SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 20, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

1750-
1750A Index 451341/13

Tanya Lapsley-Cockett, et al.,
Plaintiffs-Respondents,

-against-

Metropolitan Transit Authority,
Defendant,

New York City Transit Authority,
Defendant-Appellant.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

Mead, Hecht, Conklin & Gallagher, LLP, White Plains (Elizabeth M. Hecht of counsel), for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about December 22, 2015, which, following a framed-issue hearing, granted plaintiffs' motion to confirm the report of a judicial hearing officer (JHO), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about October 2, 2014, to the extent it held in abeyance defendants' motion to dismiss the complaint as against defendant New York City Transit Authority for failure to serve a

proper notice of claim, and referred the issue of service of the notice of claim to a JHO to hear and report on certain issues of fact, unanimously dismissed, without costs, as moot.

The court found credible evidence to show that the notice of claim was served, albeit by regular mail, on the Transit Authority within 90 days after the claim arose, and that the Transit Authority requested a 50-h hearing (*see* General Municipal Law § 50[e][3][c] ["If the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant . . . be examined in regard to it"]). Thus, the "savings clause" was satisfied.

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

ENTERED: OCTOBER 20, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1903 Blanca Viruet, Index 104158/09
Plaintiff-Appellant,

-against-

The Mount Sinai Medical Center Inc., et al.,
Defendants-Respondents,

Blair Lewis, M.D.,
Defendant.

_____

The Adam Law Office, P.C., New York (Richard Adam of counsel), for appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi DiFolco of counsel), for respondents.

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Amended order, Supreme Court, New York County (Martin Shulman, J.), entered September 5, 2014, which, among other things, granted defendants the Mount Sinai Hospital, Ron Palmon, M.D., and Daniel Labow, M.D.'s motion to dismiss the action as a sanction for plaintiff's failure to comply with discovery orders, unanimously modified, on the law and the facts, to reinstate the complaint in accordance with the conditions set forth in this order, and as so modified, affirmed, without costs.

Although plaintiff eventually, albeit belatedly, provided or addressed many of the outstanding items listed in Supreme Court's fifth and final order of discovery, she still did not supplement the bill of particulars to articulate the basis for her

malpractice claims or demand for special damages, even though five years had passed since the commencement of the action. She also failed to provide completed HIPAA authorization forms.

Nevertheless, "[s]triking a party's pleadings is a drastic sanction, and will generally be made only upon a clear showing that the party's conduct was willful and contumacious" (*CEMD El. Corp. v Metrotech LLC I*, 141 AD3d 451, 453 [1st Dept 2016], citing *Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]; *Frye v City of New York*, 228 AD2d 182 [1st Dept 1996]). The record shows that the 77-year-old plaintiff responded to many of defendants' discovery demands, which were extensive, spanning 10 years of medical records and other documents. Under the circumstances of this medical malpractice case, dismissal of the action is too harsh a sanction at this point for plaintiff's partial failure to comply with discovery orders (CPLR 3042[d]; 3126).

We, therefore, modify to reinstate the complaint, direct plaintiff within 45 days of this order to pay a monetary sanction

in the amount of $1,500, and afford plaintiff a final opportunity to supplement her bill of particulars and to provide complete HIPAA authorizations (*see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472 [1st Dept 2013]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1951-
1952 The People of the State of New York,
Respondent,

-against-

Hector Diaz,
Defendant-Appellant.

Ind. 4451/11

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J. at suppression hearing; Jill Konviser, J. at jury trial and sentencing), rendered August 21, 2012, as amended October 17, 2012 and October 18, 2012, convicting defendant, after a jury trial, of auto stripping in the second degree, petit larceny and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

Except with regard to items recovered from a backpack, the court properly denied defendant's suppression motion. The police had probable cause for defendant's arrest, based on a chain of events, before, during and after the crime, that compelled the conclusion that defendant broke into a vehicle. An officer

virtually observed the crime and defendant's immediate flight, even though the officer heard, but did not see, the actual breaking of the vehicle's window (*see e.g. People v Santos*, 41 AD3d 324, 326 [1st Dept 2007], *lv denied* 9 NY3d 926 [2007]). However, the evidence did not establish any basis for a search of a backpack that was within the officer's sole control. Nonetheless, this error was harmless because additional stolen items from the car were lawfully recovered from defendant and thus the items recovered from defendant's backpack were cumulative, adding little to the People's case (*see People v Crimmins*, 36 NY2d 230, 240-241 [1975]).

The trial court properly exercised its discretion in allowing the officers to testify that they knew defendant from their work in the precinct, with the limiting instruction that the jurors should not speculate as to specifically how the officers knew him. This testimony was necessary to complete the

overall narrative and explain how defendant came to be arrested after he fled from the scene (*see People v Hernandez*, 227 AD2d 162 [1st Dept 1996]). In any event, any error in this regard was harmless.

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1953 Marbru Associates, et al., Index 102117/12
Plaintiffs-Appellants,

-against-

William J. White, et al.,
Defendants-Respondents.

_____

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for appellants.

Hyman Silverglad, New York (Hyman Silverglad of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered May 27, 2015, which granted defendants' motion to vacate their default and the ensuing judgment awarding plaintiffs arrears of use and occupancy and possession, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting vacatur in the interests of substantial justice (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]), even

though defendants' default was unexplained (*see New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012]). The relief was justified by defendants' payment of substantially all of the amount due just two months after the order and judgment they sought to vacate; plaintiffs do not claim prejudice (*see Gluck v McDonough*, 139 AD3d 628 [1st Dept 2016]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1954 In re Athena H. M.,
Petitioner-Appellant,

-against-

Samuel M.,
Respondent-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Rosemary Rivieccio, New York, for respondent.

Bruce A. Young, New York, attorney for the child.

_____

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about January 13, 2016, which granted respondent father's motion to dismiss the amended petition for a modification of custody, without a hearing, unanimously reversed, on the law and the facts, without costs, the motion denied, and the matter remanded for proceedings consistent herewith.

In the context of their divorce proceedings, the parties stipulated to joint custody of their two children, with physical custody to petitioner mother. About six years later, petitioner relinquished physical custody to respondent because she was medically unable to care for the children. Respondent then brought a petition to modify the custody order to grant him sole custody. Petitioner, appearing by telephone and without legal counsel, consented to modify the custody order to grant sole

custody to the father, with visitation to be worked out between the parties and frequent telephone contact.

Approximately a year later, petitioner, still acting pro se, moved to enforce visitation, and requested appointment of counsel to challenge the custody order. After counsel was appointed for her, she moved to amend her petition to seek modification of the custody order based on changed circumstances, including the expressed preference of the younger child, then 13 years old, to resume living with her. Respondent consented to the motion to amend, and cross-moved to dismiss the amended petition, on the ground that petitioner had not provided any evidence of changed medical condition.

In response, petitioner submitted evidence of the younger child's preference, his growing apprehension about staying with respondent, and respondent's maltreatment of the child. She submitted evidence that she was addressing the mental health concerns that had led to her initial consent to relinquish custody to respondent and evidence that she had sought treatment for issues relating to a history of domestic violence and that she had obtained new living quarters for herself and the younger child. The child supported the petition and asked for an in camera hearing (*see Matter of Lincoln v Lincoln*, 24 NY2d 270 [1969]).

Without meeting with the child or considering the sworn allegations of domestic abuse (*see* Domestic Relations Law § 240[1]), the court granted the motion to dismiss. This was error.

Petitioner presented sufficient evidence to warrant a plenary hearing to determine whether the totality of the circumstances warrants a modification of the custody order, including its limited visitation provisions and the grant of complete decision-making authority to respondent, and whether such a change is in the best interests of the child (*see St. Clement v Casale*, 29 AD3d 367, 368 [1st Dept 2006]; *see also S.L. v J.R.*, 27 NY3d 558, 564 [2016] [rejecting application of "the 'adequate relevant information' standard" for deciding whether to hold a hearing where facts material to the best interests analysis remain in dispute]). The child's wishes, to be discerned from an interview, should be considered in making the

determination (*see Matter of Olimpia M. v Steven M.*, 228 AD2d 270 [1st Dept 1996]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1955 Barbara A. Lowenstern, Index 159528/14
Plaintiff-Respondent,

-against-

Sherman Square Realty Corp., et al.,
Defendants-Appellants.

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Milber Makis Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for appellants.

Queller, Fisher, Washor, Fuchs & Kool, LLP, New York (Christopher L. Sallay of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about April 10, 2015, which denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, without costs.

Supreme Court properly denied the motion to dismiss pursuant to CPLR 3211(a)(7), because the complaint adequately pleaded a cause of action sounding in negligence.

In addition, Supreme Court properly denied defendants' motion to dismiss pursuant to CPLR 3211(a)(1), because the climactical records do not conclusively refute the complaint's allegations. The affidavit submitted by defendants in support of their motion to dismiss was not documentary evidence and does not conclusively establish a defense to the asserted claims as a matter of law (*see Asmar v 20th & Seventh Assoc., LLC*, 125 AD3d

563, 563-564 [1st Dept 2015]).

Defendants' arguments based on summary judgment standards are of no moment; as noted by Supreme Court, they moved only to dismiss under CPLR 3211, and the court gave no indication that it was deeming the motion to dismiss a motion for summary judgment pursuant to CPLR 3211(c) (*see Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

Defendants' request to strike the paragraph at the end of the order is unavailing; in denying the motion to dismiss, the court did not render a finding on the merits of the complaint or express an opinion as to plaintiff's ability to establish the truth of the averments (*see Khan v Newsweek, Inc.*, 160 AD2d 425, 426 [1st Dept 1990]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1957 The People of the State of New York, Dkt. 50369C/10
Respondent,

-against-

Mitchell Martinez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Richard Lee Price, J.), entered on or about February 16, 2012, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously modified, on the law, to the extent of reducing the adjudication to that of a level one offender, and otherwise affirmed, without costs.

The court erred in assessing 5 points under the risk factor for a history of drug abuse, since only an assessment of 15 or 0 points under this factor is authorized by the Risk Assessment Guidelines and Commentary (*see People v Smith*, 78 AD3d 917, 918 [2d Dept 2010], *lv denied* 16 NY3d 707 [2011]). Moreover, the court improperly exercised its discretion in assessing any points under this factor, since defendant had undisputedly abstained from drug use for about 20 years after joining Narcotics

Anonymous (*see People v Ferrer*, 69 AD3d 513, 515 [1st Dept 2010], *lv denied* 14 NY3d 709 [2010]), and we reject the People's arguments on this issue.

The People also failed to present clear and convincing evidence supporting the assessment of 10 points under the risk factor for an inappropriate employment situation. Defendant's trial testimony that he was a breakdancing instructor with students mostly under 18 during the period from 2008 to 2010, did not establish that defendant's employment upon his release in 2012 would involve exposure to children in violation of his probation conditions.

Accordingly, defendant's correct point score is 70 points, resulting in a level one adjudication. We find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1958 The People of the State of New York, Dkt. 50369C/10
Respondent,

-against-

Mitchell Martinez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered February 16, 2012, convicting defendant, after a nonjury trial, of sexual abuse in the third degree, attempted sexual abuse in the second degree, and attempted endangering the welfare of a child, and sentencing him to an aggregate term of 60 days, with 1 year's probation, unanimously modified, on the law, to the extent of vacating the attempted endangerment conviction and dismissing that count, and otherwise affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the court's credibility determinations, including its evaluation of the victim's explanations for her delay in reporting the sexual abuse.

The court's *Sandoval* ruling balanced the appropriate factors

and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court permitted the prosecutor to elicit the facts underlying defendant's 2006 conviction of assaulting his then-girlfriend, which was relevant to his credibility, while precluding any cross-examination about offenses that were more remote in time.

Defendant's challenges to other evidentiary rulings and to the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find that any error was harmless, particularly in the context of a nonjury trial, in light of the overwhelming evidence of defendant's guilt.

As the People concede, the charge of attempted endangering the welfare of a child is time-barred, and we dismiss this claim in the interests of justice. 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]). Therefore, since defendant has not made a CPL 440.10 motion, the merits of these claims may not be addressed on appeal.

