SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 9, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

16343 The People of the State of New York, Respondent, Ind. 2201/09

-against-

Elmer Castillo,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Sullivan & Cromwell LLP, New York (George Robert Painter IV of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Peter J. Benitez, J.), rendered January 12, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 18 years, modified, on the law, to the extent of remanding for resentencing proceedings consistent with this decision, and otherwise affirmed.

Initially, there was overwhelming evidence supporting the jury's finding that the attack on May 8, 2009 by defendant and his accomplices was the cause of the victim's death on May 12,

2009. Eyewitnesses and surveillance video established that they hit the victim repeatedly in the head, including defendant's assault on him with a tire iron. The victim was also kicked in the face and thrown down an open basement stairway. He suffered severe injuries, specifically a fractured skull with bone fragments pushed into his brain, causing cerebral bleeding and swelling and a lack of oxygen to the brain, from which he died four days later.

The jury appropriately rejected the suggestion of the defense's expert that the victim had so recovered by his third day in the hospital that his death on the fourth day was caused not by his injuries but by a possible infection of unknown origin or a fall from his bed, since that testimony was unconvincing, if not speculative, particularly in view of the expert's acknowledgment that the injury was life-threatening and required emergency surgery. In any event, the jury's finding that the attack caused the victim's death was warranted by

> "the rule in New York that '[i]f a person inflicts a wound . . . in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes cooperated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally

> follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible'"

(*People v Pratcher*, 134 AD3d 1522, 1524 [4th Dept 2015], quoting *People v Kane*, 213 NY 260, 274 [1915]).

Defendant failed to raise any challenge to the court's charge regarding causation of death at a time when the court could have easily rephrased the instruction. The issue is therefore unpreserved for appellate review (*see* CPL 470.05[2]). The claimed error does not fall within the "very narrow exception" discussed in *People v Thomas* (50 NY2d 467, 471 [1980]), as the dissent suggests. That narrow exception is only applicable "when the procedure followed at trial was at basic variance with the mandate of law prescribed by Constitution or statute" (*id.*). Here, as was the case in *Thomas*, preservation was necessary because defendant essentially claims that "a portion of the charge could, in the particular case, be interpreted as having a contrary effect" to the burden of proof charge that was correctly stated by the court (*id.* at 472). Nor is the exercise of interest of justice jurisdiction warranted; defendant was not deprived of a fair trial (*see* CPL 470.15[6][a]). As an alternative holding, we consider the charge, viewed as a whole, to have properly conveyed the law

regarding whether the assault was a sufficiently direct cause of the victim's death (*see People v Umali*, 10 NY3d 417, 426-427 [2008], *cert denied* 556 US 1110 [2009]; *People v Ladd*, 89 NY2d 893, 895 [1996]).

Defendant's argument that the prosecutor engaged in a pattern of improper remarks which deprived him of a fair trial is similarly unpreserved, as no objection was made at trial to any of the remarks of which he now complains, and we decline to review it in the interest of justice. As an alternative holding, on balance the prosecutor's remarks did not prejudice defendant, and did not have the cumulative effect of depriving defendant of a fair trial (*see People v D'Alessandro*, 184 AD2d 114, 119-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

Defendant's argument that his defense was in conflict with that of his codefendant such that a severance was necessary is also unpreserved, since defendant never sought severance at trial (*see People v Bernier*, 245 AD2d 137, 138 [1st Dept 1997], *lv denied* 91 NY2d 940 [1998]), and we decline to review it in the interest of justice. As an alternative holding, this argument lacks merit. The two defendants' defenses — that one was not there and that the other did not mean to inflict serious injury or death — "were not so irreconcilable as to require severance"

(*People v Funches*, 4 AD3d 206, 207 [1st Dept 2004], *lv denied* 3 NY3d 640 [2004]). Moreover, since the proof that defendants acted in concert to commit the crimes charged was supplied by the same evidence, a balancing of defendant's rights against the interest of judicial economy warranted the joint trial (*see People v Mahboubian*, 74 NY2d 174, 183 [1989]).

Finally, we reject defendant's contention that his counsel's failure to preserve the foregoing claimed errors establishes an ineffective assistance claim. The record establishes that defendant's attorney mounted a competent defense in the face of a difficult case with powerful evidence of his client's guilt -- indeed, defendant's attorney succeeded in obtaining an acquittal of the charge of second-degree murder, the most serious of the numerous charges and defendant was not prejudiced by the lack of preservation.

However, as the People concede, defendant is entitled to a youthful offender determination (*see People v Rudolph*, 21 NY3d 497 [2013]). The conviction for first-degree manslaughter, a class B felony (Penal Law § 125.20[1]), does not disqualify defendant from a youthful offender finding (*see* CPL 720.10[2][a]). Defendant had not previously been convicted of a felony or received youthful offender treatment; nor does his 2008

juvenile delinquency adjudication in Family Court for fifth-degree criminal possession of a controlled substance disqualify him from youthful offender adjudication (*see* CPL 720.10[2][b]-[c]; Family Court Act § 301.2[8]). Accordingly, we remand for a new sentencing proceeding, at which the court shall expressly decide whether to adjudicate defendant a youthful offender.

All concur except Tom, J.P. who dissents in a memorandum as follows:

TOM, J.P. (dissenting)

Defendant and the two codefendants attacked and beat Jonathan Jimenez and threw him down an open basement stairway. Jimenez was taken to St. Barnabas Hospital in the Bronx, where he died four days later. Following the attack, defendants were arrested and charged with second-degree murder, first-degree manslaughter, and first and second-degree gang assault. During trial, a number of lesser assault offenses were submitted (first through third degree assault), all of which required proof of physical injury or serious physical injury.

The trial presented two sharply different theories as to the cause of the victim's death. The medical examiner testified for the prosecution that the victim's injuries, which were consistent with "blunt impact to the skull," were the "but for" cause of the victim's death notwithstanding any complications the victim suffered during his hospitalization. In contrast, defendant's medical expert testified that the victim had recovered from the head injury sustained during the alleged assault, and that complications attributable to hospital negligence were the sole causes of his death. In particular, defendant's expert noted that while in the hospital the victim's condition was improving and he appeared to be recovering from the head injury, but then he

suffered a fall from his bed. Defendant's expert opined that the hospital was negligent in allowing him to fall but also in failing to repeat a CT scan of his head after the fall to make sure there was no injury, and in failing to swiftly treat the fever and infection which the victim developed within 24 hours after the fall. The expert also stated that the infection, which he believed was the cause of death, was likely caused either by the victim's fall from his bed or one of the intravenous catheters used on him.

Although there were various charges submitted to the jury, some of which only required proof of physical injury or serious physical injury, the court gave a single "charge of causation as being applicable to all the counts," lumping "death, physical injury or serious physical injury" together to the jury. The jury ultimately found defendant guilty of manslaughter in the first degree. On appeal, defendant argues that the trial court's charge misstated the law on causation and relieved the People of their burden of proving defendant caused the death of Jimenez, an essential element of the crime of manslaughter, by requiring the prosecution only to prove that defendant's conduct was a sufficiently direct cause of the victim's injury relating to the lesser assault offenses.

Although defendant failed to preserve his challenge to the court's charge regarding causation of death, because the instructions relieved the People of their burden of proving causation of death, normal preservation requirements do not apply and the issue may be reviewed nothwithstanding the lack of preservation (*see People v Thomas*, 50 NY2d 467, 471–472 [1980]). In the alternative, I would consider the claim in the interest of justice (*see People v McTiernan*, 119 AD3d 465, 467 [1st Dept 2014]). Further, I conclude that the charge, viewed as a whole, failed to properly convey the law regarding whether the assault was a sufficiently direct cause of the victim's death (*see People v Umali*, 10 NY3d 417, 426-427 [2008], *cert denied* 556 US 1110 [2009]; *People v Ladd*, 89 NY2d 893, 895 [1996]), and thus a new trial is warranted.

"In considering a challenge to a jury instruction, the 'crucial question is whether the charge, in its entirety, conveys an appropriate legal standard and does not engender any possible confusion'" (*People v Hill*, 52 AD3d 380, 382 [1st Dept 2008], quoting *People v Wise*, 204 AD2d 133, 135 [1st Dept 1994], *lv denied* 83 NY2d 973 [1994]). Where the court's charge creates undue confusion in the minds of the jurors, reversal is warranted (*Hill*, 52 AD3d at 382; *People v Rogers*, 166 AD2d 23 [1st Dept

1991], *lv denied* 78 NY2d 1129 [1991]). Guided by these principles, I find that the court's instructions on causation were prejudicially defective.

A person is guilty of first-degree manslaughter when "[w]ith intent to cause serious physical injury to another person, he causes the death of such person or of a third person" (Penal Law § 125.20[1]). In contrast, first through third degree assault and gang assault in the first and second degrees require the causation of either physical injury (third degree assault) or serious physical injury (first and second degree assault, gang assault in the first and second degrees) (Penal Law §§ 120.00, 120.05, 120.06, 120.07, 120.10).

In order to prove defendant was guilty of manslaughter in the first degree, the People must "at least, prove that the defendant's conduct was an actual cause of death, in the sense that it forged a link in the chain of causes which actually brought about the death" (*People v Stewart*, 40 NY2d 692, 697 [1976]). The defendant's conduct must thus "be *a sufficiently direct cause* of the ensuing death before there can be any imposition of criminal liability" (*id.* [internal quotation marks omitted]). Causation of death is thus "an essential element which the People must prove beyond a reasonable doubt" (*id.*).

Significantly, while a defendant will generally be criminally responsible for a victim's death notwithstanding negligent medical treatment, he will be relieved of liability where the "death can be attributed *solely* to the negligent medical treatment" (*People v Bowie*, 200 AD2d 511, 512 [1st Dept 1994], *lv denied* 83 NY2d 869 [1994]).

Similarly, proof of injury or serious physical injury is an essential element of the assault offenses (*see* Penal Law §§ 120.00, 120.05-.07, 120.10).

