SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 29, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

16183 The People of the State of New York, Respondent, Ind. 5370/11

-against-

Emma Cornelius,
Defendant-Appellant.

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Dewey Pegno & Kramarsky LLP, New York (Joseph P. Mueller of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Annalisa Torres, J. at nonjury trial and sentencing), rendered March 13, 2013, convicting defendant of manslaughter in the first degree, and sentencing her to a term of eight years, unanimously affirmed.

On November 7, 2011, police responded to West 137th Street in New York County and learned from EMS workers at the scene that defendant's companion, Christopher Joseph, had been stabbed. After she came downstairs from the apartment, defendant spoke to a uniformed police officer who asked her what had happened;

defendant ultimately gave two different accounts of the stabbing. During the time that the officer was speaking with defendant, police did not search or handcuff her or tell her that she was under arrest.

At the request of police, defendant went to the precinct to discuss the incident with detectives. Once defendant was at the precinct, she spoke with detectives, giving an account in which Joseph had somehow harmed himself in the apartment. Soon after defendant arrived at the precinct, Joseph died from his injuries, but police kept this information from defendant.

Detectives obtained a *Miranda* sheet so that they could read defendant her *Miranda* warnings. At that point, one of the detectives told defendant, based upon her conflicting stories, that she was "more than . . . just [] a witness," and he sought to ask her more specific questions about the incident. The detective informed defendant that he would read her rights to her before they began speaking again.

The detective wrote defendant's name at the top of the *Miranda* sheet, entitled "INTERROGATION WARNINGS TO PERSON IN CUSTODY," and asked her to answer "yes" or "no" verbally after he read each right. Defendant verbally answered "yes" to each question and the detective marked her affirmative answers on the form. The final question the detective asked from the sheet was

whether defendant was willing to answer questions after having been advised of her rights; defendant verbally answered "yes" and the detective so indicated on the form.

However, defendant refused to initial the "yes" responses or sign the bottom of the *Miranda* sheet. Instead, defendant underlined the word "interrogation" several times and told the detective that she was uncomfortable with that word, stating that she did not understand why she was being interrogated. According to the detective's testimony, he told defendant, "[A]t this point you are not being interrogated." However, the detective told defendant, "[W]e want to make sure that you know your rights and that you are aware of your rights. And we are asking you to sign this in agreement that you have been read your rights and have been made aware of your rights." The detective also told defendant that signing the *Miranda* sheet did not constitute an admission that defendant was admitting anything. Nevertheless, defendant refused to sign the sheet, stating that her verbal responses should be sufficient.

Defendant then gave detectives another account of the incident. She first repeated that Joseph had been injured when he fell to the floor, but after the detective opined that her story made no sense, she changed the account. In the second account, defendant stated that Joseph had physically tried to

prevent her from leaving the room after the two had had an argument. According to defendant, she fell to the floor, hoping Joseph would let her go. When Joseph continued to hold defendant down, she picked up a kitchen knife and began to swing it, stabbing Joseph.

The court properly denied defendant's motion to suppress the statements that she made both before and after she received her *Miranda* warnings. The People established that the pre-*Miranda* statements were not the product of custodial interrogation, because a reasonable innocent person in defendant's position would not have thought she was in custody (*see Stansbury v California*, 511 US 318, 325 [1994]; *People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]; *People v Dillhunt*, 41 AD3d 216, 217 [2007], *lv denied* 10 NY3d 764 [2008]). Although the officer at the scene asked defendant some questions about what had happened, questions posed in an attempt to gather information about the circumstances surrounding a possible crime do not constitute custodial interrogation for the purposes of *Miranda* (*see Dillhunt*, 41 AD3d at 217; *Matter of Rennette B.*, 281 AD2d 78, 83 [1st Dept 2001]). Further, there is no evidence that, during the pre-warnings period, any officer compelled defendant to go or remain anywhere, or created the impression that she was not free to leave.

The record also establishes that defendant subsequently received full and effective *Miranda* warnings, and made a knowing and voluntary waiver of her rights before making additional statements. The detective did not make any improper statements of the type discussed in *People v Dunbar* (24 NY3d 304 [2014], *cert denied* __ US __, 135 S Ct 2052 [2015]), or that otherwise undermined the effect of the *Miranda* warnings. In *Dunbar*, the *Miranda* warnings were coupled with statements that directly contradicted those warnings – namely, statements suggesting that the defendant did not, in fact, have the right to remain silent and that his statements would be used to help him rather than to incriminate him. Here, by contrast, nothing in the record suggests that police misinformed or misled defendant about her right to remain silent, or about the fact that her statements might be used against her. Nor does the record suggest that police misinformed or misled defendant about any of the other rights recited in the *Miranda* warnings.

