SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**APRIL 6, 2017**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2260-
2261 Index 312561/13

Deborah Keller-Goldman,
Plaintiff-Respondent,

-against-

Jacob Goldman,
Defendant-Appellant.

_____

Kanfer & Holtzer, New York (Mark M. Holtzer of counsel), for appellant.

Martin Friedlander, PC, New York (Martin E. Friedlander of counsel), for respondent.

_____

Judgment of divorce, Supreme Court, New York County (Matthew F. Cooper, J.), entered October 15, 2015, to the extent appealed from, adhering to the court's interpretation that there was a cap on the "room and board" credit provision of the parties' Stipulation of Settlement and Agreement in its August 19, 2015 order, affirmed, without costs. Appeal from order, same court and Justice, entered August 19, 2015, which granted plaintiff's motion to the extent of interpreting the parties' agreement as

providing a cap on defendant's credit against his child support obligations, dismissed, without costs, as subsumed in the appeal from the judgment.

The parties entered into a Stipulation of Settlement and Agreement (the agreement) that resolved all issues surrounding their separation. Although they had four unemancipated children, the agreement only provided for support for the three children for whom plaintiff mother was the custodial parent. Defendant father retained custody of the fourth child, but agreed to receive no support for him from the mother. Had the parties not negotiated the issue of child support, the mother stood to collect $5,000 per month in child support payments, pursuant to the Child Support Standards Act, a fact acknowledged by the agreement. Instead, she agreed to monthly child support payments of $2,500.

Paragraph 10.3 of the agreement provided for a graduated reduction in the father's child support payments upon the emancipation of the three children, to wit: upon the first emancipation his monthly payment would be reduced to $2,150 per month; and upon the second emancipation the payment would be reduced to $1,462 per month. Attendance at college, the agreement's definition of which included a "gap year" at a

yeshiva or seminary in Israel, was not considered an emancipation event. However, the agreement did provide, in paragraph 10.4, immediately following the support reduction schedule:

> "During the period in which a Child is attending a college and residing away from the residences of the parties and [the father] is contributing towards the room and board expenses of that Child, [the father] shall be entitled to a credit against his child support obligations in an amount equal to the amount [the father] is paying for that Child's room and board. The credit shall be allocated in equal monthly installments against [the father's] child support payments."

At the time the agreement was negotiated and executed, the eldest of the three children in the mother's custody was attending a 10-month seminary program in Israel. The father, who was responsible under the agreement for the entire tuition and for room and board, paid approximately $12,000 for the latter expense. Relying on the language from paragraph 10.4 of the agreement, quoted above, the father, prior to a judgment of divorce having been entered, informed the mother that he was due a credit towards his total monthly child support obligation of $2,500, in the amount of approximately $1,200. The mother then moved by order to show cause for a declaration that the pending judgment include language making clear that any credit due the

father would be capped in accordance with the graduated emancipation reduction provided for in the immediately preceding paragraph 10.3 of the agreement. In other words, she interpreted that formula as defining the amount of child support due the particular child in question as $350 ($2,500 minus $2,150, the amount to be paid after emancipation of that child), and sought to limit the father's credit to that amount. She noted that under the father's construction of the agreement, he could, in theory, completely deprive one or two of her children of support if he paid enough in room and board for the other child or children that the credit would wipe out the obligation.

The father opposed the motion and cross-moved for, inter alia, an order awarding him expenses, costs and fees incurred in responding to the mother's motion. The father stressed that the court was required to enforce the plain language of the agreement, which, again, with respect to the child studying in Israel, granted him "a credit against his child support obligations in an amount equal to the amount [he] is paying for that Child's room and board." Since that amount was $1,200 a month, the father reasoned, he was entitled to a credit in that amount.

In oral argument on the motions, the court opined that, as a

matter of public policy, the agreement could not be enforced as written. It expressed deep concern with the possibility that one or two of the children could be deprived of any child support because the father was paying room and board for their sibling or siblings in an amount that exceeded the amount owed the mother. The court stressed the fact that the father was already enjoying a reduction in the presumptive support amount provided by the Child Support Standards Act. The court ultimately entered a judgment of divorce that clarified that the provision allowing the father a credit against his child support obligations is capped at the amount identical to the decrease in monthly child support when such child becomes emancipated.

A stipulation of settlement which, like the one at issue here, is incorporated but not merged into a judgment of divorce, is a contract subject to the ordinary principles of contract construction and interpretation (*see Matter of Meccico v Meccico*, 76 NY2d 822, 823-824 [1990]; *Rainbow v Swisher*, 72 NY2d 106 [1988]; *Kosnac v Kosnac*, 60 AD3d 636 [2d Dept 2009]). These rules provide that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. . . and courts may not by construction add or excise terms, nor distort the meaning of

those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Beinstein v Navani*, 131 AD3d 401, 405 [1st Dept 2015] [internal citations and quotation marks omitted]). In the specific realm of settlement agreements defining a parent's child support obligations, there is a presumption that the agreement reflects what the parties believed to be a fair and equitable division of the financial burden to be assumed in rearing the child (*see Matter of Trester v Trester*, 92 AD3d 949, 950 [2d Dept 2012]). However, this Court has articulated a very important caveat to that principle:

> "[T]he parties cannot contract away the duty of child support. Despite the fact that a separation agreement is entitled to the solemnity and obligation of a contract, when children's rights are involved the contract yields to the welfare of the children. The duty of a parent to support his or her child shall not be eliminated or diminished by the terms of a separation agreement, nor can it be abrogated by contract" (*Matter of Thomas B. v Lydia D.*, 69 AD3d 24, 30 [1st Dept 2009] [internal quotation marks and citations omitted]).

The agreement here violates this rule. The credit sought by the father takes away that portion of child support intended for the welfare of the other two children. Taken to its logical end, the agreement threatens to completely deprive the other children of any support whatsoever, if monthly room and board costs for

one child were to exceed $2,500. The dissent does not question the principle this Court enunciated in *Thomas B.*, which makes all but irrelevant the dissent's adherence to traditional canons of contractual interpretation. Neither *Matter of Brandt v Peirce* (132 AD3d 665 [2d Dept 2015]) nor *Schulman v Miller* (134 AD3d 616 [1st Dept 2015], *appeal dismissed* 27 NY3d 947 [2016]), both discussed by the dissent, deals with a situation where a child was threatened with a potential loss of support. Similarly, *Meshel v Meshel* (146 AD3d 595 [1st Dept 2017]) did not involve a result that conflicted with public policy.

*Thomas B.* is also instructive insofar as it demonstrates that it is appropriate for courts, in ensuring the fairness of child support provisions in divorce agreements, to look beyond the plain language chosen by the parties. In that case, the parties had stipulated that the father's obligation to support the child would terminate when the child turned 21 or was otherwise emancipated, defining "emancipation," unambiguously, as "engaging in fulltime employment" (69 AD3d at 25). The father sought to end his support payments when the child, in fulfilling a condition of a substance abuse recovery program, obtained a 35-hours-per-week job at a music store. The mother objected, and this Court agreed, relying on case law holding that, as a matter

of public policy, a child cannot be considered emancipated, regardless of how clearly and unambiguously the parties defined that term in an agreement, unless he or she is "economically independent," a finding that could be not be made based on the facts in *Thomas B.* (*id.* at 30).

As in *Thomas B.*, there is precedent to help us interpret the agreement here in a manner that is consistent with public policy. In *Lee v Lee* (18 AD3d 508 [2d Dept 2005]), in considering whether the father might have to at some future point have to pay the children's college expenses, the court stated:

> "[I]t is not the defendant's overall child support obligation, which in this case encompasses his duty to support four children, that might properly be reduced on account of his payment of 'college expenses' on behalf of one or more of those children; rather, the 'college expenses' paid on behalf of one particular child or on behalf of some particular children, could properly serve as a credit only with respect to so much of the defendant's overall child support obligation as it relates to such particular child or children" (18 AD3d at 512; *see Matter of Levy v Levy*, 52 AD3d 717, 718-719 [2d Dept 2008]).

It is irrelevant that *Lee* did not involve a negotiated settlement agreement. It is, however, in accordance with *Thomas B.*, completely appropriate to look to *Lee* as authority that establishes public policy concerning child support provisions

like the one at issue here, and to interpret the provision in a manner consistent with that public policy.

We recognize that Domestic Relations Law section 240(1-b)(h) permits parties to deviate by agreement from the basic child support obligation. However, that section also provides that the court shall retain discretion with respect to child support. That discretion unquestionably extends to invalidating those provisions in agreements that violate public policy, as the court did here. Further, we do not believe that enforcing a specific and narrow public policy, will, as the dissent fears, "create confusion, uncertainty, and even chaos."

Another reason why we agree with the wife's interpretation of the agreement is because, while it is important for a court to adhere to the plain language of an agreement in interpreting it, it is also true that "a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010] [internal quotation marks omitted]). The reasonable expectation of the parties when they executed the agreement, based on its plain language, was that the father would support each child individually until that child was emancipated.

This can be deduced from the fact that paragraph 10.3 of the agreement reduced the total support amount after the emancipation of the first, and then the second, child. Insofar as the credit provision is the one that immediately follows, it was reasonable for the mother to interpret that provision as making clear that attendance at college or a gap year program is effectively a "temporary emancipation," where no support payment is necessary for the child because the child is not a financial burden on the mother. At the same time, the credit provision prevents the mother from realizing a windfall by collecting child support for a child who, temporarily, is not a household expense. Reading the agreement this way, the two provisions can be understood as being in harmony with each other, which is a goal when construing any contract (*see Gessin Elec. Contrs. Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516, 518 [1st Dept 2010]). We are unaware of any rule of construction limiting the ability to harmonize two or more separate contraction clauses to instances where they explicitly cross-reference each other. Indeed, to interpret the credit provision as negating the child support promised for each child in the preceding provision would be an untenable

construction, and the absurd result we are admonished against producing.

All concur except Andrias and Gesmer, JJ. who dissent in a memorandum by Andrias, J. as follows:

ANDRIAS, J. (dissenting)

Supreme Court, under the guise of contract interpretation, read a nonexistent cap into section 10.4 of the parties' Stipulation of Settlement and Agreement, which, expressly gave defendant a credit against his overall child support obligations equal to the amount he paid for a child's room and board while away at an educational institution. A majority of this Court would affirm, finding that section 10.4 violates the rule that parties cannot contract away the duty of child support and that the reasonable expectation of the parties was that defendant would support each child until emancipated, not that he could use the room and board credit for one child to reduce or eliminate support for other children.

I do not agree. The parties negotiated a comprehensive settlement agreement under which they resolved all equitable distribution, custody, maintenance and support issues, with defendant, inter alia, assuming full responsibility for all tuition and education expenses and other statutory add-ons. Under these circumstances, enforcement of the room and board credit provision, pursuant to its unambiguous terms, does not run afoul of the public policy imperative with respect to child support. There is simply no basis for rewriting the parties'

comprehensive settlement agreement to the sole benefit of plaintiff. The majority's abrogation of the principles of contract interpretation will create confusion, uncertainty, and even chaos, as to the enforceability of settlements in the future, thereby undermining the strong public policy favoring the prompt and peaceful resolution of divorce disputes. Equally troubling is that the parties, during the negotiations and in the agreement, fully complied with the provisions of section 240(1-b)(h) of the Domestic Relations Law, which provides that "[n]othing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph." Therefore, I dissent.