Accordingly, the Criminal Jury Instructions (CJI) incorporate these principles, in a parallel fashion, with respect to causation of injury and causation of death, as follows:

> "CAUSE OF INJURY . . .
>
> "A person 'causes [physical or serious physical] injury' to another when that person's conduct is a sufficiently direct cause of such injury to another.
>
> "A person's conduct is a sufficiently direct cause of such injury when: One, the conduct is an actual contributory cause of such injury; and two, when the injury was a reasonably foreseeable result of the conduct. . .
>
> "A person's conduct is an actual contributory cause of [physical or serious physical] injury to another when that conduct forged a link in the chain of causes which actually brought about such injury — in other words, when the conduct set in motion or continued in motion the events which ultimately resulted in such injury.
>
> "An obscure or merely probable connection between the

conduct and the injury will not suffice.

"At the same time, if a person's conduct is an actual contributory cause of the injury to another, then it does not matter that such conduct was not the sole cause of the injury, or that a pre-existing medical condition also contributed to the injury, or that the injury was not immediately apparent. . .

"Injury is a reasonably foreseeable result of a person's conduct when the injury should have been foreseen as being reasonably related to the actor's conduct. It is not required that the injury was the inevitable result or even the most likely result.

"If a person inflicts injury on another, a reasonably foreseeable consequence of that conduct is that the victim will need medical or surgical treatment. It is no defense to causing the victim's injury that the medical or surgical treatment contributed to such injury. Only if the injury is solely attributable to the medical or surgical treatment and not at all induced by the inflicted injury does the medical intervention constitute a defense"

(CJI2d [NY] Penal Law art 120, Causation [footnotes omitted]).

"CAUSE OF DEATH . . .

"A person 'causes the death' of another when that person's conduct is a sufficiently direct cause of the death of another.

"A person's conduct is a sufficiently direct cause of death when: One, the conduct is an actual contributory cause of the death; and two, when the death was a reasonably foreseeable result of the conduct. . .

"A person's conduct is an actual contributory cause of the death of another when that conduct forged a link in the chain of causes which actually brought about the death -- in other words, when the conduct set in motion or continued in motion the events which ultimately resulted in the death.

> "An obscure or merely probable connection between the conduct and the death will not suffice.
>
> "At the same time, if a person's conduct is an actual contributory cause of the death of another, then it does not matter that such conduct was not the sole cause of the death, or that a pre-existing medical condition also contributed to the death, or that the death did not immediately follow the injury. . .
>
> "Death is a reasonably foreseeable result of a person's conduct when the death should have been foreseen as being reasonably related to the actor's conduct. It is not required that the death was the inevitable result or even "the most likely result. . .
>
> "And, it is not required that the actor have intended to cause the death. . .
>
> "If a person inflicts injury on another, a reasonably foreseeable consequence of that conduct is that the victim will need medical or surgical treatment. It is no defense to causing the victim's death that the medical or surgical treatment contributed to the death of the victim. Only if the death of the victim is solely attributable to the medical or surgical treatment and not at all induced by the inflicted injury does the medical intervention constitute a defense"

(CJI2d [NY] Penal Law art 125, Causation [footnotes omitted]).

However, rather than reading these pattern jury instructions separately, the trial court effectively took the CJI charge for "Injury" and selectively added the word "death" thereto, and instructed the jury in one lumped instruction as follows:

> "[E]ach of the counts that you will be asked to consider has as an element that the defendants caused a particular result. *A person causes physical injury or serious physical injury or death to another person when that person's conduct*

is a sufficiently direct cause of such injury to another (emphasis added).

"A person's conduct is a sufficiently direct cause of such injury when the conduct is an actual contributory cause of such injury and when the injury was a reasonably foreseeable result of that conduct. . .

"*A person's conduct is an actual contributory cause of physical injury or serious physical injury or death to another when that conduct forged a link in the chain of causes which actually brought about such injury* (emphasis added).

"In other words, when the conduct set in motion or continued in motion the events which ultimately resulted in such injury. [A]n obscure or merely probable connection between the conduct and the injury will not suffice. At the same time, if a person's conduct is an actual contributory cause of the injury to another, then it does not matter that such conduct was not the sole cause of the injury or that a preexisting medical condition also contributed to the injury or that the injury was not immediately apparent. . .

"Injury is a reasonably foreseeable result of a person's conduct when the injury should have been foreseen as being reasonably related to the actor's conduct. It is not required that the injury was the inevitable result or even the most likely result.

"If a person inflicts injury on another, a reasonably foreseeable consequen[ce] of that conduct is that the victim will need medical or surgical treatment. It is no defense to causing the victim's injury that the medical or surgical treatment contributed to such injury. Only if such injury is solely . . . attributable to the medical or surgical treatment and not at all induced by the inflicted injury does the medical intervention constitute a defense."

As is evident, adding to the confusion of the lumped-together charge, the court did not consistently add the word

"death" to its set of instructions, in most cases omitting "death" and discussing only causation of "injury." Notably, the trial court did not use the term "death" when addressing the impact of "medical or surgical treatment," which may have given the jurors an impression that improper medical treatment is irrelevant to the question of cause of death. Most concerning, however, is that in the two sentences emphasized above the court instructed the jury that, if it were to find causation of injury, then causation of death would also be proven. This is an incorrect statement of the law because the jury could of course simultaneously find causation of injury or serious physical injury but not causation of death. However, the charge on causation as given by the trial court could lead the jury to find defendant guilty of manslaughter in the first degree by merely finding defendant caused the victim's physical injury or serious physical injury.

Thus, the court's instructions as a whole did not convey the proper standard, created undue confusion in the minds of the jurors (*People v McTiernan*, 119 AD3d at 467), and had the effect of relieving the People of their burden of proving that defendant caused the victim's death as an essential element of the manslaughter count by requiring the People only to prove injury,

and not death. Moreover, these instructions misstated the law on a critical issue at trial - whether the victim died as a result of the assault or solely because of his inadequate medical treatment. Indeed, while the evidence that defendant participated in the assault was overwhelming, the evidence that those injuries caused the victim's death was not, and the jury was faced with a battle of experts and a question of fact as to the ultimate cause of the victim's death. Consequently, the court's error essentially "gutted" defendant's causation defense (*People v Minor*, 111 AD3d 198, 205 [1st Dept 2013]). Hence, I reject the People's contention that the error was harmless.

Proof of negligent medical treatment will not relieve defendant's criminal responsibility for the subsequent death of the victim unless the intervening negligence is the sole proximate cause of death (*People v Bowie*, 200 AD2d at 512). The court's charge improperly linked injury and death in a confusing manner that undermined these principles. There was ample evidence to support defendant's position that the victim's death was caused by the hospital's negligent medical treatment of the victim.

Defendant's medical expert, Dr. Ronald Paynter, testified that the victim "was actually getting better," such that, by his

third day in the hospital, "they were removing the sedation" and removed the "decompression tube" which had been relieving the pressure in his brain. At this point, the victim "appeared to be recovering from the head injury." After they "removed some of the sedation," however, he "fell out of bed, which is not supposed to happen in a hospital." Dr. Paynter stated that the hospital made "very little response" to the victim's fall. "[W]ithin 24 hours" of his fall, he "developed an infection" and "a very high fever" of 104º. "[A]s a result of the fever," he "developed a very rapid heart rate." Dr. Paynter opined that "the treatment for the fever was slow by the hospital," and stated that the hospital "did not give aggressive intravenous fluid and aggressive antibiotic treatment, and it appeared that [the victim] succumbed to the infection." Notably, the evidence at trial supports the conclusion that the victim died from an infection and fever, and not directly from injuries to his head. The jury may have found defendant responsible for the victim's death due to the trial court's confusing charge.

Accordingly, it is my opinion that the judgment should be reversed, and the matter remanded for a new trial.

The Decision and Order of this Court entered herein on April 7, 2016 is hereby recalled and vacated (*see* M-2070 decided simultaneously herewith).

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

ENTERED: JUNE 9, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

126 Mapfre Insurance Company of New York,
Plaintiff-Appellant,

-against-

Balgobin Manoo, et al.,
Defendants,

Active Care Medical Supply Corporation,
Defendant-Respondent.

Index 152858/12

_____

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

The Rybak Firm, PLLC, Brooklyn (Damin J. Toell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about November 13, 2014, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Active Care Medical Supply Corporation (Active Care) to reargue and, upon reargument, denied plaintiff's motion for summary judgment, reversed on the law, without costs, plaintiff's motion granted, and it is declared that plaintiff is not obligated to pay Active Care for the claim at issue.

On November 14, 2011, plaintiff's insured, defendant Balgobin Manoo, was involved in an automobile accident. On or

about January 10, 2012, he received treatment from Active Care, at which time he executed an assignment of benefits. Prior thereto, plaintiff had referred Manoo's claim for no-fault benefits for investigation due to inconsistencies in his statements as to treatment.

The policy's New York State Mandatory Personal Injury Protection Endorsement required, as a condition precedent, full compliance with the conditions of coverage, which included the insured's appearance at an examination under oath (EUO), "as may reasonably be required" (*see* 11 NYCRR 65-1.1). By letter dated February 3, 2012, plaintiff requested an EUO to confirm the facts and circumstances of Manoo's loss and the treatment he received. The letter, which scheduled the EUO for February 16, was received by Manoo on February 9. Meanwhile, Active Care drafted an NF-3 claim form dated February 7, 2012.

Manoo did not appear on February 16, 2012 for his EUO. By letter dated February 23, 2012, the EUO was rescheduled for March 9, 2012. When Manoo again failed to appear, by letter dated March 16, 2012, the EUO was rescheduled for a third and final date of March 30, 2012. Manoo failed to appear, and plaintiff commenced this action seeking a declaratory judgment that defendants are ineligible to receive no-fault reimbursements due

to Manoo's failure to comply with a condition precedent to coverage under his insurance policy and the no-fault regulations by failing to appear for an EUO.

