SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 15, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3154 Donna Walker, et al., Index 150009/14
Plaintiffs-Appellants,

-against-

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

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

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondents.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered March 18, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing of their entitlement to judgment dismissing the false arrest and false imprisonment claims. Defendants submitted competent proof that plaintiffs were in constructive possession of the drugs and weapon recovered from the balcony in the apartment in which plaintiffs Donna

Walker and Kendra Esannason were registered as tenants, and that the police had probable cause to arrest all three plaintiffs (*see Boyd v City of New York*, 143 AD3d 609, 609-610 [1st Dept 2016]; *see generally People v Manini*, 79 NY2d 561, 573 [1992]). Plaintiffs' general denials of knowledge of the contraband at the apartment failed to raise a triable issue of fact. In addition, the evidence showed that plaintiff Jasminlee Mejia was more than just merely present at the apartment when the police arrived, as she was in a relationship with Ms. Esannason, frequently slept in the apartment, kept her clothes there, and was in a state of undress or semi-dress when the police arrived (*see People v Edwards*, 206 AD2d 597, 597-598 [3d Dept 1994], *lv denied* 84 NY2d 907 [1994]).

The motion court correctly dismissed the excessive force claims, since the plaintiffs offered no competent proof to show that the alleged excessive actions by the police were unreasonable given the circumstances, or caused plaintiffs compensable injury (*see Koeiman v City of New York*, 36 AD3d 451, 453 [1st Dept 2007], *lv denied* 8 NY3d 814 [2007]; *Rivera v City of New York*, 40 AD3d 334, 341-342 [1st Dept 2007], *lv dismissed* 16 NY3d 782 [2011]).

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

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

ENTERED: MARCH 15, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3170-
3171

Index 650721/13

High Definition MRI, P.C., etc.,
Plaintiff-Appellant,

-against-

Liberty Mutual Holding
Company, Inc., et al.,
Defendants-Respondents.

_____

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for appellant.

Freiberg, Peck & Kang, LLP, Armonk (Yilo J. Kang of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Robert R. Reed, J.), entered May 11, 2016, dismissing the complaint, unanimously reversed, on the law, the judgment vacated, and the complaint reinstated, without costs. Appeal from order, same court and Justice, entered February 4, 2016, which granted defendants' motion to dismiss, unanimously dismissed, without costs as subsumed in the appeal from the judgment.

Contrary to the motion court's conclusion, the breach of contract action against defendants Liberty Mutual Holding Company, Inc., Liberty Mutual Insurance Company, Safeco Insurance Company of America, Inc., and Indiana Insurance Company provides

adequate notice of the transactions and occurrences intended to be proved (*see* CPLR 3013), and the cause of action for a declaration that defendants' claim-handling processes are unlawful and that plaintiff is properly incorporated states a cause of action for declaratory relief (*see State Farm Mut. Auto. Ins. Co. v Anikeyeva*, 89 AD3d 1009, 1010 [2d Dept 2011]).

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

ENTERED: MARCH 15, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3172N High Definition MRI, P.C., Index 651039/13
Plaintiff-Appellant,

-against-

Mapfre Insurance Company of New York,
Defendant-Respondent.

_____

D'Agostino, Levine, Landesman & Lederman LLP, New York (Bruce H. Lederman of counsel), for appellant.

Bruno, Gerbino & Soriano, LLP, Melville (Nathan Shapiro of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about July 14, 2016, which granted plaintiff's motion for reargument of defendant's motion to sever the breach of contract cause of action or, in the alternative, for a stay of the severance order pending appeal, only to the extent of extending plaintiff's time to commence separate actions in Civil Court for the 198 claims asserted in the breach of contract cause of action, unanimously affirmed, with costs.

Although the order on reargument purported to deny plaintiff's motion to reargue defendant's severance motion, it is appealable, because the court addressed the merits of the motion, in effect, granting it and adhering to the original determination (*see Jackson v Leung*, 99 AD3d 489, 490 [1st Dept 2012]).

The court properly severed the breach of contract cause of action, since the 198 unrelated no-fault claims asserted therein raise no common issues of fact or law (*see* CPLR 603; *Radiology Resource Network, P.C., v Fireman's Fund Ins. Co.*, 12 AD3d 185 [1st Dept 2004]). Plaintiff's contention that the defense of fraudulent incorporation presents common factual and legal issues that predominate is unavailing, since defendant has made clear that it does not intend to pursue that defense.