The parties, represented by highly regarded and experienced counsel, entered into a 55-page Stipulation of Settlement and Agreement, dated December 31, 2014, which was allocuted by the court and "so ordered" on January 8, 2015 (the agreement). By its express terms, the agreement, which provided that it would survive any decree or judgment of separation or divorce and not merge therein, was intended to fully determine the parties'

respective financial and property rights, the care and custody of their unemancipated children, and all other respective rights, remedies, privileges and obligations to each other, arising out of the marriage.

Under the agreement, defendant was obligated to pay plaintiff $395,000 in equitable distribution and $1,500 per month in maintenance for five years, subject to specified contingencies. Section 8.5 of the agreement provided that the three older children would spend an equal amount of time with each parent. Nonetheless, the parties agreed in section 10.1 that defendant would pay basic child support to plaintiff in the sum of $2,500 per month for those three children (then 15, 17 and 18), for whom plaintiff was deemed the custodial parent. The parties also agreed in section 8.5 that the youngest child, then nine, would have primary custody with defendant. However, although defendant was deemed the custodial parent of that child, he waived any claims against plaintiff for child support.

Pursuant to section 10.3 of the agreement, defendant's basic support obligation for the children in plaintiff's custody would be reduced to $2,150 per month when one child becomes emancipated and $1,462 per month when a second child becomes emancipated, and would terminate when the third child becomes emancipated. During

the 5½-year period after the emancipation of the third child, plaintiff would not contribute at all to the support of the youngest child, who would continue to live primarily with defendant. Defendant was also obligated to pay 100% of the children's health insurance, unreimbursed medical and dental expenses, school tuition, summer camp tuition, tutoring and therapy, and college tuition (subject to a cap based on the tuition at SUNY Binghamton).

In negotiating the child support due plaintiff, the parties expressly agreed to deviate from the provisions of the Child Support Standards Act (CSSA) guidelines, as is expressly permitted under section 240(1-b)(h) of the Domestic Relations Law. To accomplish this, all of the required safeguards of § 240(1-b)(h) were strictly adhered to in the agreement. Section 10.9(n) informed the parties that the applicable child support due plaintiff for their three oldest children under the guidelines would have been $4,996.68 per month (which, absent the negotiated settlement, would have been offset by the amount of child support that plaintiff would have been obligated to pay defendant for the youngest child in defendant's custody). Section 10.9(n) also explained that the parties arrived at the agreed upon sum of $2,500 per month, after taking into

consideration numerous factors, including: (i) the financial resources of the parties; (ii) the children's needs; (iii) the standard of living the children would have enjoyed had the marriage or household not been dissolved; (iv) the tax consequences for the parties; (v) the nonmonetary cotributions that the parties would make toward the care and well-being of the children; (vi) defendant's custody of the parties' youngest child and his waiver of child support from plaintiff; (vii) defendant's agreement to pay 100% or the children's school expenses [which included basic tuition and other items regularly billed]; and (viii) the statutory add-on expenses defendant had agreed to pay pursuant to the agreement.

Section 10.4 of the agreement provided that

> "[d]uring the period in which a Child is attending a college and residing away from the residences of the parties and [defendant] is contributing towards the room and board expenses of that Child, [defendant] shall be entitled to a credit against his child support obligations in an amount equal to the amount [defendant] is paying for that Child's room and board. The credit shall be allocated in equal monthly installments against [defendant's] child support payments. For the purposes of this provision, 'college' includes any educational institution, wherever located, for which [defendant] is paying for a Child's room and board, including but not limited to the one-year post high school programs referenced in section 10.7(d) below."

Section 10.7(d) included "one (1) year of post-high school

yeshiva or seminary in Israel for each Child."

On or about April 9, 2015, before a judgment of divorce had been entered, plaintiff moved "[f]or the Court to clarify the issue of credit from room and board off child support" under the agreement. The application arose out of a dispute between the parties as to the credit that defendant was entitled to as a result of their eldest daughter's attendance at a seminary in Israel, for which defendant reported paying in excess of $12,000, which plaintiff does not dispute.

Plaintiff argued that defendant was not entitled to the dollar for dollar room and board credit he was claiming, and that the credit for a particular child was to be capped to the amount that child support was to be reduced in the event of that particular child's emancipation. Plaintiff posited that if defendant's position was adopted, he could potentially reduce his overall child support payments to nothing, even though she would still have children at home. Defendant opposed the motion and cross-moved for, inter alia, an order awarding him expenses, costs and fees incurred in responding to plaintiff's motion. Noting that their daughter was already attending seminary in Israel when the agreement was drafted, defendant argued that the unambiguous language of section 10.4 entitled him to a credit

against the child support payments "in an amount equal to the amount [he] is paying for that Child's room and board," without limitation.

The motion court adopted plaintiff's position and ordered that "[d]efendant shall pay [p]laintiff any arrears owed on child support in light of this Order clarifying the cap on the room and board credit." The court then signed the judgment of divorce on appeal which stated that section 10.4 of the agreement "is interpreted as capping such credit at the amount identical to the decrease in monthly child support when such child becomes emancipated." This determination was in error.

"A stipulation of settlement that is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation *(Kraus v Kraus*, 131 AD3d 94, 100 [2d Dept 2015]). "[W]here the terms of a written contract are clear and unambiguous, and the intent of the parties can be gleaned from the four corners of the document, the contract should be enforced in accordance with its plain meaning" (*Meshel v Meshel*, 146 AD3d 595, 596 [1st Dept 2017]; *see also Dimond v Dimond*, 105 AD3d 891, 892 [2d Dept 2013] ["Where the stipulation is clear and unambiguous on its face, the intent of the parties must be gleaned from the four corners of the

instrument, and not from extrinsic evidence"] [internal quotation marks omitted]). "A court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, and it may not construe the language in such a way as would distort the contract's apparent meaning" (*Matter of Scalabrini v Scalabrini*, 242 AD2d 725, 726 [2d Dept 1997]; *see also Brantly v Brantly*, 89 AD3d 881, 882 [2d Dept 2011] [courts cannot "rewrite the unambiguous terms of a marital stipulation"]).

Applying these principles, the plain and natural meaning of the phrase "the Husband shall be entitled to a credit against his child support obligations in an amount equal to the amount the Husband is paying for that Child's room and board," is that defendant is entitled to just that, "an amount equal to" the amount he is paying for room and board (*see Meshel v Meshel*, 146 AD3d at 596-597). The agreement does not provide for a cap on the credit, and to insert such a cap would improperly add a term or condition to an otherwise heavily negotiated agreement, where both parties were represented by counsel, under the guise of contractual interpretation (*see Matter of Brandt v Peirce*, 132 AD3d 665 [2d Dept 2015]; *Schulman v Miller*, 134 AD3d 616 [1st Dept 2015], *appeal dismissed* 27 NY3d 947 [2016]).

In *Brandt*, the parties' separation agreement provided that "[t]he father will receive a dollar for dollar credit in Child Support for every dollar he spends on the Children's college, room and board" (132 AD3d at 667). The father paid for the child's college expenses using funds from a 529 account. The appellate court found that the "plain and natural meaning of the parties' words entitle[d] the father to the credit for 'every dollar' that the father '[spent]' on the children's college, room, and board, without limitation" and that the father had "spent" money and was entitled to the credit because he funded the 529 account (*id.*). In *Schulman,* this Court enforced a matrimonial stipulation of settlement where the agreement was "an exhaustive, 62-page document" and "[b]oth parties were represented by counsel during its negotiation" (134 AD3d at 617).

Citing *Matter of Thomas B. v Lydia D.* (69 AD3d 24 [1st Dept 2009]), the majority finds that the agreement violates the rule that parties cannot contract away the duty of child support, a "principle . . . which makes all but irrelevant the dissent's adherence to traditional cannons of contractual interpretation." The majority maintains that *Brandt* and *Schulman* are inapposite because neither "deals with a situation where a child was threatened with a potential loss of support," whereas here "[t]he

credit sought by the father takes away that portion of child support intended for the welfare of the other two children" and threatens to deprive the children of any support whatsoever (citing *Thomas B.* at 30).

In *Thomas B.*, the issue was whether the father was entitled to abate his child support obligation because the son's full-time employment was an emancipation event under the parties' stipulation of settlement. Noting that, pursuant to statute, parental child support obligations continue until the child attains the age of 21 (Family Ct Act § 413 [1][a]), unless the child is sooner emancipated, and that a finding of emancipation terminates the parental obligation of support, this Court held that parents of a child under the age of 21 may not, by written agreement, terminate the child support obligation because of a child's full-time employment, without a simultaneous showing of the economic independence of a child.

In the matter before us, we are not dealing with the termination of child support based on an alleged emancipation event. Rather, in consideration for defendant voluntarily assuming the obligation to pay the full cost of the parties' daughter's room and board during her year at a seminary in Israel, defendant, as in *Brandt*, is being given a negotiated

dollar-for-dollar credit against his basic child support obligation for the children.

*Meshel v Meshel* (146 AD3 595 [1st Dept 2017], *supra*), is instructive. In *Meshel*, the parties' revised stipulation modified the custody and financial stipulations and judgment of divorce by granting the ex-husband sole custody of the parties' son, and provided that, for the support of their daughter, he would pay $5,000 per month instead of the $6,000 per month he was paying for both children. The ex-wife subsequently moved to bar the ex-husband from deducting their son's college expenses for room and board from his child support payments for their daughter. Citing traditional canons of contract interpretation, we held that the parties' revised stipulation did not modify the divorce judgment's provision giving him credit against all monthly child support payments for any and all amounts contributed toward the cost of the son's room and board while away at college. Thus, the ex-husband was entitled to deduct his son's college room and board charges from his monthly child support payments for the daughter (*id.* at 596-597; see *also Matter of Tannenbaum v Gilberg*, 134 AD3d 846, 847 [2d Dept 2015] ["determination that the father was entitled to a credit against his basic child support obligation for college room and board

paid by him for parties' two older children was consistent with terms of parties' stipulation of settlement in divorce action"; "the mother's alternative argument, that the stipulation of settlement provided for a maximum amount upon which the credit could be applied, is without merit"]).

*Lee v Lee* (18 AD3d 508 [2d Dept 2005]), on which the majority relies, does not mandate a different result. In *Lee*, the divorce judgment was a decision after trial and did not contain a "provision requiring the husband to pay the cost of any 'present or future . . . post-secondary, private, special, or enriched education for the child[ren]' (Domestic Relations Law § 240 [1-b][c][7])" (*id.* at 511). Consequently, the Second Department found premature the proviso giving the defendant a dollar-for-dollar credit toward his child support obligation in the event he had to pay such tuition.

Although the Second Department did state in *Lee* that a credit for college expenses "could properly serve as a credit only with respect to so much of the defendant's overall child support obligation as relates to such particular child or children" (*id.* at 512), *Lee* did not involve an agreement under which the terms of the credit had been negotiated by the parties as part of a comprehensive settlement. While the majority

believes that the absence of an agreement is irrelevant, in negotiating a settlement the parties could trade off financial distributions and obligations so as to reach an overall result acceptable to both of them. In contrast, the trial judge in *Lee* had no choice but to assess each financial provision in the judgment separately, allowing the court to properly cap the credit for college expenses.

The majority alternatively states that while the plain language of the agreement may support defendant's position, "'a contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties'" (quoting *Greenwich Capital Fin. Prods. Inc. v Negrin*, 74 AD2d 413, 415 [1st Dept 2010]). In affirming the imposition of a nonexistent cap, the majority opines that the reasonable expectation was that child support for a child would continue until that child was emancipated, which conflicts with defendant's interpretation that he is entitled to a dollar-for-dollar credit for one child's room and board against his overall support obligation. However, the plain language of section 10.4 provides for no such cap. Nor does the agreement suggest that the parties intended for the room and board credit to be subject to a cap tied to the emancipation reductions.