Defendant takes issue with the detective's statement that she was "not being interrogated." This statement, defendant asserts, implied that the *Miranda* warnings did not apply to the conversation the detective was about to have with her. We reject this argument. Given the circumstances surrounding the defendant's statements to police at the scene and at the

precinct, her objection to the word "interrogation" merely suggested surprise that the police apparently believed her to have committed a crime rather than to simply have witnessed an incident in which Joseph had injured himself. Indeed, defendant reiterated that her verbal responses to the *Miranda* warnings should be sufficient even if she did not sign the *Miranda* sheet, thus evincing her understanding that she had agreed to waive her rights.

Although the police misinformed defendant that Joseph was still alive, defendant made no showing that the deception was so fundamentally unfair as to deny due process, or that a promise or threat was made that could induce a false confession (*see People v Tarsia*, 50 NY2d 1, 11 [1980]). After considering the totality of the circumstances (*see People v Aveni*, 22 NY3d 1114, 1117 [2014]), we conclude that defendant's statements were "the product of [her] own choice" (*People v Thomas*, 22 NY3d 629, 642 [2014]).

Finally, the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations.

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Acosta, Andrias, Richter, JJ.

16494 The People of the State of New York, Respondent, Ind. 1533/12

-against-

Andrew Lessey, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered June 25, 2013, as amended November 18, 2013, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of nine months, unanimously affirmed.

We need not decide whether defendant preserved his challenge to the court's ruling striking the testimony of a character

witness, or whether the character witness's testimony was relevant and admissible, because the evidence of defendant's guilt was overwhelming. If there was any error in the decision to preclude this testimony, it was harmless.

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

ENTERED: MARCH 29, 2016

CLERK

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

4 Margaret Brown, Index 350513/04
Plaintiff-Respondent,

-against-

Paul F. Condzal,
Defendant-Appellant.

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Abbott Bushlow & Schechner, LLP, Ridgewood (Alan L. Bushlow of counsel), for appellant.

Margaret Zox Brown, respondent pro se.

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Judgment, Supreme Court, New York County (Matthew F. Cooper, J.), entered July 10, 2014, which, to the extent appealed from as limited by the briefs, characterizes the amount awarded to plaintiff as "unpaid child support," unanimously affirmed, with costs.

The parties' marriage was terminated by a judgment of divorce entered in November 2005. Incorporated but not merged into the judgment is the parties' separation agreement, which provides, inter alia, that the parties' sole child is to attend private school and that defendant husband is to bear 100% of the costs of the child's tuition. In 2010, plaintiff wife asserted a cause of action for breach of contract, under the caption and index number of the divorce action, to recover a judgment against defendant for reimbursement of amounts she had paid for the

child's tuition, defendant having defaulted on his obligation under the separation agreement to make such payments. After a four-day trial, by decision and order entered January 9, 2012 (the January 2012 order), the court rejected defendant's opposing arguments and directed him to pay plaintiff, within 60 days, $56,326.66 as reimbursement for her tuition payments. The order further directed the clerk, without further order of the court, and upon service of the order with notice of entry and plaintiff's affidavit of defendant's default in making the payment, to enter judgment in favor of plaintiff against defendant in the amount of $56,326.66 with statutory interest from July 1, 2010, plus costs and disbursements. In addition, the January 2012 order directed defendant to pay plaintiff's counsel $30,000 in attorney's fees and similarly directed the clerk, upon a properly supported application, to enter judgment for such fees with interest in favor of plaintiff's counsel if not paid within 60 days. In July 2014, plaintiff submitted to the clerk a proposed judgment against defendant awarding her and her former counsel recoveries in accordance with the January 2012 order, and the clerk entered the judgment on July 10, 2014.

