SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 11, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1310-
1311 Index 101239/14

In re Leon Pokoik, etc., et al.,
Petitioners-Appellants,

-against-

575 Realties, Inc., et al.,
Respondents-Respondents.

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The Law Firm of Gary N. Weintraub, LLP, Huntington (Leland S. Solon of counsel), for appellants.

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered November 4, 2015, which, insofar as appealed from, denied petitioners' motion to renew, unanimously reversed, on the law, without costs, the motion granted, and upon renewal, so much of the judgment, same court and Justice, entered on or about October 2, 2015, which denied the petition brought pursuant to CPLR article 78 to inspect certain records of respondent Steinberg & Pokoik Management Corp. (SPMC) vacated, and the petition granted. Appeal from order entered on or about October 2, 2015, unanimously dismissed, without costs, as academic.

In this appeal, we consider whether petitioners' right to inspect the books and records of respondent 575 Realties, Inc. (575) relating to salaries and compensation, pursuant to Business Corporation Law § 624 or the common law, should include the right to inspect the books and records of respondent SPMC, 575's wholly owned subsidiary. Stating that 575's financial statements listed salaries of in excess of $2 million per annum for the company and its subsidiaries but did not provide an itemized breakdown, petitioners claim that they have a valid purpose for their request - namely, to investigate possible fiduciary mismanagement and wasteful dissipation of corporate assets through the payment of excessive salaries and compensation.

The motion court granted the petition with respect to 575's records but denied the request to inspect SPMC's records on the ground that petitioners are not direct shareholders of SPMC. Thereafter, 575's counsel advised petitioners' counsel that 575 was "not in possession of [any] documents which are responsive to [p]etitioners' requests."

Based on 575's failure to produce any responsive records, petitioners moved to renew. The motion court denied the motion on the ground that petitioners had not produced any new facts that would change its original decision, even though in rendering that decision the court had stated as follows: "I would think at

this point the petitioner[s] would get the . . . books and records from 575 Realties[.] [Petitioners] will look them over. If they believe they need further information or further records, . . . they will probably at that point have sufficient documentation to make the connection to say that, Judge, guess what, we need the other documents now and here is why. You can point to it."

"Under New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose" (*Retirement Plan for Gen. Empls. of the City of N. Miami Beach v McGraw-Hill Cos., Inc.*, 120 AD3d 1052, 1055 [1st Dept 2014] [*McGraw-Hill*]; *Matter of Crane Co. v Anaconda Co.*, 39 NY2d 14, 19-20 [1976]; *Matter of Peterborough Corp. v Karl Ehmer, Inc.*, 215 AD2d 663, 664 [2d Dept 1995]). Furthermore, "because the common-law right of inspection is broader than the statutory right, petitioners are entitled to inspect books and records beyond the specific materials delineated in Business Corporation Law § 624 (b) and (e)" (*McGraw-Hill* at 1056).

Petitioners' concerns about board mismanagement and excessive expenditures and wasteful dissipation of corporate assets are, on their face, a proper purpose, "even if the

inspection ultimately establishes that the board had engaged in no wrongdoing" (*Id.*). While respondents maintain that petitioners did not tender any evidence to suggest that corporate formalities were not followed between 575 and SPMC, they do not refute petitioners' assertions that SPMC is the wholly owned subsidiary of 575, in which petitioner Leon Pokoik Family Partners, LP holds shares, and that 575 and SPMC share office space and management and are dominated by certain family members who control the affairs of multiple family businesses. Significantly, 575's counsel advised petitioners' counsel that "575 . . . has no employees; has no payroll; pays no salaries; pays no workers' compensation insurance; and, issues no W-2 forms . . . [and] has no books or records reflecting salaries paid by 575 . . . to any individual or entity" — which leaves petitioners with no source other than SPMC for the information they seek. Furthermore, petitioners' requests are narrowly related to salaries and compensation and there has been no showing that requiring SPMC to produce the records would impose any undue burden.

Under these circumstances, petitioners have made a sufficient showing to establish their common-law right to inspect the books and records of SPMC, 575's wholly owned subsidiary, relating to salary and compensation (*see McGraw-Hill*, 120 AD3d

1052 [reversing order denying petition to inspect the respondent's books and records pertaining to the alleged wrongful conduct of its wholly owned subsidiary]; *Matter of Bluhdorn v Greenwald Indus.*, 12 AD2d 662 [2d Dept 1960] [affirming order granting petitions to inspect and examine the books and records of a holding corporation and of five of its wholly owned subsidiary corporations]; *see also State ex rel. Brown v III Investments, Inc.*, 188 SW3d 1, 6 [Mo Ct App 2006] ["We do not believe that day-to-day control of a company's operations is necessary to compel an examination of a subsidiary's corporate books by a parent-company shareholder."]; *Danziger v Luse*, 103 Ohio St 3d 337, 341, 815 NE2d 658, 662 [2004] ["(W)e adopt the majority rule and hold that, in Ohio, shareholders have a right at common law to inspect the records of a wholly owned subsidiary of the corporation in which they own stock when the parent corporation so controls and dominates the subsidiary that the separate corporate existence of the subsidiary should be disregarded."]).

Respondents' argument that the right to inspect extends only to the shareholders of the corporation whose books and records they seek to inspect would allow respondents to shield their alleged misdeeds from scrutiny, as the books and records of SPMC would never be discoverable by anyone other than 575's board of

directors. It also fails to give due consideration to the relationship between a parent and its wholly owned subsidiary. For example, where the parent controls the subsidiary, a shareholder may bring a "double" derivative action "not only for wrongs inflicted directly on the corporation in which he holds stock, but for wrongs done to that corporation's subsidiaries which make indirect, but nonetheless real, impact upon the parent corporation and its stockholders" (*Kaufman v Wolfson*, 1 AD2d 555, 556-557 [1st Dept 1956]; *see Ascot Fund Ltd. v UBS PaineWebber, Inc.*, 28 AD3d 313, 314-315 [1st Dept 2006]).