The court properly denied plaintiff's motion for a stay, since adjudication of the separate breach of contract claims in Civil Court is not dependent on a determination of the declaratory judgment cause of action (*see Hunter v Hunter*, 10 AD2d 937 [1st Dept 1960]).

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

ENTERED: MARCH 15, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3173N People of the State of New York, etc., et al.,
Plaintiffs-Respondents,

-against-

Sprint Communications Inc., formerly known as Sprint Nextel Corp., et al.,
Defendants-Appellants.

Index 103917/11

Williams & Connolly LLP, Washington, D.C. (David S. Blatt of the bar of the Commonwealth of Pennsylvania and District of Columbia, admitted pro hac vice, of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Eric Del Pozo of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about July 6, 2016, which, insofar as appealed from, denied defendants' motion to compel the Attorney General to produce documents, unanimously modified, on the law, to grant the motion except as to the names of the taxpayers (other than defendants) filing sales tax returns and reports, without prejudice to seeking further redaction in the motion court, and otherwise affirmed, without costs.

To the extent defendants seek the production of documents "sufficient to identify every provider of mobile telecommunications voice services ... that has paid sales tax

related to those services," the court correctly denied their motion to compel. Tax Law § 1146(a) states:

> Except in accordance with proper judicial order . . . it shall be unlawful for . . . any officer or employee of the department of taxation and finance . . . or any person who in any manner may acquire knowledge of the contents of a return or report filed with the tax commission pursuant to this article, to divulge or make known in any manner *any particulars set forth or disclosed in any such return or report*. The officers charged with the custody of such returns and reports shall not be required to produce any of them or *evidence of anything contained in them* in any action ... in any court, except on behalf of the tax commission in an action ... under the provisions of the tax law or in any other action ... involving the collection of a tax due under this chapter to which the state . . . is a party . . . or on behalf of any party to any action ... when *the returns, reports or facts shown thereby* are directly involved in such action . . . in any of which events the court ... may require the production of . . . so much of said returns, reports or of the facts shown thereby, as are pertinent to the action . . . and no more . . . . Nothing herein shall be construed to prohibit . . . the publication of statistics so classified as to prevent the identification of particular returns or reports and the items thereof (emphasis added).[1]

Both a sales tax return and a sales tax report include the taxpayer's name.

As the Tax Law provides, one exception to the prohibition is

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[1] We need not defer to the New York State Department of Taxation and Finance's (DTF) interpretation of the statute, because this language "is plain and involves no special or technical words" (*Matter of Raganella v New York City Civ. Serv. Commn.*, 66 AD3d 441, 446 [1st Dept 2009]).

disclosure "*on behalf of the tax commission* in an action . . . under the provisions of the tax law or in any other action . . . involving the collection of a tax due under this chapter to which the state ... is a party" (Tax Law § 1146[a] [emphasis added]). The third cause of action of the amended superseding complaint alleges violation of article 28 of the Tax Law, and the State is a party to this action. Nevertheless, in light of the structure of Tax Law § 1146(a) (*see* discussion of the second exception, below) and the severe penalties for violating tax secrecy (*see* Tax Law § 1146[f]), we accept the People's argument that this exception does not apply because DTF did not request disclosure.

As also set forth in the Tax Law, a further exception is for disclosure "*on behalf of any party* to any action ... when the returns, reports or facts shown thereby are *directly involved* in such action" (emphasis added). This exception does not apply because this action is about *defendants'* alleged underpayment of tax, and the facts shown in defendants' *competitors'* tax returns or reports are not directly involved (*see Matter of Manufacturers Trust Co. v Browne*, 269 App Div 108, 112-113 [1st Dept 1945], *affd* 296 NY 549 [1946]; *see also Matter of Capitol Cablevision Sys. v State Tax Commn.*, 98 AD2d 100, 102 [3d Dept 1983]).

As to defendants' remaining requests, a taxpayer's or DTF's

opinions about debundling, the Mobile Telecommunications Sourcing Act, the 2002 amendments to the New York Tax Law, the 2002 Technical Services Bureau Memorandum, etc., are not "particulars set forth or disclosed in" a sales tax return or report, "evidence of anything contained in" such a document, or "facts shown" by such documents; therefore, Tax Law § 1146(a) does not shield these items from disclosure (*see Matter of KLM Royal Dutch Airlines v New York State Tax Commn.*, 87 AD2d 902 [3d Dept 1982]).