Defendant now appeals from the July 2014 judgment insofar as it characterizes the amount awarded to plaintiff against him as a

recovery "for unpaid child support."[1] While he does not challenge the recoveries granted plaintiff and her former counsel by the judgment, defendant argues that the judgment's characterization of the award as damages for "unpaid child support" is inconsistent with the January 2012 order, pursuant to which the judgment was entered, because the January 2012 order does not specifically use the term "child support" to describe the payments at issue. Rather, the relevant decretal paragraph of the January 2012 order directs defendant "to pay the plaintiff $56,326.66 as and for the child's private school tuition payments." Defendant contends that we should therefore modify the judgment "by striking from it each and every reference to 'unpaid child support' in order to conform it to the Decision and Order on which it is based."

We affirm the judgment as entered. While it is well-settled that, "[w]hen there is an inconsistency between a judgment or order and the decision upon which it is based, the decision

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[1]In pertinent part, the judgment recites: "Plaintiff having moved for a judgment against the defendant *for unpaid child support* and for attorneys [sic] fees incurred in connection with obtaining the judgment *for unpaid child support* and the Honorable Matthew Cooper having rendered a Decision and Order dated January 5, 2012, (i) in favor of the plaintiff *for unpaid child support* . . . and (ii) in favor of plaintiff's counsel . . . for $30,000 with interest . . . for attorneys [sic] fees incurred in connection with the proceedings to collect defendant's *unpaid child support*" (emphasis added).

controls, and such inconsistency may be corrected on appeal" (*Matter of Hyman*, 78 AD3d 583, 584 [1st Dept 2010]), there is no such inconsistency between the judgment under review and the January 2012 order on which it is based. Regardless of the January 2012 order's reference to the amount at issue as "the child's private school tuition payments," the obligation to make such payments, although undertaken by defendant in the separation agreement rather than imposed on him by independent judicial determination, constitutes a "child support" obligation within the meaning of Domestic Relations Law § 240. That statute defines the term "child support" to mean "a sum to be paid pursuant to court order or decree by either or both parents *or pursuant to a valid agreement between the parties* for care, maintenance and education of any unemancipated child under the age of twenty-one years" (Domestic Relations Law § 240[1-b][b][2] [emphasis added]). Inasmuch as the payments at issue are for the child's education and are to be made "pursuant to a valid agreement between the parties," such payments plainly fall within the statutory definition of "child support" as a matter of law. The parties' election, as permitted by Domestic Relations Law § 240(1-b)(h), to define their respective child support obligations by the terms of their separation agreement, rather than by the court's application of the statutory guidelines, does not alter

the nature of the tuition payments in question — which defendant does not deny that he was obligated to make and that he failed to make — as "child support" within the meaning of the statute. Nor was the nature of the payments changed by the happenstance that the January 2012 order did not use the particular words "child support" to refer to these payments.

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

ENTERED: MARCH 29, 2016

CLERK

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

188 Erik Matz, et al., Index 105982/05
Plaintiffs-Respondents,

-against-

Jessie Nettles,
Defendant,

Carlson, et al.,
Defendants-Appellants.

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Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellants.

Martello & Lamagna, P.C., Garden City (Maksim Leyvi of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered August 14, 2014, which, insofar as appealed from, denied the motion of defendants Carlson, L.I.R. Management Corp., the Riese Organization Corporate Group and T.G.I. Friday's Inc. for summary judgment dismissing plaintiffs' claims for negligence and negligent infliction of emotional distress as against them, unanimously affirmed, without costs.

The court properly denied that part of defendants' motion seeking dismissal of plaintiffs' causes of action for negligence in failing to take minimal security precautions to protect those on their premises from the foreseeable criminal acts of third

parties (*see Jacqueline S. v City of New York*, 81 NY2d 288 [1993]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 304 [1st Dept 2001]). Defendants' submissions failed to eliminate triable issues of fact as to whether defendant Nettles's aggressive acts against patrons on the premises of defendants' bar/restaurant throughout the evening made it reasonably foreseeable that Nettles's continued presence on the premises could lead to the physical injury of a patron (*see Rivera v 21st Century Rest.*, 199 AD2d 14, 15 [1st Dept 1993]).

The motion court properly declined to dismiss plaintiffs' claim for negligent infliction of emotional distress. Although seeking dismissal of the complaint in its entirety, defendants never addressed the claim before the motion court and only raise their arguments for the first time on appeal (*see e.g. Chisholm v Madison Sq. Garden Ctr.*, 289 AD2d 168 [1st Dept 2001]).