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1689 Lindy Joseph, et al., Index 153735/12
Plaintiffs-Respondents,

-against-

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

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

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

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered May 8, 2015, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim, and granted plaintiffs' cross motion for partial summary judgment on the issue of liability on that claim, unanimously reversed, on the law, without costs, the motion granted, the cross motion denied, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff Lindy Joseph was struck by a pipe while it was being flushed clean with a highly pressurized mixture of air, water, and a rubber "rabbit" device. The movement of this mixture through the pipe failed to bring the mechanism of plaintiff's injury within the ambit of section 240(1) because it

did not involve "the direct consequence of the application of the force of gravity to an object" (*Gasques v State of New York*, 15 NY3d 869, 870 [2010]). The mixture in the pipe did not move through the exercise of the force of gravity, but was rather intentionally propelled through the pipe through the use of high pressure (*see Medina v City of New York*, 87 AD3d 907, 909 [1st Dept 2011] [subway rail that struck and hit the plaintiff "was propelled by the kinetic energy of the sudden release of tensile stress ... not the result of the effects of gravity"]; *see also Smith v New York State Elec. & Gas Corp.*, 82 NY2d 781 [1993]).

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

ENTERED: OCTOBER 11, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Kapnick, Webber, JJ.

1731 The People of the State of New York, Respondent,

Ind. 2223/10

-against-

Edward Coney,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered February 22, 2012, convicting defendant, after a nonjury trial, of assault in the first degree and sentencing him to a term of 13 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 element of serious physical injury was established by evidence objectively supporting the court's finding that a razor wound to the victim's neck running "from the middle of the bottom of the hairline at the back of the neck in a downward slant" caused a long "rope-like scar" that met the standard of serious disfigurement set forth in *People v McKinnon* (15 NY3d 311, 315-316 [2010]). The evidence presented to the court during the trial, including photographs taken

shortly after the incident, medical testimony describing the scar as remaining "significant" at the time of trial, approximately 18 months after the incident, and unlikely to heal any further, as well as the observations made by the court as trier of fact in this nonjury trial that the scar was "about seven or eight inches close to the - - in a downward slope right up to the vein that runs vertically on the neck, and the scar is sort of a rope-like scar that looks to be about a quarter of an inch around" support the inference that the serious disfigurement had persisted, and was permanent (*see e.g. People v Acevedo*, 140 AD3d 494 [1st Dept 2016]; *People v Cruz*, 131 AD3d 889 [1st Dept 2015], *lv denied* 26 NY3d 1108 [2016]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1849 The People of the State of New York, Respondent, Ind. 3272/13

-against-

Luis Miranda, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 31, 2014, convicting defendant, after a jury trial, of two counts of criminal contempt in the second degree, and sentencing him to a conditional discharge for a period of one year, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Among other things, the victim's testimony was generally

corroborated by a videotape, and defendant's arguments to the contrary are unavailing.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1850 Perine International Inc., Index 650040/12
Plaintiff-Appellant-Respondent,

-against-

Bedford Clothiers, Inc.,
Defendant-Respondent-Appellant,

Seena International Inc., et al.,
Defendants-Respondents,

Regent Alliance Ltd., et al.,
Additional Cross Claim Defendants.

_____

Meister Seelig & Fein LLP, New York (Kevin Fritz of counsel), for appellant-respondent.

Law Office of Dennis Grossman, Great Neck (Dennis Grossman of counsel), for Bedford Clothiers, Inc., respondent-appellant, and Seena International Inc., Ricky Singh, Brooklyn Xpress and Vasu Kothapally, respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 29, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment in its favor on its first and third causes of action, defendants' fourth affirmative defense, and defendants' first counterclaim, except to the extent of granting summary judgment in plaintiff's favor on the first cause of action as against defendant Bedford with respect to two invoiced shipments (P253D and P254D), and dismissing the fourth affirmative defense and first counterclaim insofar as they relate to those two invoices,

unanimously modified, on the law, to grant plaintiff summary judgment, as against Bedford, on the remainder of the first cause of action (relating to five additional invoiced shipments) and on the third cause of action, and to dismiss the fourth affirmative defense and the first counterclaim to the extent they relate to the five additional invoices, and otherwise affirmed, without costs.

Plaintiff Perine is a foreign corporation that manufactures textiles and apparel. Defendant Seena International Inc. ("Seena") is a domestic corporation that designs, manufactures, and sells apparel. Defendant Bedford shares an office with Seena and acts as its "design and production arm," importing goods using trademarks and designs owned by Seena. Plaintiff seeks damages from both Bedford and Seena for their failure to pay for shipments of goods that were accepted by them.

Defendants waived any defense based on a lack of capacity or standing to sue by failing to assert it in the answer or a pre-answer motion to dismiss (CPLR 3211[e]; 3211[a][3]; *see also Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279-281 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]). Even if the defense had not been waived, it would be unavailing because defendants admitted in their amended answer to having a contractual relationship with plaintiff (*see Bogoni v Friedlander*, 197 AD2d

281, 291-292 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]).

The motion court correctly granted summary judgment on the first cause of action, for breach of contract, as against Bedford with respect to the P253D and P254D invoices. Plaintiff presented prima facie evidence that the parties entered into agreements for plaintiff to sell textile apparel to Bedford, and that Bedford accepted those goods and failed to pay for them. Plaintiff also relied on emails sent by Bedford's president within months after all the goods had been shipped, in which he acknowledges that payment is due, requests additional time to pay, and promises to pay the total amount due on all seven invoices. At his deposition, Bedford's president was unable to recall whether he rejected or revoked acceptance of any of the goods at issue. Bedford's claim, supported by two affidavits, that the emails were in fact nonbinding settlement proposals, is belied by the plain text of the emails, and appears to have been tailored to avoid the consequences of those emails and the earlier deposition testimony (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

Bedford failed to raise an issue of fact with respect to whether it is entitled to offsets based on the purported nonconformity of the goods delivered by plaintiff. Bedford waived any right to offsets when it promised, in November 23 and

24, 2011 emails, to pay plaintiff the full amounts billed in the invoices. By that time, Bedford had a reasonable time to inspect and reject the goods (UCC 2-607[3]; United Nations Convention on Contracts for the International Sale of Goods at art 49[2], reprinted in 52 Fed Reg 6262-02 [1987]). Bedford's reliance on affidavits stating that defendants rejected or revoked acceptance of the goods, is unavailing because the affidavits are inconsistent with the prior deposition testimony (*see Phillips*, 268 AD2d at 320). Furthermore, the emails promising payment postdate the purported rejections or revocations of acceptance.

Defendants' allegations of trademark infringement do not preclude summary judgment on plaintiff's breach of contract claim as against Bedford, because the allegations are adequately addressed by defendants' remaining counterclaims and cross claims for trademark infringement and unfair competition.