Section 10.4 does not reference section 10.3 and section 10.3 does not reference section 10.4. As various provisions in Article X, for example, contain references to other sections, the fact that sections 10.3 and 10.4 do not contain any such references is telling. Indeed, the majority's interpretation would unfairly limit defendant's room and board credit to a fraction of the negotiated amount, while at the same time enforcing the provisions of the agreement that require him to pay, in addition to a child's tuition, the full cost of a child's room and board while at a seminary or a college.

Moreover, while the majority is concerned about the effect of the credit on the older children, it disregards the effect of its position on the youngest child, and on defendant's ability to care for the older children. This is not a traditional situation where the father sees the children only on weekends. Rather, the three oldest children divide their time equally between the parents, and the youngest lives primarily with defendant. Thus, defendant, like plaintiff, must provide a home suitable for all of the children.

Furthermore, while, generally, "[a] parent's duty to support his or her child until the child reaches the age of 21 years is a matter of fundamental public policy in New York" (*Matter of*

*Cellamare v Lakeman*, 36 AD3d 906, 906 [2d Dept 2007], *appeal dismissed* 8 NY3d 975 [2007]), "[w]here the parties have included child support provisions in the agreement, it is presumed that in the negotiation of the terms of the agreement the parties arrived at what they felt was a fair and equitable division of the financial burden to be assumed in the rearing of the child" (*Matter of Trester v Trester*, 92 AD3d 949, 950 [2d Dept 2012] [internal quotation marks omitted). Here, plaintiff knowingly agreed to a compromise which was less than what she was entitled to under the child support guidelines. In return for that deviation, defendant, among other things, assumed responsibility for 100% of tuition and room and board expenses and other statutory add-ons, as well as the full support obligation for the youngest child, who would remain in his custody and would be the last to be emancipated. The sum and substance of the agreement of the parties is consistent with defendant's duty of support, and plaintiff is free to make a motion for an upward modification of the unallocated support, obligation upon a proper showing of a substantial change in circumstances, in which case she and defendant would have to submit current net worth statements which the court could evaluate. However, we should not rewrite the agreement in order that plaintiff might achieve this end (*see*

*Schulman v Miller*, 134 AD3d at 617). Indeed, the majority's holding would undermine the long-standing public policy in favor of settlements in divorce actions by creating uncertainty as to their enforceability.

Nor is the enforcement of the agreement pursuant to its unambiguous terms manifestly inimical to public policy. Section 240(1-b)(h) of the Domestic Relations Law provides that parties may deviate from the CSSA provided that their agreements or stipulations

> "include a provision stating that the parties have been advised of the provisions of this subdivision, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded. In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount."

Section 10.9 of the agreement substantially provided each acknowledgment and advisement required by § 240(1-b)(h) and the agreed upon child support provisions do not violate public policy.

Accordingly, I would vacate the language interpreting section 10.4 of the parties' agreement to place a cap on defendant's credit against his child support obligations.

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

ENTERED: APRIL 6, 2017

CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2597 The People of the State of New York, Ind. 5462/12
Respondent,

-against-

Ali Cisse,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Richard D. Carruthers, J. at suppression ruling; A. Kirke Bartley, Jr., J. at jury trial and sentencing), rendered June 9, 2014, convicting defendant of robbery in the first degree (two counts), robbery in the second degree, attempted robbery in the first degree (two counts), attempted robbery in the second degree, criminal possession of a weapon in the second degree (two counts), reckless endangerment in the first degree, and criminal possession of a weapon in the third degree, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

Defendant's motion to suppress physical evidence was properly denied. Defendant's principal argument is that his

initial encounter with the police, from which his arrest ultimately flowed, was at least a level two common-law inquiry unsupported by the necessary predicate. However, the record establishes that the police officer only conducted a level one request for information by telling defendant to "hold up for a second" or "hold on for a second," and to "turn around" to face the officer, while standing about 10 or 15 feet away from him (*see People v Reyes*, 83 NY2d 945 [1994], *cert denied* 513 US 991 [1994]; *People v Montero*, 284 AD2d 159, 160 [1st Dept 2001], *lv denied* 96 NY2d 904 [2001]). This request for information was "supported by an objective, credible reason, not necessarily indicative of criminality" (*People v McIntosh*, 96 NY2d 521, 525 [2001]), based on defendant's suspicious behavior when he appeared to notice the marked police car (*see Montero*, 284 AD2d at 160). Defendant's contention that the officer's command to "turn around" was a level three stop is unpreserved, and we decline to review it in the interest of justice. We reject defendant's argument that, pursuant to CPL 470.15(1), we lack jurisdiction to review the level of the police encounter at issue here, as this case does not present a *LaFontaine* issue (*People v LaFontaine*, 92 NY2d 470 [1998]). Although the judicial hearing officer's decision may have been inartfully worded, the fair

import of his finding that the officers had a "credible reason" to stop the defendant is that the encounter at issue was in fact a level one request for information (*see People v Nicholson*, 26 NY3d 813, 825 [2016] [noting that an appellate court is not prohibited "from considering the record and the proffer colloquy with counsel to understand the context of the trial court's ultimate determination"]; *People v Garrett*, 23 NY3d 878, 885 n 2 [2014]).

The court properly exercised its discretion when it asked the jury whether it had reached a partial verdict. The trial court is in the best position to decide whether to make such an inquiry, especially where, as here, jury notes give an indication that such a query might be appropriate, and we have repeatedly upheld the court's authority in this regard (*see e.g. People v Adamson*, 127 AD3d 566, 566 [1st Dept 2015], *lv denied* 25 NY3d 1197 [2015]). The court specifically urged the jury not to rush, "and there is no indication that the jurors felt compelled to reach a verdict against their will" (*People v Hall*, 105 AD3d 658, 658 [1st Dept 2013], *lv denied* 21 NY3d 1016 [2013]). The fact that the jury reached a full verdict shortly after the court's query does not establish that the court's inquiry was coercive (*see e.g. People v Brown*, 1 AD3d 147 [1st Dept 2003], *lv denied* 1

NY3d 625 [2004]).

The admission of incriminating, nonprivileged phone calls that defendant chose to make while incarcerated, after receiving multiple forms of notice that his calls may be monitored and recorded, did not violate federal or state wiretapping laws (*see United States v Conley*, 531 F3d 56, 58 [1st Cir 2008]; *United States v Verdin-Garcia*, 516 F3d 884, 893-895 [10th Cir 2008], *cert denied* 555 US 868 [2008]; *United States v Horr*, 963 F2d 1124, 1125-1126 [8th Cir 1992], *cert denied* 506 US 848 [1992]; *United States v Amen*, 831 F2d 373 [2d Cir 1987], *cert denied sub nom. Abbamonte v United States*, 485 US 1021 [1988]; *People v Jackson*, 125 AD3d 1002, 1003-1004 [2d Dept 2015], *lv denied* 25 NY3d 1202 [2015]), defendant's federal or state right to counsel (*see People v Johnson*, 27 NY3d 199 [2016]; *People v Velasquez*, 68 NY2d 533 [1986]), or his due process right to participate in the preparation of his own defense (*see Florence v Board of Chosen Freeholders of County of Burlington*, 566 US __, 132 S Ct 1510 [2012]; *Matter of Lucas v Scully*, 71 NY2d 399, 406 [1988]). Defendant was free to make privileged calls to his attorney on all aspects of his case, including pretrial investigation. Defendant was also free to limit his social calls to matters unrelated to his case. Instead, defendant chose to assume the

risks involved in making unprotected case-related communications. Furthermore, since no public servant, or anyone else, did anything to obtain any statements from defendant, his phone conversations cannot be viewed as involuntary for purposes of CPL 60.45, and no such jury instruction was warranted.

Defendant's legal sufficiency claim regarding his reckless endangerment conviction 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 [2007]). We likewise decline to review defendant's unpreserved challenge to a voice identification procedure, and reject it in any event (*see People v McRae*, 195 AD2d 180 [1st Dept 1994], *lv denied* 83 NY2d 969 [1994]). We have considered and rejected defendant's ineffective assistance of counsel claims relating to the issues we have found to be unpreserved (*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.

The court properly exercised its discretion in denying youthful offender treatment (*see People v Drayton*, 39 NY2d 580 [1976]), and we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 6, 2017

CLERK

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

3080 Multi Capital Group LLC, Index 652598/11
Plaintiff-Appellant,

-against-

Mark Karasick, et al.,
Defendants-Respondents.

_____

Gulko Schwed LLP, New York (Asher C. Gulko of counsel), for appellant.

Zane and Rudofsky, New York (Eric S. Horowitz of counsel), for respondents.

_____

Judgment, Supreme Court, New York (Shirley Werner Kornreich, J.), entered September 25, 2015, dismissing the complaint with prejudice, unanimously affirmed, with costs.

In June 2007, plaintiff, Multi Capital Group, LLC, a real estate investment banking firm, submitted an offer to purchase the U.S. Steel Tower building, located in Pittsburgh, Pennsylvania. At the time, the asking price for the building was approximately $348 million, and plaintiff was unable to finance the purchase by itself. Shortly thereafter, plaintiff's representative met defendants Harry Skydell and Mark Karasick, real estate investors, who began discussions about purchasing the building. Plaintiff claims that, in return for a fee, it agreed to introduce defendants to the building's owner and real estate

broker, and would provide services to defendants to facilitate acquisition of the building.

On July 13, 2007, plaintiff sent two emails to defendants asking to "confirm the fee structure" that the parties had previously discussed - namely, that plaintiff would receive a finder's fee equal to 1% of the purchase price. The parties thereafter exchanged multiple drafts of a fee agreement that stated plaintiff would receive a $2 million finder's fee. No written agreement was ever executed by the parties. In 2008, the negotiations for defendants' purchase of the building ended because the seller and defendants could not agree on the value of the building.

In 2011, nearly four years after the parties' 2007 fee negotiations had ended, defendants met with a real estate consultant - someone with no affiliation with plaintiff - who independently introduced them to the building's owner. Defendants ultimately bought the building from the owner that year for $289 million - approximately $60 million less than the $348 million that the seller had asked for in 2007. Defendants did not pay a fee to plaintiff.

Plaintiff then commenced this action seeking a finder's fee alleging that without its efforts, defendants would never have

become aware of the opportunity to buy the property, and the purchase would never have occurred. Plaintiff asserted causes of action for breach of contract, unjust enrichment and promissory estoppel, and sought $2 million in damages from defendants.

Defendants moved to dismiss the complaint pursuant to CPLR 3211. The court denied that motion, finding that the documentary evidence submitted by plaintiff in opposition raised factual issues as to whether defendants may have contracted to pay plaintiff a finder's fee or may have agreed to pay plaintiff a fee to give up its interest in the deal.

Defendants answered and upon completion of discovery, moved for summary judgment dismissing the complaint. Defendants argued that after 2007, plaintiff had no involvement in the negotiations leading up to the ultimate purchase of the building in 2011. Defendants further asserted that individuals with no connection to plaintiff had initiated and facilitated the defendants' 2011 purchase of the building.

Defendants established as a matter of law that plaintiff was not entitled to a finder's fee. Although the parties exchanged drafts of a finder's fee agreement, they never executed a final written agreement. Moreover, there was no connection between plaintiff's purchase opportunity and the transaction several

years later. On the contrary, the record shows that defendants bought the building through the actions of real estate professionals who had no affiliation whatsoever with plaintiff (*see e.g. Edward Gottlieb, Inc. v City & Commercial Communications*, 200 AD2d 395, 399 [1st Dept 1994]). The motion court also properly determined that plaintiff was not otherwise entitled to compensation from defendants. The record is clear that defendants never agreed that plaintiff was entitled to any fee, as their broker or otherwise.