Alternatively, to the extent the 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]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1959 Shipyard Quarters Marina, LLC, et al., Plaintiffs-Appellants, Index 651854/15

-against-

New Hampshire Insurance Company, Defendant-Respondent.

Hur & Lash, LLP, New York (Robert L. Lash of counsel), for appellants.

Sedgwick, LLP, New York (Lawrence Klein and Soo Y. Kim of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 9, 2016, which granted defendant's motion to dismiss the complaint on the ground of forum non conveniens, unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in determining that this insurance coverage dispute is better adjudicated in Massachusetts (*see Atlantic Mut. Ins. Co. v Cadillac Fairview US*, 125 AD2d 181 [1st Dept 1986], *lv denied* 69 NY2d 613 [1987]). The record demonstrates that plaintiff Shipyard Quarters Marina, LLC, at the time of the alleged losses, investigation, and commencement of the underlying Massachusetts action, was a Massachusetts resident. In addition, where the underlying dispute involves a Massachusetts plaintiff at the time

of the underlying events, property located in Massachusetts, and multiple witnesses who may provide depositions relative to coverage obligations, and where Massachusetts law will most likely apply, dismissal was warranted (*see Alberta & Orient Glycol Co., Ltd. v Factory Mut. Ins. Co.*, 49 AD3d 276, 277 [1st Dept 2008], *lv denied* 10 NY3d 713 [2008]). The fact that the insurance policies were issued in New York "does not automatically make New York the most convenient forum" (*Avnet, Inc. v Aetna Cas. & Sur. Co.*, 160 AD2d 463, 464 [1st Dept 1990]).

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

ENTERED: OCTOBER 20, 2016

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1962-
1962A The People of the State of New York,
Respondent,

-against-

Robert Stephens,
Defendant-Appellant.

Ind. 4934/12
5705/12

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Greenberg & Wilner, LLP, New York (Harvey L. Greenberg of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 26, 2014, convicting defendant, after a jury trial, of burglary in the second degree, grand larceny in the third degree and petit larceny, and sentencing him to an aggregate term of 3½ years, unanimously affirmed.

The court properly granted consolidation of indictments involving similar thefts, committed a few weeks apart, in which defendant used his position as a cable technician to obtain access to the victims' apartments. The court properly consolidated the indictments pursuant to CPL 200.20(2)(b) based on mutually admissible evidence to demonstrate identity, intent, or absence of mistake or accident (*see generally People v Rojas*, 97 NY2d 32, 36-37, 37 n 3 [2009]). Contrary to defendant's

assertion, identity was at issue at trial because although he admitted being in the buildings on the dates in question, he disputed having perpetrated the crimes (*see People v Agina*, 18 NY3d 600, 604-05 [2012]). The court also properly granted consolidation pursuant to CPL 200.20(2)(c) because the grand larceny and petit larceny charges were "defined by the same or similar statutory provisions" and the burglary charge was "intertwined with" the grand larceny charge (*People v McNeil*, 39 AD3d 206, 207 [1st Dept 2007]). Furthermore, defendant did not establish that the exception set forth in CPL 200.20(3) should apply. We have considered and rejected defendant's remaining arguments relating to joinder and consolidation.

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 concerning counsel's strategy in examining witnesses (*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 counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

Defendant's remaining claims do not warrant reversal. To the extent that curative actions were required, the court took actions that were sufficient to prevent defendant from being prejudiced by any improper evidence or remarks.

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1967 The People of the State of New York, Respondent, Ind. 2812/14

-against-

Myrrheleki Turner, Defendant-Appellant.

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Gary Greenwald & Partners, P.C., Chester (Gary Greenwald of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered May 12, 2015, as amended June 12, 2015, convicting defendant, after a jury trial, of attempted murder in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years, unanimously affirmed.

The court properly permitted the People to introduce an eyewitness's grand jury testimony as evidence-in-chief to establish defendant's guilt, as it was "demonstrate[d] by clear and convincing evidence that the defendant, by violence, threats or chicanery, caused [the] witness's unavailability" (*People v Cotto*, 92 NY2d 68, 75-76 [1998]; *see also People v Geraci*, 85 NY2d 359 [1995]). There was ample circumstantial evidence (*see People v Encarnacion*, 87 AD3d 81, 85-89 [1st Dept 2011], *lv*

denied 17 NY3d 952 [2011]), including defendant's recorded phone calls and reasonable interpretations thereof, to support the conclusion that defendant, acting through proxies, influenced the witness to give false trial testimony, thereby rendering her effectively unavailable (*see People v White*, 4 AD3d 225 [1st Dept 2004], *lv denied* 3 NY3d 650 [2004]), and that the change in her testimony could only be explained by this unlawful influence. We have considered and rejected defendant's remaining arguments.

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1968-
1969-
1970-
1971-
1972

Index 101979/11
153389/12

Goidel & Siegel, LLP, etc.,
Plaintiff-Respondent,

-against-

122 East 42nd Street, LLC,
Defendant-Appellant.

- - - - -

122 East 42nd Street, LLC,
Plaintiff-Appellant,

-against-

Jonathan Goidel, et al.,
Defendants-Respondents.

_____

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (John G. Nicolich of counsel), for appellant.

Goidel & Siegel, LLP, New York (Andrew B. Siegel of counsel), for respondents.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about October 13, 2015, which, insofar as appealed from, denied plaintiff 122 East 42nd Street, LLC's (landlord) motion for partial summary judgment on its claim for attorneys' fees in index No. 153389/12, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for determination of reasonable attorneys' fees. Order, same court and Justice, entered October 14, 2015, which, insofar

as appealed from, denied defendant landlord's motion for partial summary judgment on its claim for attorneys' fees in index No. 101979/11, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for determination of reasonable attorneys' fees.

Pursuant to the stipulation settling the parties' multiple litigations against each other, tenant Goidel & Siegel, LLP, and its members, Jonathan Goidel and Andrew Siegel, guarantors of the payment of the rent, agreed to pay, inter alia, an amount of money in "liquidation of . . . all unpaid rent and additional rent allegedly owed . . ., but not including attorneys' fees and expenses," and the parties agreed to discontinue all remaining claims against each other. The parties further agreed that the payment of the abovementioned amount would be accepted by landlord "without prejudice to Tenant's and Guarantors' defenses and affirmative defenses" and that, after the stipulation was entered and payment was received, landlord would move for an order finding tenant and its members liable for landlord's attorneys' fees.

Having received all allegedly unpaid rent and additional rent, exclusive of legal fees, which, pursuant to the lease, had become additional rent, and which were reserved for judicial resolution, landlord is the prevailing party (*see Sykes v RFD*

Third Ave. I Assoc., LLC, 39 AD3d 279 [1st Dept 2007]).

Tenant and its members argue that landlord is not the prevailing party because its claims were discontinued with prejudice, while their affirmative defenses have not been disposed of. However, all claims having been discontinued, there can be no further proceedings to test those affirmative defenses, and landlord has already obtained all the non-legal-fee rent it sought.

In light of the foregoing, the matter is remanded to Supreme Court for a determination of landlord's reasonable attorneys' fees incurred in connection with the above-captioned matters and, pursuant to the stipulation, the proceeding commenced in Civil Court, New York County, L&T index No. 50778/2011, and including the fees incurred in seeking attorneys' fees (*see Katz Park Ave. Corp. v Jagger*, 98 AD3d 921, 922 [1st Dept 2012]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1973 In re Juan J.R.,
Petitioner-Appellant,

-against-

Krystal R.,
Respondent-Respondent.

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Anne Reiniger, New York, for appellant.

Andrew J. Baer, New York, for respondent.

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Order, Family Court, Bronx County (Llinet Rosado, J.), entered on or about April 23, 2015, dismissing the maternal grandfather's petition for custody of the subject child, unanimously affirmed, without costs.

As between a parent and a nonparent, the parent has the superior right to custody that cannot be denied unless the nonparent establishes the existence of extraordinary circumstances (*see Matter of Bennett v Jeffreys,* 40 NY2d 543, 544 [1976]). The court conducts a two-prong inquiry. First, the nonparent must prove extraordinary circumstances such as surrender, abandonment, persistent neglect, unfitness, or involuntary disruption of custody over an extended time period or other like circumstances (*id.* at 546). If extraordinary circumstances are established, then the court must make an award based on the best interests of the child (*id.* at 547-548; *Matter*

of Suarez v Williams, 26 NY3d 440, 446, 454 [2015]). A grandparent of a minor child may demonstrate extraordinary circumstances where there was a prolonged separation of the parent and child for at least 24 continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the grandparent's household. The court may find extraordinary circumstances exist even where the prolonged separation lasts for less than 24 months (Domestic Relations Law § 72[2][a], [b]).

The court properly found that the grandfather failed to demonstrate the requisite extraordinary circumstances. Although the mother had prolonged absences, none of which amounted to 24 continuous months, during which time the child resided with the grandparents, it was undisputed that she made clear that she intended to retrieve the child after she established a household in Indiana and maintained contact for part of the time that she was out of state.

The court did not find the testimony concerning the mother's drug use to be credible because the grandmother and grandfather contradicted each other, she had no history of child protective

or criminal proceedings against her, and her older child was well cared for. This finding is entitled to deference (*see Matter of Louise E. S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1976 The People of the State of New York, Respondent, Ind. 3968/13

-against-

Ronnie Mason, Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered April 17, 2015, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him to an aggregate term of 3½ to 7 years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, 140 AD3d 401 [1st Dept 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 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1978 The People of the State of New York, Respondent, Ind. 30240/14

-against-

David Richmond, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Neil Ross, J.), entered March 4, 2015, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law article 6-C), unanimously modified, on the facts and in the exercise of discretion, to the extent of reducing the adjudication from level two to level one, and otherwise affirmed, without costs.

The mitigating factors cited by defendant were not

adequately taken into account by the guidelines. After considering defendant's arguments, and in the exercise of our discretion, we find that a downward departure to level one is warranted under all the circumstances.

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

ENTERED: OCTOBER 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1979 The People of the State of New York, Respondent, Ind. 4674/12

-against-

Charles Welcome,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 21, 2013, 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 20, 2016

CLERK

Mazzarelli, J.P., Acosta, Richter, Kapnick, Gesmer, JJ.

1980N AQ Asset Management LLC, etc., et al., Plaintiffs-Respondents, Index 652367/10

-against-

Michael Levine, Defendant-Respondent,

Habsburg Holdings Ltd. et al., Defendants-Appellants.

_____

Kerry Gotlib, New York, for appellants.

Reitler Kailas & Rosenblatt LLC, New York (Edward P. Grosz of counsel), for AQ Asset Management LLC, Antiquorum, S.A., Antiquorum USA, Inc., and Evan Zimmermann, respondents.

Levine & Associates, P.C., Scarsdale (Michael Levine of counsel), for Michael Levine, respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 10, 2015, which denied the motion of defendants Habsburg Holdings Ltd. and Osvaldo Patrizzi to renew (1) their motion for an accounting and (2) their opposition to defendant Michael Levine's cross motion to dismiss so much of their fraud and breach of fiduciary duty cross claims as related to Levine's payment of $625,000 to nonparty Karastir LLC, unanimously modified, on the facts and in the exercise of discretion, to grant renewal as to the opposition and, upon renewal, deny the currently contested portion of the cross

motion, and otherwise affirmed, without costs.

Habsburg and Patrizzi sold half of their shares of various Antiquorum companies for $30 million; Levine was the escrow agent for that transaction. Levine said he disbursed a total of $925,000 from the escrow account to obtain loan commitments from Karastir. The IAS court permitted Habsburg and Patrizzi to sue Levine as to the last $300,000 of Karastir-related payments but not the first $625,000.

The motion court believed that the new fact offered by Habsburg and Patrizzi on their motion to renew was that Karastir did not have money to lend; it said that issue was raised in the original motion and addressed in the court's original decision. Actually, it does not appear to have been previously raised and discussed. In any event, the new fact was not just that Karastir did not have money to lend, but that all of the supposed loan commitment transactions may have been a sham. Before the motion to renew, the first three transactions with Karastir (the ones that led to the payment of $625,000 from Levine's escrow account) appeared to be regular. However, on the motion to renew, Habsburg and Patrizzi cast considerable doubt on the transactions and the credibility of Karastir's principal.