Matter of Tartan Oil Corp. v State of New York Dept. of Taxation & Fin. (239 AD2d 36 [3d Dept 1998]), on which the People rely, is distinguishable. In that case, one company sought another company's "cash disbursement journal, cash receipts journal, check disbursement journal, purchase invoices, general ledger and a day book" (*id.* at 37) for use in a lawsuit between the two companies. The Third Department observed that "a major purpose of tax secrecy statutes is to facilitate tax enforcement by encouraging taxpayers to make full and truthful declarations without fear that these statements will be revealed or used against them for other purposes" (*id.* at 38). In the case at bar, defendants do not seek to use other cell phone companies' views about debundling against them in private litigation;

rather, defendants seek this information to defend themselves in a tax collection case brought by the People – a case, moreover, in which the People are relying, at least in part, on other cell phone companies' conduct to show that defendants' conduct was unreasonable.

The People claim that they will use only material obtained from third-party discovery and that they have disclosed those materials to defendants. However, the fact that the People have chosen to restrict the materials they will use to prosecute defendants does not mean that defendants must restrict the materials they will use to defend themselves. Moreover, defendants cannot obtain DTF's documents from third parties.

If a document that shows another cell phone company's or DTF's position about debundling, etc., happens to mention the other cell phone company's name, the People may not withhold the entire document. *Matter of Moody's Corp. & Subsidiaries v New York State Dept. of Taxation & Fin.* (141 AD3d 997 [3d Dept 2016]), on which the People rely, is distinguishable, because it is based on language specific to the Freedom of Information Law

(*see Matter of Short v Board of Mgrs. of Nassau County Med. Ctr.*, 57 NY2d 399, 404-405 [1982]). Instead, the People should replace the taxpayers' names with "Cell Phone Company No. 1" and "Cell Phone Company No. 2," or the like.

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3367 The People of the State of New York, Ind.3645/03
Respondent,

-against-

Jasper Grayson,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Dmitriy Povazhuk of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (George Villegas, J.), entered on or about May 2, 2013, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's motion (*see People v Sosa*, 18 NY3d 436, 442-443 [2012]; *People v Paulin*, 17 NY3d 238, 244 [2011]), particularly in light of the very serious criminal conduct in which defendant engaged shortly

after he was released on parole for the underlying drug conviction.

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3368-
3369 In re Enrique R., and Another.,

Children under Eighteen
Years of age, etc.,

Eddie R.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Megan E. K. Montcalm of counsel), for respondent.

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

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Order of disposition, Family Court, Bronx County (Linda B. Tally, J.), entered on or about June 18, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about March 19, 2015, finding that respondent derivatively neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of

the evidence, and the court's credibility determinations are entitled to deference (Family Ct Act § 1046 [b][I]; *Matter of Irene O.*, 38 NY2d 776, 777-778 [1975]).

The neglect findings were not based solely upon a presumption that the father's conviction for sexually abusing an unrelated five year old is sufficient to establish that he poses a danger to his children in the absence of treatment (*see Matter of Afton C. [James C.]*, 17 NY3d 1, 9-10 [2011]). Rather, the neglect findings were premised on the circumstances surrounding the conviction, which involved abuse of a friend's child, as well as the father's failure to complete a sex offender treatment program prior to the filing of the petitions, denial of responsibility for the crime to which he had pleaded guilty, and violation of the conditions of his parole which prohibited him from living with any children without permission of the sentencing court (*see Matter of Cashmere S. [Rinell S.]*, 125 AD3d 543, 544-545 [1st Dept 2015], *lv denied* 26 NY3d 909 [2015]; *Matter of Anastacia L. [Vito L.]*, 90 AD3d 452, 453 [1st Dept 2011], *lv denied* 18 NY3d 809 [2012]; *Matter of Ahmad H.*, 46 AD3d 1357, 1358 [4th Dept 2007], *lv denied* 12 NY3d 715 [2009]). The court was also justified in drawing a negative inference concerning the father's rehabilitation based on his failure to

testify and his denial of responsibility (*Matter of Brandon M. [Luis M.]*, 94 AD3d 520, 521 [1st Dept 2012]). All of these factors together warranted a finding that the father was not acting as a "reasonable and prudent parent" under the circumstances (*Matter of Christopher C. [Joshua C.]*, 73 AD3d 1349, 1350-1351 [3d Dept 2010]).

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3370 Deutsche Bank National Trust Company, etc., Plaintiff-Appellant, Index 380910/11

-against-

Samuel Lopez, Defendant-Respondent,

Ana Lopez, et al., Defendants.