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

ENTERED: APRIL 6, 2017

CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Webber, Gesmer, JJ.

3454 In re Oscar S.,
Petitioner-Respondent,

-against-

Joyesha J.,
Respondent-Appellant.

_____

George E. Reed, Jr., White Plains, for appellant.

Law Offices of Susan Barrie, New York (Susan Barrie of counsel), for respondent.

Steven N. Feinman, White Plains, attorney for the child Kamaryn S.

Leslie Lowenstein, Woodmere, attorney for the children Jaada S., X'Zavier S. and Avanah S.

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about August 10, 2015, which, upon the parties' respective petitions, awarded sole legal and physical custody of the parties' children to petitioner father, with parenting time to respondent mother, unanimously modified, on the law and the facts, to remand the matter to the Family Court to issue an order addressing the process of the transfer of custody to the father, and to hold an immediate hearing on whether there any changed circumstances which would cause an award of legal and physical custody of the oldest child to the father to no longer

be in her best interest, and otherwise affirmed, without costs.

The Family Court's determination to award custody of the parties' four children to the father has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). Where, as here, the Family Court's findings are based almost entirely on its assessment of the credibility of witnesses, and, in particular, the character of the parents, "its findings 'must be accorded the greatest respect'" (*Matter of Elissa A. v Samuel B.*, 123 AD3d 638, 639 [1st Dept 2014], quoting *Matter of Irene O.*, 38 NY2d 776, 777 [1975]). However, we remand to the Family Court for two purposes: to issue an order addressing the process of the transfer of custody to the father, and to hold an immediate hearing on whether transfer of custody of the oldest child to the father is still in her best interest, based on any change of circumstances since the trial.

The Family Court found, after considering all of the evidence, that the father was the parent better able to care for the children and ensure their relationship with the other parent. Although the mother had been the children's primary caretaker, there was ample evidence that her care of them was at times less than adequate. For example, although she lived close to the children's school, she acknowledged that she often got the

children to school late. The testimony showed that the children were sometimes disheveled when they came for visits, and that one child showed up for a visit with her shoes on the wrong feet.

Moreover, the trial court found that the mother was "single-minded in her determination to keep the children away from the father . . . [and that she] did not consider the father to be an important part of the children's lives." The Family Court based this finding in large part on the mother's pursuit of a false sexual abuse allegation against the father, which it found she made for "the purpose of disrupting the relationship and contact between the father and the children." However, that was not the only support for the finding that the mother attempted to disrupt the children's relationship with their father; the evidence also showed that the mother often did not produce the children for scheduled visits (including court-ordered visits) with the father, sometimes taking them to visit the maternal grandmother instead, or brought them late; the mother failed to provide the father with information about the children's education, including their individual education plans; the mother failed to provide the father with information about their health, including

emergency room visits;[1] and the mother testified that, if granted custody, she would not involve him in decision making about the children in the future.

The trial judge's finding that the mother was unlikely to comply with any visitation order was also supported by the mother's failure to comply with prior court orders; specifically, she did not make herself available to the Administration for Children's Services for a court-ordered investigation and home visit after the father reported that all of the children had reported to him that the mother pushed one of them, resulting in a "knot" on her head, and she failed to produce two of the children for in camera interviews, despite being ordered to do so.

As a result of the mother's false allegations and baseless family offense petition, the children were interviewed by the police and medically examined, and the custody trial was delayed for two years, so that the family offense proceeding could be heard first. For over a year during the pendency of the mother's family offense petition, the father had only supervised

[1]The father testified that he has since met the children's teachers and doctor, reviewed their report cards and attended parent-teacher conferences.

visitation with the children and was denied overnight visitation. The Family Court found that, despite this, the father managed to maintain a close, loving bond with the children. The court also found that the father would ensure that the mother had a "meaningful relationship with the children."

The mother's actions, coupled with the father's close bond with the children, justified the court's award of sole physical and legal custody of the children to the father, since "'[i]nterference with the relationship between a child and a noncustodial parent by the custodial parent is an act so inconsistent with the best interests of the child that it raises, by itself, a strong probability that the offending party is unfit to act as a custodial parent'" (*Victor L. v Darlene L.*, 251 AD2d 178, 179 [1st Dept 1998], *lv denied* 92 NY2d 816 [1998], quoting *Matter of Gago v Acevedo*, 214 AD2d 565, 566 [1995], *lv denied* 86 NY2d 706 [1995]]; *see also Matter of Elissa A.*, 123 AD3d at 639; *David K. v Iris K.*, 276 AD2d 421, 422 [1st Dept 2000]).
All four children took the position during the custody trial that they wished to remain with their mother, and the Family Court nonetheless ordered that the father be granted custody, after considering their stated wishes in light of their ages and their best interests. The Family Court found that the father is the

parent best able to care for all of the children and to ensure that they have a relationship with the other parent, rather than "using the children as a weapon...as the mother has done."

The oldest child's attorney argues that this Court should award custody of her to the mother, in accordance with that child's wishes. Ordinarily, we would not consider this request since there was no request before the Family Court for split custody, and the child's attorney made the request for the first time on appeal. However, in light of the issues raised by the child's attorney, we direct the trial court to hold a hearing to determine whether there are any changed circumstances which would cause the transfer of custody of this child to the father to no longer be in her best interest. In conducting the hearing, the Family Court will focus on the child's best interest, "the age and maturity of the child and the potential for influence having been exerted on the child" (*Eschbach v Eschbach*, 56 NY2d at 173), as well as our strong presumption in favor of keeping siblings together (*id.*).

In view of the stay of enforcement of the Family Court's order granted by this Court on August 19, 2015, and so as not to disrupt the children's academic schedules, we also direct the Family Court to enter an order within 30 days encompassing the

following provisions: the father should continue to see the children on the regular schedule set forth in this Court's stay, with the holiday schedule set forth in the Family Court's order to supersede the regular schedule, until the first Saturday following the last day of the spring 2017 semester of all of the children's schools, at which time the parenting schedule set forth in the Family Court's order would commence in its entirety.

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, JJ.

3639 In re Jennifer Tabb, Index 102223/15
Petitioner,

-against-

The New York State Office of
Court Administration, et al.,
Respondents.

_____

Kyle B. Watters, PC, Bayside (Kyle Watters of counsel), for petitioner.

John W. McConnell, Office of Court Administration, Albany (John Sullivan of counsel), for respondents.

_____

Determination of respondents, dated September 15, 2015, as amended on February 11, 2016, which denied petitioner's appeal of her placement on involuntary leave from her position as a court officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Barbara Jaffe, J.], entered on or about December 22, 2015), dismissed, without costs.

The determination that petitioner was incapacitated from

employment is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]), including the testimony and report of a forensic psychiatrist.

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

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3640 The People of the State of New York, Ind. 4201/13
Respondent,

-against-

Trinae Romaine,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Ashley Ochs of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Hilary Hassler of counsel), and Gibson Dunn & Crutcher LLP, New York (Akiva Shapiro of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered April 22, 2014, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing her to five years' probation, and ordering her to pay restitution, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, the evidence of defendant's guilt was overwhelming. There is no basis for disturbing the jury's credibility determinations. The evidence lacked any reasonable explanation other than that defendant, who was motivated to steal the victim's phone because it contained a

damaging recording of defendant, used pepper spray on the victim for the purpose of stealing the phone, and stole it as part of a single incident.

Even if the court improvidently exercised its discretion when it denied defendant's request to introduce extrinsic evidence of an alleged prior inconsistent statement made by the victim, any error in the court's ruling was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3641 Manuel A. Cuprill, Index 20357/14E
Plaintiff-Appellant,

-against-

Citywide Towing and Auto Repair Services, et al.,
Defendants-Respondents.

_____

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for appellant.

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., Elmsford (James M. Skelly of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered December 22, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion to compel post-note of issue discovery, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting defendants' motion. Contrary to plaintiff's argument, defendants did not seek, and the motion court did not order, vacatur of the note of issue. Trial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced (*see Pickering v Union 15 Rest. Corp.*, 107 AD3d 450 [1st Dept 2013]), and we perceive no prejudice here (*see e.g.*

*Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 163 AD2d 376, 376-377 [1st Dept 1990]).

Counsel's affirmations submitted with the initial motion and on reply, when viewed together, provided sufficient detail to comply with 22 NYCRR 202.7(c) (*Loeb v Assara N.Y. I L.P.*, 118 AD3d 457, 457-458 [1st Dept 2014]).

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: APRIL 6, 2017

CLERK

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

3642 In re Shamarie S.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

_____

Order of disposition, Family Court, New York County (Gayle P. Roberts, J.), entered on or about December 7, 2015, 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 petit larceny, criminal mischief in the fourth degree, criminal possession of stolen property in the fifth degree and attempted assault in the third degree, unanimously modified, on the facts and as a matter of discretion in the interest of justice, to the extent of vacating the criminal mischief finding and dismissing that count of the petition, and otherwise affirmed, without costs.

Except as indicated, the court's finding was based on legally sufficient evidence and was not against the weight of the

evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. Although the court dismissed some of the charges, as the trier of fact it was entitled to disregard so much of the victim's testimony that it found was untruthful, and accept so much of it as it found to have been truthful and accurate.

However, we dismiss the criminal mischief charge, based on a theory of recklessness, because there was no evidence that the neck chain taken from the victim was damaged in the amount of $250 (*see* Penal Law § 145.00[3]).

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3643 Eastern Consolidated Properties, Inc., Plaintiff-Respondent, Index 652994/15

-against-

Waterbridge Capital LLC, et al., Defendants-Appellants.

_____

Smith & Shapiro, New York (Eliad S. Shapiro of counsel), for appellants.

Goetz Fitzpatrick LLP, New York (Douglas Gross of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 29, 2016, which, to the extent appealed from, denied defendants' motion to dismiss the first and second causes of action and granted plaintiff's cross motion for leave to amend the complaint to add Joel Schreiber as a defendant, unanimously affirmed, with costs.

Plaintiff alleges that, after Waterbridge agreed to pay plaintiff a 1% commission in connection with the purchase of a certain property, Waterbridge's chief executive, Joel Schreiber, asked plaintiff to accept a ½% commission because another broker also was claiming a commission. Plaintiff agreed and, thereafter, defendant WB Berry Street LLC (WB Berry), allegedly

an affiliate of Waterbridge, acquired the property and both defendants refused to pay any commission.

The complaint adequately pleads that defendants breached the agreement to pay plaintiff half of the commission previously agreed upon. Contrary to defendants' arguments, plaintiff is not required to plead or prove that it was a "procuring cause" of the purchase in order to recover on this agreement, which was in the nature of a settlement agreement. Plaintiff's relinquishment of its claim for a full commission provides adequate consideration for the agreement, even if its claim was doubtful or would ultimately prove to be unenforceable (*see Admae Enters. v Smith*, 222 AD2d 471, 472 [2d Dept 1995]; *Nolfi Masonry Corp. v Lasker-Goldman Corp.*, 160 AD2d 186, 187 [1st Dept 1990]).

Alternatively, plaintiff stated a valid cause of action to recover its full commission in quantum meruit, in order to prevent unjust enrichment, since it alleges that it performed valuable services in good faith, including providing confidential information concerning the property to Waterbridge, that the services were rendered with an expectation of compensation, and that they were accepted by defendants (*see Zere Real Estate Servs., Inc. v Parr Gen. Contr. Co., Inc.*, 102 AD3d 770, 772 [2d Dept 2013], *lv denied* 21 NY3d 855 [2013]; *Curtis Props. Corp. v*

*Greif Cos.*, 212 AD2d 259, 266 [1st Dept 1995]; *see also SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 97-98 [1st Dept 2014]). The dispute over the validity of the oral settlement agreement allows plaintiff to plead this cause of action in the alternative (*Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408 [1st Dept 2008]).