For the foregoing reasons, plaintiff established its entitlement to summary judgment on its breach of contract cause of action as against Bedford with respect to invoices P239D, P258D, P259D, P286D, and P360D. While the motion court found it significant that in those five invoices, there were discrepancies between the quantities specified in the purchase orders and the quantities ultimately delivered and invoiced, Bedford nonetheless admitted its obligation to pay the full invoiced amounts in the

November 23 and 24 emails.

Plaintiff established its entitlement to summary judgment on its third cause of action, for account stated, as against Bedford. Plaintiff submitted "documentary evidence showing that [Bedford] received and retained the invoice without objection" and Bedford failed to raise an issue of fact in response (*Miller v Nadler*, 60 AD3d 499, 499 [1st Dept 2009]). The November 24 email from Bedford, which listed each invoice and the amount due, is proof that the invoices were received by Bedford. Plaintiff's principal averred that no objections were made to the invoices. In opposition, Bedford submitted affidavits that failed to specify any objections made to any of the invoices. Moreover, the affidavits are not credible as a matter of law, because they conflict with the contemporaneous promises to pay the full amount billed.

The motion court properly denied plaintiff's motion for summary judgment as against defendant Seena, an entity related to Bedford, because plaintiff failed to establish as a matter of law that the corporate veil should be pierced to hold Seena responsible for Bedford's contractual obligations (*see generally Horsehead Indus. v Metallgesellschaft AG.*, 239 AD2d 171, 171-172 [1st Dept 1997]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, JJ.

1851 In re Zariah O., etc., and Another,

Children Under Eighteen Years of Age, etc.,

Zuleika O.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Stanley Neustadter, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Mackenzie Fillow of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

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Order of fact-finding and disposition, Family Court, New York County (Jane Pearl, J.), entered on or about June 1, 2015, which, to the extent appealed from as limited by the briefs, determined that respondent mother had neglected the subject children due to mental illness, unanimously affirmed, without costs.

A preponderance of the evidence supports the court's finding that the subject children were neglected, since the children were harmed and at imminent risk of harm due the mother's mental condition (*see Matter of Cerenithy Ecksthine B. [Christian B.]*, 92 AD3d 417 [1st Dept 2012]; *see also* Family Ct Act § 1012[f]).

The mother had an extensive history of irrational conduct, which resulted in arrests and psychiatric hospitalizations, over several years. She continued to engage in irrational conduct, including, on one occasion, driving off with the children during the night, refusing to tell the children's father where they were for three days, and then leaving the children unattended in a CVS pharmacy, hungry, dirty, dazed, and reeking from urine. The mother also absconded with the then one and one-half-year-old Turi from her babysitter, and ran into oncoming traffic while holding Turi under her arm, which eventually resulted in the mother's arrest.

In light of the evidence demonstrating the mother's clear lack of insight into her behavior and untreated mental illness, the court properly found that the mother neglected the children

(*see Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008]; *see also Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516, 517 [1st Dept 2012]; *Matter of Princess Ashley C. [Florida S.C.]*, 96 AD3d 682 [1st Dept 2012]).

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1852 The People of the State of New York, Respondent, Ind. 5666/11

-against-

Chrisstena Dickson, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 18, 2013, convicting defendant, after a jury trial, of two counts of robbery in the first degree and five counts of robbery in the second degree, and sentencing her to an aggregate term of 9½ years, unanimously affirmed.

Although the court's *Sandoval* ruling was undisputedly erroneous to the extent it permitted the People to elicit defendant's pending charges, defendant was not prejudiced, because the People announced, before completing their case, that they would not pursue that line of impeachment, and the court then gave defendant ample time to consider whether or not she wished to testify. Defendant did not preserve her claim that she had immutably committed herself to a trial strategy that depended on her not testifying, and we decline to review it in the

interest of justice. As an alternative holding, we find that defendant has not substantiated this claim. If defendant chose to testify after learning that she would not be questioned about pending charges, that would have been fully compatible with the strategy pursued by her attorney up to that point in the trial.

The court properly admitted portions of telephone calls made by defendant from Rikers Island that were routinely recorded by the Department of Correction (*see People v Johnson*, 27 NY3d 199 [2016]). Defendant did not preserve her claim that she should have received notice that the calls would not only be recorded, but also shared with the prosecutor, nor did she preserve her challenge to the prosecutor's summation, and we decline to review these claims in the interest of justice. As an alternative holding, we find them unavailing.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1853 In re Gary F. Index 53/14

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Bronx Psychiatric Center,
Petitioner-Appellant,

-against-

Gary F.,
Respondent-Respondent.

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Eric T. Schneiderman, Attorney General, New York (Betnany A. Davis Noll of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Z. Ishee of counsel), for respondent.

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Order, Supreme Court, Bronx County (Robert T. Johnson, J.), entered on or about May 23, 2016, which, after a hearing pursuant to Mental Hygiene Law (MHL) § 9.33, denied the application of petitioner Bronx Psychiatric Center for the continued involuntary retention of respondent for a period not to exceed six months, and ordered him to be released, unanimously affirmed, without costs.

The court properly denied petitioner's application for continued involuntary retention of respondent pursuant to MHL § 9.33, based on the court's finding that petitioner failed to "'establish, by clear and convincing evidence, that the patient is ... in need of continued, supervised care and treatment'" for his undisputed mental illness, and that he "'poses a substantial

threat of physical harm to himself and/or others'" (*Matter of Anonymous v Carmichael*, 284 AD2d 182, 184 [1st Dept 2001]). Although respondent's treating psychiatrist stated in conclusory fashion that the requirements for continued involuntary retention were met, the court reasonably rejected these conclusions on the ground that they were not strongly supported by the evidence (*see Matter of Charles T. v Sanchez*, 215 AD2d 235 [1st Dept 1995]). The psychiatrist indicated that respondent recognized his mental illness, that he had been compliant with his medication regimen, and that his treatment in the facility for more than two years had alleviated the manic symptoms he had initially presented upon admission. The psychiatrist acknowledged that respondent's medications and therapy programs would remain readily available to him on an outpatient basis, and the psychiatrist provided no reason to doubt respondent's claim that he would continue taking his medication once released (*compare id. with Matter of Anonymous*, 284 AD2d at 184).