The new evidence showed that the final $300,000 benefited an entity of which Levine owned 49%. If all or part of the first

$625,000 also went to this entity, this could constitute a breach of fiduciary duty on Levine's part. In addition, if Levine led Habsburg and Patrizzi to believe that the first $625,000 constituted normal commitment fees, but they actually went to his entity, this could support their fraud claim.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1981 The People of the State of New York, Respondent, Ind. 83/13

-against-

Kenneth Bartlett, Defendant-Appellant.

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White & White, New York (Brendan White of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J. at suppression hearing; Edward J. McLaughlin, J. at jury trial and sentencing), rendered February 19, 2014, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony offender, to an aggregate term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the third-degree possession conviction to a term of 4 years, with 2 years' postrelease supervision, and otherwise affirmed.

The hearing court properly denied defendant's suppression motion. As the police followed defendant's car toward a location known for drug activity, the car moved from the travel lane to the parking lane without signaling and stopped in front of a fire

hydrant. At a minimum, these facts gave the police the requisite objective, credible reason to approach defendant's stopped car, which led to the discovery of drugs (*see e.g. People v Ruiz*, 100 AD3d 451 [1st Dept 2012], *lv denied* 20 NY3d 1065 [2013]).

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. 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 possession of 17 bags of drugs, as well as $1,360 in cash, supported the inference of intent to sell (*see People v Miller*, 92 AD3d 520, 520 [1st Dept 2012], *lv denied* 18 NY3d 996 [2012]). There is no basis for disturbing the jury's credibility determinations, including its rejection of the testimony of a defense witness.

The court did not err in informing the jury, in the middle of their first day of deliberations, that deliberations would have to end the next day (a Friday) a few hours early, and, if necessary, resume on Monday. This innocuous scheduling announcement was informative and not coercive, as evidenced by the fact that the jury deliberated for roughly a full day after this announcement before rendering its verdict (*see People v Glover*, 165 AD2d 761, 763 [1st Dept 1990], *lv denied* 77 NY2d 877

[1991]). Defendant has not shown how informing the jurors that the Friday session would end a few hours early was any more coercive than the jurors' general awareness that if they did not reach a verdict by the end of a session they would be expected to return on the next working day.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1982 Leandro Gil, Index 152194/13
Plaintiff,

Pedro Reyes, et al.,
Plaintiffs-Appellants,

-against-

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

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Frekhtman & Associates, P.C., Brooklyn (Eileen Kaplan of counsel), for Pedro Reyes, appellant.

Silbowitz, Garafola, Silbowitz Schatz & Frederick, L.L.P., New York (Howard R. Schatz of counsel), for Carl Jean, appellant.

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

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Order, Supreme Court, New York County (Frank P. Nervo, J.), entered February 17, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff Reyes's motion for an extension of time to serve the City nunc pro tunc, and his cross motion to serve a supplemental summons and amended complaint to add the City as a defendant, and denied plaintiff Jean's cross motion for an order permitting him to serve an amended summons and complaint adding the City as a defendant, unanimously affirmed, without costs.

It is undisputed that Reyes and Jean filed a complaint naming only New York City Department of Parks and Recreation

(Parks), which it served only on Parks. Movants contend that they should be permitted to amend the summons and complaint to add the City as a defendant because Parks was a misnomer. However, the misnomer exception is inapplicable because the proper party, the City, was not served (*see National Refund & Util. Servs., Inc. v Plummer Realty Corp.*, 22 AD3d 430 [1st Dept 2005]; *Freda v Board of Educ. of City of N.Y.*, 224 AD2d 360 [1st Dept 1996]). Moreover, CPLR 306-b may not be used to extend the statute of limitations (*see Gonzalez v New York City Health & Hosps. Corp*, 29 AD3d 369, 370 [1st Dept 2006]).

The relation back doctrine is similarly inapplicable because a mistake of law is not the type of mistake contemplated by the doctrine (*see Matter of Gilbert v Perine*, 52 AD3d 240 [1st Dept 2008]; *Matter of 27th St. Block Assn. v Dormitory Auth. of State of N.Y.*, 302 AD2d 155, 165 [1st Dept 2002]). Here, movants

mistakenly believed that Parks was an entity subject to suit (*see* NY City Charter § 396).

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

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1983 In re Sharon B.,
Petitioner-Respondent,

-against-

Tiffany P.,
Respondent-Appellant,

Morris T.,
Respondent.

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Neal D. Futerfas, White Plains, for appellant.

Bruce A. Young, New York, for respondent.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child.

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Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about March 20, 2015, which, after a hearing, awarded sole physical and legal custody of the subject child to petitioner, unanimously affirmed, without costs.

Petitioner, the child's grandmother, demonstrated the requisite extraordinary circumstances to establish her standing to seek custody of the child (*see Matter of Suarez v Williams*, 26 NY3d 440 [2015]; Domestic Relations Law [DRL] § 72[2][a]). Contrary to respondent mother's argument, substantial evidence supports the court's determination that petitioner, not respondent, cared for the child on a daily basis beginning in his infancy and that the child resided in her home for more than 10

years, nearly his entire life. Respondent's 28-month incarceration for selling drugs – during which time the child resided in petitioner's home – is alone enough to constitute extraordinary circumstances under DRL § 72(2) (*see Suarez*, 26 NY3d at 451).

The record also supports the court's determination that it is in the child's best interests to be in petitioner's custody (*see Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]). Petitioner has supported the child and provided a stable and loving home where he is thriving, while respondent is at this point unable to do so (*see Matter of Ruth L. v Clemese Theresa J.*, 104 AD3d 554 [1st Dept 2013], *lv denied* 21 NY3d 860 [2013]). The child is fully bonded with petitioner, and, by all accounts, she has provided him with excellent care. The court gave the appropriate weight to the testimony of petitioner and the child's social worker, the reports of the forensic evaluator, and the

child's own wishes in coming to its determination.

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

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1984-
1984A The People of the State of New York,
Respondent,

-against-

Craig Hutter,
Defendant-Appellant.

Ind. 923/11

_____

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered February 8, 2012, convicting defendant, upon his plea of guilty, of attempted assault in the first degree, assault in the second degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 7 years, unanimously affirmed. Order, same court (Ruth Pickholz, J.), entered on or about December 15, 2014, which denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously affirmed.

The record supports the suppression court's determination that, notwithstanding a suppressed lineup, the victim had an independent source for his identification of defendant (*see Neil v Biggers*, 409 US 188, 199-200 [1972]; *People v Williams*, 222

AD2d 149, 153 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]). The victim had an ample opportunity to observe defendant under good lighting conditions, and he provided a detailed and accurate description. Moreover, he selected defendant from a fair photo array, as well as from a fair lineup that was suppressed solely on right to counsel grounds.

The record establishes that defendant's plea was knowing, intelligent and voluntary. Defendant asserts that the voluntariness of his plea was impaired by the court's allegedly erroneous preliminary ruling on the admissibility of certain evidence. However, defendant's evidentiary argument was forfeited by his guilty plea, and he "should not be permitted to circumvent that rule by asserting on appeal that a ruling 'impacted' the decision to plead guilty or left 'no choice' but to do so" (*People v Smith*, 130 AD3d 411, 411 [1st Dept 2015], *lv denied* 26 NY3d 1043 [2015]). In any event, the court did not make a final ruling, and defendant has not shown that the evidence at issue, which tended to support an inference of witness-tampering by proxy (*see e.g. People v Jones*, 21 NY3d 449, 456 [2013]), was inadmissible to begin with. Furthermore,

defendant received sufficient time to investigate this issue and decide whether to accept the plea, and no further time was requested.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1985 Aghogho Emenike, etc., et al., Index 301697/07
Plaintiffs-Respondents,

-against-

Ginsburg Development Companies, LLC, et al.,
Defendants,

Kensington Woods Homeowners Association, Inc.,
Defendant-Appellant.

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Law Office Of Vincent D. McNamara, East Norwich (Anthony Marino of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 19, 2015, which, to the extent appealed from, denied the motion of defendant Kensington Woods Homeowners Association Inc. (Kensington) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The record presents triable issues of fact as to whether Kensington either created or had notice of the hazardous condition that caused the death of plaintiffs' decedent, namely, the Norway Spruce that fell on his car and crushed him (*see e.g. Connolly v Incorporated Vil. of Lloyd Harbor*, 139 AD3d 656 [2d Dept 2016]; *Priore v New York City Dept. of Parks & Recreation*, 124 AD3d 749 [2d Dept 2015]). In addition, considering that the

autopsy report indicated that the decedent slowly suffocated to death as a result of the tree resting on his head, issues of fact exist regarding whether, during that time, decedent had conscious pain and suffering. Decedent's widow, who raced out of her house to discover her husband crushed by the tree, also has a cognizable claim for negligent infliction of emotional distress arising from being in the "zone of danger" (*see Garcia v Lawrence Hosp.*, 5 AD3d 227 [1st Dept 2004]; *Cushing v Seemann*, 247 AD2d 891 [4th Dept 1998]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1986 The People of the State of New York, Respondent, Ind. 15/13

-against-

Donika Marku, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered April 29, 2014, convicting defendant, after a jury trial, of grand larceny in the third degree, welfare fraud in the third degree and four counts of offering a false instrument for filing in the first degree, and sentencing her to an aggregate term of three years' probation, unanimously affirmed.

The court properly granted the People's request for submission of grand larceny in the third degree and welfare fraud in the third degree as lesser included offenses of these crimes' second-degree counterparts. The evidence supported a reasonable view that defendant fraudulently obtained public assistance health benefits in an amount exceeding $3,000, but under $50,000 (*see generally People v Rivera*, 23 NY2d 112, 120 [2014]). Although the People's principal theory was that all of

defendant's applications for benefits were fraudulent, the People were nevertheless entitled to submission of the lesser offenses because the evidence also supported a reasonable alternative theory.

Defendant did not preserve her claim that a People's witness improperly provided factual interpretations of charts that the witness had created summarizing voluminous records in evidence, or her claim that the court should have specifically instructed the jury not to consider certain conduct because it fell outside the statute of limitations, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal with regard to either issue.

Defendant's ineffective assistance of counsel claims relating to the issues we have found to be unpreserved 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]). Accordingly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Webber, JJ.

1987-
1987A-
1987B

Index 153861/14

Southwest Marine and General Insurance Company, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Preferred Contractors Insurance Company,
Defendant-Appellant-Respondent,

Gilmar Design Corporation,
Defendant.

_____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Eric D. Suben of counsel), for appellant-respondent.

Carroll McNulty Kull LLC, New York (Ann M. Odelson of counsel), for respondents-appellants.

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Orders, Supreme Court, New York County (Robert R. Reed, J.), entered April 14 and May 20, 2015, which denied defendant Preferred Contractors Insurance Company's (PCIC) motion to dismiss the complaint as against it, and denied plaintiffs' motion for summary judgment declaring that PCIC is obligated to defend and indemnify them in the underlying personal injury action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered November 23, 2015, to the extent that, upon reargument, it adhered to the original determination, unanimously dismissed, without costs, as academic.

PCIC, a Montana risk retention group, failed to show that

the documentary evidence submitted in support of its motion to dismiss "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff[s'] claim" (*West 64th St., LLC v Axis U.S. Ins.*, 63 AD3d 471, 471-472 [1st Dept 2009] [internal quotation marks omitted]). While the additional insured endorsements at issue do not reference plaintiffs, plaintiffs are identified on the certificates of insurance, which is relevant to whether plaintiffs' exclusion from the endorsements was perhaps an inadvertent error (*Rosalie Estates v Colonia Ins. Co.*, 227 AD2d 335, 337 [1st Dept 1996]).