Supreme Court properly granted plaintiff's cross motion to add Schreiber as a party defendant. As a member of Waterbridge, Schreiber could not be held personally liable for an agreement made on Waterbridge's behalf (*Matias v Mondo Props. LLC*, 43 AD3d 367, 367 [1st Dept 2007]; *see also* Limited Liability Company Law §§ 609, 610). However, at the time of the oral agreement, WB Berry was not yet formed. To the extent that Schreiber acted on WB Berry's behalf before its formation, he is presumed personally liable as an agent of the nonexistent corporate principal (*see BCI Constr., Inc. v Whelan*, 67 AD3d 1102, 1103 [3d Dept 2009]; *see also Production Resource Group L.L.C. v Zanker*, 112

AD3d 444, 445 [1st Dept 2013]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3644 Fifth Ave. Center, LLC, Index 652724/15
Plaintiff-Appellant,

-against-

Dryland Properties, LLC,
Defendant-Respondent.

_____

Law Offices of Lisa M. Solomon, New York (Lisa M. Solomon of counsel), for appellant.

Golino Law Group PLLC, New York (Brian W. Shaw of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 18, 2016, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the cause of action seeking a return of the security deposit, unanimously reversed, on the law, with costs, and the motion denied.

The parties' lease provides that, in the event plaintiff tenant complies with the material terms of the lease, its security deposit will be returned after the date fixed as the end of the lease, i.e., June 12, 2028. Plaintiff alleges that it terminated the lease, or was constructively evicted, due to material breaches by defendant landlord, in 2015. To the extent plaintiff is able to show its entitlement to recover the security

deposit in these circumstances, it need not wait until the date fixed at the end of the defunct lease to assert the claim, but may recover the security deposit at the time that the claims between the parties are resolved in this action (*see Meinken v Levinson*, 239 AD 382, 392 [1st Dept 1933]; *Seafeld Realty Corp. v Thomas*, 112 NYS2d 839 [App Term, 1st Dept 1952]).

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3647 The People of the State of New York, Ind. 4462/10
Respondent,

-against-

Edward Gantt,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered September 16, 2011, as amended October 3, 2011 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: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3650 The People of the State of New York, Ind. 30223/14
Respondent,

-against-

John Etheridge, true name John Etheredge,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Neil E. Ross, J.), entered May 11, 2015, 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 court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's long period of law abiding conduct after being released from custody was outweighed by the seriousness of the underlying crime, in which defendant repeatedly raped a young child over a period of months. Even if defendant's clean record for a period of years made him significantly less likely to reoffend, the magnitude of harm that

would result if he did reoffend establishes a valid reason for denial of a downward departure (*see People v Cabrera*, 91 AD3d 479 [2012], *lv denied* 19 NY3d 801 [2012]).

The remaining mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, or were outweighed by the seriousness of the underlying sex offense.

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3651 Art Capital Group, LLC, et al., Index 601389/05
Plaintiffs-Appellants,

-against-

Andrew C. Rose et al.,
Defendants-Respondents.
- - - - -
[And Another Action]

_____

The Majorie Firm Ltd., New York (Francis B. Majorie of counsel), for appellants.

Barton, LLP, New York (Mathew E. Hoffman of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about July 13, 2016, which denied plaintiffs' motion for summary judgment as to liability and granted defendants' request to search the record and grant them summary judgment dismissing plaintiffs' claims, unanimously modified, on the law, to deny defendants' request to search the record and grant summary judgment as to the eleventh, twelfth, and fourteenth through seventeenth causes of action, and to deny defendants summary judgment dismissing so much of the second cause of action as is based on the transactions with Berry Hill Galleries/Coram Capital, LLC, Michael Antonello, George Newman, Holcombe Green, Paul Bennet (or Bennett), and Alan

Milton/SageCrest, and otherwise affirmed, without costs.

Although their brief began and ended by saying that plaintiffs sought summary judgment on the *second amended complaint*, the brief, affidavit, affirmations, and statement of uncontested facts focused on the faithless servant doctrine, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. In searching the record upon defendants' request, the motion court properly reached the first through tenth and eighteenth through twenty-first causes of action (*see e.g. Siegel Consultants, Ltd. v Nokia, Inc.*, 85 AD3d 654, 656-657 [1st Dept 2011], *lv denied* 18 NY3d 809 [2012]). The second cause of action alleges breach of fiduciary duty against Christopher Krecke; the fourth alleges that Andrew Rose aided and abetted Krecke's breaches of fiduciary duty. While there is no claim labeled "faithless servant," that issue is related to the first through third, fifth through tenth, and eighteenth through twenty-first causes of action. Furthermore, defendants' papers specifically mentioned trade secrets/confidential information, whether the names of defendant companies were confusingly similar to plaintiffs' names, lack of evidence that Krecke solicited clients or funding sources for Rose, and the lack of noncompete, confidentiality, or nonsolicitation agreements. The affidavit by

plaintiffs' principal (Ian Peck) addressed the issue of fraud, which is the subject of the thirteenth cause of action.

By contrast, the eleventh, twelfth, and fourteenth through seventeenth causes of action neither were raised in the motion papers nor are related to the claims raised therein, and therefore the court lacked the power to reach them without a motion by defendants (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 427 [1996]; *Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73, 82 [1st Dept 2002]).

The court correctly denied plaintiffs' motion for summary judgment as to Krecke's liability under the faithless servant doctrine for breaching his fiduciary duty. It also correctly dismissed so much of the claim as was based on Krecke's finding a lawyer for Rose (it is law of the case [54 AD3d 276 (1st Dept 2008)] that this did not breach Krecke's fiduciary duty to plaintiffs), Krecke's alleged participation in setting up Rose's new entities (plaintiffs failed to rebut defendants' evidence that only Rose established those entities), and Krecke's alleged finding of office space for Rose's new entities (Krecke was not involved in the negotiations for the lease, and merely looking at office space does not constitute a breach of fiduciary duty).

However, defendants are not entitled to summary judgment

dismissing so much of the faithless servant claim as is based on transactions involving Berry Hill/Coram, Antonello, Newman, Green, Bennet (or Bennett), and Milton/SageCrest.

With respect to Newman, there is a conflict between Krecke's deposition and Peck's, and a credibility issue may not be resolved on a motion for summary judgment.

Although Rose testified that Peck said he did not want to do the Bellows transaction for the Hills, neither Rose nor Krecke said that Peck expressly consented to Rose's doing that transaction[1] (*see Epstein Eng'g P.C. v Cataldo*, 101 AD3d 552 [1st Dept 2012]). Indeed, Peck's affidavit suggests that he would not have consented. The same is true for the transactions involving Green, Bennet (or Bennett), and Antonello. Moreover, Krecke admitted that he did not tell Peck that he was referring the Bennet/Bennett transaction to Rose.

It does not avail defendants that SageCrest's loan of money to Rose did not impact its lending to plaintiff Art Capital Group (*see Feiger v Iral Jewelry*, 41 NY2d 928 [1977]). It is reasonable to infer that information that their biggest lender

[1] We are not determining here that Krecke was actually a faithless servant or that the opportunities were actually diverted. A trier of fact will need to make those determinations.

was going to become their competitor's[2] lender "would be useful to [plaintiffs] in the protection and promotion of [their] interests" (*E.W. Bruno Co. v Friedberg*, 21 AD2d 336, 340 [1st Dept 1964] [internal quotation marks omitted]).

New York's strict application of the faithless servant doctrine "mandates the forfeiture of all compensation . . . where . . . one who owes a duty of fidelity to a principal is faithless in the performance of his services" (*Soam Corp. v Trane Co.*, 202 AD2d 162, 163-164 [1st Dept 1994], *lv denied* 83 NY2d 758 [1994]), and defendants cite no authority for their purported "friendly advice" exception to the faithless servant doctrine.

To the extent we are dismissing part of the claim that Krecke breached his fiduciary duty, Rose obviously cannot be liable for aiding and abetting. Even as to those parts of the

[2] There is conflicting evidence as to whether defendants actually competed with plaintiffs. In a prior appeal, we said that Krecke and Rose "are now plaintiffs' competitors" (54 AD3d 276, 276 [1st Dept 2008]). However, we issued that decision before Peck made relevant admissions at his deposition in 2010.

faithless servant/breach of fiduciary duty claim that survive against Krecke, the aiding and abetting claim against Rose was correctly dismissed, because plaintiff failed to show damages (*see Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]).

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

ENTERED: APRIL 6, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, JJ.

3652 The People of the State of New York ex rel. Howard Greenberg, Esq., on behalf of Miguel Paredes, Petitioner-Appellant,

Index 260512/16
Ind. 2221/16

-against-

Joseph Ponte, etc., Respondent-Respondent.

Howard Greenberg Law Firm, Brooklyn (Jonathan Rosenberg of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

Judgment (denominated an order), Supreme Court, Bronx County (Steven L. Barrett, J.), entered on or about September 15, 2016, which denied the petition for a writ of habeas corpus and dismissed the proceeding, unanimously affirmed, without costs.

The habeas court properly determined that the bail court (Ethan Greenberg, J.) did not abuse its discretion in denying bail in the underlying case involving very serious allegations of interstate firearms trafficking (*see People ex rel. Lazer v Warden, N.Y. County Men's House of Detention*, 79 NY2d 839 [1992]). Considering the statutory factors set forth in CPL 510.30(2)(a), and given the strength of the evidence against petitioner and the potential lengthy sentence if convicted, we

conclude that the bail court did not abuse its discretion in denying bail (*see e.g. People ex rel. Siegel v Sielaff*, 182 AD2d 389, 390 [1st Dept 1992]). We have considered and rejected petitioner's remaining arguments.

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3653- Index 600112/09
3653A Bhupinder Grewal, doing business as United Shipping Solutions, et al.,
Plaintiffs-Appellants,

Shero Shipping, LLC doing business as United Shipping Solutions, et al.,
Plaintiffs-Intervenors-Appellants,

-against-

DHL Express (USA), Inc.,
Defendant-Respondent.

_____

K & L Gates LLP, New York (John C. Blessington of the bar of the Commonwealth of Massachusetts and State of Maine, admitted pro hac vice, of counsel), for Bhupinder Grewal, Shipping Solutions, Bryan Smetanka, Buckley Shipping and Frieght, Inc., Clever Goods, LLC, Cold Spring Investments, LLC, Cold Spring Investments, No. 1, Limited Partnership, Cold Spring Investments, No. 2, Limited Partnership, Diamond Mountain Holdings, LLC, Elite Logistics, Inc., Extreme Group, Inc., First Coast Shipping, LLC, Global Express Shipping, Inc, Hannah Enterprises, Inc, Mariposa Express, Inc, Metro Mar Ventures, LLC, Michael Jones, LLC, Michaelson Ventures Inc, M.K. Logistics Management, LLC, OLS LLC, Outforce, LLC, Premier Solutions Logistics, LLC, Shermanator Inc., Stirling LLC, The Double A&O Group, Inc., Timothy Salavejus, 4O Enterprises, United Shipping Solutions, LLC, USS Boston Inc., USS Charlotte Inc., USS Essex Inc., USS Highland Park, Inc., USS Holdings, LLC, USS O'Brien, Inc., USS Raleigh Inc., USS SanDiego, CA, Inc., and Wiley & Company, LLC, appellants.