_____

Hogan Lovells US LLP, New York (Benjamin P. Jacobs of counsel), for appellant.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered April 15, 2014, as amended by order entered May 9, 2014, which granted defendant Samuel Lopez's motion to dismiss the complaint, and denied as academic plaintiff's motion for a judgment of foreclosure and sale, upon default, unanimously reversed, on the law and the facts, without costs, defendant's motion denied, and plaintiff's motion granted. The Clerk is directed to enter judgment accordingly.

Defendant failed to proffer a reasonable excuse for his default in answering the complaint and his failure to respond to plaintiff's motion for a reference and a default judgment (*see Citibank, N.A. v K.L.P. Sportswear, Inc.*, 144 AD3d 475, 476-477

[1st Dept 2016]). His assertion that he was not sure if the summons and complaint were real is unavailing (*see Dorrer v Berry*, 37 AD3d 519 [2d Dept 2007]), especially because he cites no efforts he made to determine the legitimacy of these papers, although the name, address and phone number of plaintiff's counsel is prominently displayed on them. Moreover, defendant offered no explanation for failing, after attending a settlement conference, to seek to serve either an answer to the complaint or opposition to the motion for a reference and default judgment, which he does not deny receiving. Having so defaulted, and having failed to proffer a reasonable excuse for his defaults, defendant is precluded from moving to dismiss the foreclosure action on the ground of plaintiff's alleged failure to comply with RPAPL 1304 (*see PHH Mtge. Corp. v Celestin*, 130 AD3d 703, 704 [2d Dept 2015]).

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3371 David Eagle, Index 650314/13
Plaintiff-Appellant,

-against-

Emigrant Savings Bank,
Defendant-Respondent.

_____

Kaiser Saurborn & Mair, P.C., New York (Daniel J. Kaiser of counsel), for appellant.

Proskauer Rose LLP, New York (Evandro C. Gigante of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 3, 2016, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the claims for breach of contract and unjust enrichment, unanimously affirmed, without costs.

Plaintiff seeks to enforce an employment offer letter providing that he was eligible for participation in defendant's carried interest compensation plan at a rate to be determined in defendant's sole discretion. However, the subject language in the offer letter lacks the requisite definiteness to be enforceable, since it provides neither the level of plaintiff's participation in the plan, nor a methodology or extrinsic standard for determining it (*see Matter of 166 Mamaroneck Ave.*

Corp. v 151 E. Post Rd. Corp., 78 NY2d 88, 91-92 [1991]; *Benham v eCommission Solutions, LLC*, 118 AD3d 605, 6060-607 [1st Dept 2014]; *Magnum Real Estate Servs., Inc. v 133-134-135 Assoc., LLC*, 103 AD3d 453 [1st Dept 2013]; *compare Tonkery v Martina*, 78 NY2d 893 [1991]).

Based on the terms of both the language of the offer letter and of the carried interest compensation plan itself, it is entirely within defendant's discretion to determine if and at what level plaintiff would participate in the plan (*see Hunter v Deutsche Bank AG, N.Y. Branch*, 56 AD3d 274 [1st Dept 2008]), and it is undisputed that defendant never exercised this discretion. Furthermore, plaintiff's contention that defendant was under a good faith obligation to set his participation level in the plan is undermined by defendant's clear right to exercise its discretion in that regard (*id.*).

The unjust enrichment claim was properly dismissed, since it is duplicative of the breach of contract claim (*Benham* at 607).

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3372- Index 105411/08
3373-
3374 Aaron Elkin,
Plaintiff-Appellant,

-against-

Andrea Labis,
Defendant-Respondent.

_____

Aaron Elkin, M.D., appellant pro se.

Char & Herzberg, LLP, New York (Edward M. Char of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered April 23, 2015, which, among other things, denied plaintiff father's motion to hold defendant mother in contempt, and granted so much of defendant's cross motion as sought counsel fees to the extent of ordering plaintiff to pay to defendant's attorneys the sum of $2000; and order, same court and Justice, entered April 28, 2015, which, among other things, granted plaintiff's motion for an order directing certain relief only to the extent of appointing, in an order entered April 29, 2015, Dr. Jo Hariton to conduct therapeutic visits between plaintiff and the parties' child, and otherwise denied the motion; and order, same court and Justice, entered April 29,

2015, which, among other things, directed plaintiff to arrange six therapeutic visits between him and the child with Dr. Hariton, unanimously affirmed, without costs.

Plaintiff failed to establish any basis for the motion court to order defendant to bring the child to the courtroom (Domestic Relations Law § 70). Nor did plaintiff establish any change in circumstance warranting the reassessment or updating of the parenting plan (*Matter of Moore v Gonzalez*, 134 AD3d 718, 719 [2d Dept 2015]). An evidentiary hearing was not required (*see e.g. Allen v Farrow*, 215 AD2d 137, 140 [1st Dept 1995]).