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

625 The People of the State of New York, Ind. 3654/11
Respondent,

-against-

Gilberto Vargas,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Natalia Bedoya-McGinn of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered on or about October 24, 2014, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated sexually

violent offense, and the court lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]).

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

626 In re Jeannine Shanley Argondizza also known as Jeannine Morand, Deceased. File 3991/12

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Leo Shanley, et al.,
Petitioners-Respondents,

-against-

Christopher Argondizza,
Respondent-Appellant.

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Goldfarb Abrandt Salzman & Kutzin LLP, New York (Michael S. Kutzin of counsel), for appellant.

Joseph A. Ledwidge, P.C., Jamaica Estates (Joseph A. Ledwidge of counsel), for respondents.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered March 2, 2015, which, to the extent appealed from as limited by the briefs, denied respondent's motion to dismiss petitioners' claim for breach of fiduciary duty, unanimously affirmed, without costs.

In their amended petition for a turnover of property, petitioners, decedent's children, alleged that respondent, decedent's second husband, fraudulently intended to deprive petitioners of their inheritance by transferring to himself, through a power of attorney granted by decedent while she was suffering from dementia, decedent's one-half interest in an apartment she co-owned with respondent as tenants in common.

The motion court correctly concluded that the amended petition stated a claim for breach of fiduciary duty that sought an equitable remedy — namely, a constructive trust and a return of decedent's interest in the apartment (*see Simonds v Simonds*, 45 NY2d 233, 241 [1978]), and that the claim was timely under the applicable six-year statute of limitations (*see Loengard v Sante Fe Indus.*, 70 NY2d 262, 266-267 [1987]; *Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]).

The statute of limitations did not begin to run until respondent allegedly openly repudiated his fiduciary obligations by transferring decedent's interest in the apartment to himself in May 2009 (*see Matter of Barabash*, 31 NY2d 76, 80 [1972]). Therefore, the claim, brought in August 2013, was timely.

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

627-
628-
628A-
628B-
628C In re Jennifer W.,
Petitioner-Respondent,

-against-

Dwayne P.,
Respondent-Appellant.

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In re Dwayne P.,
Petitioner-Appellant,

-against-

Jennifer W.,
Respondent-Respondent.

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

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Order, Family Court, Bronx County (Robert D. Mulroy, Support Magistrate), entered on or about June 17, 2009, which, after a fact-finding hearing, determined that appellant Dwayne P. is the father of the subject child; order, same court (Sidney Gribetz, J.), entered on or about September 4, 2009, which denied appellant's objection to an order of the same Support Magistrate, dated July 8, 2009, directing him to pay $36.00 per week for child support; and order of dismissal, same court (Myrna Martinez-Perez, J.), entered on or about February 3, 2010, which

dismissed the family offense petition commenced by Dwayne P., against respondent-respondent Jennifer W., unanimously affirmed, without costs. Appeal from orders, same court (same Support Magistrate), entered on or about March 11, 2009 and same court (Myrna Martinez-Perez, J.), on or about November 15, 2010, unanimously dismissed, without costs, as abandoned.

The Family Court's determination that appellant is the biological father of the subject child was supported by clear and convincing evidence (*Matter of Commissioner of Social Servs. v Martinez*, 96 AD2d 496, 496 [1st Dept 1983]). Under Family Court Act § 532, there is a rebuttable presumption of paternity if the results of genetic marker testing show that the probability of paternity is greater than 95%. In this case, the genetic test results indicated that there was a 99.99% chance that appellant was the child's father. The circumstantial evidence appellant relies upon and the arguments he makes are not sufficient to rebut this presumption.

The record supports the court's determination that appellant did not timely object to the child support order. In any event, Family Court's award of $36.00 per week in child support is amply supported by the record, and the lesser amount that appellant urges would have been proper, would have been "unjust [and] inappropriate" (Family Court Act §§ 413[d], [f]). The evidence

and testimony reveal that appellant is capable of earning significantly more than he was receiving at the time of the support hearing, and he failed to produce evidence to show that he was actively seeking employment.

Finally, the Family Court properly dismissed appellant's family offense petition since, even giving the petition the broadest construction and the benefit of every possible inference, it does not allege the commission of a family offense.