Davidoff Hutcher & Citron LLP, New York (Robert J. Lewis of counsel), for Shero Shipping, LLC, KuK Logistics, MNS, LLC, KuK Logistics MNO, LLC, and KuK Logistics SS, LLC, appellants.

Dechert LLP, Los Angeles, CA (Christopher S. Ruhland of the bar of the State of California, admitted pro hac vice, of counsel), for respondent.

_____

Amended judgment, Supreme Court, New York County (Eileen Bransten, J.), entered February 3, 2016, which brings up for review orders, same court and Justice, entered February 15, 2012, which denied plaintiffs' motion and plaintiffs-intervenors' cross motion for summary judgment, and entered September 30, 2015, which denied plaintiffs' and plaintiffs intervenors' motions pursuant to CPLR 4404(a) to set aside the verdict and direct judgment as a matter of law or order a new trial, unanimously affirmed, without costs. Appeal from judgment, entered February 1, 2016, unanimously dismissed, without costs, as superseded by the appeal from the amended judgment.

Defendant, a global shipping company that sells its services to "resellers" that negotiate shipping rates with it and then resell the shipping services to their customers at higher rates, entered into a Reseller Agreement with USS Logistics (Logistics) in January 2003. Plaintiffs and plaintiffs intervenors (collectively plaintiffs) are franchisees of an affiliate of Logistics. They commenced this action against defendant alleging, inter alia, breach of contract after defendant discontinued domestic shipping service prior to the expiration of its reseller agreement with Logistics.

The sole issue on this appeal is plaintiffs are third-party

beneficiaries of the reseller agreement between defendant and Logistics. The case was tried to a jury which returned a verdict determining that they were not. Plaintiffs argue that the relevant provision of an amendment to the reseller agreement was unambiguous, requiring a determination that they were third-party beneficiaries as a matter of law and because the language of the amendment was determinative, the jury's conclusion otherwise was irrational. Other than arguing that the language of the amendment was determinative, they do not raise any argument regarding the evidence presented to the jury or the jury's interpretation of it.

Contrary to plaintiffs' contention, Supreme Court correctly concluded that the provision at issue was ambiguous on the issue of whether they were third-party beneficiaries of the reseller agreement. In any event, pursuant to California law, which governed the reseller agreement, "[i]n determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence of the circumstances and negotiations of the parties in making the contract is both relevant and admissible. And, in the absence of grounds for estoppel, the contracting parties should be allowed to testify as to their actual intention" (*Garcia v Truck Ins. Exch.*, 36 Cal 3d 426, 437

[Cal 1984] [citation and internal quotation marks omitted]; *see Spinks v Equity Residential Briarwood Apts.*, 171 Cal App 4th 1004, 1024 [Cal Ct App 2009]). Accordingly, the issue was properly submitted to a jury for resolution based on the evidence offered at trial. Because plaintiffs do not raise any argument with regard to the evidence or the jury's interpretation of it, other than to argue that the language of the amendment was determinative, they are not entitled to a new trial.

Further, under Utah law, a jury verdict on the issue in a Utah action involving defendant and other franchisees, which settled and was dismissed with prejudice before the verdict was reduced to final judgment does not collaterally estop defendant (*Richardson v Navistar Intl. Transp. Corp.*, 8 P3d 263, 265 [Utah 2000]; *see Bruno v Bruno*, 83 AD3d 165, 169 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]; *see also Peterson v Forkey*, 50 AD2d 774, 774-775 [1st Dept 1975]).

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3654 The People of the State of New York, Ind. 1469/13
Respondent,

-against-

Larry Davis,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J. at grand jury resubmission authorization; Gregory Carro, J. at jury trial and sentencing), rendered July 23, 2013, as amended July 31, 2013, convicting defendant of murder in the second degree (two counts), burglary in the first degree, aggravated criminal contempt and criminal contempt in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

Except for an argument concerning the unlawful remaining element of burglary, which we find unavailing, defendant's legal sufficiency claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them 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]). With regard to the intentional murder conviction, the viciousness and extent of defendant's attack on his elderly grandmother, accompanied by the surrounding circumstances, support the inference that defendant intended to beat her to death. With regard to the felony murder conviction and its underlying crime of burglary, the evidence warranted the inference that defendant unlawfully remained in the victim's apartment with the intent to commit a crime (*see People v Lewis*, 5 NY3d 546, 552 [2005]).

The police did not violate defendant's right to counsel when they questioned him about the murder. Even assuming that defendants' right to counsel had attached on a pending criminal trespass case, the murder was not "so closely related transactionally, or in space or time" to an earlier trespass he committed, upon which an arrest warrant had issued, "that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel" (*People v Cohen*, 90 NY2d 632, 638 [1997]). The trespass occurred nearly a month before the murder, at a different location. The fact that the victim's refusal to pay defendant's fine for the trespass may have

provided a motive for the murder did not make the two crimes so related that representation on the trespass precluded defendant from effectively waiving his right to counsel regarding the murder (*see e.g. People v Tucker*, 30 AD3d 312, 313 [1st Dept 2006], *lv denied* 7 NY3d 818 [2006]).

The court properly exercised its discretion in declining to order a CPL article 730 competency examination of defendant (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878 [1995]). There is nothing in the record to cast doubt on defendant's competency, and the record supports the court's finding that defendant, who actively sought a 730 examination, was attempting to manipulate the proceedings by way of, among other things, a plainly feigned suicide attempt.

Defendant forfeited his right to be present at trial when he refused to be produced in the courtroom, with full knowledge that his trial was in progress (*see People v Sanchez*, 65 NY2d 436, 443-444 [1985]) and having been previously warned by the trial court that the trial would proceed in his absence. We have considered and rejected defendant's arguments on this issue, including those relating to his alleged mental state.

The court providently exercised its discretion in admitting

images and descriptions of pornography websites that defendant visited on the victim's computer shortly after the murder. In his statement to the police, defendant claimed that the death was accidental and that he was grieving for the loss of his grandmother in the period following her death. The evidence at issue tended to refute that claim (*see generally People v Aska*, 91 NY2d 979, 981 [1998]), and we do not find that it was so inflammatory as to create undue prejudice.

The People, who originally obtained an indictment charging only second-degree manslaughter, properly re-presented the case to the grand jury for the purpose of having it consider additional, more serious charges. Initially, we note that we have examined the grand jury minutes in camera, and that they confirm that the first grand jury was never asked to vote on the murder and burglary charges. In any event, regardless of whether court authorization under CPL 190.75(3) for the resubmission was necessary in the first place (*but see* CPL 200.80 [existing indictments may be superseded]), the court providently exercised its discretion when it authorized the re-presentation. "[L]eave to re-present should be granted as a matter of course" where, as here, there is no indication "that the first grand jury's decisional authority was being subverted" (*People v Credle*, 17

NY3d 556 [2011]), and "CPL 190.75(3) does not limit the court's discretion to situations where the People make a showing of newly discovered evidence" (*People v Morris*, 248 AD2d 169, 170 [1st Dept 1998], *affd* 93 NY2d 908 [1999]).

Defendant failed to preserve his claim that the resubmission application should not have been made and determined on an ex parte basis, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see e.g. People v Martinez*, 141 AD3d 429 [1st Dept 2016], *lv denied* 28 NY3d 972 [2016]).

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

We perceive no basis for reducing the sentence

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3655 Benita Collins, Index 301128/12
Plaintiff-Respondent,

-against-

Nate Tours Bus Co., et al.,
Defendants,

Swift River Transportation, Ltd.,
Defendant-Appellant.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Meredith Drucker Nolen of counsel), for appellant.

Subin Associates, LLP, New York (Robert J. Eisen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about March 16, 2016, which, in this action for personal injuries sustained when plaintiff slipped and fell as she boarded a bus, denied the motion of defendant Swift River Transportation, Ltd. (Swift River) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The court erred in denying Swift River's motion for summary judgment. Plaintiff's claim that Swift River negligently allowed a slippery condition to persist on the stairs leading into the

bus was precluded, as a matter of law, by plaintiff's testimony that it was raining at the time of the accident (*see Byrne v New York City Tr. Auth.*, 78 AD3d 525 [1st Dept 2010]). "Defendant is not obligated to provide a constant remedy for the tracking of water onto a bus during an ongoing storm" (*Morazzani v MTA N.Y. City Tr.*, 67 AD3d 598, 598 [1st Dept 2009]), and here, the evidence showed that plaintiff was the last of a group of people to board the bus during the rainstorm (*see e.g. Duncan v New York City Tr. Auth.*, 260 AD2d 213 [1st Dept 1999]).

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3656 Lorraine L. Callahan, Index 21036/12
Plaintiff-Appellant,

-against-

Dina E. Shekhman,
Defendant-Respondent.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered February 16, 2016, dismissing the complaint, and bringing up for review an order, same court and Justice, entered February 1, 2016, which granted defendant's motion for summary judgment based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant made a prima facie showing that plaintiff did not suffer a permanent or significant limitation in use of her cervical or lumbar spine as a result of the motor vehicle accident through the submission of an orthopedic surgeon's report finding normal range of motion in each part (Insurance Law § 5102[d]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submitted affirmed reports of three physicians who treated her in the months following the accident, but none of them provided quantified results of range of motion testing or a qualitative assessment of any limitations in use resulting from injuries causally related to the accident (*see Hospedales v "John Doe,"* 79 AD3d 536 [1st Dept 2010]). Plaintiff's physical therapist's findings were insufficient to raise an issue of fact, because a physical therapist cannot diagnose or make prognoses, and therefore any opinion she rendered on "permanency, significance [or] causation" would be "incompetent evidence" (*Henchy v VAS Express Corp.*, 115 AD3d 478, 479 [1st Dept 2014]; *see Tornatore v Haggerty*, 307 AD2d 522, 522-523 [3d Dept 2003]). Plaintiff presented no evidence of recent limitations in use of her neck or back to raise an issue of fact as to permanency.

Defendant established that plaintiff did not sustain an injury in the 90/180-day category by submitting plaintiff's

employment records showing that she returned to work part time less than 90 days after the accident, which defeats that claim (*see Tsamos v Diaz*, 81 AD3d 546 [1st Dept 2011]). Plaintiff failed to submit evidence sufficient to rebut that showing.

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3657 Jonathan Brown, Index 308662/11
Plaintiff-Appellant,

-against-

New York City Department of Correction
Officers Captain S. Tia, etc., et al.,
Defendants-Respondents.

_____

Watters & Svetkey, LLP, New York (Jonathan Svetkey of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Eddie J. McShan, J.), entered October 15, 2015, which granted defendants' motion to dismiss the complaint as barred by he doctrine of res judicata, unanimously affirmed, without costs.

The motion court correctly found that this action is barred by res judicata, since plaintiff brought a prior action in Queens County arising out of the same transactions (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Elias v Rothschild*, 29 AD3d 448 [1st Dept 2006]). That plaintiff's original suit in Queens County named only municipal defendants, and not those defendants'

employees is of no matter, as the claims against those individuals could have been brought (*see O'Brien* at 357), and the employees are in privity with the prior defendants *(see Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]).

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3658N Victor Q., Jr., an Infant, by his Mother and Natural Guardian, Yuselle V., etc., Plaintiffs-Respondents, Index 350637/07 83813/11

-against-

Bronx Lebanon Hospital Center, Defendant-Appellant.

- - - - -

Bronx Lebanon Hospital Center, Third-Party Plaintiff,

-against-

Richard K. Deveaux, M.D., et al., Third-Party Defendants-Appellants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for Bronx Lebanon Hospital Center, appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for Richard K. Deveaux, M.D. and Norris M. Allen, M.D., appellants.