Contrary to plaintiffs' contention that the policy must be construed against PCIC, as the drafter, because ambiguity is created by the appearance of the phrase "Blanket Accident Insurance" within the same form that requires additional insureds to be scheduled (*see Ames Constr., Inc. v Intermountain Indus., Inc.*, 712 F Supp 2d 1160, 1166 [D Montana 2010], *affd* 445 Fed Appx 971 [9th Cir 2011]; *Baker v Nationwide Mut. Ins. Co.*, 158 AD2d 794, 796-797 [3d Dept 1990]), "the parties may submit extrinsic evidence as an aid in construction" (*State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]; *see also New York*

State Ins. Fund v Everest Natl. Ins. Co., 125 AD3d 536 [1st Dept 2015]; *Baker v 16 Sutton Place Apt. Corp.*, 72 AD3d 500, 501 [1st Dept 2010]; *Corporate Air v Edwards Jet Ctr.*, 345 Mont 335, 349, 190 P3d 1111, 1121 [Mont 2008]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1988 In re Geovany S., and Others,

Children Under Eighteen Years of Age, etc.,

Geovany S., et al.,
Appellants,

Administration for Children's Services
Petitioner-Respondent,

Martin R.,
Respondent-Respondent.

_____

Neal D. Futerfas, White Plains, for appellants.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for Administration for Children's Services, respondent.

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

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Appeal from order of fact-finding and disposition (one paper), Family Court, Bronx County (Joan L. Piccirillo, J.), entered on or about April 28, 2014, which, to the extent appealed from as limited by the briefs, following a fact-finding hearing, determined that respondent derivatively neglected the appellant children, unanimously dismissed, without costs, as moot.

The appellant children are not aggrieved by the finding against respondent that he derivatively neglected them (*see Matter of Desiree C.*, 7 AD3d 522, 523 [2d Dept 2004]). To

the extent that the children were aggrieved by the dispositional portion of the order, which prevented respondent from living with them for one year, its terms have expired (*see Matter of David L. Jr. [David L.]*, 118 AD3d 468, 469 [1st Dept 2014]). Furthermore, the two older appellant children have reached the age of 18, and thus, the proceedings are academic as to them (*see Matter of Joseph B.*, 6 AD3d 609, 610 [2d Dept 2004]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1989 The People of the State of New York, Ind. 3039/13
Respondent,

-against-

Joseph Jones,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered February 28, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second felony drug offender, to an aggregate term of two years, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing court saw and heard the witnesses, and there is no basis for disturbing its credibility determinations (*see People v*

Prochilo, 41 NY2d 759, 761 [1977]). The police account of defendant's behavior in permitting drugs to be in plain view was not so implausible as to warrant a different conclusion (*see e.g. People v Lewis*, 136 AD3d 468 [1st Dept 2016], *lv denied* 27 NY3d 1001 [2016]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1990 Boaz Maor, Index 652714/11
Plaintiff-Respondent,

-against-

Blu Sand International Inc., et al.,
Defendants-Appellants.

_____

Dorsey & Whitney LLP, New York (Bruce R. Ewing of counsel), for appellants.

Daley Law, P.C., New York (M. Teresa Daley of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 13, 2016, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants demonstrated their entitlement to judgment as a matter of law on plaintiff's breach of contract claim by submitting evidence that, from and after the date of the subject agreement, plaintiff continued to market and sell, for his own benefit, Magic Towels, which pertained to the Invention Assets, without ever obtaining express authorization from defendant Blu Sand International, Inc. Thus, plaintiff's breach of the agreement precluded him from satisfying a necessary element on a

cause of action for breach of contract, namely, his own performance under the agreement (*see Dorfman v American Student Assistance*, 104 AD3d 474 [1st Dept 2013]).

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, the unjust enrichment claim cannot be maintained, since there can be no quasi-contract claim against a third-party nonsignatory to a contract that covers the subject matter of the claim (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 AD3d 804 [2012]; *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313 [1st Dept 1995]).

The claim for an accounting should have been dismissed in the absence of a fiduciary relationship arising out of the contract between the parties (*see Elghanian v Elghanian*, 277 AD2d 162 [1st Dept 2000], *lv denied* 96 NY2d 712 [2001]; *Waldman v Englishtown Sportswear,* 92 AD2d 833, 835-836 [1st Dept 1983]). Plaintiff also failed to show the existence of a joint venture agreement that would give rise to a fiduciary relationship, since

there was no evidence that plaintiff agreed to, inter alia, participate in losses as well as profits (*see Mendelson v Feinman*, 143 AD2d 76 [2d Dept 1988]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1991 John P. Gourary, etc., Index 651932/10
Plaintiff-Appellant,

-against-

Alice Green, etc., et al.,
Defendants-Respondents,

Elizabeth Laster, etc., et al.,
Defendants.

_____

Wollmuth Maher & Deutsch LLP, New York (William A. Maher of counsel), for appellant.

Abrams Garfinkel Margolis Bergson, LLP, New York (Robert J. Bergson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 15, 2016, which granted defendants Alice Green, as executor of the estate of Paul Green, and Green & Ettinger's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, with costs.

Plaintiff, the administrator of the estate of his deceased father, Paul Gourary (Gourary), alleges that, in connection with the May 2006 sale of Gourary's 50% share in a New York S-corporation to defendant Macomber, the son-in-law of the corporation's other 50% shareholder, Oliver Laster (since deceased) (Laster), defendant Paul Green (since deceased) and his law firm, defendant Green & Ettinger, committed legal malpractice

and fraud in connection with their representation of Gourary in the sale, enabling Macomber to purchase Gourary's interest in the corporation at a steep discount.

The Green defendants established prima facie, through deposition testimony and two experts' affidavits, that the sale was consistent with Gourary's objectives, that Green did not represent Macomber before the deal was struck, and that the evidence did not support an inference that Green's representation violated the ethics rules or was inconsistent with the standard of professional conduct (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). Moreover, defendants established the absence of proximately caused damages; since "there is no way to know whether the advice not given . . . 'would have altered the [outcome],'" the claim of damages is speculative (*id.* at 436; *see also Fielding v Kupferman*, 104 AD3d 580 [1st Dept 2013], *lv denied* 21 NY3d 859 [2013]; *Global Bus. Inst. v Rivkin Radler LLP*, 101 AD3d 651, 652 [1st Dept 2012]).

Contrary to plaintiff's contention, the Green defendants were not required to submit an expert opinion on the issue of causation. Unlike issues implicating "the byzantine world of immigration law" (*see Suppiah v Kalish*, 76 AD3d 829, 833 [1st Dept 2010], *appeal withdrawn* 16 NY3d 796 [2011]), the issue of causation in this case rests on the "discrete factual question"

of how Gourary, a lay person, would have reacted to certain information (*see Wo Yee Hing Realty Corp. v Stern*, 99 AD3d 58, 63 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. There is no evidence that Green represented Macomber and Gourary dually in connection with the negotiations for the sale of Gourary's share of the corporation. Before making an offer, Macomber had consulted a tax lawyer; later he retained separate counsel to provide services in connection with the transaction. Moreover, Green's structuring of the transaction favored Gourary's interests over those of Macomber. Plaintiff's real estate law expert's opinion concerning the alleged dual representation was made without the benefit of knowing what, if anything, Green and Gourary discussed with respect to the price of the sale, and assumes that there were either no such discussions or that, on Green's side, the discussions failed to sufficiently promote Gourary's interests. In contrast to *Papaioannou v Lukas* (170 AD2d 289 [1st Dept 1991]), relied upon by plaintiff, there are no questions here about the nature of advice Green provided Gourary. The nature of that advice is simply unknown.

The fact that Gourary suffered from dementia did not necessarily render him incompetent to enter into the subject

transaction (*see Matter of Mildred M.J.*, 43 AD3d 1391 [4th Dept 2007]). "A party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function" (*Pruden v Bruce*, 129 AD3d 506, 507 [1st Dept 2015]). Indeed, arguing that Green had a duty to take steps to protect Gourary as a client with diminished capacity, plaintiff apparently concedes that, with the proper protection, Gourary was capable of entering into the transaction. However, whether Green provided that protection cannot be known or reasonably inferred from the record.

The fraud claims are duplicative of the legal malpractice claim, since they arise from the same facts as underlie that claim and involve no additional damages separate and distinct from those alleged in connection with the malpractice claim (*see Dinhofer v Medical Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]; *Carl v Cohen*, 55 AD3d 478 [1st Dept 2008]; *cf. Johnson v Proskauer Rose LLP*, 129 AD3d 59, 69 [1st Dept 2015] [legal malpractice and fraud claims found not duplicative where plaintiffs alleged not only that defendants failed to advise them adequately as to tax strategy but also, inter alia, that defendants pressured them into the tax avoidance

strategy to preserve the firm's "lucrative arrangement" with the strategy's developer]).

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 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1992-
1993 The People of the State of New York, Respondent,

Ind. 414/12
5/13

-against-

Traille Turner,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered May 9, 2013, as amended May 22 and June 14, 2013, convicting defendant, after a jury trial, of aggravated criminal contempt, criminal contempt in the first degree and eight counts of criminal contempt in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the conviction of aggravated criminal contempt and remanding the matter for a new trial on that count, and otherwise affirmed.

Although the indictment charged defendant with aggravated criminal contempt based on intentionally causing injury, the court charged the jury that defendant could be convicted if he

acted intentionally or recklessly. In doing so, the court impermissibly expanded the scope of the indictment (*see* CPL 200.70[2]; *People v Kaminski*, 58 NY2d 886 [1983]). Because the jury found defendant not guilty of all the charges stemming from the same incident that required intent, it is not clear that the verdict convicting him of aggravated criminal contempt was based on a finding of intentionally causing injury, as opposed to recklessly doing so (*see People v Ortiz*, 207 AD2d 279, 280 [1st Dept 1994], *lv denied* 84 NY2d 909 [1994]). Although the issue requires preservation and is unpreserved, we reach it in the interest of justice.

The nontestifying victim's statements to police when they responded to a 911 call were properly admitted as excited utterances (*see e.g. People v Gantt*, 48 AD3d 59, 63-64 [1st Dept 2007], *lv denied* 10 NY3d 765 [2008]). The record supports inferences that these statements closely followed a startling event, and were "so influenced by the excitement and shock of the event that it is probable that . . . she spoke impulsively and without reflection" (*People v Caviness*, 38 NY2d 227, 231 [1975]). Furthermore, the statements were nontestimonial and thus did not violate the Confrontation Clause, because the police responded to an emergency, secured the apartment, and with the assailant's whereabouts unknown, asked for a description (*Davis v Washington*,

547 US 813, 822 [2006]; *People v Nieves-Andino*, 9 NY3d 12, 15-16 [2007]).

The court properly exercised its discretion in admitting expert testimony on the dynamics of domestic violence. The expert testified only generally about the subject to explain the behavior of victims that might appear unusual or that jurors might not be expected to understand (*see People v Carroll*, 95 NY2d 375, 387 [2000]; *People v Taylor*, 75 NY2d 277, 293-294 [1990]).

Since we are ordering a new trial on the aggravated contempt conviction, we do not reach defendant's claim that his sentence on that conviction was excessive.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1994 The People of the State of New York, Respondent, Ind. 1768/05

-against-

Francisco Velasquez, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Milbank Tweed Hadley & McCloy LLP, New York (Alexis Kim of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), entered January 3, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure. There was clear and convincing evidence to establish an aggravating factor that was not adequately accounted for by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). Defendant's possession of numerous and repellent images of child pornography was sufficiently linked to a risk of reoffense (*see People v Hughes*, 71 AD3d 579, 579-80 [1st Dept 2010], *lv denied* 14 NY3d 713 [2010]). Moreover, the

mitigating factors cited by defendant were accounted for in the risk assessment instrument and were outweighed by the seriousness of his conduct. We have considered and rejected defendant's remaining arguments.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1995 Michelle R., SCI 309377/12
Plaintiff-Appellant, Dkt 49309/12

-against-

Alexander R.,
Defendant-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Michael L. Paikin, P.C., New York (Michael L. Paikin of counsel), attorney for Alexander R., respondent.

Law Office of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for Administration for Children's Services.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered February 5, 2015, which, to the extent appealed from as limited by the briefs, granted defendant father sole legal and physical custody of the subject child, with therapeutic supervised visitation for plaintiff mother, unanimously affirmed, without costs.