The motion court properly declined to appoint Dr. Alexandra Stone to supervise therapeutic visitation between plaintiff and the child, since Dr. Stone previously had declined the appointment and had withdrawn from the process. Similarly, the court properly declined to appoint Dr. Joel Klass to supervise therapeutic visitation. Dr. Klass had served as plaintiff's expert during the custody trial and therefore was not an appropriate choice as supervisor, which requires the trust of both parties. Moreover, given that Dr. Klass resides in Florida, his appointment would cause the parties to incur substantially greater expense. The court properly appointed Dr. Hariton, especially since plaintiff failed to submit, at the court's

request, any appropriate professionals to conduct therapeutic visitation and failed to establish that Dr. Hariton was otherwise unqualified.

The motion court properly denied plaintiff's motion to hold defendant in contempt for her alleged failure to follow the court's August 19, 2014 order concerning plaintiff's access to the child's medical information. Defendant confirmed with the child's pediatrician that plaintiff had received all of the child's medical records to date and that no additional records had been created since that time. Thus, plaintiff's rights were not prejudiced by defendant's actions (Judiciary Law § 753[A]), nor was defendant's conduct willful (*id.* § 750[A][3]). The court properly awarded defendant's attorneys $2000 for defending against plaintiff's unsuccessful motion.

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

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3375 The People of the State of New York, Ind. 2832/14
Respondent,

-against-

Bryon Coleman,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered August 6, 2015,

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

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

ENTERED: MARCH 15, 2017

CLERK

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

Friedman, J.P., Andrias, Gische, Webber, JJ.

3376 Maureen Summers, Index 151213/13
Plaintiff-Respondent,

-against-

Chelsea Piers Management Inc.,
et al.,
Defendants,

MarineMax Services, Inc., et al.,
Defendants-Appellants,

American Cruise Lines, Inc.,
Defendant-Respondent.

_____

Giuliano McDonnell & Perrone, LLP, Mineola (Joseph J. Perrone of counsel), for appellants.

Dankner Milstein, P.C., New York (Alexander J. Wulwick of counsel), for Maureen Summers, respondent.

Rubin, Fiorella & Friedman LLP, New York (Michael E. Stern of counsel), for American Cruise Lines, Inc., respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 13, 2016, which denied the motion of MarineMax Services, Inc. and MarineMax Northeast, LLC (collectively MarineMax) for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

MarineMax established entitlement to judgment as a matter of

law, in this action where plaintiff was injured when she fell while disembarking from a cruise ship that had docked at Chelsea Piers. The record shows that the area of plaintiff's fall was not a part of the Chelsea Piers complex leased by MarineMax for their power boat dealership and small vessel marina. Plaintiff was also not a third-party beneficiary of MarineMax's contract with Chelsea Piers to operate and manage the nondemised portion of the marina (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554, 555 [1st Dept 2011]). The subject agreement was not a comprehensive and exclusive management agreement such to displace Chelsea Piers' duty to safely maintain the premises *(see Corrales v Reckson Assoc. Realty Corp.*, 55 AD3d 469 [1st Dept 2008]).

Because MarineMax neither owned, occupied, or controlled the pier where plaintiff's fall occurred, it was not a wharfinger (*compare Smith v Burnett*, 173 US 430, 434 [1899]; *Bouchard Transp. Co., Inc. v Tug Gillen Bros.*, 389 F Supp 77 [SD NY 1975]). In any event, the gap in the floating dock was known to the captain of the docking vessel, and thus no wharfinger duty to

warn arose (*see Bunge Corp. v M/V Furness Bridge*, 558 F2d 790, 795 [5th Cir 1977], *cert denied* 435 US 924 [1978]).

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3377 Solange Arroyo, Index 20181/14E
Plaintiff-Respondent,

-against-

Kenneth Clarke, et al.,
Defendants-Appellants.

_____

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellants.

Greg Garber, New York (Matthew Gray of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered May 9, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was injured when she slipped on icy steps in front of defendants' residence. The record shows that defendant Kenneth Clarke testified that sheets of icy rain had been falling all morning on the day of the accident, and that the steps had been cleared earlier that morning by a man he had hired to clear snow and ice. However, plaintiff and a neighbor who lived across the street testified that there was no precipitation on the morning of the accident, but that it had snowed two and three days earlier. Plaintiff also stated that

she had not seen the man defendant had hired to clear the steps, either after the previous snowfall or that morning, although she was home and would have been aware of his presence. Moreover, there are conflicting opinions of expert meteorologists regarding the weather conditions on the morning of plaintiff's fall. Under these circumstances, summary judgment was properly denied, since triable issues of fact exist as to whether there was a storm in progress on the morning of plaintiff's accident, which would have suspended defendants' obligation to clear the steps of snow and ice (*see Pipero v New York City Tr. Auth.*, 69 AD3d 493 [1st Dept 2010]).