Respondent has a history of sexual preoccupation, sexual misconduct, and sexual impulsivity. However, the court gave little weight to the allegations of recent misconduct in the absence of any eyewitness testimony and in light of respondent's denials, and there is no basis for disturbing the court's weighing of the evidence. The remaining hearsay statements that

respondent had acted inappropriately were unaccompanied by any detail, including when the incidents allegedly occurred. Significantly, the psychiatrist, the only witness called to testify at the hearing, did not indicate that he had ever personally observed respondent engaging in any misconduct. In the absence of any corroboration of such incidents or any information about their chronology, the court properly concluded that petitioner had failed to establish that respondent remained in need of involuntary confinement in a psychiatric facility as of the time of the hearing.

It does not avail petitioner to argue that respondent needed to be retained in order to begin taking a new medication. The psychiatrist's testimony indicated that this medication was recommended about 10 months before the hearing but still had not been implemented, suggesting that it was not "essential to [respondent]'s welfare" (MHL § 9.01). Petitioner's argument that this waiting period was necessary to administer medical tests to determine respondent's physical suitability for the medication is improperly raised for the first time in its reply brief, and in any event is unsupported by the record.

We decline petitioner's invitation to take judicial notice of new evidence which was not introduced at the hearing (*see Matter of Gilman v New York State Div. of Hous. & Community*

Renewal, 99 NY2d 144, 150 [2002]).

Contrary to petitioner's argument, the court properly exercised its discretion in precluding petitioner from introducing respondent's "chart," i.e. a binder containing his medical records, such as progress notes and examination reports, in its entirety at the outset of the hearing, since petitioner had not provided a copy of the chart to respondent's counsel. The court did not prevent petitioner from making use of any particular relevant medical records. Rather the court clearly stated that any materials the psychiatrist wished to use could be identified and admitted. Since there is no indication that petitioner's counsel or the psychiatrist ever sought to do so during the hearing, it cannot be said that the ruling prevented petitioner from being able to establish respondent's sexual misbehavior by clear and convincing evidence.

In light of the foregoing, there is no occasion to reach the parties' unpreserved arguments about whether petitioner had a statutory obligation to disclose the chart to respondent's counsel and the court in advance of the hearing pursuant to MHL § 9.31(b).

Respondent's academic contention that the business records exception to the hearsay rule was inapplicable to the chart is

concededly unpreserved, and we decline to review it in the interest of justice. Were we to review it, we would find it unpersuasive.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1854 The People of the State of New York, Respondent, Ind. 1553/07

-against-

Edy Rodriguez, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered July 18, 2010, as amended August 19, 2010 and November 18, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree and assault in the first degree, and sentencing him to consecutive terms of 25 years and 15 years, respectively, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

As in *People v Velez* (131 AD3d 129 [1st Dept 2015]), reversal in the interest of justice is warranted by the court's failure to convey to the jury, directly or indirectly, in any part of its charge, that an acquittal on the top counts, regarding the respective victims, of murder in the second degree and attempted murder in the second degree based on a finding of justification would preclude consideration of the lesser

manslaughter and assault charges. While the jury may have acquitted on the top charge without relying on defendant's justification defense in connection with one or both victims, it is nevertheless "impossible to discern whether acquittal of the top count . . . was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts" (*id.* at 133; *see also People v Rowley*, 138 AD3d 577 [1st Dept], *lv denied* 27 NY3d 1138 [2016]; *People v Colasuonno*, 135 AD3d 418 [1st Dept 2016]).

In light of this determination, we find it unnecessary to reach any other issues, except that we find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence, and we therefore reject defendant's argument that the manslaughter count should be dismissed.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1855 Thor Gallery At South DeKalb, LLC, Index 654003/13
Plaintiff-Appellant,

-against-

Reliance Mediaworks (USA) Inc., formerly known as Adlabs Films USA, Inc.,
Defendant-Respondent.

_____

Matalon, Shweky, Elman, PLLC, New York (Joseph Lee Matalon of counsel), for appellant.

Chugh, LLP, New York (Prema Roddam of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about February 22, 2016, which denied plaintiff's cross motion for summary judgment, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of plaintiff in the amount sought.

Contrary to the findings of the motion court, plaintiff established prima facie the existence of the lease and the guaranty, through an affidavit by its CFO, and the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease, through the CFO's affidavit and an affidavit by plaintiff's manager of accounts receivable, which included a table of all payments by the tenant (*see Reliance Constr. Ltd. v Kennelly*, 70 AD3d 418 [1st Dept 2010], *lv dismissed* 15 NY3d 848 [2010]). As defendant offered no

evidence in opposition, plaintiff is entitled to judgment (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

Defendant's assertion that there may have been other, undocumented payments is mere speculation. Its contention that the validity of the notice of default should be determined in a subsequently filed action between the tenant and plaintiff is contrary to our prior ruling in this action, in which we reversed the dismissal of the complaint on the ground of forum non conveniens and directed that the issues be resolved here (131 AD3d 431 [1st Dept 2015]). No issue of fact exists as to the validity of the notice of default since the record demonstrates that the tenant was not current with the rent, as the lease required, when it purported to exercise early termination.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1856-
1856A In re Tracy B., etc., and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

Carlton B., Jr.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

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

_____

Orders of disposition, Family Court, New York County (Stewart Weinstein, J.), entered on or about March 24, 2015, which, to the extent appealed from, upon a finding of permanent neglect, terminated the father's parental rights to the subject children Tracy B. and Myah B., and committed custody of the children to the Jewish Child Care Association and the Commissioner of the Administration for Children's Services for purposes of adoption, unanimously affirmed, without costs.

By devising an appropriate service plan, providing numerous referrals for random drug tests, regularly scheduling visitation between the father and the children, providing the father with

transportation funds to ensure his attendance at visits and drug screening appointments, notifying him of the children's medical appointments, and counseling him as to the importance of complying with the service plan, the agency expended the requisite diligent efforts to reunite the father with his daughters (*see Matter of Essence T.W. [Destinee R.W.]*, 139 AD3d 403, 404 [1st Dept 2016]; *Matter of Jenna Nicole B. [Jennifer Nicole B.]*, 118 AD3d 628, 629 [1st Dept 2014]; *Matter of Jaylin Elia G. [Jessica Enid G.]*, 115 AD3d 452, 452-453 [1st Dept 2014]).