Supreme Court's determination that an award of sole custody to the father would be in the child's best interest has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The court considered the appropriate factors in making its determination, including the parties' credibility

(*see id.*), and gave appropriate weight to the testimony and recommendations of the court-appointed forensic expert (*Matter of Cisse v Graham*, 120 AD3d 801, 806 [2d Dept 2014], *affd* 26 NY3d 1103 [2016]). The record shows that the mother's lack of insight into her parenting deficiencies and failure to engage in recommended mental health services led to findings of educational and medical neglect against her and a release of the child to the father (*see Matter of Kira J. [Lakisha J.]*, 108 AD3d 541 [2d Dept 2013]). Although the father also was found responsible for the medical and educational neglect of the child, he ultimately addressed the child's behavioral and educational needs, and the child thrived in his care (*see Matter of Ricardo S. v Carron C.*, 91 AD3d 556 [1st Dept 2012]). Among other things, the child progressed from exhibiting fairly severe behavioral problems and social delays, to being a functioning member of a third grade classroom, with friends and extracurricular activities.

Based on all the evidence, Supreme Court properly determined that a continuation of the mother's supervised therapeutic visitation with the child, rather than non-therapeutic supervised visitation, would be in the child's best interest (*see Matter of*

Flood v Flood, 63 AD3d 1197, 1198 [3d Dept 2009]).

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 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1996 In re Michael T.,

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

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about April 21, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree and jostling, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's fact-finding determination 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, including its evaluation of inconsistencies.

Appellant did not preserve his claim that the court erred in admitting evidence of his pretrial silence, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The record plainly demonstrates the court's awareness that pretrial silence is inadmissible, and its general refusal to receive such evidence. Accordingly, there is no reason to believe that the allegedly offending question influenced the court's fact-finding determination (*see People v Torres*, 249 AD2d 229 [1st Dept 1998], *lv denied* 92 NY2d 861 [1998]; *see also Matter of Jamar W.*, 269 AD2d 103 [1st Dept 2000], *lv denied* 95 NY2d 752 [2000]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1997 The People of the State of New York, Ind. 2295/14
Respondent,

-against-

Aziz Rasheem-Coleman,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered October 16, 2014,

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 20, 2016

CLERK

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

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1998 The People of the State of New York, Respondent, Ind. 846/07

-against-

Leonel Solis,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Renee A. White, J.), entered December 10, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure to level three. There was clear and convincing evidence to establish aggravating factors that were not otherwise adequately accounted for by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861-862 [2014]). Even without regard to a third incident for which defendant was not prosecuted, defendant's New York and Bronx County convictions presented a pattern of egregious, predatory crimes against young girls and demonstrated a serious risk of reoffense that

outweighed the mitigating factors cited by defendant.

Accordingly, defendant was properly adjudicated a level three offender based on the upward departure, regardless of whether his correct point score is 95, as the court found, or 75, as defendant asserts. In any event, the court correctly assessed points under the risk factor for relationship (strangers) between defendant and the victim.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1999 The People of the State of New York, Respondent,

Ind. 2618/12

-against-

Angel Casimay,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 7, 2013, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed.

Defendant, who contends that his plea was involuntary because the court did not specifically advise him that he could be deported as a result of the plea, did not show that the narrow exception to the preservation requirement applies (*see People v Peque*, 22 NY3d 168, 182-183 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]). Defendant was informed, by way of a notice of immigration consequences served upon him by the People, that he could potentially be deported. We decline to reach defendant's unpreserved contention in the interest of justice because, given

the circumstances of the plea, it is unlikely that he could make the requisite showing of prejudice under *Peque* if granted a hearing (*see id.* at 198-201; *People v Diakite*, 135 AD3d 533 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

2000 AXA Art Insurance Corporation as subrogee of Richard Avedon Foundation, Plaintiff-Respondent-Appellant, Index 152982/13

-against-

Fortress Fine Art Storage also known as Fortress New York Holdings, Inc., Defendant-Appellant-Respondent.

_____

Tarter Krinsky & Drogin LLP, New York (Alex Spizz of counsel), for appellant-respondent.

Faust Goetz Schenker & Blee LLP, New York (Jeffrey Rubinstein of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered on or about December 11, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment as to liability and a stay pending adjudication of a related proceeding, and denied defendant's cross motion to dismiss the complaint, unanimously affirmed, as to the denial of the motions for summary judgment and to dismiss, and appeal therefrom otherwise dismissed, without costs, as moot.

Plaintiff, as subrogee of its insured, the Richard Avedon Foundation, seeks damages for water damage that a photograph owned by the Foundation allegedly sustained while in storage at defendant's facility.

Defendant argues that the complaint should be dismissed on

the ground that plaintiff lacks standing to sue because it failed to demonstrate, by showing that it made payment to or for the Foundation, that it has a right of subrogation. Defendant waived this argument by failing to raise it in the answer (CPLR 3211[e]; *Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 524 [1st Dept 2016]). In any event, the complaint adequately alleges that plaintiff is subrogated to the Foundation's rights of recovery against defendant for the damage to the photograph, and none of the documentary evidence submitted by defendant conclusively refutes this allegation.

On its motion for summary judgment as to liability, plaintiff failed to establish prima facie that defendant breached a duty to the Foundation or that any such breach proximately caused damage to the photograph (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 118 [1st Dept 2016]). Plaintiff failed to present any evidence that the storage facility had a leak, that defendant had notice of any such leak and a reasonable opportunity to repair it, that any such leak was the cause of any damage, or indeed that the photograph sustained water damage.

Plaintiff's appeal from the denial of its motion for a stay

pending a determination in the related action between itself and the insured is moot in light of the recent settlement of that action.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

2001 The People of the State of New York, Ind. 3350/13
Respondent,

-against-

Tarrel Flow,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Oliver Mconald 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 (Edward McLaughlin, J.), rendered April 13, 2015,

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 20, 2016

CLERK

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

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

2002 The People of the State of New York, Ind. 89/14
Respondent,

-against-

Juan Puig,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered June 12, 2014,

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 20, 2016

CLERK

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

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

2003N Pensmore Investments, LLC., Index 650002/14
Plaintiff-Respondent,

-against-

Gruppo, Levey & Co., et al.,
Defendants,

Claire Gruppo, et al.,
Defendants-Appellants.

_____

Olshan Frome Wolosky LLP, New York (Jeremy M. King of counsel), for appellants.

Kennedy Berg LLP, New York (Gabriel Berg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 11, 2015, which granted plaintiff's motion for a prejudgment attachment, unanimously affirmed, with costs.

Plaintiff established a likelihood of success on its veil piercing claim by showing that defendants used a variety of corporate entities and accounts to collect and disburse money to themselves and the various corporate entities without consideration or corporate formalities, and that they used this web of payments to keep the judgment debtor corporation in business but grossly undercapitalized by paying its debts without putting any funds into it (*see Shisgal v Brown*, 21 AD3d 845, 848

[1st Dept 2005]).

Contrary to defendants' contention, this case is not like *Timur on 5th Ave. v Jim, Jack & Joe Realty Corp.* (Sup Ct, NY County, Sept. 6, 2001, Cahn, J., index No. 603233/2000, *affd* 302 AD2d 223 [1st Dept 2003]). In that case, there was no allegation of deceit or wrongdoing. Indeed, there, the defendants did nothing more than take out a lease through a holding company, which the plaintiff knew was an operating company with no assets. Here, in contrast, defendants are alleged to have thwarted the bargain plaintiff made with the corporate judgment debtor by consistently starving the debtor of cash and capitalization.

While an undertaking is required for an attachment (CPLR 6201; 6212[b]), since a motion to set the undertaking on the attachment is currently before the motion court, we leave it with the court to set the undertaking in the first instance.

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

2004N In re People of the State of New York, Respondent, Ind. 30222/15

-against-

Conrado Juarez,
Defendant,

Frances Robles,
Nonparty Appellant.

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The Reporters Committee for Freedom of the Press and 57 Media Organizations,
Amici Curiae.

_____

Levine Sullivan Koch & Schulz, LLP, New York (Katherine M. Bolger of counsel), for appellant.

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

Baker & Hostetler LLP, Washington, D.C., (Mark I. Bailen of counsel), for amici curiae.

_____

Order, Supreme Court, New York County (Bonnie Wittner, J.), entered on or about August 4, 2016, which denied nonparty appellant's motions to quash subpoenas requiring her testimony and the production of notes relating to her jailhouse interview of the defendant in the underlying criminal proceeding, unanimously reversed, on the law, without costs, and the motions granted.

In July 1991, the body of an unidentified four-year-old

girl, "Baby Hope," was found in a picnic cooler near the Henry Hudson Parkway. A medical examination of the body showed that the girl had been sexually assaulted and suffocated. In 2013, investigative leads led law enforcement to interview the defendant in the underlying criminal proceeding, a cousin of the dead girl. During the videotaped interview, the defendant initially told the police that he did not kill the girl but helped his (since deceased) sister dispose of the body. Later in the interview, however, the defendant reversed course and admitted that he had suffocated the girl with a pillow during a sexual encounter. Based on this evidence, in October 2013, the defendant was arrested and charged with one count of murder in the second degree.

On October 16, 2013, several days after the defendant was arraigned on the murder charge, nonparty appellant (Robles), a Florida-based reporter, interviewed the defendant at Rikers Island. The following day, the New York Times published an article written by Robles based on the interview, titled, "Suspect Recalls the Short Life of 'Baby Hope.'" As reflected in the article, during his jailhouse interview with Robles, the defendant repeated many of the details he had given to law enforcement regarding his relationship with the child and his help in disposing of her body in the cooler, but he claimed that

his confession to killing her was false and had been coerced.

The People served subpoenas on Robles requiring her to testify about her interview with the defendant and to turn over her interview notes for an in camera review by the court. After granting Robles's motions to quash the subpoenas in connection with a *Huntley* hearing, the court denied the motions to quash in connection with the underlying criminal trial, and ordered Robles to testify at the trial and to provide her interview notes for an in camera inspection.

We reverse. In *People v Bonie* (141 AD3d 401 [1st Dept 2016], *lv dismissed* 28 NY3d 956 [2016]), a murder case based on circumstantial evidence, we found that the outtakes of an interview of the defendant taken at a detention center in which he discussed, inter alia, the charges against him and his relationship with the victim were "'critical or necessary' to the People's effort to prove motive, intent, and consciousness of guilt, since they contradict[ed] defendant's earlier statements to police" (141 AD3d at 404). In contrast, in this case, the People have a videotaped confession by the defendant that has been found admissible at trial and that includes statements consistent with other evidence in the case. Under the circumstances, and in keeping with "the consistent tradition in this State of providing the broadest possible protection to 'the

sensitive role of gathering and disseminating news of public events'" (*O'Neill v Oakgrove Constr.*, 71 NY2d 521, 527 [1988]), we find that the People have not made a "clear and specific showing" that the disclosure sought from Robles (her testimony and interview notes) is "critical or necessary" to the People's proof of a material issue so as to overcome the qualified protection for the journalist's nonconfidential material (Civil Rights Law § 79-h[c]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

2005 In re Alpheaus Marcus, Index 65/16
[M-4187] Petitioner,

-against-

Hon. Lori Sattler, etc., et al.,
Respondents.

_____

Alpheaus Marcus, petitioner pro se.

John W. McConnell, Office of Court Administration, New York (Lee Alan Adlerstein of counsel), for Hon. Lori Sattler, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: OCTOBER 20, 2016

CLERK

Acosta, J.P., Renwick, Saxe, Feinman, Kahn, JJ.

2030 77 Hudson, LLC, Index 157867/15
Plaintiff-Appellant,

-against-

Susan Lawrence,
Defendant-Respondent.

_____

Duane Morris LLP, New York (Amy C. Gross of counsel), for appellant.

The Law offices of Jack L. Lester, New York (Jack L. Lester of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered April 18, 2016, which denied plaintiff's motion for summary judgment seeking return of its deposit for the purchase of defendant's condominium, unanimously affirmed.