Supreme Court initially granted plaintiff summary judgment declaring that it was not obligated to provide no-fault coverage to Active Care. However, upon granting reargument, the court denied summary judgment and restored the action. In so ruling, the court held that plaintiff did not establish that its initial February 3, 2012 request for an EUO was made within the time frame set forth in the no-fault implementing regulations, because it submitted no proof as to when it received Active Care's NF-3 form (*see* 11 NYCRR 65-3.5[b] ["Subsequent to the receipt of one or more of the completed verification forms, any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms"]). We now reverse.

Plaintiff made a prima facie showing of its entitlement to summary judgment dismissing Active Care's claim for first-party no-fault benefits by establishing that it timely and properly mailed the notices for EUOs to Manoo and that Manoo failed to appear at his initial and follow-up EUOs. The record establishes that plaintiff requested Manoo's initial EUO by letter dated

February 3, 2012. Although Active Care's NF-3 form is dated February 7, 2012, plaintiff was entitled to request the EUO prior to its receipt thereof (*see* 11 NYCRR 65-1.1; *Steven Fogel Psychological, P.C. v Progressive Cas. Ins. Co.*, 7 Misc 3d 18, 20-21 [App Term, 2d Dept 2004], *affd* 35 AD3d 720 [2d Dept 2006]; *Life Tree Acupuncture P.C. v Republic W. Ins. Co.*, 50 Misc 3d 132[A]; 2016 NY Slip Op 50023[U] [App Term, 1st Dept 2016]; *Alfa Med. Supplies, Inc. v Praetorian Ins. Co.*, 50 Misc 3d 126[A], 2015 NY Slip Op 51847[U] [App Term, 1st Dept 2015]). The notification requirements for verification requests under 11 NYCRR 65-3.5 and 65-3.6 do not apply to EUOs that are scheduled prior to the insurance company's receipt of a claim form (*see Fogel*, 7 Misc 3d at 21; *New York Cent. Mut. Fire Ins. Co. v Bronx Chiropractic Servs., P.C.*, 2014 NY Slip Op 33210(U) [Sup Ct, NY County 2014]).

Once Active Care presented its claim dated February 7, 2012, plaintiff was required to comply with the follow-up provisions of 11 NYCRR 65-3.6(b) (see *Inwood Hill Med., P.C. v General Assur. Co.*, 10 Misc 3d 18, 19-20 [App Term, 1st Dept 2005]). Plaintiff established that it fulfilled its obligation under § 65-3.6(b) by rescheduling Manoo's EUOs within 10 days of his failure to appear at each scheduled exam (*see Arco Med. NY, P.C. v Lancer Ins. Co.*,

37 Misc 3d 136(A) [App Term, 2d Dept 2012]). The second EUO scheduling letter was sent on February 23, 2012, which was just seven days after the February 16, 2012 nonappearance. The third EUO scheduling letter was sent on March 16, 2012, which was just seven days after the March 9, 2012 nonappearance.

In opposition, Active Care did not raise a triable issue with respect to Manoo's nonappearance or the mailing or reasonableness of the underlying notices (*see Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]; *Easy Care Acupuncture P.C. v Praetorian Ins. Co.*, 49 Misc 3d 137[A], 2015 NY Slip Op 51524[U] [App Term, 1st Dept 2015]).

The failure of a person eligible for no-fault benefits to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage (*see Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]; *Allstate Ins. Co. v Pierre*, 123 AD3d 618 [1st Dept 2014]). "There is no requirement to demonstrate that the claims were timely disclaimed since the failure to attend medical exams was an absolute coverage defense" (*American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424-425 [1st Dept 2013]), *citing New York & Presbyt. Hosp. v Country-Wide Ins. Co.*, 17 NY3d 586, 593 [2011]).

The dissent believes that *Fogel* should not be followed because it is inconsistent with settled principles in this Department. Yet the dissent cites no precedent holding that an insurer cannot request an EUO prior to its receipt of a claim form pursuant to 11 NYCRR 65-1.1 and the terms of the policy's Mandatory Personal Injury Protection Endorsement. As the Second Department explained in *Fogel* (35 AD3d 720), "The appearance of the insured for IMEs at any time is a condition precedent to the insurer's liability on the policy (*see* 11 NYCRR 65-1.1). This conclusion accords with the language of the mandatory endorsement and the interpretation given it by the State Insurance Department, which promulgated the regulations (*see* 2005 Ops Ins Dept No. 05-02-21 [www.ins.state.ny.us/ogco2005/rg050221.htm; http://www.courts.state.ny.us/reporter/webdocs/no-fault_benefits_ cutoff_ date.htm]; 2003 Ops Ins Dept No. 03-02-12 [www.ins.state.ny.us/ogco2003/rg030212.htm; http://www.courts.state.ny.us/reporter/webdocs/failure_to_attend_ no_fault_ ime.htm]; 2002 Ops Ins Dept No. 02-04-19

[www.ins.state.ny.us/ogco2002/rg204121.htm; http://www.courts.state.ny.us/reporter/webdocs/no_faultinsurer_medicalexaminations.htm])" (*id.* at 722).

In sum, plaintiff established its prima facie entitlement to summary judgment through evidence that (i) it mailed Manoo the original EUO request in accordance with the policy's New York State Mandatory Personal Injury Protection Endorsement, before Active Care prepared its verification; (ii) after Manoo failed to appear at that EUO, and Active Care submitted its verification, plaintiff twice rescheduled the EUO in conformity with the requirements of 11 NYCRR 65-3.6(b); and (iii) Manoo never appeared for an EUO, a condition precedent to coverage. In opposition, Active Care did not disprove any of these facts. On this record, plaintiff's failure to tender proof as to the exact date it received Active Care's verification is immaterial, and

the dissent's position would unduly reward an insured who repeatedly failed to honor his obligation to appear for an EUO under the policy and the Insurance Department regulations.

All concur except Acosta, J. who dissents in a memorandum as follows:

ACOSTA, J. (dissenting)

I dissent because I believe that plaintiff failed to establish prima facie that it was entitled to a judgment declaring that it had no duty to cover defendant Active Care Medical Supply Corporation's bills for no-fault medical services rendered to Active Care's assignor, defendant Manoo, due to Manoo's failure to appear at examinations under oath (EUOs) (*see National Liab. & Fire Ins. Co. v Tamara A. Steckler, The Legal Aid Society, New York (of counsel), for Med. Supply Corp.*, 131 AD3d 851 [1st Dept 2015]; *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC*, 82 AD3d 559, 560 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]).

Although Manoo's failure to appear for a properly noticed EUO constitutes a breach of a condition precedent vitiating coverage (see *Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st Dept 2015]; *Allstate Ins. Co. v Pierre*, 123 AD3d 618 [1st Dept 2014]), plaintiff failed to tender proof that it received Active Care's verification. Thus, plaintiff did not demonstrate that it requested Manoo's EUO subsequent to such receipt within the time prescribed in the Insurance Department Regulations (11 NYCRR) §65-3.5[b] ["*subsequent* to the receipt of one or more of the completed verification forms, any additional

verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the prescribed verification forms"] [emphasis added]). Plaintiff's argument that it submitted evidence showing that its request for Manoo's EUO was made prior to the date of Active Care's claim is unavailing in the absence of proof of when the claim was received (*see id.*). Indeed, plaintiff's motion never disclosed when it received any claim forms whatsoever from either Manoo (Form NF-2) or any medical provider who rendered services to him (Form NF-3). Plaintiff would have this Court ignore 11 NYCRR 65-3.5(b), notwithstanding the long-established rule that "[t]he No-Fault Law is in derogation of the common law and so must be strictly construed" (*Presbyterian Hosp. In city of N.Y. v Atlanta Cas. Co.*, 210 AD2d 210, 211 [2d Dept 1994]; *see also Matter of Bayswater Health Related Facility v Karagheuzoff*, 37 NY2d 408, 414 [1975]; *Pekelnaya v Allyn*, 25 AD3d 111, 118 [1st Dept 2005]). To the extent *Steven Fogel Psychological, P.C. v Progressive Cas. Ins. Co.* (7 Misc 3d 18, 21 [App Term, 2d Dept 2004], *affd* 35 AD3d 720 [2d Dept 2006]) holds otherwise, I would not follow it, because it is inconsistent with settled principles in this Department. Plaintiff having failed to establish its prima facie entitlement to summary judgment, it is irrelevant that, as the

majority notes, plaintiff rescheduled Manoo's EUO within 10 days of Manoo's failing to appear.

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

ENTERED: JUNE 9, 2016

CLERK

Sweeny, J.P., Renwick, Moskowitz, Kapnick, Gesmer, JJ.

1223 The People of the State of New York, Ind. 4759/13
Respondent,

-against-

Christopher Dwight,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered September 2, 2014, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports reasonable inferences that when defendant entered a closed, unoccupied office in the basement of a restaurant, from which he stole a laptop computer, he intended from the outset to commit a crime, and knew he was entering an area closed to the public (*see e.g. People v Watson*, 221 AD2d 264 [1st Dept 1995], *lv denied* 87 NY2d

926 [1996]; *People v Jenkins*, 213 AD2d 279 [1st Dept 1995], *lv denied* 85 NY2d 974 [1995]). The alternative explanations posited by defendant are speculative.

Defendant's argument that comments by the prosecutor during jury selection and in his opening statement, touching on defendant's right to testify or to refrain from doing so, violated defendant's privilege against self-incrimination is unpreserved (*see People v Tevaha*, 84 NY2d 879, 881 [1994]) and we decline to review it in the interest of justice. As an alternative holding, we find that the prosecutor's brief remarks, made in the context of the jurors' assessment of defendant's testimony, if he did testify, did not invite the jury to penalize defendant if he chose not to do so. In any event, any error in this regard 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: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

1243 Sandra Francis, Index 21739/11E
Plaintiff-Respondent,

-against-

Regina Nelson, et al.,
Defendants-Appellants.

_____

Katz & Associates, Brooklyn (Anthony M. Grisanti of counsel), for appellants.