The Fitzgerald Law Firm, P.C., Yonkers (John M. Daly of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered November 4, 2016, which, after a *Frye* hearing (*Frye v United States*, 293 F 1013 [DC Cir 1923]), denied defendant hospital's motion and third-party defendant doctors' (collectively appellants) motion insofar as they sought to

preclude plaintiffs' expert from testifying as to causation, unanimously affirmed, without costs.

In this medical malpractice action, plaintiffs allege that the infant plaintiff suffered brain damage as a result of appellants' failure to diagnose and treat fetal hypoxia-ischemia.

The motion court properly denied the motions to preclude. The articles proffered by plaintiffs were sufficient to establish that it is generally accepted that perinatal hypoxia can be the cause of brain injury, in the absence of evidence of neurological injury in the neonatal period (*see Marso v Novak*, 42 AD3d 377, 378-379 [1st Dept 2007], *lv denied* 12 NY3d 704 [2009]). The articles established that infants who experienced a hypoxic event in the neonatal period but were asymptomatic for neurological injuries might still manifest such injuries later in life. That the infants in these articles exhibited certain manifestations of hypoxia not exhibited by the infant plaintiff is irrelevant (*see Zito v Zabarsky*, 28 AD3d 42, 46 [2d Dept 2006] [literature relied on to establish general acceptance need not involve "circumstances virtually identical to those of the plaintiff"]).

Even if some of the infant plaintiff's symptoms are attributable to his autism, the cause of which is unknown, some of his impairments may also be due to brain damage resulting from

hypoxia (*see Bygrave v New York City Hous. Auth.*, 65 AD3d 842, 846-847 [1st Dept 2009]).

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

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3659N Christopher A. Velarde, Index 306010/12
Plaintiff-Appellant,

-against-

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

Correction Officer Ms. B., etc., et al.,
Defendants.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered December 11, 2015, which denied plaintiff's motion for leave to amend his complaint, unanimously affirmed, without costs.

Plaintiff alleges that while he was an inmate at Riker's Island, he was assaulted by a fellow inmate who is not a party to this action. Plaintiff sued the City for the negligence of its corrections officers in failing to stop the assault. When the City joined issue, it asserted CPLR 1601 as an affirmative defense, seeking to apportion damages with the nonparty assailant. Plaintiff then sought leave to amend his complaint to

add causes of action under CPLR 1602(7) and (11), arguing that the City was not entitled to apportion its damages with nonparty tortfeasor since the corrections officer acted with a reckless disregard for plaintiff's safety and/or in concert with the assailant.

Leave to amend a complaint is typically freely granted, but is committed, however, to the sound discretion of the trial court (*see* CPLR 3025[b]; *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015]). To obtain leave, a plaintiff must submit evidentiary proof of the kind that would be admissible on a motion for summary judgment (*see American Theatre for the Performing Arts, Inc. v Consolidated Credit Corp.*, 45 AD3d 506 [1st Dept 2007]). Here, plaintiff's motion was properly denied since his purported proof was insufficient to show that the correction officers were anything more than negligent.

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

ENTERED: APRIL 6, 2017

CLERK

Renwick, J.P., Mazzarelli, Manzanet-Daniels, Feinman, Webber, JJ.

3660 In re Henry Harrison, Ind. 04768/15
[M-6557] Petitioner, OP 91/16

-against-

Hon. Gilbert C. Hong, etc., et al.,
Respondents.

_____

Neighborhood Defender Service of Harlem, New York (Roxanna Gutierrez of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. Gilbert C. Hong, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Jessica Peck of counsel), for Hon. Cyrus R. Vance, Jr., 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: APRIL 6, 2017

CLERK

Andrias, J.P., Feinman, Gische, Kahn, JJ.

2786 In re Catherina Park, et al., Index 101163/14
Petitioners-Appellants,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

_____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellants.

Mark F. Palomino, New York (Martin B. Schneider of counsel), for New York State Division of Housing and Community Renewal, respondent.

Robert M. Olshever, PC, New York (Robert M. Olshever of counsel), for 27 Washington Sq. North Owner LLC, respondent.

_____

Judgment, Supreme Court, New York County (Paul Wooten, J.), entered October 27, 2015, affirmed, without costs.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Paul G. Feinman
Judith J. Gische
Marcy L. Kahn, JJ.

2786
Index 101163/14

_____x

In re Catherina Park, et al.,
Petitioners-Appellants,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

_____x

Petitioners appeal from the judgment of the Supreme Court, New York County (Paul Wooten, J.), entered October 27, 2015, denying the petition to annul a final order of respondent New York State Division of Housing and Community Renewal (DHCR), dated August 12, 2014, which denied the Petition for Administrative Review and affirmed the order of the DHCR Rent Administrator, dated May 9, 2013, which dismissed petitioners' Fair Market Rent Appeal as time-barred and determined that the subject apartment became decontrolled on May 1, 2005, and dismissing the proceeding brought pursuant to CPLR article 78.

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellants.

Mark F. Palomino, New York (Martin B. Schneider of counsel), for New York State Division of Housing and Community Renewal, respondent.

Robert M. Olshever, PC, New York (Robert M. Olshever of counsel), for 27 Washington Sq. North Owner LLC, respondent.

GISCHE, J.

This is yet another appeal that requires us to resolve issues in the aftermath of the Court of Appeals' decision in *Roberts v Tishman Speyer* (13 NY3d 270 [2009]). The disputes before us arise from the Fair Market Rent Appeal (FMRA) petitioners filed with respondent New York State Division of Housing and Community Renewal (DHCR), implicating both the regulatory status of their apartment and the legality of the rent they were charged from the time they first took occupancy in 2010.

The DHCR decision being challenged in this article 78 proceeding denied the FMRA as untimely because it was filed more than four years after the apartment was no longer subject to the rent control laws following the death of the previous tenant in 2004. DHCR rejected petitioners' contention that the applicable statute of limitations should be disregarded because the owner had engaged in fraud. DHCR also rejected petitioners' claim that the owner's late notices and/or registrations had extended the time period within which petitioners could file an FMRA challenging the owner's efforts to set an initial rent following the apartment's removal from rent control. Finally, on the merits, DHCR concluded that petitioners were not entitled to either a rent-regulated apartment or regulated rent because in

2010, when they first took occupancy, the apartment was no longer receiving any J-51 tax benefits and had become vacant at a time when the legal vacancy rent clearly exceeded $2,000 per month, an amount sufficient to make it high-rent/vacancy, "luxury" decontrolled (Rent Stabilization Law of 1969 [Administrative Code of City of NY] [RSL] § 26-504.2[a]). We find that the motion court properly dismissed the petition because DHCR's determination was neither arbitrary nor capricious, it was supported by a rational basis and was not affected by any error of law (CPLR 7803; *Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 [2004]; *see Matter of Boyd v New York State Div. Hous. & Community Renew*, 23 NY3d 999 [2014]).

Most of the critical events in this case that have transpired over the past decade are either unrefuted or undisputed. In November 2010, petitioners first became the tenants of apartment 3C at 27 Washington Square North in Manhattan, pursuant to a one year written lease. Although the building was, at one time, part of the J-51 tax abatement program[1], by the time the parties entered into their first lease,

[1]*See* Administrative Code of City of NY § 11-243 [previously § J51-2.5]. The City's "J-51" program, authorized by Real Property Tax Law § 489, allows property owners who complete eligible projects to receive tax exemptions and/or abatements

the J-51 benefits had already expired. Petitioners initially paid a market rent of $7,400 per month for the six room apartment, which consisted of three bedrooms, two bathrooms, three fireplaces, central air-conditioning, an updated kitchen and bamboo floors.[2] Prior to their tenancy, apartment 3C had been occupied by Uta Hagen Berghof, a rent-controlled tenant. Berghof occupied the apartment from 1984 until her death in April 2004. At the time of Berghof's death, the registered maximum base rent (MBR) for the apartment was $1,548.48 a month.

After tenant Berghof died, the owner undertook major renovations to the apartment. The owner provided DHCR with copies of its contracts with an architect, various contractors, and service providers, as well as invoices marked "paid," statements, bills and cancelled checks, all in support of the owner's claim that the work had not been ordinary repairs, but a gut renovation of the apartment. The owner also produced documentary support for its claim that the expenditures for these

---

that continue for a period of years (*see* Administrative Code §§ 11-243[b][2], [3], [8]; 28 RCNY 5-03[a]).

[2] Petitioners thereafter renewed the lease for another year at a rent of $7,500 per month. When the renewal lease expired on October 31, 2012, the landlord commenced a holdover proceeding against them claiming that their tenancy was not subject to any form of rent regulation (*27 LLC v Kyun Sang Park and Catherina Park*, Civil Court, New York County Index No. L&T 86068/12).

individual apartment improvements (IAIs) had exceeded $200,000[3].

In setting a fair market rent for the vacant apartment in 2005, the owner sought to take advantage of two increases that were available to it under the rent regulation laws. One increase was simply due to the apartment becoming vacant; that increase, which was equal to 50% of the MBR, raised the rent from $1,548.48 to $2,322.72 (RSL § 26-513[b][1], Rent Guidelines Board Order No. 36). The other increase was equal to 1/40th of the cost of the owner's IAI expenditures, which in this case was $5,034.57 ($201,382.89 x 1/40th) (RSL § 26-511[c][13]). Adding these amounts to the registered MBR increased the rent to $7,357.29.

The first tenant to rent the apartment after it was renovated was Piers Playfair. Playfair and the owner entered into an unregulated, two year lease, commencing May 1, 2005, at a monthly rent of $7,200. In returning the apartment to a free market, unregulated status in 2005, the owner relied on a two-step analysis. First, as a result of Berghof's death, the rent controlled apartment became vacant, making it subject to rent-stabilization (*see* New York City Rent Control Law [65 McKinney's Unconsol. Laws] [RSL] § 26-403[e][2][i][9]; *see also* DHCR Fact

---

[3]Petitioners disputed the bona fides of the renovation. The DHCR, however did not reach this issue.

Sheet #6). This first step was consistent with prevailing law and remains unchallenged. The second step taken by the owner was to decontrol the apartment on the basis that the rent exceeded the high rent/vacancy threshold for luxury decontrol (RSL § 26-504.2[a]). Although the building was part of the J-51 tax abatement program in 2005, the landlord's belief that it could rely on the luxury decontrol laws to return the apartment to the free market was consistent with the DHCR's interpretation of the relevant laws and regulations at that time (*Roberts, supra* at 281). This second assumption turned out to be incorrect.

Playfair remained the tenant of apartment 3C for over four years. He renewed the lease twice, first for a two-year term commencing May 29, 2007 at a monthly rent of $7,825, and then again for a one-year term commencing November 1, 2009 at a monthly rent of $7,600. On September 30, 2010, before the last renewal lease expired, Playfair surrendered the apartment and moved out. Throughout most of the time that Playfair occupied the apartment, the owner was receiving J-51 tax exemption benefits for the building. The benefits expired, however, in June 2010, shortly before Playfair permanently vacated the apartment. Although it does not appear that while he was in occupancy Playfair was served with an RR-1, which is the notice setting an initial fair market rent for an apartment that is

removed from rent control, Playfair never filed his own FMRA.