Furthermore, assuming that there was no storm in progress, the record also presents issues of fact as to whether anyone acting on defendants' behalf ever inspected and cleared the steps, either on the morning of the accident or after the prior snowfall, and, if so, whether such person's "failure to place sand or salt on the stairs created or exacerbated a dangerous

condition" after the prior storm (*id.* at 493).

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3378 Barbara Dzidowska, Index 452293/14
Plaintiff-Respondent,

-against-

The Related Companies, L.P., et al.,
Defendants-Appellants,

Fujitec America, Inc., doing business as Fujitec Serge of New York,
Defendant-Respondent.

_____

London Fischer LLP, New York (Brian P. McLaughlin of counsel), for appellants.

The Platta Law Firm, PLLC, New York (Brian J. Vannella of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 11, 2016, which to the extent appealed from, granted plaintiff's motion for spoliation sanctions against defendants-appellants, denied defendants-appellants' cross motion to sanction plaintiff's counsel and for summary judgment dismissing the complaint and all cross claims as against the Related Companies, L.P. (Related) and 1616 First Company, LLC (First), unanimously affirmed, with costs.

The court properly concluded that appellants failed to demonstrate that plaintiff's counsel violated the Rules of Professional Conduct, CPLR 3101 and 3120 or 22 NYCRR § 130-

1.1(c), warranting sanctions, based on alleged conduct of an investigator.

However, the court properly sanctioned appellants for spoliation of certain videotapes, which they were notified by plaintiff's counsel to preserve, within days of the accident. Despite this notice, appellants preserved copies of only limited portions of the surveillance tape from one camera and destroyed the footage for the entire relevant period from another camera located in the elevator. Plaintiff showed that the portions of the tape that were recorded over were relevant to whether defendants had notice of elevator malfunctions prior to her accident. The court properly concluded that defendants' culpable state of mind was evidenced by their failure to comply with plaintiff's request to preserve this evidence (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]).

Related and First failed to establish that they did not own, manage or maintain the building. Their reliance largely on

unidentified documents not before the court is insufficient to meet their burden on summary judgment.

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3379 The People of the State of New York, Ind. 4177/11
Respondent,

-against-

Walde Vizcaino,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered October 11, 2013, as amended October 15, 2013, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him to concurrent terms of 10 and 6 years, respectively, unanimously affirmed.

The court properly denied defendant's suppression motion. Police, who undisputedly had a sufficient basis for a common-law inquiry of defendant based on their investigation of a robbery, entered defendant's apartment with the consent of another resident. After the resident who answered the door knocked on a bathroom door, defendant came out of the bathroom and complied with an officer's request to move to a position between two officers. Meanwhile, an officer told the victim that the police

might have someone who matched the description, and then brought him to the apartment. While defendant was flanked on both sides by two officers, and other officers were nearby, the victim identified defendant as one of the robbers.

The record supports the conclusion that the police made a common-law inquiry, and not a seizure requiring reasonable suspicion. Notwithstanding the presence of several police officers, the request for defendant to move to the front of his apartment did not constitute a forcible stop or seizure (*see People v Donald R.*, 127 AD3d 575 [1st Dept 2015], *lv denied* 25 NY3d 1162 [2015]; *see also People v Bora*, 83 NY2d 531, 535 [1994]).

The showup identification procedure was not unduly suggestive, in light of the "close spatial and temporal proximity to the robbery, as the result of a single unbroken chain of events," and the fact that defendant was not physically restrained (*People v Williams*, 15 AD3d 244, 246 [1st Dept 2005], *lv denied* 5 NY3d 771 [2005]). Notwithstanding the presence of several police officers in or near the apartment, and an officer's statement to the victim that the police had someone who might match the description provided by the victim, "the overall effect of the allegedly suggestive circumstances was not

significantly greater than what is inherent in any showup" (*People v Brujan*, 104 AD3d 481, 482 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Therefore, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Alternatively, to the extent the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Accordingly, we find no basis for a remand for the purpose of reopening the suppression hearing in light of the victim's trial testimony, or any other remedy for the alleged ineffectiveness.

