on the sovereign authority of another state by, in effect, forcing that state to extinguish an entity formed under its own laws.

We recognize that New York State courts play a critical role in resolving disputes involving business entities, and our limited holding here is only that New York courts lack subject

matter jurisdiction to dissolve a business entity created under another state's laws, an extremely narrow subset of cases. This case does not involve the authority of our courts to adjudicate the myriad disputes involving foreign entities doing business in this state, or to grant provisional relief in the course of hearing such controversies. The only relief sought here is the judicial dissolution of a foreign limited liability company, which can only be granted by the state that created it.

Finally, we disagree with petitioner that Delaware has only a minimal interest in the question of whether a business entity created in that state should be dissolved. Indeed, Delaware has a strong interest in determining whether business entities formed under its own laws continue to exist at all, and we should refrain from telling Delaware whether or not it should dissolve business entities formed in that state. In any event, the question here is not whether New York or Delaware is the more appropriate forum, an issue that would be part of a forum non conveniens analysis, but rather whether New York has subject matter jurisdiction in the first instance.

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

Accordingly, the order of the Supreme Court, New York County

(Alice Schlesinger, J.), entered November 28, 2014, which granted respondent's cross motion to dismiss the petition for lack of subject matter jurisdiction, should be affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 25, 2016

CLERK