Despite these efforts, the father failed to substantially and continuously maintain contact with or plan for the future of the children. The father failed to visit the children consistently and did not visit for periods of time, including the five-weeks immediately prior to the dispositional hearing (*see Matter of Calvario Chase Norall W. [Denise W.]*, 85 AD3d 582, 583 [1st Dept 2011]; *Matter of Aisha C.*, 58 AD3d 471, 472 [1st Dept 2009], *lv denied* 12 NY3d 706 [2009]). Moreover, the father did not comply with the service plan, as he failed to act appropriately at the visits that he attended (*see Matter of Isis M. [Deeanna C.]*, 114 AD3d 480, 480 [1st Dept 2014]), failed to comply with all random drug tests (submitting to less than half of the referrals) (*see Matter of Jenna Nicole B.*, 118 AD3d at

629), failed to complete substance abuse treatment (*id.*), failed to maintain a suitable home (*Matter of Chandel B.*, 61 AD3d 546, 547 [1st Dept 2009]), and failed to attend the children's medical appointments (*see Matter of Isis M.*, 114 AD3d at 481).

A preponderance of the evidence at the dispositional hearing supported the determination that it is in the children's best interests that the father's parental rights be terminated to facilitate adoption by the foster parents, with whom the children have lived since February 2014 and developed close relationships (*see Matter of Alexis Alexandra G. [Brandy H.]*, 134 AD3d 547, 548 [1st Dept 2015]; *Matter of Destiny S. [Hilda S.]*, 79 AD3d 666, 666-667 [1st Dept 2010], *lv denied* 16 NY3d 709 [2011]).

We have reviewed the father's remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1857 The People of the State of New York, Respondent, Ind. 4557/12

-against-

Venil Wattkis, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered February 24, 2014, convicting defendant, after a jury trial, of strangulation in the second degree, unlawful imprisonment in the first degree, assault in the third degree, and menacing in the second degree, and sentencing him to an aggregate term of two years, unanimously affirmed.

There was legally sufficient evidence that defendant restrained the victim under circumstances that exposed her to a risk of serious physical injury to support the first-degree unlawful imprisonment conviction. The evidence supports the conclusion that the risk of serious physical injury occasioned by defendant's violent conduct toward the victim was present during the time he restrained her. Defendant's remaining sufficiency-related arguments are unpreserved, and we decline to review them

in the interest of justice. As an alternative holding, we reject them on the merits, and we also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713–714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any

of the objections or applications that he faults trial counsel for failing to make had any reasonable possibility of success, or of affecting the outcome of the case.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1858 The People of the State of New York, Ind. 2327/11
Respondent,

-against-

Leonard Nesbit,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about November 15, 2012, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the guidelines, and were

outweighed by the circumstances of the underlying crime and defendant's criminal history.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1859- Index 159045/12
1860- 654470/12
1861 Madison Avenue Diamonds LLC, et al.,
Plaintiffs-Appellants,

-against-

KGK Jewelry LLC,
Defendant-Respondent.

_____

Morrison Cohen LLP, New York (Jeffrey D. Brooks of counsel), for appellants.

Sabharwal & Finkel LLC, New York (Adam Finkel of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered February 29, 2016, which, inter alia, awarded defendant-counterclaim plaintiff KGK Jewelry LLC damages in the principal amount of $2,375,000, and bringing up for review an order, same court and Justice, entered on or about August 21, 2015, which granted KGK's motion for summary judgment dismissing plaintiffs Madison Avenue Diamonds LLC and Shaindy Lax's complaint, and denied as moot their cross motion to compel discovery and for leave to file a second amended complaint, unanimously affirmed, with costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff Madison is a wholesaler of jewelry. Plaintiff Lax

is Madison's personal guarantor. Defendant KGK was Madison's exclusive manufacturer for the jewelry. Madison and KGK entered into a settlement agreement in which Madison agreed to pay outstanding amounts for jewelry over the time after KGK returned computer files used to manufacture the jewelry.

KGK's delivery of the converted computer files on Monday August 13, 2012, one day after the 45-day period provided for in the parties' settlement agreement, was permissible under General Construction Law § 25. Nothing in the agreement suggests an intent that August 12, 2012 was to be a firm deadline such that failure to deliver the files by that date constitutes a material breach of the agreement. That one of the 166 files was missing critical information did not render KGK in breach, as KGK was in substantial compliance (*see Balemian v LB Real Estate Dev. Corp.*, 226 AD2d 223, 224 [1st Dept 1996]).

Plaintiffs have not demonstrated that facts essential to justify opposition to summary judgment may exist but cannot be stated (*see* CPLR 3212[f]). The proof submitted thus far undermines its contention that KGK had further breached the agreement by counterfeiting jewelry.

We decline to vacate the judgment award. Plaintiffs have not set forth any authority that would require KGK to liquidate

the collateral held for purposes of mitigating damages, and nothing in the parties' agreements so provides.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1862 The People of the State of New York, Respondent, Ind. 3094/13

-against-

Chayanne Arias, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 5, 2014, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1863-
1864 In re Ricardo M. J.,

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

Kiomara A.,
Respondent-Appellant,

Commissioner of the Administration
for Children's Services, City of New York,
Petitioner-Respondent.

_____

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

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

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Erik S. Pitchal, J.), entered on or about March 21, 2014, which to the extent appealed from as limited by the briefs, brings up for review a fact-finding order, same court and Judge, entered on or about November 13, 2013, which found that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The record supports the court's determination that the mother neglected the child by inflicting excessive corporal

punishment on him. The social worker testified that the child reported that the mother beat him with a belt with spikes "all the time," the mother admitted beating him, and he appeared to be afraid of her. His out of court statements were corroborated by the bruises the social worker observed on the child's body and the statements the child made to the detective (*see Matter of Joshua B.*, 28 AD3d 759, 761 [1st Dept 2006]; *Matter of Samara M.*, 19 AD3d 214 [1st Dept 2005]).

The court's credibility assessment is entitled to the "greatest respect" on appeal (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]), and is supported by the record in that the mother provided varying explanations for the bruises on the child's body (*see Matter of Mia B. [Brandy R.]* 100 AD3d 569, 569-570 [2012], *lv denied* 20 NY3d 858 [2013]).

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

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1865 Harmacol Realty Co. LLC, Index 600528/09
Plaintiff-Appellant,

-against-

Nike, Inc.,
Defendant-Respondent.

_____

Goodfarb & Sandercock, LLP, New York (Adam D. Goodfarb of counsel), for appellant.

Strongin Rothman & Abrams LLP, New York (Howard F. Strongin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 17, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff, the owner of a building in Manhattan, seeks holdover rent and recovery for damages sustained as a result of a fire in a commercial space that had been leased to defendant.