Mark B. Rubin, P.C., Bronx (Michael A. Rubin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about March 27, 2015, which, insofar as appealed from, upon reargument, denied defendants' motion for summary judgment dismissing the claims of serious injury resulting in "significant" or "permanent consequential limitation of use" within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

The court properly granted reargument based on plaintiff's contention that the unaffirmed CT scan reports prepared by her radiologist could be considered, because they had been referenced and relied upon by defendant's medical expert in diagnosing

preexisting degenerative changes in plaintiff's cervical and lumbar spine (*see Amamedi v Archibala*, 70 AD3d 449 [1st Dept 2010], *lv denied* 17 NY3d 713 [2010]). However, the reports do not avail plaintiff. Although they found herniated and bulging discs, they also found "degenerative changes," including osteophyte formations at multiple levels, and plaintiff's treating chiropractor, while acknowledging the findings of degeneration, did not adequately address those findings or explain why degeneration was not the cause of the claimed spinal injuries (*see Acosta v Traore*, 136 AD3d 533 [1st Dept 2016]).

Defendants made a prima facie showing that all of plaintiff's other claimed injuries had resolved and that her claimed knee injury preexisted the accident. In opposition, plaintiff did not provide any medical evidence to rebut defendants' showing.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1413 The People of the State of New York, Respondent, Ind. 3920/08

-against-

Michael Butler, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Lori Farrington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered March 8, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 22 years, unanimously affirmed.

The record does not establish that counsel improperly delegated to her client the decision to agree to a joint trial with the codefendant. Instead, the record supports the conclusion that in agreeing to a joint trial, along with redactions of portions of defendant's statement that arguably incriminated the codefendant, counsel weighed defendant's desire for a joint trial, but ultimately accepted her client's choice on the basis of her own professional judgment as well (*see People v Gottsche*, 116 AD3d 1303, 1303-1305 [4th Dept 2014], *lv denied* 24

NY3d 1084 [2014]). This is not a case like *People v Colville* (20 NY3d 20 [2012]), or *People v Lee* (120 AD3d 1137 [2014]), where the court made a ruling by choosing the defendant's position over the attorney's contrary position on a matter within the purview of counsel. In any event, harmless error analysis applies (*see Colville*, 20 NY3d at 32-33), and we find that any error in this regard was harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1414 Jerry Michael Syrko, Index 302168/12
Plaintiff,

-against-

Jertom Incorporated doing business
as Tom & Jerry's Bar and Grill,
Defendant-Appellant,

Silver Lake Realty, LLC, et al.,
Defendants,

Brewster Plaza, LLC, et al.,
Defendants-Respondents.

_____

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for appellant.

Law Offices of Tobias & Kuhn, New York (Cathleen A. Giannetta of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about March 18, 2015, which granted defendant Brewster Plaza, LLC's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Defendant Brewster Plaza, the owner of premises leased by defendant Jertom Incorporated and operated as a bar and restaurant, established prima facie that it was not responsible for repairing the leak in the window that Jertom claims was the

source of the pool of water in which plaintiff allegedly slipped. The lease between Brewster Plaza and Jertom provides that Brewster Plaza is responsible only for structural repairs, the definition of which does not include windows. Nor did Jertom identify any significant structural or design defect that was contrary to a specific statutory safety provision (*see Quing Sui Li v 37-65 LLC*, 114 AD3d 538 [1st Dept 2014]). As Brewster Plaza owed no duty to plaintiff to repair the window, whether it had actual or constructive notice of the leak is immaterial (*see Podel v Glimmer Five, LLC*, 117 AD3d 579 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]).

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1415 In re Ironelys A.,
Petitioner-Appellant,

-against-

Jose A.,
Respondent-Respondent.

_____

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

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

_____

Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about November 6, 2015, which denied petitioner's application for an extension of an order of protection issued against respondent, unanimously affirmed, without costs.

Petitioner failed to demonstrate good cause pursuant to Family Court Act § 842 to show that an extension of the order of protection was necessary in order to prevent a recurrence of domestic violence. Respondent has complied with the initial order of protection, and there have been no incidents or violations claimed by petitioner, and no specific claims of fear of continued violence. It is also notable that when respondent picked up the parties' child, it was done at petitioner's

residence and not at a police precinct (*compare Matter of Molloy v Molloy*, 137 AD3d 47, 53-54 [2d Dept 2016]).

Furthermore, petitioner failed to cite any issues that would have required further elaboration or any additional facts that would have warranted a hearing under the circumstances.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1417 Rebecca Sears, Index 101748/12
Plaintiff-Respondent,

-against-

S3 Tunnel Construction AJV, et al.,
Defendants,

Metropolitan Transportation Authority,
Defendant-Appellant.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellant.

Gropper Law Group, PLLC, New York (David De Andrade of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered March 16, 2015, which, to the extent appealed from, denied defendant Metropolitan Transportation Authority's (MTA) motion for summary judgment dismissing the complaint and all cross claims against it, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries she allegedly sustained when a re-paved trench in the street collapsed under her; at the time, construction of the Second Avenue subway was taking place in the area.

MTA failed to establish prima facie that it owes no duty to plaintiff because neither it nor its contractors launched a force

or instrument of harm in performing their contractual duties (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). While the record conclusively demonstrates that two of MTA's contractors, defendants J. D'Annunzio & Sons, Inc. and S3 Tunnel Construction AJV, performed no work at the location where plaintiff fell, it also shows that there was a total of 10 contracts on the project, and MTA did not show that no work under any of the other contracts was done at that location. There is also evidence that other entities were performing excavation work within the area, and MTA did not show that the work of those entities was not related to the subway construction.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1418 Patricia German, et al., Index 105539/11
Plaintiffs,

Kristian Gevert, et al.,
Plaintiffs-Appellants,

-against-

S&P Associates of New York, LLC,
Defendant-Respondent,

PMF Properties LLC, et al.,
Defendants.

_____

Goldsmith & Fass, New York (Robert N. Fass of counsel), for appellants.

Law Office of Jeffrey A. Oppenheim, New York (Jeffrey A. Oppenheim), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered August 4, 2015, which, to the extent appealed from, denied plaintiffs Kristian Gevert, Tim Kao and Chi-Hua Chuang's motion for partial summary judgment on the first cause of action for specific performance of purchase agreements for condominium units, unanimously affirmed, with costs.

The court correctly found that the record at this early stage of the litigation presents issues of fact as to whether plaintiffs caused an unreasonably prejudicial delay in closing on

the purchase agreements that would render a decree of specific performance a drastic, harsh or unjust remedy, i.e., whether they "made excuses in order to delay closing on the contract, with an actual purpose of waiting to see whether to enforce the contract depending upon whether the market value of the subject property increase[d] or decrease[d]" (*EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 52-53 [1st Dept 2004], *lv denied* 3 NY3d 607 [2004]).

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1420-
1421 Index 650165/08

Carey & Associates LLC,
Plaintiff-Appellant,

-against-

521 Fifth Avenue Partners, LLC,
et al.,
Defendants,

Green 521 Fifth Avenue LLC,
Defendant-Respondent.

_____

Carey & Associates LLC, New York (Michael Q. Carey of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Edmond O'Brien of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Anil C. Singh, J.), entered April 3, 2015, which granted defendant Green 521 Fifth Avenue LLC's motion for summary judgment dismissing the seventh cause of action as against it, and denied plaintiff's cross motion for summary judgment on that cause of action, unanimously modified, on the law, to grant plaintiff's cross motion to the extent it seeks the return of amounts overcharged for operating costs and real estate taxes, in the total amount of $3,488.84, and to deny defendant's motion to that extent, and otherwise affirmed, without costs.

On plaintiff's main claim, that defendant landlord improperly overcharged for electricity costs under the lease, the motion court correctly determined that section 3.1(A) of the lease unambiguously provides that 50% of all electricity costs for the building should be included in the calculation of operating expenses payable as additional rent. Section 3.1(A) creates two separate frameworks for calculating operating expenses – one to be employed if defendant furnishes electricity, and one to be employed "if [defendant] shall discontinue the redistribution or furnishing of the electrical energy to all tenants in the Building." However, whether or not defendant furnishes electricity, it is entitled to include 50% of building electricity costs in operating expenses.

In the event defendant furnishes electricity, section 3.1(A)(xviii) provides for inclusion of 50% of building electricity costs as operating expenses. Contrary to defendant's assertion, section 3.1(A)(iii) does not tack on an additional 100%. In the event defendant discontinues furnishing electricity, 100% of building electricity costs should be included in operating expenses pursuant to section 3.1(A), but 50% of these expenses should then be deducted pursuant to section 3.1(A)(14). Contrary to the parties' assertions, it is plain

from the structure of the provision that section 3.1(A)(14) applies only in the event defendant discontinues furnishing electricity. Because defendant billed, and plaintiff paid, 50% of building electric costs, plaintiff's claim of overbilling related to the electricity provisions of the lease was correctly dismissed.

As to plaintiff's secondary claims of overcharges, construed liberally, the complaint sufficiently pleads these claims; it requests an amount in damages that plainly includes these charges (CPLR 3026; *Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964]). Plaintiff is entitled to summary judgment on these claims because it established prima facie that it was double-charged for 2008 real estate taxes and that defendant did not timely provide a required statement containing a computation of Escalation Rent due for 2004 operating expenses, and defendant submitted no evidence to raise an issue of fact as to those amounts.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1422 The People of the State of New York, Ind. 4730/13
Respondent,

-against-

Christopher Andretta,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered August 12, 2014, convicting defendant, upon his plea of guilty, of assault in the second degree, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed.

The sentencing court properly found that it had no discretion to defer defendant's mandatory surcharge (*see People v Jones* 26 NY3d 730 [2016]).

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1423 In re Hope Linda P., and Others,

Dependent Children Under Eighteen Years of Age, etc.,

Cardinal McCloskey Community Services,
Petitioner-Appellant,

Cassandra P.,
Respondent-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

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

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about July 9, 2015, which, after a fact-finding hearing, dismissed the agency's petitions to terminate the parental rights of respondent mother on the ground of permanent neglect, unanimously reversed, on the law, without costs, the petitions reinstated, findings of permanent neglect made thereupon, and the matters remanded for dispositional hearings.