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

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

629 The People of the State of New York, Respondent, Ind. 5549/10 5158/11

-against-

Rashitbek Adikov, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered February 8, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree, and sentencing him to a term of two to six years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea. Based on an objective reading of the plea bargain (*see People v Collier*, 22 NY3d 429, 433-434 [2013]), we conclude that defendant's plea was not induced by an unfulfilled promise. Defendant was clearly apprised that the promise was a sentence of two to six years, and not time served. While the court informed defendant that his sentence would "in effect" be time served because he had already served the two-year minimum, and because prompt parole for the purpose of deportation to defendant's

native country was very likely, this was expressed in terms of probability, not certainty. The court also made no firm promise about whether defendant would be in City or State custody before being paroled. In any event, to the extent the promise could be objectively understood to be a promise of a sentence that was nearly or approximately a sentence of time served, that promise was essentially fulfilled.

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

632 Marian O'Connor, Index 112874/11
Plaintiff-Respondent,

-against-

Restani Construction Corp.,
Defendant-Appellant,

Consolidated Edison Company of New York, et al.,
Defendants.

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Pisciotti Malsch, White Plains (Danny C. Lallis of counsel), for appellant.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Michael J. Fitzpatrick of counsel), for respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered January 26, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Restani Construction Corp.'s (Restani) motion for summary judgment, unanimously affirmed, without costs.

Supreme Court correctly denied Restani's motion for summary judgment, because Restani failed to meet its initial burden to offer proof sufficient to show that it did not create the hole in the crosswalk that caused plaintiff to fall. It is undisputed that Restani employees performed milling work at the accident location eight days before it happened (*see DeSilva v City of New York*, 15 AD3d 252, 254 [1st Dept 2005]). The May 31, 2011

Inspector's Report of the New York City Department of Design and Construction fails to establish the accident location was in a reasonably safe condition on May 23, 2011, because the statements contained in that report are inadmissible hearsay (*see Rue v Stokes*, 191 AD2d 245 [1st Dept 1993]). Even if the Report could be admitted as a business record, there is no foundation in the record to support its admissibility (*see Daliendo v Johnson*, 147 AD2d 312, 321 [2d Dept 1989]).

In addition, Restani failed to meet its initial burden to show that it lacked actual notice, because its witness did not testify during his deposition that Restani had not received a complaint about the hole prior to the accident (*see Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469 [4th Dept 2013]). Lastly, Restani failed to establish it lacked constructive notice of the hole, because it is undisputed that Restani was responsible to inspect and maintain the subject location between May 24, 2011 and June 8, 2011, but presented no evidence that its

employees had actually inspected the area prior to the June 1, 2011 accident (*see Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept 2009]).

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

633 Clarence Gaines, as the Executor of the Estate of Janie Gaines, Deceased, Plaintiff-Respondent, Index 14471/03

-against-

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

Department of Social Services of the City of New York, Claimant-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Michael Pastor of counsel), for appellant.

Jacoby & Meyers LLP, Newburgh (James W. Shuttleworth III of counsel), and Tamara L. Stack, New York, for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 22, 2014, which denied claimant's cross motion to, among other things, amend a prior order, same court (Edgar G. Walker, J.), entered August 17, 2010, unanimously affirmed, without costs.

Prior to the death of plaintiff's daughter (decedent), decedent had entered into a settlement with defendants Metropolitan Transportation Authority (MTA) and Evercare Home Health Care Services Inc., resolving a personal injury action. Upon entering into the settlement, decedent, who was receiving supplemental security income, Medicare and Medicaid due to

several preexisting conditions, petitioned the court to approve and authorize the creation of a supplemental needs trust (SNT) (*see* 42 USC § 1396p[c][2][B][iv], [d][4][A]; Social Services Law § 366[2][b][2][iii][A]), into which the settlement proceeds would be transferred. By order entered August 17, 2010, the petition was granted. On or about September 23, 2010, the MTA sent its portion of the settlement to decedent's counsel, who placed the funds in escrow pending completion of the documents creating and funding the SNT. On November 8, 2010, before she had the opportunity to formally execute the trust documents, decedent died. Thereafter, claimant, which was to be the remainderman of the SNT, moved for, among other things, the principal and interest that remains in the SNT.