The record presents numerous triable issues of facts with respect to whether the contract required that the HVAC permit be "signed off" on by the Department of Buildings before certain renovations could be considered completed, whether buyer waived any delays caused by the bathroom renovations, by agreeing to adjournments of the closing date (*see Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 590 [1st Dept 1992], *lv denied* 80 NY2d 754 [1992]), whether buyer was ready, willing and able to close on any of the dates, and whether the email correspondence between the parties sufficiently put seller on

notice of a definitive closing date and that failure to close on that date would result in an event of default and termination of the contract (*Westreich v Bosler*, 106 AD3d 569, 569-570 [1st Dept 2013]).

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

ENTERED: OCTOBER 20, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1352-
1353 Index 652680/14

Skanska USA Building Inc.,
Plaintiff-Appellant-Respondent,

-against-

Atlantic Yards B2 Owner, LLC, et al.,
Defendants-Respondents-Appellants,

ABC Companies, LLC, et al.,
Defendants.

- - - - -

Associated General Contractors of NYS, LLC,
Amicus Curiae.

_____

Peckar & Abramson, P.C., New York (Bruce D. Meller of counsel), for appellant-respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Harold P. Weinberger of counsel), and Troutman Sanders LLP, New York (Lee W. Stremba, of counsel), for respondents-appellants.

Couch White, LLP, Albany (Joel M. Howard, III of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 20, 2015, modified, on the law, to deny defendants Atlantic Yards B2 Owner, LLC and Forest City Ratner Companies, LLC's motion to dismiss subpart (h) of the first cause of action and to grant their motion to dismiss the third cause of action, and otherwise affirmed, without costs.

Opinion by Acosta, J.P. All concur except Gische and Kahn, JJ. who dissent in part in an Opinion by Gische, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
David B. Saxe
Judith J. Gische
Troy K. Webber
Marcy L. Kahn, JJ.

1352-1353
Index 652680/14

_____x

Skanska USA Building Inc.,
Plaintiff-Appellant-Respondent,

-against-

Atlantic Yards B2 Owner, LLC, et al.,
Defendants-Respondents-Appellants,

ABC Companies, LLC, et al.,
Defendants.

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Associated General Contractors of NYS, LLC,
Amicus Curiae.
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Cross appeals from the order of the Supreme Court, New York Country (Saliann Scarpulla, J.), entered July 20, 2015, which, insofar as appealed from as limited by the briefs, granted defendants-respondents' motion to dismiss subparts (f) and (h) of the first cause of action and denied the motion as to subparts (a), (b), and (c) of that cause of action and as to the third cause of action, and denied plaintiff's motion to disqualify the law firm of Troutman Sanders LLP as defendants' attorneys.

Peckar & Abramson, P.C., New York (Bruce D. Meller and Peter E. Moran of counsel), for appellant-respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Harold P. Weinberger, Nathan M. Hammeerman and Kaavya Viswanathan of counsel), and Troutman Sanders LLP, New York (Lee W. Stremba, Aaron Abraham and Kevin P. Wallace of counsel), for respondents-appellants.

Couch White, LLP, Albany (Jennifer K. Harvey and Joel M. Howard, III of counsel), for amicus curiae.

ACOSTA, J.P.

This case gives us the opportunity to interpret the language of Lien Law § 5, which provides that a private developer on public land must post a bond or other undertaking guaranteeing prompt payment to the contractor. We also address piercing the corporate veil in litigation involving sophisticated entities, as well as several breach of contract claims and attorney disqualification. These issues arose in the context of construction litigation between plaintiff and its affiliates, an international construction conglomerate, and defendants Atlantic Yards B2 Owner LLC (B2 Owner) and Forest City Ratner Companies, LLC (Forest City) and their affiliates, the developers of the Atlantic Yards project in Brooklyn. Specifically, the litigation revolved around the construction of a high-rise residential tower called "B2." B2 was to be built using innovative prefabricated modular units developed by defendant Forest City that would then be stacked together by plaintiff to form the high-rise. For the reasons stated below, we decline to adopt plaintiff's interpretation that Lien Law § 5 is satisfied by the posting of a bond only and not a guarantee as was done here. We also find that plaintiff failed to plead a veil-piercing claim. As the facts show, both parties were very sophisticated, and negotiated in minute detail all aspects of their agreements to build B2

using innovative technology. That the project failed does not lead to a veil-piercing claim, especially since plaintiff failed to identify the alleged fraud or other wrongdoing. We also reinstate the claim based on inadequate factory and labor, and decline to disqualify one of defendants' law firms based on a conflict of interest.

Background

In July 2006, the Empire State Development Corporation (ESDC), a state actor, adopted a plan for the Atlantic Yards Land Use Improvement and Civil Project, a 22-acre mixed-use development project in Brooklyn, to be anchored by the Barclay Center sports arena. As part of this project, in March 2010, ESDC entered into an interim lease agreement with AYDC Interim Developer, LLC, an entity affiliated with defendant B2 Owner, for construction of a number of buildings near the Barclays Center sports arena.

One of these buildings, the B2 Residential Project (B2 Building), was a proposed 34-story residential building containing 350 units. The B2 Building was to be erected with innovative modular construction, i.e., assembled pre-manufactured modular units. The modular construction concept was based on proprietary technology and design developed by defendant Forest City, also an affiliate of B2 Owner.

Forest City invited plaintiff, an international construction conglomerate, to participate in establishing a factory to construct the modules near the B2 site, and then to assemble the modules into the B2 Building. In June 2012, plaintiff and FCRC Modular, LLC (a Forest City affiliate) entered into a "Contract for Module Fabrication and Testing Services" (the Testing Agreement). The Testing Agreement contemplated a joint effort by plaintiff and the Forest City entities to build and test the modular units to be used in the B2 Building, with the goal of entering into a joint venture for construction of a full-blown modular factory facility.

On October 31, 2012, affiliates of plaintiff and Forest City executed three agreements in furtherance of the B2 Project. FCRC Modular, Skanska Modular, LLC (a daughter company of plaintiff), together with (as to certain portions) plaintiff and B2 Owner, entered into an "LLC Agreement" establishing FC+Skanska Modular, LLC (FC Skanska), to build and operate the modular factory. The LLC Agreement was, in sum, a joint venture among the parties, wherein Forest City affiliates supplied the modular unit intellectual property (including the fruits of the Testing Agreement), plus some capital, and plaintiff's affiliates supplied capital and construction know-how. The LLC Agreement made Skanska Modular the managing member for purposes of day-to-

day operations.

On the same day, FCRC Modular, Skanska Modular, and FC Skanska entered into an "Intellectual Property Transfer and Development Agreement" (IP Transfer Agreement), which conveyed the modular IP and fruits of the Testing Agreement to FC Skanska.

Finally, also on October 31, 2012, plaintiff and B2 Owner entered into a "Construction Management and Fabrication Services Agreement" (the CM Agreement). The CM Agreement provided for plaintiff to enter into a subcontract with FC Skanska, under which FC Skanska would supply the modular units and plaintiff would effect the assembly, in exchange for a contract price of $116,875,078.

Among its other provisions, the CM Agreement called for the B2 Project to be substantially completed 416 business days after B2 Owner issued a "Notice to Proceed." In the CM Agreement, plaintiff represented that it had conducted due diligence and had no reason to believe that the modular design was inadequate or would not permit construction as provided for in the CM Agreement. On the other hand, the CM Agreement recited that plaintiff could "rely upon and use" in its performance "information supplied to it by or on behalf of [B2] Owner and its [a]ffiliates." The CM Agreement further stated that plaintiff was "not responsible for defects and/or deficiencies in the Work

attributable to [its] reliance upon any such information that is incorrect, inaccurate or incomplete," and provided further that plaintiff would "notify [B2] Owner promptly of any inaccuracies in such information . . . so as to minimize potential delays."

The CM Agreement contemplated changes to the schedule for "Force Majeure Event[s]," "Owner-Caused Event[s]," and "Contractor-Caused Delay[s]." Plaintiff was entitled to extensions of time for Force Majeure and Owner-Caused Events, but only if it gave written notice within five days of its actual knowledge of the event, followed by a second notice within 45 days after the end of the event (or the initial notice). Moreover, time extensions were only available for events that "adversely impact[ed] activities on the critical path" of the construction schedule. The CM Agreement similarly provided for plaintiff to receive additional payment for Force Majeure or Owner-Caused Events if it gave timely notice.

B2 Owner could also request or direct changes in the scope of work. Either plaintiff or B2 Owner could terminate the CM Agreement for cause. B2 Owner could also terminate the CM Agreement for convenience. B2 Owner issued the Notice to Proceed on December 14, effective December 21, 2012. The deadline for substantial completion was July 25, 2014.

By a 146-page letter dated August 8, 2014, plaintiff gave B2

Owner notice of its intent to terminate the CM Agreement on account of dozens of alleged Force Majeure and Owner-Caused Events and other breaches. The letter specified 12 alleged periods of delay, each lasting between one week and as much as five months. Plaintiff attributed the delays to delays in the factory fit-out (i.e., the time to get the modular factory up and running); defects in Forest City's modular unit design technology; related negligence and failure to cooperate by B2 Owner's design professionals; and improper changes to the scope of work made by B2 Owner without the requisite change orders. Plaintiff also alleged that Forest City had breached the CM Agreement's requirement that it provide evidence of satisfactory financing for the project by, among other things, failing to post a bond required by Lien Law § 5. Plaintiff alleged that it had suffered damages in excess of $50 million.

On August 27, 2014, plaintiff stopped work on the project and shortly thereafter notified B2 Owner that the CM Agreement was terminated.

Complaint & Dismissal Motion

Plaintiff commenced this action asserting causes of action for breach of the CM Agreement. It claimed that defendants had breached the CM Agreement by, among other things, providing a defective design for the project, including an inadequately

designed modular factory facility with inadequate labor, changing the project scope without issuing change orders, and failing to provide adequate security as required by the Lien Law. Plaintiff also asserted a cause of action alleging that B2 Owner was a mere alter ego of Forest City, and seeking to pierce Forest City's corporate veil. Plaintiff sought damages of at least $30 million.

Defendants moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the veil-piercing cause of action, as well as certain parts of plaintiff's breach of contract claims, including the claims that defendants violated Lien Law § 5, supplied a defectively designed modular factory and inadequate factory labor, and changed the project scope without appropriate change orders.

Plaintiff opposed the motion and cross-moved pursuant to CPLR 3211(c) for partial summary judgment on the issue of defendants' liability on the Lien Law § 5 claim.

Attorney Disqualification Motion

Plaintiff also moved to disqualify the law firm Troutman Sanders LLP (Troutman) as defendants' attorneys, on the ground of conflict of interest, inasmuch as Troutman represented two of plaintiff's affiliates in matters in Maryland and Florida. Plaintiff added that Troutman's representation of Forest City was

adverse to the interests of one of its affiliate's directors, who was a named defendant in a related action in Supreme Court, New York County, brought by FCRC Modular.

Court's Decision on the Motion

The motion court dismissed subpart (f) of the first cause of action, which alleges that defendants breached the CM Agreement by failing to post a bond required under Lien Law § 5, and subpart (h), which alleges breach of the CM Agreement based on an inadequate factory and inadequate labor.

The motion court denied defendants' motion to dismiss subparts (a) and (b) of the first cause of action, which alleges breach of contract due to design defects, as well as subpart (c), which alleges breach of the parties' CM Agreement by improperly changing the scope of work. It also declined to dismiss the third cause of action, which seeks to pierce the corporate veil of defendants and their affiliates, and denied plaintiff's motion to disqualify Troutman.

Analysis

Lien Law § 5

Plaintiff argues that the text and legislative history of Lien Law § 5 demonstrate that Forest City Ratner Companies, LLC (FCRC) was required to post a bond to guarantee B2 Owner's performance under the CM Agreement. We disagree. Far from

supporting plaintiff's argument, the statute's legislative history indicates that no bond — as opposed to some other sort of "undertaking," such as a guarantee — was required to be posted here.

Lien Law § 5, entitled "Liens under contracts for public improvements," provides, in relevant part:

> "Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of *the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys* due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement" (emphasis added).