The record establishes that the agency fulfilled its statutory obligation to exert diligent efforts in the face of a lack of cooperation from respondent mother (*see Matter of Byron*

Christopher Malik J., 309 AD2d 669, 669 [1st Dept 2003]) and supports the findings of permanent neglect with clear and convincing evidence (*see* Social Services Law § 384-b [7]).

Respondent mother did not express an interest in planning for the children's return independent of the children's maternal grandfather until five months prior to the filing of the petitions (*see Matter of Ericka Stacey B.*, 27 AD3d 245, 246 [1st Dept 2006], *lv denied* 6 NY3d 715 [2006]). When the mother did express a willingness to plan for the children's return, the agency diligently attempted to assist her in efforts to obtain suitable housing; however, she repeatedly failed to cooperate, including, among other things, refusing offers of services from the agency and refusing to consent to the disclosure of records from mental health providers (*see Matter of Kristian-Isaiah William M. [Jessenica Terri-Monica B.]*, 109 AD3d 759, 760 [1st Dept 2013], *lv denied* 22 NY3d 856 [2013]). The agency remained in regular contact with the mother and her therapist, and sought to have him assist the mother in applying for appropriate housing, since the mother had refused the agency's assistance (*see Matter of Natalie Maria D. [Miguel D.]*, 73 AD3d 536, 536-537 [1st Dept 2010]; *Matter of Makever Carl B.*, 298 AD2d 303, 303 [1st Dept 2002]). It also arranged regular visitation between

the mother and the subject children, and kept the mother apprised of the children's health issues and special needs, as well as their educational progress.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1425 Gray Line New York Tours, Inc., et al., Plaintiffs-Appellants, Index 114496/09

-against-

Big Apple Moving & Storage, Inc., Defendant-Respondent,

Salvador Skerret, Defendant.

[And a Third-Party Action]

_____

The Law Offices of Christopher P. DiGiulio, P.C., New York (William Thymius of counsel), for appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

_____

Judgment, Supreme Court, New York County, (Martin Shulman, J.), entered May 6, 2015, upon a jury verdict in favor of defendants, unanimously affirmed, without costs.

The verdict was legally supported by sufficient evidence and was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498-499 [1978]; *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]), and the jury was free to rationally credit the defendant driver's statement that the accident was caused by unanticipated brake failure, rather than the alternative causes propounded by plaintiffs.

The court properly declined to direct a verdict, enter a judgment notwithstanding the verdict or preclude Big Apple from presenting evidence of a nonnegligent cause of the accident based on statements of its counsel or the pleadings in the third-party complaint because, to the extent facts were stated, the statements were not conclusive and constituted a permissive alternative pleading under CPLR 3014 (*see People v Brown*, 98 NY2d 226, 232 n 2 [2002]).

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

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1426 The People of the State of New York, Ind. 4806/12
Respondent,

-against-

Adan Torres,
Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Steffi Yellin of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered November 26, 2013, convicting defendant, after a jury trial, of two counts of assault in the second degree, and sentencing him to concurrent terms of five years, unanimously affirmed.

The court properly declined to charge justification, since there was no reasonable view of the evidence, when viewed most favorably to defendant, to support that defense (*see People v Goetz*, 68 NY2d 96, 105-106 [1986]; *People v Watts*, 57 NY2d 299, 301 [1982]). Defendant stabbed two undisputedly unarmed men in the back. Even under the exculpatory version of the events contained in defendant's statements to the police (which was, in any event, undermined by a recorded telephone call he made while

incarcerated), defendant was the only person to use deadly physical force, he had the ability to retreat, and he had no reason to believe that the victims or their companions were armed or were about to use deadly force. At most, the group that included the victims engaged in abusive behavior falling far short of what could reasonably be perceived as the imminent use of lethal force.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1427 Arthur Anderson, Index 310456/10
Plaintiff-Respondent,

-against-

Liberty Lines Transit, Inc.,
Defendant-Appellant,

Robert D. Wells,
Defendant.

_____

Lifflander & Reich LLP, New York (Kent B. Dolan of counsel), for appellant.

Burns & Harris, New York (Stephen D. Wagner III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about January 20, 2016, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Liberty Lines Transit, Inc. (Liberty) to dismiss the complaint, unanimously affirmed, without costs.

Liberty's motion to dismiss the complaint on the ground that plaintiff failed to attend a General Municipal Law § 50-h hearing was properly denied. The record established that Liberty granted plaintiff an adjournment of the hearing, did not set a subsequent date, and never sought to reschedule the hearing (*see Belton v Liberty Lines Tr.*, 3 AD3d 334 [1st Dept 2004]; *Vargas v City of*

Yonkers, 65 AD3d 585 [2d Dept 2009]).

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

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1428 In re CPS 227 LLC, Index 652566/15
Petitioner-Respondent,

-against-

Martin Brody, also known as Mendel Brody, et al.,
Respondents,

Little Cherry LLC,
Respondent-Appellant.

_____

Moritt Hock & Hamroff LLP, Garden City (Robert M. Tils of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Niall D. O'Murchadha of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered November 13, 2015, which granted the petition seeking a turnover of assets and an appointment of a receiver, unanimously dismissed, without costs.

Petitioner judgment creditor sought to satisfy a judgment entered in its favor against respondent judgment debtor by attaching the judgment debtor's membership interests in the respondent LLCs. After the order on appeal was issued, and after this Court affirmed the underlying judgment against the judgment debtor (*CPS 227 LLC v Brody*, 135 AD3d 607 [1st Dept 2016]), the judgment debtor paid the judgment in full. Accordingly, the

issues raised on appeal are moot, since no property of the judgment debtor remains subject to execution. That the judgment debtor may eventually face collateral consequences of the order on appeal does not warrant an exception to the mootness doctrine, as he is a respondent on this appeal but has not submitted a brief.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1429 The People of the State of New York, Ind. 3081/12
Respondent,

-against-

Rolando Garcia,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (James Wen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven Barrett, J.), rendered, June 13, 2014 convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 25 years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1431N In re Jean M. Isernio, Index 651295/15
Petitioner-Appellant,

-against-

Blue Star Jets, LLC,
Respondent-Respondent.

_____

Laura Alto, Center Moriches, for appellant.

Phillipson & Uretsky, LLP, New York (Jonathan C. Uretsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 20, 2015, which denied the petition to confirm an arbitration award, and granted respondent's cross motion to vacate the award, unanimously reversed, on the law, without costs, the petition granted, and the cross motion denied. The Clerk is directed to enter judgment accordingly.

Contrary to the motion court's conclusion, the arbitrator's award, which granted petitioner's claim after evaluating the evidence and identifying the salient issues, was "final and definite" (CPLR 7511[b][1][iii]; *Matter of Olidort v Pewzner*, 125 AD3d 778, 779 [2d Dept 2015]). A final and definite award will not be vacated unless "it is violative of a strong public policy,

or is totally irrational, or exceeds a specifically enumerated limitation on [the arbitrator's] power" (*Montanez v New York City Hous. Auth.*, 52 AD3d 338, 339 [1st Dept 2008] [internal quotation marks omitted]; *see* CPLR 7511). None of the grounds for vacating an award exists on this record.

In concluding that the arbitrator had failed to consider a contractual provision and by drawing its own factual and legal determinations, the motion court exceeded its statutory power of review (*Azrielant v Azrielant*, 301 AD2d 269, 275 [1st Dept 2002], *lv denied* 99 NY2d 509 [2003]; CPLR 7510, 7511). We have considered respondent's remaining contentions and find them unavailing.

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

ENTERED: JUNE 9, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Kapnick, Kahn, JJ.

1432N Duandre Corporation, et al., Index 101433/11
Plaintiffs-Respondents,

-against-

Golden Krust Caribbean
Bakery & Grill, etc., et al.,
Defendants,

Rolston Waltin,
Defendant-Appellant.

_____

Rodman and Campbell, P.C., Bronx (Hugh W. Campbell of counsel), for appellant.

Daniel Kogan, Ozone Park, for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about October 10, 2014, which, to the extent appealed from as limited by the briefs, denied defendant Rolston Waltin's motion to vacate a default judgment entered against him on November 22, 2013, unanimously reversed, on the law and the facts, without costs, and the motion granted.

The suspension of defendant's counsel during the pendency of this action resulted in an automatic stay of the proceedings against defendant until thirty days after notice to appoint another attorney was served upon him, or until the court granted leave to resume proceedings (CPLR 321[c]; *Moray v Koven & Krause*,

Esqs., 15 NY3d 384, 388-390 [2010]). Because there was no compliance with the leave or notice requirements of CPLR 321(c), and the record demonstrates that defendant did not retain new counsel until February 2014, the automatic stay was in place when the November 22, 2013 judgment was entered based upon defendant's default. Accordingly, the judgment must be vacated. Defendant's failure to invoke CPLR 321(c) until submission of his reply papers on his motion does not result in a waiver of his argument (*Moray*, 15 NY3d at 390). Nor was he required to submit an affidavit of merit (*Scirica v Colantonio*, 111 AD3d 571, 572 [1st Dept 2013]).

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

ENTERED: JUNE 9, 2016

CLERK

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

16114 In re Carol Puerto, Index 402224/11
Petitioner-Respondent-Appellant,

-against-

Robert Doar, etc., et al.,
Respondents-Appellants-Respondents.

_____

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for municipal appellant-respondent.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for state appellant-respondent.

Legal Services NYC-Bronx (Sienna Fontaine of counsel), for, respondent-appellant.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered on or about April 25, 2013, modified, on the law, to vacate the declaration that 18 NYCRR 385.11(a)(2) and certain notices issued thereunder violate Social Services Law § 341(1) by failing to require that public assistance recipients be notified of their right to show compliance with required work activities, and declare that 11 NYCRR 385.11(a)(2) and the subject notices do not violate Social Services Law §341(1), and otherwise affirmed, without costs.