With regard to defendant's phone calls made while incarcerated, the only preserved argument is the claim that because an inmate handbook was only in English, it failed to provide notice that the calls would be recorded. That argument is unavailing, because defendant received two other forms of notice, one or both of which were in Spanish. Defendant's

remaining contentions regarding the calls are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3380 Wells Fargo Bank, N.A., Index 104131/11
Plaintiff-Respondent,

-against-

George L. Sanchez,
Defendant-Appellant.

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Jonathan Cohen, New York, for appellant.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 15, 2015, which granted plaintiff's motion for summary judgment, unanimously affirmed, without costs.

The motion court correctly found the affidavit submitted in support of plaintiff's motion sufficient for prima facie entitlement to judgment as a matter of law. Contrary to defendant's contention, it was not necessary for the affiant to possess first-hand knowledge of the mechanics of the shortfall requirement in the parties' short sale agreement, as her affidavit was not submitted to explain the transaction. The motion court correctly found the short sale agreement unambiguous and not deceptive (*see Sanif, Inc. v Iannotti*, 119 AD2d 654 [2d Dept 1986]), and properly rejected defendant's defenses as

conclusory and unsubstantiated in finding that they failed to raise an issue of fact in opposition.

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3381 Mark Versace, Index 112302/07
Plaintiff-Appellant,

-against-

1540 Broadway L.P., et al.,
Defendants-Respondents,

Nest International, et al.,
Defendants.

- - - - -

[And a Third Party Action]

- - - - -

Schindler Elevator Corporation,
Second Third-Party Plaintiff,

-against-

Elpro, Inc.,
Second Third-Party Defendant,

Vertitron Midwest, Inc.,
Second Third-Party Defendant-Respondent.

_____

Mulholland, Minion, Davey, McNiff & Beyrer, Williston Park (John A. Beyrer of counsel), for appellant.

O'Connor, O'Connor, Hintz & Deveney, Melville (Robert C. O'Connor of counsel), for 1540 Broadway L.P., 1540 Broadway NY, LLC, Virgin Entertainment Group, Inc., and Virgin Megastores (USA), L.P., respondents.

Steve S. Efron, New York, for Schindler Elevator Corporation, respondent.

Rende Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Minnesota Elevator, Inc., and Vertitron Midwest, Inc., respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered November 17, 2015, which, insofar as appealed from as limited by the briefs, granted defendant Schindler Elevator Corporation's motion for summary judgment dismissing the strict products liability claims as against it, granted defendant Minnesota Elevator, Inc. and second third-party defendant Vertitron Midwest, Inc.'s motion for summary judgment dismissing the strict products liability claims as against Minnesota, granted defendants 1540 Broadway L.P., 1540 Broadway NY, LLC, Virgin Entertainment Group, Inc., and Virgin Megastores (USA), L.P.'s motion for summary judgment dismissing the Labor Law § 240(1) claim as against them, and denied plaintiff's motion to amended the complaint to add a claim for punitive damages against Minnesota, unanimously modified, on the law, to deny Schindler's and Minnesota and Vertitron's motions as to the design defect and failure to warn claims predicated on an alleged defective elevator shim, and otherwise affirmed, without costs.

Plaintiff, an elevator mechanic, allegedly was injured in January 2006 when an elevator that he had been dispatched to repair suddenly dropped, with him inside, allegedly because a defective shim had caused the guide shoe to crack and because of the failure of a low-pressure switch. Defendant Minnesota and

third-party defendant Vertitron established prima facie that the low-pressure switch and the shim (a piece bolted between the guide shoes and the elevator cab to create a snug fit between them) were not defective by demonstrating that the elevator was inspected and approved for service by the City of New York after it was first installed in 1995 and again in 2005, after it was returned to service after having been repaired, and that the low-pressure switch was tested every two years by the City (*see McArdle v Navistar Intl. Corp.*, 293 AD2d 931 [3d Dept 2002]).

In opposition, plaintiff failed to raise an issue of fact as to the defectiveness of the low-pressure switch. His expert's assertion that it was the switch that failed (11 years after the elevator was installed) provides no evidentiary basis for inferring that the switch was defective at the time it left Minnesota's hands (*see Steckal v Haughton El. Co.*, 59 NY2d 628 [1983]).