The motion court correctly dismissed plaintiff's claim for contractual indemnity. The controlling lease provision requires each party to "look first to any insurance in its favor before making any claim against the other" in the event of fire or other casualty damage (¶ 9[e]), which plaintiff failed to do. Even if plaintiff were able to pursue indemnity under paragraph 8 of the lease, which limits indemnity to "damages . . . and expenses for

which [plaintiff] shall not be reimbursed by insurance" (¶ 8), such recovery would be barred because plaintiff failed to pursue a claim with an insurer, which was a condition precedent to recovery under that paragraph. Plaintiff failed to preserve its argument that defendant waived the condition precedent, and, in any event, the argument is unavailing since there is no clear showing of an intent to abandon or relinquish the condition (*see Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]).

Defendant is not otherwise liable for the negligent acts of its independent contractor (*see Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992], *rearg dismissed* 82 NY2d 825 [1993]). Plaintiff's unpled theory that defendant is liable for such acts because it was negligent "in selecting, instructing or supervising the contractor" (*Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]), is unpreserved and unsupported by the record.

The motion court properly dismissed plaintiff's holdover tenancy claim, since defendant vacated the leased premises prior to the expiration of the lease, and left behind no property on the premises (*see Building Serv. Local 32B-J Pension Fund v 101 L.P.*, 115 AD3d 469, 472 [1st Dept 2014], *appeal dismissed* 23 NY3d 954 [2014]). Defendant's undertaking of repairs, following vacatur, did not create a holdover tenancy (*see Charlebois v*

Carisbrook Indus., Inc., 23 AD3d 821, 822-823 [3d Dept 2005]).

The motion court providently exercised its discretion in deeming admitted the unopposed and uncontroverted statements contained in defendant's statement of material facts (*see* Rules of the Commercial Division of the Supreme Court [22 NYCRR 202.70(g)] rule 19-a[c]; *Moonstone Judge, LLC v Shainwald*, 38 AD3d 215, 216 [1st Dept 2007]).

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

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1866-
1866A The People of the State of New York,
Respondent,

SCI 129N/06
Ind. 55N/12

-against-

Jonathan Fernandez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at plea; Richard M. Weinberg, J. at sentencing), rendered March 22, 2012, convicting defendant of criminal possession of a controlled substance in the fourth degree, and sentencing him to a term of one year, unanimously affirmed. Judgment, same court (Richard M. Weinberg, J.), rendered March 22, 2012, convicting defendant, upon his plea of guilty, of bail jumping in the second degree, and sentencing him to a concurrent term of one to three years, unanimously affirmed.

Defendant, who contends that his plea to possession of a controlled substance was involuntary because the plea court in 2006 failed to advise him that he could be deported as a result of his plea (*see People v Peque*, 22 NY3d 168 [2013], *cert denied*

574 US __, 135 S Ct 90 [2014]), has not established that the exception set forth to the preservation requirement set forth in *Peque* (*id.* at 182-183) should apply, and we decline to review his unpreserved claim in the interest of justice. The record demonstrates that defendant was fully aware of the potential for deportation at a time when judgment on the controlled substance conviction had not yet been entered (*see e.g. People v Diakite*, 135 AD3d 533 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]). On March 1, 2012, defendant pleaded guilty to bail jumping and received a warning that undisputedly satisfied *Peque.* Although the court had imposed sentence on the controlled substance conviction just before taking the bail jumping plea, it stayed entry of the controlled substance sentence for several weeks (*see* CPL 1.20[15]; *People v Jian Jing Huang*, 1 NY3d 532 [2003]). In any event, "the circumstances of the plea render it highly unlikely that defendant could make the requisite showing of

prejudice under *Peque* (*id*. at 198-201) if granted a hearing"

(*Diakite*, 135 AD3d at 533 [internal citations omitted]).

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1867 The People of the State of New York, Ind. 74N/14
Respondent,

-against-

Cornelius Watkins,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard Carruthers, J.), rendered February 26, 2014, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1869 The People of the State of New York, Respondent, Ind. 8364/99

-against-

Tony Sanchez, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about March 19, 2015, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure from the presumptive override to level three for a prior felony sex crime conviction (*see generally People v Howard*, 27 NY3d 337, 339 [2016]; *People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, or were outweighed by the facts that defendant's prior sex crime had been committed against a child, and that in the underlying crime he kidnapped a four-year-old

child, holding him overnight and abandoning him in a subway station.

We have considered defendant's additional arguments, including his assertion that the court insufficiently considered alternative risk assessment instruments, and we find them unavailing.

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1870 The People of the State of New York, Ind. 3268/11
Respondent,

-against-

Hector Matos,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered August 14, 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: OCTOBER 11, 2016

CLERK

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

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1872- Ind. 1280/11
1873 The People of the State of New York,
Respondent,

-against-

Sean W.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered on or about November 8, 2012, and judgment of resentence, same court and Justice, rendered April 1, 2014, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Moskowitz, Gesmer, JJ.

1874- Index 159345/14
1875N Charles F. Gibbs,
Plaintiff-Appellant,

-against-

Holland & Knight, LLP,
Defendant-Respondent.

_____

Blank Rome LLP, New York (Leslie D. Corwin of counsel), for appellant.

Orrick, Herrington & Sutcliffe LLP, New York (John D. Giansello and Michael Delikat of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 30, 2015, which granted defendant's motion to compel arbitration and stay this action, and order, same court and Justice, entered October 22, 2015, which denied plaintiff's motion for renewal, unanimously affirmed, with costs.

The motion court correctly found that, although plaintiff had not signed the partnership agreement containing the arbitration provision, he had assumed the duty to arbitrate by annually agreeing to be bound by the partnership agreement and by repeatedly invoking the dispute resolution provision in the partnership agreement (*see Thomson-CSF, S.A. v American Arbitration Assn.*, 64 F3d 773, 777 [2d Cir 1995]).

The court also correctly found that the dispute was

governed by the arbitration provision.

Renewal was properly denied, as no waiver of the right to arbitrate was effected by defendant's application for a preliminary injunction in aid of arbitration and the accompanying assertion of counterclaims, with no further litigation activity (*see Cusimano v Schnurr*, 26 NY3d 391, 400 [2015]; *LaRosa v Arbusman*, 74 AD3d 601, 604 [1st Dept 2010]). Notably, defendant demonstrated a clear intent to continue the arbitration process by seeking mediation of the counterclaims under the dispute resolution provision of the partnership agreement.