All concur except Friedman, J.P. and Andrias, J. who dissent in an Opinion by Friedman, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Dianne Renwick
Richard T. Andrias
Karla Moskowitz, JJ.

16114
Index 402224/11

_____x

In re Carol Puerto,
Petitioner-Respondent-Appellant,

-against-

Robert Doar, etc., et al.,
Respondents-Appellants-Respondents.

_____x

Cross appeals from the order of the Supreme Court, New York County (Lucy Billings, J.), entered on or about April 25, 2013, which, insofar as appealed from as limited by the briefs, granted the petition to annul a determination of the New York State Office of Temporary and Disability Assistance, dated April 19, 2011, upholding the decision of the New York City Human Resources Administration (HRA), dated January 12, 2011, which reduced petitioner's public assistance benefits on the ground that she missed a scheduled appointment, to the extent of declaring that 18 NYCRR 385.11(a)(2) and certain notices issued thereunder violate Social Services Law § 341(1) by failing to require that public assistance recipients be notified of their right to show compliance with required work activities, and granted the municipal respondent's motion to dismiss the petition

to the extent of dismissing the claim that HRA's conciliation and conference procedures violate Social Services Law § 341(1) by not allowing a public assistance recipient to avoid sanctions by curing noncompliance with work activities.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross and Edward F.X. Hart of counsel), for municipal appellant-respondent.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo and Cecella C. Chang of counsel), for state appellant-respondent.

Legal Services NYC-Bronx (Sienna Fontaine of counsel), for respondent-appellant.

ACOSTA, J.

At issue in this case is the validity of the notice of conciliation and the notice of decision that public assistance recipients receive informing them of their failure to participate in mandatory assessments and employability plans. The specific question is whether 18 NYCRR 385.11, and the above-mentioned notices approved by the New York State Office of Temporary and Disability Assistance (OTDA),[1] violate Social Services Law (SSL)§ 341 because the notices fail to state affirmatively that a valid reason for not attending a mandatory assessment is that on the scheduled date of the assessment the recipient was participating in an approved training program. The notices also do not offer recipients a chance to cure their noncompliance prospectively. For the reasons stated below, we hold that the notices comply with SSL § 341(1).

Public assistance programs in New York City, including the State's family assistance program (*see* SSL §§ 2[18],[19]; 348; 349), are administered by the New York City Human Resources Administration (HRA)[2] under OTDA's supervision. To receive

[1]The state respondent is Elizabeth Berlin, as Executive Deputy Commissioner of OTDA.

[2]The municipal respondent is Robert Doar, as Commissioner of HRA.

public assistance under the family assistance program, non-exempt recipients "must be engaged in work" (SSL § 335-b[5][a]; 18 NYCRR 385.2[f]). To carry out this mandate, local social services districts assign recipients to work activities (SSL § 336; 18 NYCRR 385.9[a]). HRA's employment plan defines "engaged in work" as "Compliance with assessment, employment planning, all activities included in the individual's Employment/Self-Sufficiency plan including . . . any of the work activities listed [elsewhere in the HRA employment plan]." Recipients who willfully and without good cause[3] fail to participate in assessments and employability plans are subject to reductions in their public assistance benefits.[4]

Petitioner, a recipient of public assistance benefits from HRA, was participating in a city-approved training program in 2010. She was sent a notice, dated November 26, 2010, to attend a "Mandatory Training Assessment Group [TAG] Appointment" on December 9, 2010, at 9:00 a.m., to "discuss [her] employment goals," but she never received the notice, because it was not addressed properly. Instead, on December 9, petitioner went to work, as HRA required her to do under the training program.

---

[3]SSL § 341[1][a]; 18 NYCRR 385.ll[a][4][i].

[4]SSL §§ 335[3]; 342; 18 NYCRR 385.6[a]; 385.12.

Apparently, HRA, by way of a computerized system known as "autoposting," automatically posted an infraction. Petitioner alleges that the infraction automatically triggered the issuance of a "Conciliation Notification."[5] On December 26, 2010, HRA mailed petitioner the conciliation notification instructing her to appear at its office on January 8, 2011, at 9:00 a.m., "to explain to a Conciliation Worker why [she] did not report or cooperate" with work requirements. The conciliation notification informed petitioner that she should be prepared to show "good cause" for having failed to "comply[] with a work requirement." It provided "examples of good reasons" for failing to comply, including but "not limited to" the following circumstances: that her child was "sick on the day of the work activity," that she "had a household emergency," that she did not have child care for a child under 13, and that she was "unable to participate due to a domestic violence situation." The notification did not give, as an example of good cause, the fact that she was participating in an HRA-mandated training program. HRA again failed to address the notice to petitioner's address. Consequently, petitioner did not appear for the conciliation interview on January 8, 2011.

On January 12, 2011, HRA mailed petitioner a notice of

[5]According to OTDA, the conciliation notice used in this case was created by HRA and approved by OTDA.

decision (NOD). The NOD stated that the agency had determined that petitioner "willfully did not complete" "employment requirement(s)," by failing to attend the interview on December 9, 2010, and that petitioner had failed to respond to the conciliation notification. The NOD stated that petitioner's public assistance benefits would be reduced from $753 to $502 per month, effective January 23, 2011. The NOD advised petitioner that, if she disagreed with HRA's decision, she could request a "conference," or "informal meeting," with HRA, or a "State Fair Hearing," at which she could be represented by counsel. This time HRA addressed the NOD properly.

On February 4, 2011, petitioner requested a fair hearing, which was held on March 11, 2011, before an OTDA hearing officer. Petitioner appeared pro se. Petitioner testified that she never received the TAG interview letter, and that, had she received the letter, she would have informed HRA that she had to go to her internship on the scheduled date of December 9, 2010.

By decision dated April 19, 2011, OTDA upheld HRA's decision, finding that HRA had correctly determined that petitioner "willfully and without good cause failed or refused to comply with employment requirements." In particular, OTDA found that, although petitioner "contended at the hearing that [she] did not comply because she is already engaged in approved Agency

activity, [her] testimony is not credible because [her] overall testimony was not persuasive in light of the Agency evidence provided." OTDA held that petitioner's "failure to comply must be deemed willful in that [she] was fully aware of the appointment in issue but did not attend without providing good cause for failure to do so." OTDA did not address petitioner's contention that she did not receive the TAG interview notice or conciliation notification because those documents were mailed to an incomplete address, i.e., an address that did not include her apartment number.

The Conciliation Notification and NOD were sent pursuant to the statutory mandate of SSL § 341. Entitled "Conciliation; refusal to participate," SSL § 341(1) provides:

> "(a) Consistent with federal law and regulations and this title, if a participant has failed or refused to comply with the requirements of this title, the social services district shall issue a notice in plain language indicating that such failure or refusal has taken place and of the right of such participant to conciliation to resolve the reasons for such failure or refusal to avoid a pro-rata reduction in public assistance benefits for a period of time set forth in [SSL § 342]. *The notice shall indicate the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title and the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits*. The notice shall indicate that the participant has seven days to request conciliation with the district regarding such failure or refusal in the case of a safety net participant and ten days in the case of a family assistance participant. *The notice*

shall also include an explanation in plain language of what would constitute good cause for non-compliance and examples of acceptable forms of evidence that may warrant an exemption from work activities, including evidence of domestic violence, and physical or mental health limitations that may be provided at the conciliation conference to demonstrate such good cause for failure to comply with the requirements of this title. If the participant does not contact the district within the specified number of days, the district shall issue ten days notice of intent to discontinue or reduce assistance, pursuant to regulations of the department. Such notice shall also include a statement of the participant's right to a fair hearing relating to such discontinuance or reduction. If such participant contacts the district within seven days in the case of a safety net participant or within ten days in the case of a family assistance participant, it will be the responsibility of the participant to give reasons for such failure or refusal.

"(b) Unless the district determines as a result of such conciliation process that such failure or refusal was willful and was without good cause, no further action shall be taken. If the district determines that such failure or refusal was willful and without good cause, the district shall notify such participant in writing, in plain language and in a manner distinct from any previous notice, by issuing ten days notice of its intent to discontinue or reduce assistance. *Such notice shall include the reasons for such determination, the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title, the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits, and the right to a fair hearing relating to such discontinuance or reduction*. Unless extended by mutual agreement of the participant and the district, conciliation shall terminate and a determination shall be made within fourteen days of the date a request for conciliation is made in the case of a safety net participant or within thirty days of the conciliation notice in the case of a family assistance participant" (SSL § 341[1] [emphasis

added]).

The notice of conciliation incorporates the requirements set forth in SSL § 341(1)(a) (*see* 18 NYCRR 385.11). As relevant on this appeal, the notice informs the recipient of what constitutes good cause for failure to complete a work requirement (SSL § 341[1][a]; 18 NYCRR 385.12[c][1]). Examples of good cause for failing to comply with a work requirement include, but are not limited to, "circumstances beyond the individual's control," such as illness, lack of child care, family emergency, and domestic violence (18 NYCRR 385.12[c][1]).

The notice of decision likewise tracks the requirements set forth in SSL § 341. Specifically, it informs the recipient that public assistance benefits are being temporarily reduced or terminated (SSL § 341[1][b]; 18 NYCRR 385.11[a][3], [a][4][i]). It identifies the specific instance of noncompliance, and advises the recipient of "the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits" (SSL § 341[1][a]; 18 NYCRR 385.11[a][2]). It also explains the reasons for the district's determination and informs the recipient of her right to request a fair hearing before her benefits can be discontinued or reduced (SSL § 341[1][b]; 18 NYCRR 385.11[a][3]; *see also* 18 NYCRR 385.12[a][2][d]). Unlike the conciliation notice, however, the notice of decision is not required to

provide examples of good cause for the missed work activity (*see* SSL § 341[1][b]).