In 2009, the Court of Appeals decided *Roberts*, rejecting DHCR's position that buildings independently subject to rent stabilization, but also participating in the J-51 tax benefits program, could deregulate apartments pursuant to the luxury decontrol laws while they were actually receiving J-51 benefits. The Court held that owners of rent stabilized apartments in buildings receiving J-51 benefits remain subject to rent stabilization for at least as long as the J-51 benefits are in force (*see* 28 RCNY at 5-03[f]; *Roberts*, *supra* at 286). *Roberts* expressly left open certain important issues, including whether it had retroactive effect (*id.* at 287). It did not address other consequent issues, including what effect, if any, the expiration of the J-51 benefits would have on the rent-regulated status of affected apartments.

In 2011, this Court decided *Gersten v 56 7th Ave., LLC* (88 AD3d 189 [1st Dept 2011]), holding that *Roberts* has retroactive application. We reached our conclusion by reasoning that the Court of Appeals had not established a new principle of law; it only construed law that had been in effect for years (*id.* at 198). Although our decision in *Gersten* was appealed, the appeal was withdrawn in March 2012 (18 NY3d 954 [2012]). Since that time, controlling authority has required that owners who had

previously luxury decontrolled apartments while still receiving J-51 tax benefits must register those apartments and retroactively restore them to rent stabilization. On February 6, 2012, this owner, consistent with *Gersten*, filed amended registration forms with DHCR, including a Report of Vacancy Decontrol (DHCR form RA-42V-NYC), an RR-1, and amended annual rent registrations for the apartment for the years 2006 through 2011[4]. These forms were mailed to both petitioners and Playfair. On April 16, 2012, within 90 days of the owner's retroactive registration, petitioners filed their FMRA, albeit almost seven years after the apartment was first removed from rent control.

In its decision, DHCR rejected petitioners' position both procedurally, as barred by the statute of limitations, and on the merits, finding that there was no validity to their claims that the apartment remains subject to rent regulation, and the free market rent they have been charged is illegal. Addressing the merits first, DHCR's conclusion that the circumstance of petitioners' occupancy did not entitle them to the benefit of a

[4]Petitioners' argument, that the owner's actions in retroactively registering the apartment as rent stabilized was motivated by their inquiries, is a red herring. Until March 2012, the legal issue of whether the owner was required to retroactively register the apartment was unclear. At about the time the issue was clarified, the owner did retroactively register the apartment.

rent-stabilized rent is amply supported in the record.

After the rent-controlled tenant's death in April 2004, and by operation of law, the apartment became subject to rent stabilization when, on May 1, 2005, it was first offered for rent after that vacancy. Because, however, the owner was still receiving J-51 tax exemption benefits for the building at that time, as subsequent court decisions in *Roberts* and *Gersten* make it clear, the owner had no right to return the apartment to the free market by relying on the luxury decontrol laws. There is no question that Playfair, as the tenant taking occupancy in 2005, was entitled to the benefits of rent-stabilization, including important rights of renewal and capped increases. Nonetheless, the rent stabilization laws would have permitted the owner at that time (in 2005) to have increased the rent to an amount over what had been the rent controlled MBR Berghof had been paying and what had been registered with DHCR (i.e. $1,548.48). This entitled the owner to a vacancy allowance increase that would have raised the base rent to a minimum of $2,322.72 per month (RSL § 26-513[b][1]; Rent Guidelines Board Order No.6). In addition, it was also permissible under the rent stabilization laws to charge an increase for IAIs, which also would result in an increase in the rent (RSL § 26-511[c][13]; *Elisofon v New York State Div. Of Hous. & Community Renewal*, 262 AD2d 40 [1st Dept

1999], *lv. denied* 94 NY2d 757 [1999]).

Before petitioners became the tenants of apartment 3C, there were pivotal events that affected the regulated status of the apartment; not only had the J-51 benefits expired several months earlier, they had expired before the previous tenant, Playfair, had surrendered the apartment.

Although the underpinnings of *Roberts* involved a situation where an owner luxury decontrolled an apartment while it was still receiving J-51 benefits, the Court did not reach the issue of what happens when such benefits expire. Nor did the Court address whether, and under what circumstances, an owner may seek deregulation of an apartment pursuant to the luxury decontrol laws. In *Matter of Schiffren v Lawlor* (101 AD3d 456 [1st Dept 2012]), this court broadly addressed the issue as follows: "[A] building that is already regulated when it receives J-51 benefits will continue to be regulated under the original rent-regulation scheme when the tax benefits expire" (*Schiffren* at 457). However, "the reversion to pre-J-51-benefit rent-regulation status includes the right of an owner to seek luxury deregulation in appropriate cases" (*id.*). More recently, in *Matter of Bramwell v New York State Div. of Hous. and Community Renewal* (147 AD3d 556 [1st Dept 2017]), this Court recognized that where an apartment is subject to rent

stabilization before receiving J-51 benefits, it resumes its former rent-stabilized status upon the expiration of those benefits.

Applying these precedents to the circumstances surrounding the parties' dispute, it is clear that in 2010, after the J-51 benefits expired, the apartment remained subject to rent stabilization. In the absence of J-51 benefits, the rent stabilization laws permit an owner to rely on the luxury decontrol laws, and if their attendant conditions are met, to deregulate an apartment. When the petitioners leased this apartment in 2010, all the circumstances permitting luxury decontrol were present and satisfied. By then the J-51 benefits had expired. They had expired before Playfair, the previous tenant, moved out of the apartment. Also, the last legally permissible rent exceeded the luxury decontrol threshold, then $2,000 per month. Consequently, the apartment was properly leased to petitioners as unregulated and at a free market rent (RSL § 26-504).

Even though the owner had improperly removed the apartment from rent stabilization in 2005, the legal rent that it could have charged in 2005 under the rent stabilization law easily exceeded the $2,000 threshold required for luxury deregulation. The 2005 vacancy allowance alone brought the rent for the

apartment to $2,322.72, an amount that was over the threshold. The owner's 2004-2005 post-vacancy improvements would also have entitled the owner to increase the rent over the threshold amount, attributable to those IAIs (*see Jemrock Realty co., LLC. v Krugman,* 72 AD3d 438 [1st Dept 2010], *lv. dismissed* 15 NY3d 866 [2010]). DHCR rationally concluded that it did not have to consider the bona fides of the IAIs because the permitted vacancy rent increase allowance, by itself, supported luxury decontrol.

Petitioners are not entitled to a different result, even though for a period of time during their occupancy the apartment was not registered with DHCR (*see Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [1st Dept 2010]). When the owner treated the apartment as deregulated in 2005 and discontinued rent registrations with DHCR, it did so based on a justifiable belief that the apartment was no longer subject to rent regulation and such filings were unnecessary. Preventing the owner from charging what is otherwise a legal rent, solely based on the lack of registration filings during the period before *Roberts* and *Gersten* were decided, would unfairly penalize the owner for action that was taken in good faith, relying upon DHCR's own interpretation of the law, without furthering any legitimate purpose of the rent stabilization laws (*see Dodd v 98 Riverside Drive, LLC*, 2012 NY Slip Op 31653 [U] [Sup Ct, NY County 2012]).

DHCR also properly concluded that there was no basis to look beyond the four-year limitation period set forth in the Rent Stabilization Code (Rent Stabilization Code [9 NYCRR] [RSC] § 2522.3[a]) to challenge the rent. The owner's amended (or late) filings did not toll or extend the time within which a FMRA could be filed. Ordinarily, when a rent-controlled apartment is vacated, it becomes subject to rent stabilization. At that time, the owner is free to charge an initial fair market rent that is "agreed to by the landlord and the tenant and reserved in a lease or provided for in a rental agreement." That initial rent is then registered and a RR-1 notice is served on the tenant, triggering the tenant's right to challenge the rent by filing a FMRA with DHCR (RSC §§2521.1[a][1], 2522.3). The FMRA is required to be filed no later than 90 days after the tenant is served with requisite notice of the initial legal regulated rent (*see Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101, 102 [1st Dept 2003]; *Muller v New York State Div. Hous. & Community Renewal*, 263 AD2d 296, 302 [1st Dept 2000], *lv. denied* 95 NY2d 763 [2000]).

If no notice is served, then the FMRA must be filed no later than four years after the time the rent controlled unit is originally removed from the City's rent laws (RSC §§ 2522.3[a], 2522.3[b][1], [2]). Moreover, examination of the rental history

is limited to the four-year period preceding the filing of the complaint or petition (*Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]). The right to file a FMRA generally belongs only to the first tenant to occupy the apartment after it becomes decontrolled (RSC § 2522.3[a]). Under certain circumstances that right may pass on to the next tenant to occupy the apartment, if there is improper notice to the first tenant (*id.; Matter of McKenzie v Mirabal* 155 AD2d 194, 201 [1st Dept 1990]), or there is evidence that the purported "notice" may have been fraudulent (*East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166, 167 [1st Dept 2005] [ample record to show that the tenants neither signed nor received the notice]).

At bar, the apartment was originally removed from rent control in 2005. Any FMRA would have needed to have been filed, at the latest, in 2009 before petitioners took occupancy. DHCR rationally concluded that petitioners' FMRA, filed in 2012, was untimely. Because the four-year limitations period expired while Playfair was still the tenant, the right to file a FMRA could never have passed on to petitioners. Additionally, there is no legal authority supporting petitioners' argument that because the RR-1 notice was served after the four-year period, the limitations period was extended.

We recognize that under certain circumstances, especially where a landlord has engaged in fraud in initially setting the rent or in removing an apartment from rent regulation, the court may examine the rental history for an apartment beyond the four-year statutory period allowed by CPLR 213-a (*Matter of Grimm v State of N.Y.S. Div. Of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 366-367 [2010]; *Thornton v Baron*, 5 NY3d 175 [2005]). However, in this case, there is simply no evidence or indicia that the owner engaged in a fraudulent deregulation scheme to remove the apartment from the protections of the rent stabilization law (*Todres v W7879, LLC*, 137 AD3d 597, 598 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]). DHCR properly concluded that the owner did not engage in fraud when it removed the apartment from rent regulation in 2005 because it was relying on DHCR's own contemporaneous interpretation of the relevant laws and regulations. Similarly, DHCR rationally concluded that there was no fraud in the owner's failure to re-register the apartment until 2012, when the issue of the retroactive application of *Roberts* became apparent. Nor may petitioners rely on their claim that the IAIs were fraudulent, because the owner sufficiently documented the apartment improvements in their response to the petition before the DHCR (*see 72A Realty Assoc. v Lucas*, 101 AD3d 401, 402-403 [1st Dept 2012]). Petitioner failed to raise a

colorable claim of fraud warranting any further consideration of that issue by DHCR (*Matter of Boyd v New York State Div. of Hous. & Community Renewal,* 23 NY3d 999, 1000 [2014]). In any event, the *bona fides* of the IAIs were, for reasons previously stated, irrelevant to the issues presented in this FMRA. Petitioners' reliance on our decision in *Olsen v Stellar West 110, LLC* (96 AD3d 440 [1st Dept 2012], *lv. dismissed* 20 NY3d 1000 [2013]) is unavailing. *Olsen* was decided on the basis of primary jurisdiction of the DHCR. Apart from any other significant distinctions, this Court did not rule substantively on the fraud issue; we simply remanded it to DHCR for further investigation.

Accordingly, the judgment of the Supreme Court, New York County (Paul Wooten, J.), entered October 27, 2015, denying the petition to annul a final order of respondent DHCR, dated August 12, 2014, which denied the Petition for Administrative Review and affirmed the order of the DHCR Rent Administrator, dated May 9,

2013, that dismissed petitioners' Fair Market Rent Appeal as time-barred and determined that the subject apartment became decontrolled on May 1, 2005, and dismissing the proceeding brought pursuant to CPLR article 78, should be affirmed, without costs.

All concur.

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

ENTERED: APRIL 6, 2017

CLERK