The motion court correctly denied the motion, because decedent's failure to complete the formalities associated with setting up the SNT prior to her death was fatal to the SNT's existence. Neither decedent nor the putative trustee executed or acknowledged the proposed trust agreement, and the SNT was never properly funded with the settlement proceeds (*see* EPTL 7-1.17, 7-1.18; *Fasano v DiGiacomo*, 49 AD3d 683, 684-685 [2d Dept 2008], *lv denied* 11 NY3d 710 [2008]; *see also Matter of Bishop v Maurer*, 73 AD3d 455, 455 [1st Dept 2010]). Accordingly, a valid SNT was never created.

The proposed SNT is a "lifetime trust" within the meaning of the EPTL, and therefore the formality requirements of that statute are applicable (EPTL 1-2.20). Although a trust "created by [a] judgment or decree of a court" is not considered a lifetime trust (*id.*), that exception does not apply here, because the order "establish[ing]" the SNT is not a judgment or decree of a court.

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

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

635 The People of the State of New York, Respondent, Ind. 5351/10

-against-

Charles Brown, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 19, 2012, as amended January 24, 2013, convicting defendant, upon his plea of guilty, of assault in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of five years, unanimously affirmed.

Defendant's claim that the court failed to advise him of the term of postrelease supervision he would receive in the event he violated the terms of his plea agreement is subject to preservation requirements in the circumstances presented. Defendant was on notice well before the sentence was imposed of the PRS component (*see People v Crowder*, 24 NY3d 1134 [2015]; People *v Murray*, 15 NY3d 725 [2010]; *People v Harris*, 103 AD3d 427 [1st Dept 2013], *lv denied* 21 NY3d 943 [2013]), particularly

since much emphasis had been placed on the terms of a written plea agreement, which spelled out the sentence to be imposed in the event of its violation, including the term of PRS, and since the PRS term was also mentioned at other junctures before sentence was imposed. We decline to review this unpreserved claim in the interest of justice. As an alternative holding, although the court should have informed defendant of the PRS term, we decline to reverse because we find that defendant was provided with all the information he needed to knowingly, intelligently and voluntarily choose among alternative courses of action (*see People v Harris*, 103 AD3d at 428; *People v Sweeney*, 102 AD3d 580 [1st Dept 2013], *lv denied* 21 NY3d 914 [2013]).

Defendant made a valid waiver of his right to appeal (*see People v Sanders*, 25 NY3d 337 [2015]), which forecloses review of his excessive sentence claim. Regardless of whether defendant made a valid waiver of his 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: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

636 In re Bawasilya Nyairah R.,
also known as Baasilya R.,

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

Maria Isabel R., also known as
Maria D.,
Respondent-Appellant,

Lutheran Social Services of
New York,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Bobette M. Masson-Churin of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about September 29, 2014, which, to the extent appealed from, determined, after a fact-finding hearing, that respondent mother permanently neglected the subject child, unanimously affirmed, without costs.

The record demonstrates by clear and convincing evidence that, despite petitioner agency's diligent efforts, respondent failed to plan for the return of the subject child (Social Services Law § 384-b[3][g][i]; [4][d]; [7][a]). Despite respondent's completion of a parenting skills course and

participation in individual therapy, the quality of her visits with the subject child was poor, since she actively favored her son to the detriment of the subject child, and she demeaned both children's physical appearance (*see Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512 [1st Dept 2015]). Further, respondent refused or rejected the agency's assistance in completing the remainder of the services offered to her, including anger management and vocational training (*see Matter of Isaac A.F. [Crystal F.]*, 133 AD3d 515 [1st Dept 2015]). The agency is not a guarantor of respondent's success "in overcoming . . . her predicaments" (*Matter of Sheila G.*, 61 NY2d 368, 385 [1984]; *Matter of Imani Elizabeth W.*, 56 AD3d 318, 319 [1st Dept 2008]).

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

637 Andrzej Smigielski, Index 115484/09
Plaintiff-Appellant,

-against-

Teachers Insurance and Annuity Association of America, et al.,
Defendants-Respondents.

[And a Third-Party Action]

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

Barry, McTiernan & Moore, LLC, New York (Laurel A. Wedinger of counsel), for Teachers Insurance and Annuity Association of America, T-C the Colorado LLC, Equinox Holdings, Inc., and Pure 86th Street, Inc., respondents.

Gallo Vitucci Klar LLP, New York (Jessica A. Clark of counsel), for Eclipse Development Inc., respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 16, 2014, which denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) cause of action, unanimously affirmed, without costs.