Petitioner commenced this hybrid article 78 proceeding and declaratory judgment action in Supreme Court, New York County, seeking, among other things, the reversal of the OTDA determination and HRA's reduction of her benefits; a declaration that the conciliation notification and NOD violate SSL § 341 by failing to inform participants of "the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits"; and an injunction barring OTDA and HRA from sanctioning public assistance recipients until the conciliation notification and NOD are amended to conform with SSL § 341.

After the petition was filed, HRA investigated the TAG notice and conciliation notification, and determined that they omitted petitioner's apartment number and therefore did not contain her complete address. HRA accordingly withdrew its determination, and OTDA correspondingly vacated its determination. HRA deleted the employment sanction from petitioner's case record, restored her full public assistance benefits, and paid her $2,008 in retroactive benefits covering the period of February 4 through October 3, 2011. HRA also updated its records to ensure that all future notices sent to petitioner would includ her full address.

OTDA served an answer in which it argued that the agencies' remedial actions rendered petitioner's claims moot. OTDA also argued that the conciliation notification and NOD complied with SSL § 341 and 18 NYCRR 385.11. OTDA further contended that petitioner's challenges to the conciliation notification and NOD were dehors the administrative record, since she never raised them at the agency level or administrative hearing.

By notice dated April 6, 2012, in lieu of answer, HRA cross-moved to dismiss the petition, arguing, among other things, that its corrective actions had rendered petitioner's claims moot.

Supreme Court denied the petition in part and granted it in part. The court granted HRA's motion to dismiss the petition "only to the extent of dismissing the claim that [HRA's] conciliation and conference procedures violate SSL § 341(1) by not allowing a public assistance recipient to participate in work activities prospectively to avoid a reduction in assistance after a failure or refusal to participate." The court similarly dismissed petitioner's claim that OTDA "violated SSL § 341(1) by approving conciliation and conference procedures that do not allow a recipient to participate in work activities prospectively to avoid a reduction in assistance after a failure or refusal to participate."

The court, however, granted the petition "to the following

extent":

> "The court declares and adjudges that 18 N.Y.C.R.R. § 385.11(a)(2), insofar as it omits that a showing of compliance with assessments, employment planning, and assigned work activities is action a public assistance recipient may take to avoid a reduction in assistance, violates SSL § 341(1)(a). [OTDA] shall amend 18 NYCRR § 385.11(a)(2) to require that a conciliation notice notify a recipient of her right to show compliance with assessments, employment planning, and assigned work activities. The court declares and adjudges that, insofar as [HRA's] Conciliation Notification and Notice of Decision omit that a showing of compliance with all assessments, employment planning, and assigned work activities is action a public assistance recipient may take to avoid a reduction in assistance, [OTDA] has approved notices that violate SSL § 341(1). [OTDA] shall disapprove conciliation notices and notices of decision that fail to notify a recipient of her right to show compliance with assessments, employment planning, and assigned work activities" (ciatations omitted).[6]

In addition, the court opined that HRA's use of "autoposting" — the use of a computerized system that "automatically imposes a sanction . . . due to a failure to attend an employment or work activity appointment" — likely violates 18 NYCRR 358-4.1(a), which calls for "review" of

---

[6]Supreme Court ruled on this issue with respect to OTDA because it answered and did not seek disclosure. The court noted that it was inconceivable how further development of the record would show whether "18 N.Y.C.R.R. § 385.ll(a)(2), in 2010 or since, requir[ed] that a conciliation notice notify a recipient of her right to show compliance with assessments, employment planning, and assigned work activities, to avoid a reduction in assistance." Supreme Court, therefore, treated the petition regarding 18 NYCRR 385.ll(a)(2) as a motion for summary judgment (CPLR 409[b]; *Matter of Hotel 71 Mezz Lender, LLC v Rosenblatt*, 64 AD3d 431, 432 [1st Dept 2009]).

reductions of public assistance benefits "to determine whether the action is correct based upon available evidence." Nonetheless, the court declined to rule on this issue before HRA served an answer and discovery with respect to its autoposting procedures.

Initially, this Court must decide whether this matter is moot. Generally, courts may not pass on moot questions (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707 [1980]). However, "[w]here . . . a judicial determination carries immediate, practical consequences for the parties, the controversy is not moot" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]; *see also Hearst Corp.*, 50 NY2d at 714 ["an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment"]). As the United States Supreme Court noted in *United States v W.T. Grant Co.* (345 US 629, 632 [1953]):

> "Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that

> the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement" (citations and footnote omitted).

Moreover, a court may adjudicate an otherwise moot matter that "satisfies the three critical conditions to the mootness exception in that it presents an issue that (1) is likely to recur, (2) will typically evade review and (3) is substantial and novel" (*Matter of Chenier v Richard W.*, 82 NY2d 830, 832 [1993]). Where these requirements are met, a court may "reach the moot issue even though its decision has no practical effect on the parties" (*Saratoga County Chamber of Commerce,* 100 NY2d at 811).

Here, petitioner's claims meet the standard for the mootness exception. There is a likelihood of repetition of the controversy, since petitioner continues to be a recipient of public assistance and continues to be subject to the public assistance sanction process, including conciliation and autoposting, which led to HRA's erroneous determination sanctioning her. As petitioner notes, in New York City alone, from July 2012 to June 2013, on average there were 15,269 public assistance recipients a month in sanction status for an employment-related infraction.[7] The practices and procedures of

[7]2013 Statistical Report on the Operations of New York State Public Assistance Programs, Table 23 at 45, available at

HRA in regard to the employment requirements and process, and their lawfulness, present a controversy that without a doubt is likely to recur both with respect to petitioner and with respect to thousands like her. Indeed, the dissent acknowledges that the "issues of the sufficiency of the contents of the notices that were sent to petitioner, and the propriety of generating those notices by means of 'autoposting,' may be likely to recur," and that the issues are substantial and novel. The dissent nonetheless disagrees with our position that these issues will typically evade review. Contrary to the dissent, however, the issues presented by this case are rarely reviewed by the courts, because pro se litigants at the administrative hearing level are not equipped to raise complex legal issues at their hearings. If, in those few cases in which public assistance recipients retain counsel to bring these issues before a court, HRA and OTDA can moot them out by vacating a fair hearing decision and restoring some lost benefits, then these issues will truly always evade review.

That HRA had a "good faith" interest in settling petitioner's claim when it determined that the notices were sent to the wrong address is beside the point. Petitioner's case was

---

http://otda.ny.gov/resources/legislative-report/2013-Legislative-Report.pdf.

settled only after Legal Services filed an article 78 proceeding; petitioner actually lost at her fair hearing even though she explained that the notices were sent to the wrong address. Nor does it matter whether respondents have a valid reason for settling or whether they do so to avoid review. The fact remains that the issue will typically evade review. The dissent makes much of the fact that petitioner noted that there were five pending cases that raise similar issues dating back to 2010. Six years later, and with hundreds of thousands of public assistance recipients in sanction status for an employment-related infraction, however, the issues have not been decided. In fact, four of those five cases settled. The fifth case, *Smith v Berlin* (Index No. 400903/10 [Sup Ct, New York County]), is still pending. However petitioner notes that, although she alleges similar deficiencies in the notices as in the *Smith* case, she also alleges that HRA's procedures are deficient because there is no opportunity to avoid sanction either during conciliation or after the notice of decision has been issued, a claim that the petitioner in *Smith* does not raise. *Smith* also does not challenge HRA's use of autoposting.

Last, it is unfair to dismiss the petition at this juncture when the issue as to whether autoposting violates 18 NYCRR 358-4.1 is still pending.

Turning to the merits, we find that the notices at issue do not violate the applicable regulatory scheme. In reviewing these notices, we are mindful that "[t]he standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious" (*Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health*, 85 NY2d 326, 331 [1995]), or contrary to the statute under which it was promulgated (*Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals*, Tax Appeals Trib., 2 NY3d 249, 254 [2004]). The party challenging a regulation has the heavy burden of establishing that "it is so lacking in reason for its promulgation that it is essentially arbitrary" (*Matter of Marburg v Cole*, 286 NY 202, 212 [1941]; *Matter of Consolation Nursing Home*, 85 NY2d at 331-332).

Applying this standard, we hold that the court erred in finding that 18 NYCRR 385.11(a)(2) violates SSL § 341(1)(a), insofar as it omits that a showing of compliance with assessments, employment planning, and assigned work activities is action that a public assistance recipient may take to avoid a reduction in assistance. The provision on which the court relied requires the agency to issue "a notice in plain language" indicating that the participant's "failure or refusal" to comply with work requirements has taken place, and "the right of such

participant to conciliation to resolve the reasons for such failure or refusal" (SSL § 341[1][a]).

The statute specifies that the notice "shall indicate the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title *and the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits*" (SSL § 341[1][a] [emphasis added]). It is the italicized language that the court most particularly relied on in concluding that the statute requires the agency to advise a public assistance recipient that she may avoid sanction by showing that she did in fact comply with work requirements.

Section 341(1)(b) similarly directs the agency, in the event conciliation is unsuccessful, to issue a notice of decision stating

> "the reasons for such determination, the specific instance or instances of willful refusal or failure to comply without good cause with the requirements of this title, the necessary actions that must be taken to avoid a pro-rata reduction in public assistance benefits, and the right to a fair hearing relating to such discontinuance or reduction" (SSL § 341[1][b]).

But, as noted above, it does not require that the notice of decision give examples of good cause.

The regulation and notices closely track the statute, which focuses on how a recipient can demonstrate good cause for having

failed to comply with work requirements. In fact, every requirement set forth in SSL § 341 is incorporated into the notices. The crux of Supreme Court's holding is that the regulation and notices do not satisfy a requirement that recipients be expressly told that they can avoid sanction by asserting compliance. The statute on its face, however, simply contains no such requirement. This is particularly true for the notice of decision, because SSL § 341(1)(b) does not require that the notice give examples of good cause. Under these circumstances, this Court cannot find that 18 NYCRR 385.11 and the notices were unreasonable or arbitrary.