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

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

ENTERED: OCTOBER 11, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Gische, Kahn, JJ.

1509 2138747 Ontario, Inc., Index 653270/14
Plaintiff-Appellant,

-against-

Samsung C&T Corporation, et al.,
Defendants-Respondents.

_____

Susman Godfrey LLP, New York (Jacob W. Buchdahl of counsel), for appellant.

Baker & McKenzie, LLP, New York (Grant A. Hanessian of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 8, 2015, affirmed, with costs.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
David B. Saxe
Judith J. Gische
Marcy L. Kahn, JJ.

1509
Index 653270/14

_____x

2138747 Ontario, Inc.,
Plaintiff-Appellant,

-against-

Samsung C&T Corporation, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 8, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss as time-barred the claims assigned by Skypower Corp. to plaintiff.

Susman Godfrey LLP, New York (Jacob W. Buchdahl, William C. Carmody, Shawn J. Rabin and Cory S. Buland, of counsel), and Ressler & Ressler, New York (Ellen R. Werther and Bruce J. Ressler of counsel), for appellant.

Baker & McKenzie, LLP, New York (Grant A. Hanessian, Jacob M. Kaplan and Adam P. Pascarella of counsel), for respondents.

GISCHE, J.

On this appeal, we are called upon to decide whether a broadly drawn contractual choice-of-law provision, that provides for the agreement to be "governed by, construed and enforced" in accordance with New York law, precludes the application of New York's borrowing statute (CPLR 202). We find that it does not. Where, as here, the plaintiff is a nonresident, alleging an economic claim that took place outside of New York, the time limitations provisions in the borrowing statute apply, regardless of whether the parties' contractual choice of law agreement can be broadly construed to include the application of New York's procedural, as well as its substantive law. Pursuant to New York's borrowing statute, the time within which plaintiff had to commence this action was the shorter of either Ontario's or New York's statute of limitations. Since this action would be untimely under Ontario's two year statute of limitations, even though it would be timely under New York's domestic, six-year, statute of limitations, the trial court correctly dismissed the action as time-barred. Contrary to plaintiff's argument, the recent Court of Appeals decision in *Ministers & Missionaries Benefit Bd. v Snow* (26 NY3d 466 [2015]) does not prohibit the application of the borrowing statute, nor does it support applying New York's domestic six year statute of limitations to

the parties' dispute in this case.

Plaintiff is incorporated under the law of the Province of Ontario, Canada and is a creditor of SkyPower Corp. a Canadian renewable energy developer. SkyPower filed for bankruptcy in August 2009, and by Canadian court order dated October 27, 2014, the bankruptcy trustee assigned to plaintiff all of Skypower's claims made against the defendants in this action. Plaintiff seeks damages in connection with the alleged breach of a nondisclosure and confidentiality agreement (NDA), dated September 26, 2008 between SkyPower and defendants, who were potential investors. No transaction ever materialized and, pursuant to the NDA, defendants were obligated to destroy certain proprietary information that SkyPower had provided. It is alleged, however, that in violation of the NDA, defendants used the confidential information to enter into a secret memorandum of understanding with the Ontario government, in December 2008, for the development of a renewable energy project. It is alleged further that SkyPower first learned of this breach in January 2010, when defendants' agreement with the Ontario government was made public. This action was commenced in October 2014.

New York's general statute of limitations for a breach of contract action is six years (CPLR 213[2]). The Ontario equivalent limitations period is only two years (Ontario

Limitations Act, 2002, Chap 24, sched B, 4). CPLR 202, New York's borrowing statute, provides as follows:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

Thus, the law of New York requires that when a nonresident sues on a cause of action accruing outside of New York, the cause of action must be timely under the limitations period of both New York and the jurisdiction where the cause of action accrued (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]). This statute has remained substantially unchanged since 1902 (*id.* at 528). Its underlying purpose is to prevent forum shopping by nonresident plaintiffs who come to New York, seeking to take advantage of a more favorable statute of limitations than that which is available to them elsewhere (*see Norex Petroleum Ltd. v Blavatnik*, 23 NY3d 665, 678 [2014]*; Insurance Co. of N. Am. v ABB Power Generation*, 91 NY2d 180, 186 [1997]). The borrowing statute incorporates express terms of preferential treatment for New York's own residents (CPLR 202).

The NDA at issue contains the following choice-of-law provision:

> "This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of New York. You hereby irrevocably and unconditionally consent to submit to the exclusive jurisdiction of the courts of the State of New York and of the United States District Courts located in the County of New York for any lawsuits, actions or other proceedings arising out of or relating to this Agreement and agree not to commence any such lawsuit, actions or other proceeding except in such courts . . . You hereby irrevocably and unconditionally waive any objection to the laying of venue of any lawsuit, action or other proceeding arising out of or relating to this Agreement in the courts of the State of New York or the United States District Courts located in the County of New York, and hereby further irrevocably and unconditionally waive and agree not to plead or claim in any such court that any such lawsuit, action or other proceeding brought in any such court has been brought in an inconvenient forum. Any right to trial by jury with respect to any lawsuit, claim or other claim arising out of or relating to this Agreement is expressly and irrevocably waived."

Plaintiff argues that the language of the choice of law provision in the NDA is extremely broad, reflecting the parties' intent to apply both New York substantive and procedural law. It further posits that by choosing New York law to resolve any dispute related to the NDA, all parties anticipated that they would also be subject to this State's domestic six-year statute of limitations. Plaintiff argues that application of CPLR 202 defeats the parties' purpose in choosing the law to be applied.