The statute dates back to the former Lien Law of 1897. Prior to 2004, the statute left a "gap," in that contractors working on projects being built by private developers, with private funds, but on public land, could not file liens against the public land or the private entity's leasehold interest (*see Matter of Paerdegat Boat & Racquet Club v Zarrelli*, 57 NY2d 966 [1982], *revg for reasons stated at* 83 AD2d 444, 449-452 [2d Dept 1981] [Hopkins, J., concurring in part, dissenting in part]; *Plattsburgh Quarries v Markoff*, 164 AD2d 30, 32 [3d Dept 1990],

lv denied 77 NY2d 809 [1991]).

In 2004, the legislature acted to fill this gap by enacting the language highlighted above. This provides for the public owner, in the case of large private development projects on public land, to "require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor . . . in the prosecution of the work on the public improvement" (L 2004, ch 155, § 1).

The crux of plaintiff's position is that the guarantee provided in this case does not comply with the law because it is not equivalent to a bond or "other form of undertaking" under the statute.

A statute, however, is to be construed so as to give meaning to each word (*see* McKinney's Statutes § 231). Black's Law Dictionary defines an "undertaking" first as "[a] promise, pledge, or engagement," and second as "[a] bail bond" (Black's Law Dictionary 1665 [9th ed 2009]). Similarly, the CPLR defines "Undertaking" first as "[a]ny obligation, whether or not the principal is a party thereto, which contains a covenant by a surety to pay the required amount, as specified therein, if any required condition . . . is not fulfilled" (CPLR 2501[1]). Hence, an "undertaking," as distinct from a "bond," is simply a

"formal promise [or] guarantee" (Black's Law Dictionary 1665 [9th ed 2009]).

That the legislature intended the term "undertaking" in Lien Law § 5 to mean a "guarantee" is strongly supported by the statute's legislative history, which indicates that the Governor vetoed an earlier version of the 2004 amendment that added the above quoted language because the earlier version would have required the posting of a bond in every instance, disallowing "other forms of security designed to guarantee payment" (Letter from Assembly sponsor, July 8, 2004, Bill Jacket, L 2004, ch 155 at 5). The senate sponsor of the amendment clarified that the phrase "or some other form of undertaking" was added to meet the Governor's concerns by providing "an alternative to posting a bond" (Letter from Assembly sponsor, July 15, 2004, Bill Jacket, L 2004, ch 155 at 3).

As defendants point out, ESDC met its obligations under the statute by causing a Forest City affiliate — Forest City Enterprises, Inc. — to issue a formal "Guaranty" that B2 Owner would "cause Substantial Completion of the Improvements and perform the Development Work," including "*to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work, including, but not limited to, the costs of constructing*,

equipping and furnishing the Guaranteed Work" (emphasis added). This guarantee follows the letter of the statute, namely "guaranteeing prompt payment" to contractors. That there are better guarantees available, such as a letter of credit, as the dissent notes, is beside the point. ESDC, as the public owner, was satisfied with the guarantee issued by Forest City Enterprises, Inc. Certainly, if the legislature had wanted the guarantee to be on par with a letter of credit it could have said that or identified the various types of guarantees that would satisfy the statute.

Since plaintiff is seeking only to force defendants to post a bond under Lien Law § 5, we need not decide whether it would have standing to enforce the guaranty as against Forest City Enterprises, as a third-party beneficiary.

Breach of Contract

Factory Facility and Labor

The motion court erred in dismissing subpart (h) of the first cause of action, which alleges breach of the CM Agreement based on an inadequate factory and inadequate labor. Plaintiff plausibly argues that the CM Agreement, particularly when viewed together with the parties' related and contemporaneously executed LLC and IP Transfer Agreements (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1st Dept 1985]), required B2 Owner to

ensure that an adequate modular factory and factory labor force were in place before it issued the Notice to Proceed. Thus, the allegations that the factory and labor force were inadequate, causing project delays, adequately state a claim for breach of the CM Agreement.

Modular Unit Design Defects

The motion court upheld the claim that defendants breached the CM Agreement by providing defectively designed modular unit technology. Defendants argue that this claim is refuted by documentary evidence. Defendants' argument lacks merit.

CM Agreement § 5.4(b)(ii) defines an "Owner-Caused Event" as including "fault, neglect or other negligent or wrongful act or failure to act by [B2] Owner's . . . Design Professionals." The CM Agreement makes clear that defendants designed the modular unit technology. Indeed, B2 Owner expressly represented that its professionals designed the modules and they were "sufficient for completion of the Work." Plaintiff alleges that the modular units, designed by defendants or their agents, were defective. Plaintiff thereby states a claim for breach of the CM Agreement.

Defendants' main argument is that plaintiff failed to provide timely notice as required to assert a claim for design defect under section 3.5 of the LLC Agreement, i.e., by December 7, 2012. However, the parties appear to have contemplated that

such flaws could be identified after December 7, 2012. Indeed, while B2 Owner represented in the CM Agreement that the design was sufficient, it further agreed that any design defects would be "Owner-Caused Events." Certainly, there is tension between these provisions — as there is also with the disclaimers of warranties to which defendants point. However, such facial conflicts present questions of facts that are not suitable for resolution on this pre-answer motion to dismiss.

Changes to Scope of Work

The motion court upheld the claim that defendants breached the CM Agreement by changing the scope of work without issuing appropriate change orders. Defendants argue that plaintiff waived this claim by failing to comply with the CM Agreement's notice provisions governing change orders.

The parties agree that plaintiff's compliance with the change order notice provision was a condition precedent to the assertion of a claim for unauthorized changes in the scope of work. However, the CPLR does not require a party asserting a contract claim to plead compliance with a condition precedent (CPLR 3015[a]). Instead, it is incumbent upon the party resisting the contract claim to plead the failure to comply with the condition precedent (*id.*). Given defendants' failure to plead, the motion court correctly declined to dismiss the breach

of contract claims.

Piercing the Corporate Veil

Veil-piercing is a narrowly construed doctrine limiting "the accepted principles that a corporation exists independently of its owners . . . and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). The party seeking to pierce the corporate veil bears the heavy burden of "showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*id.* at 141; *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 [1st Dept 2005]).

Here, plaintiff sets forth conclusory allegations merely reciting typical veil piercing factors (*see e.g. Brainstorms Internet Mktg. v USA Networks,* 6 AD3d 318 [1st Dept 2004]). It does not allege any fraud or malfeasance to support its attempt to reach FCRC or other third-party defendants. It alleges breach of contract claims against B2, but "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil" (*Bonacasa Realty Co., LLC v*

Salvatore, 109 AD3d 946, 947 [2d Dept 2013]).

Far from alleging that FCRC used B2 Owner to perpetrate a fraud, plaintiff, a sophisticated party, admits that it knowingly entered into the CM Agreement with B2 Owner, an entity formed to construct the project. Nowhere in the complaint does plaintiff allege that it believed it was contracting with or had rights vis-à-vis FCRC or any entity other than B2 Owner. Indeed, plaintiff could have negotiated for such rights. Having failed to do so, plaintiff cannot now claim that it was tricked into contracting with B2 owner only and thus should be allowed to assert claims against FCRC (*see Spectra Sec. Software v MuniBEX.com, Inc.*, 307 AD2d 835, 835 [1st Dept 2003]; *Hillcrest Realty Co. v Gottlieb*, 208 AD2d 803, 805 [2d Dept 1994]; *see also Brunswick Corp. v Waxman*, 599 F2d 34, 36 [2d Cir 1979]). Thus, the veil-piercing claim should be dismissed.

Attorney Disqualification

A movant seeking disqualification of an opponent's counsel faces a heavy burden (*see Ullmann-Schneider v Lacher & Lovell-Taylor PC*, 110 AD3d 469 [1st Dept 2013]). A party has a right to be represented by counsel of its choice, and any restrictions on that right "must be carefully scrutinized" (*id.* at 469-470 [internal quotation marks omitted]). Courts should also examine whether a motion to disqualify, made in ongoing litigation, is

made for tactical purposes, so as to delay litigation and deprive an opponent of quality representation (*see Solow v Grace & Co.*, 83 NY2d 303, 310 [1994]). The decision whether to grant a motion to disqualify rests in the discretion of the motion court (*see Macy's Inc. v J.C. Penny Corp., Inc.* 107 AD3d 616 [1st Dept 2013]).

Skanska USA Civil Inc. (Skanska Civil) is a wholly owned subsidiary of Skanska USA Inc. Plaintiff is likewise a wholly owned subsidiary of Skanska USA. Skanska Civil holds entities which work in various regions of the United States, including Skanska USA Southeast Inc. (Skanska Southeast). Neither Skanska Southeast's Virginia litigation nor its Florida and Maryland transactional matters have any relationship to, or involve any of the same adverse parties as, the instant action. Nor does plaintiff allege that any of Troutman's Forest City litigation team members possesses any of plaintiff's confidential information, or that the ethical screen that Troutman has set up between its Forest City and Skanska attorneys is in any other way inadequate.

The motion court therefore providently exercised its discretion in denying plaintiff's motion to disqualify the law firm. Plaintiff has not shown that, standing alone, Troutman's representation of corporate affiliates of plaintiff and adversity

to one of the directors of one of plaintiff's affiliates creates a conflict of interest (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.7[a], 1.13[a]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered July 20, 2015, which, insofar as appealed from as limited by the briefs, granted the motion of defendants B2 Owner and Forest City to dismiss subparts (f) and (h) of the first cause of action and denied the motion to dismiss subparts (a), (b), and (c) of that cause of action and the third cause of action, and denied plaintiff's motion to disqualify the law firm of Troutman Sanders LLP as said defendants' attorneys, unanimously modified, on the law, to deny the motion to dismiss subpart (h) of the first cause of action, and to grant the motion to dismiss the third cause of action, and otherwise affirmed, without costs.

All concur except Gische and Kahn, JJ. who dissent in part in an Opinion by Gische, J.

GISCHE J. (dissenting in part)

While I am in agreement with most of the majority's decision, I depart with respect to its conclusion that defendants' Completion Guaranty is an appropriate undertaking that satisfies the requirements of Lien Law § 5. It is for this reason that I partially dissent and would reinstate subpart (f) of the first cause of action based upon defendants' alleged failure to post a bond or other undertaking as required by Lien Law § 5[1].

The Atlantic Yards Project[2] is a sprawling $4.9 billion mixed-use mega-development encompassing 22 acres of underdeveloped public land. The New York State Development Corp d/b/a Empire State Development Corp (ESDC), a public benefit corporation created by the State of New York, partnered with defendant Forest City Ratner Companies, LLC (FCRC), a private developer, to implement and effectuate this ambitious redevelopment program, which was partly funded by the City and the State of New York. This appeal only concerns that part of

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[1]I do not reach plaintiff's request for partial summary judgment because this appeal concerns only Supreme court's disposition on defendants' CPLR 3211 motion to dismiss. Plaintiff did not appeal Supreme Court's denial of its request for summary judgment treatment under CPLR 3211(c).

[2]The project has since been renamed and is now called Pacific Park, Brooklyn.

the project involving the construction of a modular residential building located at 461 Dean Street in Brooklyn, referred to as the B2 tower. Defendant Atlantic Yards B2 Owner, LLC (B2 Owner), is an FCRC affiliate, as are many of the other entities involved at various stages of this project. Despite its description as "owner," B2 Owner does not, in fact, own fee title to the land upon which B2 tower is built. The land, which is publicly owned, was ultimately triple net leased by ESDC, as landlord, to another FCRC affiliate, FC Atlantic Yards B2, as tenant (Development Lease). The Development Lease, which gave the tenant the right to develop the land, was assigned to B2 Owner.

Many details of the overarching improvement project are set forth in the March 4, 2010 "Development Agreement" (Development Agreement), among ESDC, Atlantic Yards Development Company, LLC (AYDC), Brooklyn Arena, LLC, and AYDC Interim Developer, LLC (Interim Developer), an affiliate of B2 Owner. Plaintiff (Skanska) is not a party to this Development Agreement. One goal of the project was to have four towers built using modular units, because modular construction was believed to be an easier, faster, and more economical way to build than conventional construction. The B2 tower, now completed, is, at 32 stories

tall, reportedly the world's tallest modular building.[3] Ultimately, it was the only tower at the project erected by modular construction.