The fact that plaintiff may have been the sole witness to his accident does not preclude summary judgment in his favor (*see Verdon v Port Auth. of N.Y. & N.J.*, 111 AD3d 580, 581 [1st Dept 2013]; *Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146, 147 [1st Dept 2004]). However, where a plaintiff is the sole witness to an accident, an issue of fact may exist where he or

she provides inconsistent accounts of the accident (*see Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465, 466 [1st Dept 2013]), his or her account of the accident is contradicted by other evidence (*id.*), or his or her credibility is otherwise called into question with regard to the accident (*see Vargas v City of New York*, 59 AD3d 261 [1st Dept 2009]).

Here, plaintiff testified that he sustained injuries when the platform of a scaffold, on which he was standing to cut a hole in the ceiling, collapsed. However, the testimony of defendant Eclipse Development Inc.'s senior project manager that plaintiff's employer did not do any ceiling work or use scaffolds and no scaffolds were present in the area where plaintiff was allegedly working at the time of the accident, raises triable issues as to whether the accident occurred as plaintiff claimed.

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

639 The People of the State of New York, Respondent,

-against-

Moses Suarez, Defendant-Appellant.

Ind. 4680/10

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at hearing; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered January 17, 2013, convicting defendant of robbery in the first degree (two counts), robbery in the second degree (two counts), criminal possession of a weapon in the second degree (two counts), attempted robbery in the first degree (two counts) and attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress his videotaped statement to an Assistant District Attorney. To the extent the police made a warrantless entry in violation of *Payton v New York* (445 US 573 [1980]), the statement, made at the District Attorney's Office 20 hours later, was sufficiently

attenuated from any taint arising from the entry (*see e.g. People v Santos*, 3 AD3d 317 [1st Dept 2004], *lv denied* 2 NY3d 746 [2004]). Although the court suppressed an earlier statement to a detective, solely on the ground of lack of attenuation from the warrantless entry, the videotaped statement was attenuated from the suppressed statement as well (*see People v Paulman*, 5 NY3d 122, 130-134 [2005]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of any discrepancies between the victims' testimony and their prior statements to the police.

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

640 Carlo Coretto, et al., Index 101009/11
Plaintiffs-Appellants,

-against-

Extell West 57th Street, LLC, et al.,
Defendants-Respondents,

Extell Development Company, et al.,
Defendants.

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Dunn, Brown & Varcadipane, LLC, New York (Jeffrey W. Varcadipane of counsel), for appellants.

Cozen O'Connor, New York (Edward Hayum of counsel), for Extell West 57th Street, LLC and Bovis Lend Leasing LMB, Inc., respondents.

Litchfield Cavo LLP, New York (Kelly A. McGee of counsel), for Five Star Electric Corp., respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 20, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to vacate an order granting, on default, defendant Five Star Electric Corp.'s cross motion for summary judgment dismissing the Labor Law §§ 200 and 241(6) claims as against it, and to renew defendants Extell West 57th Street, LLC and Bovis Lend Lease LMB, Inc.'s cross motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against them, unanimously modified, on the law, to grant the part of plaintiffs' motion

seeking to vacate the order granting summary judgment to Five Star, and otherwise affirmed, without costs.

Plaintiffs proffered a reasonable excuse for their default and demonstrated a meritorious cause of action in support of their motion to vacate the order granting electrical subcontractor Five Star summary judgment dismissing the Labor Law §§ 200 and 241(6) claims as against it (*see Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]). The record supports plaintiffs' claim that they never received Five Star's motion papers and were unaware that the motion had been made. As to the merits, the testimonial evidence showing that Five Star owned the PVC pipes that caused plaintiff's fall, along with the testimony of construction manager Bovis's site safety manager and Five Star's general foreman concerning Five Star's storage of pipes, raises an issue of fact as to whether Five Star had the authority to supervise and control the injury-producing work so as to render it liable as a statutory agent under Labor Law § 200 and § 241(6) (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201 [1st Dept 2008] [§ 200]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-193 [1st Dept 2011] [§ 241(6)]).

In support of their motion to renew Extell West 57th and

Bovis's motion, plaintiffs failed to offer a reasonable excuse for their failure to submit on the original motion the affidavit that they now seek to introduce (*see Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]).

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

641-
642 Index 651589/15

Access Nursing Services, etc.,
Plaintiff-Respondent,

-against-

The Street Consulting Group, et al.,
Defendants-Appellants.