Typically, choice of law provisions are construed to apply only to substantive law issues. Statutes of limitations, however, have long been considered part of New York's procedural law because "they are 'deemed as pertaining to the remedy rather than the right'" (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410, 416 [2010]). In *Tanges v Heidelberg N. Am., Inc.* (93 NY2d 48, 55 [1999]), the Court of Appeals, quoting Siegel, NY Prac. §34 at 38 (2d ed.), explained New York's procedural characterization of statutes of limitation as follows: "[T}he theory of the statute of limitations generally followed in New York is that the passing of the applicable period does not wipe out a substantive right; it merely suspends the remedy." The borrowing statute is considered a statue of limitations provision and not a choice-of-law provision. In referring to the borrowing statute the Court of Appeals observed: "[T]here is a significant difference between a choice-of-law question. . .and this Statute of Limitations issue, which is governed by particular terms of the CPLR" (*Global Fin. Corp. v Triarc Corp*. 93 NY2d at 528). Consistent with these principles, case law generally holds that a contractual choice-of-law provision does not bar the application of New York's borrowing statute (*see Portfolio Recovery Assoc., LLC v King*, *supra; Insurance Co. of N. America,* 91 NY2d at 187; *Matter of Smith Barney, Harris Upham & Co. v Luckie,* 85 NY2d 193,

202 [1995]). We do not find support for plaintiff's argument that where a contractual choice-of-law provision is broad enough to include the application of both substantive and procedural New York law, the borrowing statute does not apply. Preliminarily, we note that the NDA choice-of-law provision in this case does not expressly provide that the parties agree only to apply New York's six-year statute of limitations to their contract-based disputes. In this regard, there is no need to resolve whether such a provision would be an unenforceable extension of the otherwise applicable statute of limitations (*see John J. Kassner & Co. v City of New York*, 46 NY2d 544 [1979]). We do agree with plaintiff's argument, that the language of the choice-of-law provision in this NDA, and in particular the use of the word "enforcement," is broad and should be interpreted as reflecting the parties' intent to apply both the substantive and procedural law of New York State to their disputes (*Luckie,* 85 NY2d 193, 202).

But even this broad reading of the NDA choice-of-law clause does not require that the borrowing statute be ignored in favor of New York's domestic six year statute of limitations. The borrowing statute is itself a part of New York's procedural law and is a statute of limitations in its own right, existing as a separate procedural rule within the rules of our domestic civil

practice, addressing limitations of time (*see Global Fin. Corp. v Triarc* at 528; *see also Norex Petroleum Ltd.*, 23 NY3d 665, 679 [an action timely commenced under New York's borrowing statute may take advantage of New York's savings statute]). Thus, applying the borrowing statute is perfectly consistent with a broad choice-of-law contract clause that requires New York procedural rules to apply to the parties' disputes.

Luckie illustrates this point. In *Luckie*, the Court of Appeals was faced with an issue of whether the parties' arbitration agreements, which all expressly provided that New York Law would govern "the agreement and its enforcement," were preempted by the Federal Arbitration Act. This informed the issue of whether an arbitrator or a court of law would determine whether the claims were timely commenced. In finding no preemption, the court implicitly recognized that the choice-of-law provisions in the arbitration agreements were broad enough to allow the New York Courts to determine the procedural statute of limitations issues in accordance with New York law. The Court of Appeals expressly acknowledged that the New York courts must apply the same period of limitations in arbitration that would govern if an action were brought on the claim being arbitrated (*id.* at 207). The matter was then remitted for consideration of the applicability of the borrowing statute. The Court of Appeals

did not hold, as plaintiff urges us to do here, that as a matter of law a choice-of-law provision broad enough to include New York's procedural law, requires abandonment of the borrowing statute. In fact, by remitting the matter, the Court of Appeals was accepting that the borrowing statute could apply, notwithstanding a broad choice-of-law contractual provision (*see Norex Petroleum Ltd. 23NY3d* at 675 [extensively discussing *Luckie*, the Court of Appeals observed that remitting the matter on the issue of the borrowing statute entailed consideration of the extensions and tolls in the foreign jurisdiction when applying the borrowing statute; implicitly acknowledging that the borrowing statute could otherwise apply to bar an action as untimely]).

Recent decisions by the Court of Appeals in *Ministers & Missionaries* and *IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.* (20 NY3d 310 [2012], *cert denied* _US_, 133 S Ct 2396 [2013]), do not change this result. Neither of those cases stands for the legal proposition, or even suggests, that a New York court should disregard the borrowing statute where there is a broad contractual choice-of-law provision in the parties' agreement.

In *IRB-Brasil Resseguros*, the Court of Appeals clarified that where there is a choice-of-law provision in a commercial contract exceeding $250,000, there is to be no analysis under New

York's conflict of laws rules (*IRB-Brasil Resseguros* at 315-316). Although such contracts are governed by the General Obligations Law, before *IRB* some courts continued to apply a traditional conflicts-of-law analysis, despite the express statutory exception allowing parties to choose New York law to govern their contracts, even if they do not have New York contacts (GOL § 5-1401[1]; § 5-1402[1]; *IRB-Brasil Resseguros,* 20 NY3d at 314). *IRB* made it clear that this analysis was impermissible.

In *Ministers & Missionaries*, the Court of Appeals expanded *IRB*, by clarifying that New York courts are also prohibited from engaging in a conflict-of-law analysis where the parties include a choice-of-law provision in their contract, even if the contract does not fall within General Obligations Law § 5-1401 (*Ministers & Missionaries*, 26 NY3d at 468, 474-475). *Ministers & Missionaries* involved application of New York's Estates, Powers and Trusts Law[1], which the Court of Appeals expressly characterized as a "statutory choice-of-law directive" (*id.* at 470-471). Because the Court equated the statute with common-law

[1] EPTL §3-5.1(b)(2) provides that the "intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death."

choice-of-law principles, it held that the contract choice-of-law provision precluded its application.

Consistent with those cases, we agree that the NDA choice-of-law provision prohibits a conflict of law analysis in this case. The borrowing statute, however, is not and has never been considered a statutory choice-of-law directive. It is a statute of limitations. It is for this reason that our analysis is perfectly consistent with this recent Court of Appeals precedent.

We also reject plaintiff's alternative argument, that even if the New York borrowing statute applies, requiring application of Ontario law, Ontario law mandates application of New York's six-year statute of limitations because the parties have chosen New York law. It does not require that we apply the borrowing statute of a foreign jurisdiction (*Insurance Co. of N. Am.* at 187) CPLR § 202 only concerns statutes of limitations, it does not require that we consider the foreign jurisdiction's borrowing law. We recognize that plaintiff raises some valid policy issues in favor of its position that the borrowing statute should not be applied in this case, including that it is inconsistent with New York's current policy to encourage businesses to use New York courts as their forum for dispute resolution and also that the salutary purpose of the borrowing statute, the avoidance of forum shopping, is satisfied by the parties' agreement to have their

disputes decided according to New York law. These policy issues, however, and any perceived conflict with the long established policy underlying the borrowing statute, are best left to the state legislature to resolve.

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 8, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss as time-barred the claims assigned by Skypower Corp. to plaintiff, should be affirmed, with costs.

All concur.

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

ENTERED: OCTOBER 11, 2016

CLERK