Pursuant to a "Construction Management and Fabrication Services Agreement" (Construction Agreement) dated October 31, 2012, between B2 Owner and Skanska, it was agreed that Skanska would be responsible for the fabrication, delivery and erection of the modules; Skanska was also to perform and provide the attendant construction and construction management services necessary to erect the tower. There is no express requirement that B2 Owner comply with the Lien Law, although there is a general requirement that the parties comply with New York law. To further effectuate the terms of the Construction Agreement, FCRC and Skanska (and/or their respective affiliates) entered into a series of additional agreements. In one agreement, the parties joined forces to establish a new company, FC+Skanska Modular, LLC (FC+S). In a second agreement, the intellectual property of fabricating the modules, which belonged to FCRC, was transferred to FC+S. Skanska also executed another agreement, a subcontract with FC+S, making it the sole source subcontractor for fabrication of the modular units. The fabrication would take

[3]http://www.designboom.com/architecture/shop-architects-461-dean-street-pacific-park-brooklyn-new-york-05-15-2016, accessed September 27, 2016

place offsite at a factory leased by FCRC; Skanska would then transport, deliver and stack them using cranes to form the tower.

Skanska is not a party to the Development Lease that was subsequently entered into as of December 14, 2012. The Development Lease expressly required the tenant, which had the rights of development, to comply with Lien Law § 5. It also expressly required that FCRC provide ESDC with a guaranty, which was made as of May 13, 2013 (Completion Guaranty).[4] The Completion Guaranty was a condition precedent to the commencement of work. In addition to guaranteeing completion of the work, FCRC also guaranteed that it would "use any and all amounts disbursed from time to time by the Construction Lender, solely to fully and punctually pay and discharge any and all costs, expenses and liabilities incurred for or in connection with the Guaranteed Work . . . . "

Additionally, FCRC guaranteed that

> "the Guaranteed Work shall be and remain free and clear of all liens, encumbrances, claims, chattel mortgages, conditional bills of sale and other charges of any and all persons, firms, corporations or other entities furnishing materials, labor or services in constructing or completing the Guaranteed Work, provided that the

[4]There is also a December 14, 2012 "Completion Guaranty" by FCRC in favor of the Bank of New York Mellon, the bank that extended almost $93 million in credit. The parties primarily direct their argument to the May 13, 2013 guaranty, referring to it as the "Completion Guaranty," which nomenclature I adopt in this dissent.

> Guarantor's obligations . . . shall be limited solely to the extent Tenant or Guarantor shall have received a disbursement from the Construction Lender or otherwise, for the payment of such materials, labor or services"

The B2 tower was beset with production problems from the outset, and the deadline that had been set for its substantial completion (July 25, 2014) was not met, with each party blaming the other. In December 2013, FCRC announced that it was abandoning modular construction and that the next scheduled residential tower (B3) would be built using conventional construction methods. In August 2014, Skanska notified B2 Owner that B2 Owner had breached the Construction Agreement in numerous specific ways, demanding that the breaches be cured or it would stop working on the tower and terminate the contract. Unable to settle their differences, this and other related litigation ensued.

Insofar as the Lien Law claim is concerned, the motion court's basis for dismissal was that there is no provision in the Construction Agreement expressly requiring defendants' compliance with the requirements of the Lien Law. In reaching the question of whether the Completion Guaranty satisfies Lien Law § 5, the majority implicitly accepts that the law applies to the parties' project, and I agree. This is a real estate development project involving publicly owned land improved by a private developer.

The express terms of the Construction Agreement provide that the project is governed by the laws of the State of New York. That includes the Lien Law (*see Dolman v United States Trust Co. of N.Y.*, 2 NY2d 110, 116 [1956]).

Defendants argue that even if Skanska can assert claims against them under Lien Law § 5, they are in compliance with the statute because, pursuant to the Development Lease, they provided ESDC with a Completion Guaranty. I disagree that the Completion Guaranty is a form of undertaking that satisfies the Lien Law. In general, the primary purpose of the Lien Law is to ensure that contractors, subcontractors, laborers and those who furnish materials in connection with the improvement of real property are promptly paid. Because the statute is remedial in nature, it is to be construed liberally to secure the beneficial interests and purposes thereof (Lien Law § 23). It is intended to protect financially those who have directly expended labor and materials to improve real property at the direction of a general contractor or owner of a construction project (*West-Fair Elec. Contrs. v Aetna Cas. & Sur. Co.*, 87 NY2d 148, 157 [1995]). Although, depending upon whether the improvement is made to public or private land, the Lien Law provides for different means of protection, the objective of making sure that protected parties are promptly paid is the same.

A private improvement is any improvement of real property not belonging to the state or a public corporation, whereas a public improvement is an improvement of any real property belonging to the state or a public corporation (Lien Law § 2[7],[8]). If the improvement is made to private property, a mechanic's lien for the amount owed to the protected party may be filed upon the property improved, affecting the owner's right, title and interest in that real property. A mechanic's lien cannot, however, be filed against improved publicly owned land (*see Albany County Indus. Dev. Agency v Gastinger Ries Walker Architects*, 144 AD2d 891, 892 [3d Dept 1988], *appeal dismissed* 73 NY2d 1010 [1989], *lv denied* 74 NY2d 605 [1989]*; Matter of Paerdegat Boat & Racquet Club v Zarrelli*, 83 AD2d 444 [2d Dept 1981], *revd* 57 NY2d 966 [1982] [for the reasons stated in the concurring in part and dissenting in part opinion by former Justice James D. Hopkins at the Appellate Division 83 AD2d 444, 449-452]). Instead, pursuant to Lien Law § 5, a protected party owed monies for improving public property may file a lien that attaches to the monies of the state or public corporation funding applicable to the improvement (Lien Law § 5; *Matter of Paerdegat*, 57 NY2d at 968, citing 83 AD2d at 449-452).

There are, however, situations where a protected party provides labor, or materials, etc., to a private entity that is

improving publicly owned land for the benefit of the private entity. In those situations, a protected party is still not entitled to file a mechanic's lien against the public property, notwithstanding that the benefits inure to a private entity (*Matter of Paerdegat Boat*, 57 NY2d at 968, *citing* 83 AD2d at 449-452). Nor can the protected party attach any public funds applicable to the improvement, because no state or public corporation funding for the project has been established. In order to address this gap in protection, Lien Law § 5 was amended in 2004 to provide the following:

> "Where no public fund has been established for the financing to a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of the moneys due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement."

The allegations in the complaint implicate the type of hybrid public/private improvement project contemplated by the 2004 Lien Law amendment, because a private entity has leased property from a public corporation, and constructed a tower. Although the parties disagree about whether the beneficial interest inures to the benefit of the public or the private

entity, there are facts alleged supporting Skanska's claim that this is a hybrid improvement project primarily inuring to FCRC's benefit (*see Davidson Pipe Supply Co. v Wyoming County Indus. Dev. Agency*, 85 NY2d 281 [1995]).[5] Thus, under the facts pleaded, Lien Law § 5's requirements in situations where there is no public fund apply, thereby obligating the public owner to require the private entity to "post, or cause to be posted, a bond or other form of undertaking."

Defendants argue that even if Lien Law § 5 applies to this project, ESDC can accept some form of security other than a bond. Furthermore, they maintain that the nature and extent of the security is completely within the discretion of the public owner, claiming that in this case ESDC could have, had it wanted to, simply accepted the private developer's representations of creditworthiness as a satisfactory undertaking. Defendants maintain that FCRC's Completion Guaranty is, therefore, an acceptable and suitable "other form of undertaking," within ESDC's exercise of discretion.

B2 Owner is correct that Lien Law § 5 does not exclusively require the filing of a bond as security in these circumstances,

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[5]Unlike *Davidson*, which involved a public agency that had only temporary status as an intermediary owner solely for tax purposes, here the land upon which B2 tower was constructed is still publicly owned (*Davidson,* 85 NY2d at 286).

because the express statutory language permits another form of undertaking. Not just any form of alternative security, however, will suffice. In order to achieve the objective of the Lien Law, and consistent with the legislative history of the amendment, any alternative undertaking must provide substantially equivalent protection to that provided by a bond. The alternative undertaking should be a financial arrangement that would afford an unpaid contractor, subcontractor, laborer, or provider of materials, a fund of money, or an asset, available for predictable and prompt payment. An identifiable fund of money, or a bond, or a lien against real property, are Lien Law remedies available in other contexts where services and materials are provided but not paid for, each having characteristics of ready availability.

A letter of credit, the alternative undertaking contemplated by Governor Pataki when the 2004 amendment was passed, would also fulfill these requirements. In vetoing an earlier bill to amend Lien Law § 5, Governor Pataki recommended that any new proposal should allow the public owner to require the private entity to "post" another form of undertaking, specifically suggesting a letter of credit as one possible alternative (New York State Legislative Annual 2004, Governor's Veto Message #1, Posting of

Payment Bonds, A 5805, L 2003 [Tocci], p475).[6] A letter of credit is an obligation undertaken by a bank to make a payment if the beneficiary fails to obtain direct payment from the applicant obtaining the letter of credit (*Nissho Iwai Europe PLC v Korea First* Banks 99 NY2d 115, 120 [2002], citing *Federal Deposit Ins. Corp. v Philadelphia Gear Corp.*, 476 US 426, 428 [1986]; *see also BasicNet S.p.A.*, 127 AD3d 157 [1st Dept 2015]). "[T]he issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the . . . contract and separate as well from any obligation of the issuer to its customer under their agreement" (*BasicNet S.p.A.*, 127 AD3d at 167). Thus, a letter of credit is "superior to a normal surety bond or guaranty because the issuer is primarily liable and is precluded from asserting defenses that an ordinary guarantor could assert" (*id.*).

The Completion Guaranty that FCRC provided in this case was a requirement of the lease and a condition precedent to commencing the work. It guarantees that B2 Owner will

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[6] In an internal memorandum dated July 20, 2004, sent by Governor Pataki's deputy counsel to the governor's counsel, reference is made to the governor's prior veto, because the prior bill "did not provide for security interests other than performance bonds (such as letters of credit)"(*see* Bill Jacket S.595 A).

substantially complete the project and apply money disbursed by its lender to do the work. Although the Completion Guaranty generically states that the work will be kept "free . . . of liens," it is unclear how a mechanic's lien could be filed against the property, given its public nature, because "real property owned by a public corporation is immune to mechanic's liens" (*Albany County Indus. Dev. Agency v Gastinger Ries Walker Architects*, 144 AD2d at 892). A completion guaranty such as FCRC's merely "guarantees the completion of a project (usually a construction project) should the borrower be unable to do so" (*Turnberry Residential Ltd. Partner, L.P. v Wilmington Trust FSB*, 99 AD3d 176, 177 [2012], *lv denied* 20 NY3d 859 [2013]).

The Completion Guaranty is not the functional equivalent of a bond or other form of undertaking, because it is no more than FCRC's contractual promise to complete the project and pay its account, which, if not honored, requires a lawsuit to secure a judgment and a collection process to obtain satisfaction (*see Crown Tire Co. v Tire Assoc. of Fairport*, 177 AD2d 974 [4th Dept 1991]). Moreover, recovery is dependent upon a guarantor's particular financial circumstances at the time a protected party is in need of the remedies that the Lien Law provides. This is hardly the streamlined and predictable process Lien Law § 5 calls for in "guaranteeing prompt payment of the moneys due to the

contractor . . . in the prosecution of the work on the public improvement" where there are no public funds. Nor is it an identifiable fund or asset on which a protected party can draw down payment. In other words, contractors and subcontractors on hybrid construction projects would be in a worse position in terms of a remedy than their private and public improvement counterparts, eviscerating the underlying purpose of the 2004 amendment. While I agree with the majority that it is permissible under Lien Law § 5 for FCRC to satisfy its obligations by means other than a bond, the Completion Guarantee FCRC provided does not fulfill that obligation. I would, therefore, modify the order to deny dismissal of subpart (f) of the first cause of action.

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

ENTERED: OCTOBER 20, 2016

CLERK