Supreme Court correctly found, however, that SSL § 341(1) does not require the agency to give sanctioned public assistance recipients a chance to cure their noncompliance. Petitioner contends that the statute's requirement that notices state "the necessary actions that must be taken to avoid a pro-rata reduction" in benefits means that the agency must inform sanctioned recipients of the "actions" they can take to avoid losing benefits. The companion statute, SSL § 342, sets forth a system of progressive periods of benefits reductions. Under this system, first offenders may end sanctions simply by complying with the work requirement. Moreover, offenders must suffer reduced benefits for at least three months and thereafter until

they comply (SSL §§ 342[2][a]-[c]). This progressive scheme is referred to in section 341 itself, which directs the agency to send a sanctioned recipient "whose failure to comply has continued for three months or longer a written reminder of the option to end a sanction after the expiration of the applicable minimum sanction period by terminating the failure to comply" (SSL § 341[5][a]).

In other words, viewed as a whole, the statutory regime of which section 341(1) is a part provides for a system of tiered sanctions. The regime does indeed provide for opportunities to cure, particularly for first offenders. It also provides for minimum sanction periods for repeat offenders. Section 341(1), however, does not grant all offenders an immediate right to cure noncompliance. Thus, the court correctly dismissed petitioner's claim that the conciliation procedures and conference procedures following a notice of decision violate SSL § 341(1) by not allowing a public assistance recipient to participate in work activities prospectively to avoid a reduction in assistance after a failure or refusal to participate.

Although we hold that the conciliation notices comport with the relevant regulatory scheme, we note that HRA's errors resulted at least in part from autoposting. We find it troubling that HRA took adverse action without any employee or officer

reviewing petitioner's case record or investigating her case, particularly since 18 NYCRR 358-4.1(a) provides that "[a] social services agency must *review* . . . actions to determine whether the action is correct based upon available evidence included in the applicant's or recipient's case record" (emphasis added). 18 NYCRR 358-4.1(b), provides that only after that review of the case record, is HRA to send a NOD informing an applicant or recipient of the action to be taken: "Where it is determined that the intended action is correct after review, the social services agency must send to the applicant/recipient a notice."

Insofar as petitioner seeks declaratory and injunctive relief prohibiting HRA's use of autoposting, rather than the reversal pursuant to CPLR article 78 of HRA's decision to reduce her public assistance, which occurred as a consequence of the use of autoposting, HRA is entitled to answer before a final determination of this claim is made upon a motion for summary judgment or after an opportunity for disclosure and a trial (CPLR 3212[f], 7804[f]; *Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 103 [1984]; *Matter of Camacho v Kelly*, 57 AD3d 297, 298-299 [1st Dept 2008]).

Accordingly, the order of the Supreme Court, New York County (Lucy Billings, J.), entered on or about April 25, 2013, which,

insofar as appealed from as limited by the briefs, granted the petition to annul a determination of the New York State Office of Temporary and Disability Assistance, dated April 19, 2011, upholding the decision of the New York City Human Resources Administration, dated January 12, 2011, which reduced petitioner's public assistance benefits on the ground that she missed a scheduled appointment, to the extent of declaring that 18 NYCRR 385.11(a)(2) and certain notices issued thereunder violate Social Services Law (SSL) § 341(1) by failing to require that public assistance recipients be notified of their right to show compliance with required work activities, and granted HRA's motion to dismiss the petition to the extent of dismissing the claim that HRA's conciliation and conference procedures violate SSL § 341(1) by not allowing a public assistance recipient to avoid sanctions by curing noncompliance with work activities, should be modified, on the law, to vacate the declaration that 18 NYCRR 385.11(a)(2) and certain notices issued thereunder violate SSL § 341(1) by failing to require that public assistance recipients be notified of their right to show compliance with required work activities, and declare that 11 NYCRR 385.11(a)(2) and the subject notices do not violate SSL §341(1), and otherwise affirmed, without costs.

All concur except Friedman, J.P. and Andrias, J. who dissent in an Opinion by Friedman, J.P.

FRIEDMAN, J.P. (dissenting)

While I do not disagree with the majority's discussion of the substantive issues raised on this appeal, I respectfully dissent from the disposition of the appeal on the ground that petitioner's claims for relief were already moot by the time the matter was submitted to Supreme Court for determination. Further, contrary to the majority's position, no exception to the mootness doctrine applies. Accordingly, we should reverse the order appealed from, grant the municipal respondent's cross motion to dismiss the petition as moot, and dismiss the proceeding.

The record shows, and petitioner does not dispute, that, promptly after this proceeding under CPLR article 78 was commenced in August 2011, the City investigated the matter and found that it had mailed the conciliation notification and subsequent notice of decision to an incomplete address, from which the number of petitioner's apartment had been omitted. The City accordingly determined that it had erred in finding, based on petitioner's failure to respond to these notices, that she had not complied with applicable work requirements. Pursuant to this determination, both the City and the State vacated the determinations adverse to petitioner, as reflected in the amended decision, dated October 12, 2011, that was issued by the State

Office of Temporary and Disability Assistance.[1] The City followed up by deleting the employment sanction from petitioner's case record, restoring her full public assistance benefits, and paying her retroactive benefits for the period when her benefits had been reduced. The City also updated its records to ensure that future notices would be sent to petitioner's full address.

As the City argued in support of its cross motion to dismiss, long before the matter was submitted to the court for adjudication on April 19, 2012, and before the court issued its decision and order on March 27, 2013, the foregoing actions by respondents "mooted the petition as to both the injunctive and declaratory relief sought" (*Matter of Santiago v Berlin*, 111 AD3d 487, 487 [1st Dept 2013]). The mere possibility that petitioner could be subjected in the future to notices with improper contents, generated by insufficient internal procedures, as alleged in the petition, is speculative and does not suffice to constitute a live controversy between this particular petitioner and respondents. Petitioner has been made whole, there are no

[1]The amended decision directed the City Human Resources Administration to "[w]ithdraw its Notice of Intent [to sanction petitioner]," to "[t]ake no further action on its Notice of Intent," and to "[r]estore any Public Assistance lost by [petitioner] as a result of such Notice, retroactive to the date of the Agency's action." The amended decision further directed the City to comply with these directives "immediately."

other charges pending against her, and there may never again be any charges against her. Hence, there is no live controversy between petitioner and respondents, and this Court's determination does not "carr[y] immediate, practical consequences for the parties" (*Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 812 [2003], *cert denied* 540 US 1017 [2003]). Further, petitioner, no longer having any personal stake in the outcome of the legal dispute raised by the petition, cannot manufacture an actual controversy by asserting a claim for declaratory relief (*see Long Is. Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253 [1st Dept 2006], *appeal dismissed* 9 NY3d 1003 [2007]).

I respectfully disagree with the majority's conclusion that Supreme Court properly considered this matter under the exception to the mootness doctrine for a matter that "presents an issue that (1) is likely to recur, (2) will typically evade review and (3) is substantial and novel" (*Matter of Chenier v Richard W.*, 82 NY2d 830, 832 [1993]). While the issues of the sufficiency of the contents of the notices that were sent to petitioner, and the propriety of generating those notices by means of "autoposting," may be likely to recur, there is no reason to expect that these issues, substantial and novel though they may be, will typically evade review. The gravamen of petitioner's argument to the

contrary, which the majority accepts, is that respondents will systematically "moot . . . out [claims presenting these issues] by vacating a fair hearing [determination] and restoring some lost benefits" in each case in which litigation is commenced. However, the record contains no evidence that respondents have been engaging in a practice of deliberately withdrawing sanctions determinations for the purpose of perpetually evading judicial review of the general practices challenged in this proceeding.

Further, the record establishes that, in this particular case, respondents had a legitimate reason, unconnected to petitioner's arguments concerning the sufficiency of the contents of the notices and the propriety of autoposting, for settling her individual claim. Specifically, petitioner avers that the notices in question did not reach her, leading ultimately to the now-withdrawn adverse determination, because the municipal respondent admittedly sent out those notices with an incomplete address. Thus, respondents had a good faith reason for settling petitioner's particular claim without conceding the merits of her arguments that are the asserted basis for the application of the exception to the mootness doctrine. There is no basis in the record for inferring that respondents' reversal of the sanctions against petitioner was motivated by a plan to evade judicial

review of the general practices challenged by the petition.[2]

While petitioner and the majority point to the great number of City residents who receive public assistance benefits as an indication that the issues of the propriety of the general practices under challenge here are likely to recur, this only underscores the point that these issues are likely to reach this Court in other cases that, unlike this one, have not been mooted. I see no merit in petitioner's contention that public assistance recipients will typically be unable to retain counsel or otherwise challenge adverse sanction determinations. As petitioner herself reports, as of the date of her petition, there were at least five pending proceedings, dating back to 2010, in which the same issues were being litigated.[3] The important

---

[2]Respondents do not contend that a notice is valid even if it does not reach the intended recipient due to the sending agency's failure to address the notice accurately or completely. If either respondent were making that argument, I would agree that the exception to the mootness doctrine should be applied.

[3]The majority asserts, based on information not contained in the record, that four of the five cases have been settled, and that the petitioner in the fifth case has not raised all of the issues raised by the instant petitioner. As to the cases that have settled, the majority does not describe the particular facts of those cases in sufficient detail to enable us to determine whether the respondents had a reason to settle those matters other than the desire to avoid review of the issues contested in this matter. If these issues are truly endemic to the system, petitioner's able counsel in this proceeding, or a similar legal services organization, should have no difficulty finding a case that can be prosecuted to final adjudication where there has been

issues that petitioner has raised should be determined in a case brought by an individual who still has a personal stake in the determination of those issues at the time a court determines them. Since petitioner had no such stake at the time the order under review was rendered, that order should be reversed and the petition dismissed.

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

ENTERED: JUNE 9, 2016

CLERK

---

no settlement or, alternatively, the settlement is attributable to the respondents' desire to avoid judicial review of these issues. To reiterate, given the independent reasons respondents had for settling the instant matter, the record of this case does not demonstrate any desire on the part of respondents to avoid judicial review of the contested issues.