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Access Nursing Services, etc.,
Plaintiff-Respondent,

-against-

Elizabeth Patten,
Defendant-Appellant.

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A. Bernard Frechtman, New York (Harvey L. Woll of counsel), for appellants.

Michael T. Carr, PLLC, Brooklyn (Nicholas J. Mundy of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered November 10, 2015, which denied defendants' motions to dismiss the complaints, and granted plaintiff's motions for leave to amend the complaints, unanimously modified, on the law, to grant defendant Elizabeth Patten's motion to the extent of dismissing the third and fourth causes of action against her, and otherwise affirmed, without costs.

The motion court properly granted plaintiff leave to amend its complaints (CPLR 3025[b]; *Peach Parking Corp. v 346 W. 40th*

St., LLC, 42 AD3d 82, 86 [1st Dept 2007]). We decline to consider defendants' argument, raised for the first time in their reply briefs, that a motion for leave to amend must be accompanied by an affidavit of merits and evidentiary proof (*see Sierra v Ogden Cap Props., LLC*, 135 AD3d 654 [1st Dept 2016]; *McDonald v Edelman & Edelman, P.C.*, 118 AD3d 562 [1st Dept 2014]).

The complaints allege that the Employment/Confidentiality Agreements are contracts between plaintiff and the respective defendants, that plaintiff performed its obligations under the Agreements, that defendants breached their respective Agreements by soliciting plaintiff's clients and using plaintiff's proprietary information to steal clients, and that plaintiff has been damaged by defendants' breaches. These allegations state causes of action for breach of contract (the first and second causes of action) (*see Harris v IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010] ["The sole criterion on a motion to dismiss is whether the pleading states a cause of action"]; *see also Greystone Funding Corp. v Kutner*, 121 AD3d 581, 584 [1st Dept 2014] ["There is a reasonable view of the pleading that would support (plaintiff's) claims that (defendant) breached the restrictive covenants in the employment contract"]).

The complaint against defendants Street Consulting Group,

Kyle Bernhard, Aparna Sharma and Joelle Velasco alleges that defendants used plaintiff's proprietary information to steal clients, and identifies client relationships that were harmed by defendants' interference. These allegations state causes of action for tortious interference and intentional interference with business relations (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 111 [1st Dept 2002]; *Rondeau v Houston*, 118 AD3d 638, 639 [1st Dept 2014], *lv dismissed* 24 NY3d 999 [2014]).

However, the complaint against defendant Patten fails to identify any specific business relationship that was harmed by Patten's alleged actions (*see Rondeau*, 118 AD3d at 639).

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

643- Ind. 1795/13
644 The People of the State of New York, 62/13
Respondent,

-against-

Randle Toussaint, etc.,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered October 1, 2013

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 29, 2016

CLERK

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

Friedman, J.P., Andrias, Saxe, Richter, JJ.

647 Debora Barahona, etc., Index 805268/13
Plaintiff-Respondent,

-against-

Long Island Ambulatory Surgery Center, L.L.C., et al.,
Defendants-Appellants,

Anthony T. Pacia, M.D., et al.,
Defendants.

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Schiavetti Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York (Stephanie Campbell of counsel), for Long Island Ambulatory Surgery Center, L.L.C., appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Jeremy S. Rosof of counsel), for The New York Eye and Ear Infirmary and Vatsal Doshi, M.D., appellants.

Duffy & Duffy, PLLC, Uniondale (Mary Ellen Duffy of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about August 11, 2014, which, inter alia, granted defendants' motions to dismiss the complaint without prejudice to the commencement of a new action within six months, pursuant to CPLR 205(a), upon plaintiff's receipt of permanent letters of administration, unanimously affirmed, without costs.

Plaintiff timely commenced this action, providing notice of the claim to defendants before the statue of limitations ran, and the dismissal was not on the merits but because of the lack of

proper letters of administration, which plaintiff was in the process of obtaining (*see Carmenate v City of New York*, 59 AD3d 162 [1st Dept 2009]).

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

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

ENTERED: MARCH 29, 2016

CLERK

Friedman, J.P., Andrias, Saxe, Richter, JJ.

648 The People of the State of New York, Ind. 4811/12
Respondent,

-against-

Harry Candelaria,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about November 7, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MARCH 29, 2016

CLERK

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