However, plaintiff raised issues of fact whether the shim was defective and a cause of the accident and whether there was a failure to warn. Plaintiff's expert opined that the cracked shoe caused the elevator car to get wedged in the hoistway in the manner that plaintiff described, and a Minnesota engineer involved in the design of the elevator acknowledged that the car

could come out of the rails and get hung up if a guide shoe cracked while the elevator was descending. The engineer also testified that, after a previous instance in which a similar guide shoe by the same manufacturer had cracked because bolts had been over-tightened, Minnesota had redesigned the shim in 2003 to prevent the guide shoe from cracking because of over-tightening of the bolts, but had made no effort to notify customers whose elevators had the older shims.

The elevator was not a safety device within the meaning of Labor Law § 240(1) (*Kleinberg v City of New York*, 61 AD3d 436 [1st Dept 2009]). Plaintiff's reliance on *McCrea v Arnlie Realty Co. LLC* (140 AD3d 427 [1st Dept 2016]) is unavailing. In that case, the elevator on which the plaintiff was engaged in repair work fell onto the plaintiff because it had not been secured. In this case, plaintiff was inside the elevator, riding up and down to test it. To the extent plaintiff may have been engaged in "repair" within the meaning of Labor Law § 240(1), the statute does not apply, because any securing device would have defeated the purpose of his work by precluding him from riding the elevator (*see Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 139-140 [2011]).

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: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3382 IDT Corporation, Index 603710/04
Plaintiff-Appellant,

-against-

Morgan Stanley Dean
Witter & Co., et al.,
Defendants-Respondents.

_____

Boies, Schiller & Flexner LLP, Armonk (David Boies of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Benjamin S. Kaminetzky of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 17, 2015, granting defendants' motion for summary judgment dismissing the remaining sixth and seventh causes of action, unanimously affirmed, with costs.

This is a dispute between IDT Corporation and its former investment banker, Morgan Stanley Dean Witter & Co. and Morgan Stanley & Co., Inc. (together Morgan Stanley), in which IDT claims that Morgan Stanley induced another of its clients, Telefónica Internacional, S.A. (Telefónica) to breach a contract with IDT. Plaintiff's remaining causes of action for fraudulent misrepresentation and fraudulent concealment allege that in response to a subpoena issued in an arbitration proceeding

between IDT and Telefónica, Morgan Stanley failed to produce key documents in its possession, and affirmatively represented that such evidence did not exist. IDT claims that had the documents, which were subsequently produced in the instant action, and which arguably show that Morgan Stanley induced or advised Telefónica to breach its contract with IDT, been produced in response to the subpoena in the arbitration proceeding, the arbitration panel would have found that the breach occurred in June 2000 rather than in October 2000, which would have resulted in IDT obtaining a much larger recovery in the arbitration proceeding.

The motion court dismissed these claims, holding that Morgan Stanley did not make a misrepresentation to IDT with respect to its document production, and even if it did, IDT cannot demonstrate that it actually and reasonably relied on Morgan Stanley's misrepresentation. We agree.

Moreover, even if the arbitration panel had been presented with the newly-produced documents, and found that they established that Telefónica, as a result of Morgan Stanley's inducement, had an intent, at a June 2000 meeting, to breach its agreement with IDT and replace it with a new partner, this would not have altered the panel's factual finding that at that June 2000 meeting, Telefónica informed IDT of its need to renegotiate

the terms of the agreement, but did not give IDT the type of "take it or leave it" ultimatum that could constitute an anticipatory repudiation under the applicable Florida law (*see Mori v Matsushita Elec. Corp. of Am.*, 380 So 2d 461, 463 [Fla Dist Ct App 1980] [prospective breach of contract occurs when there is an absolute repudiation by one of the parties prior to the time when performance is due that distinct and unequivocal], *cert denied* 389 So 2d 1112 [Fla 1980]).

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3383 The People of the State of New York, Ind. 54434C/14
Respondent,

-against-

Hubert Felder,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Seth L. Marvin, J.), rendered February 9, 2015, as amended February 13, 2015, convicting him, after a nonjury trial, of attempted forcible touching, sexual abuse in the third degree, and two counts of harassment in the second degree, and sentencing him to an aggregate term of three months, unanimously modified, on the facts, to the extent of vacating the harassment conviction with respect to complainant A.R., and dismissing that count of the information, and otherwise affirmed.

Except as indicated, the verdict was not against the weight of the evidence. There is no basis for disturbing the court's determinations concerning credibility and identification. However, in performing elements-based review regarding the weight

of the evidence (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we find that complainant A.R.'s testimony that defendant apparently mistook her for someone else, and "grazed" her arm, from her mid-shoulder to her hand, after which she walked away, did not support an inference that defendant intended to harass, annoy or alarm her (*see* Penal Law § 240.26[1]; *People v Bracey*, 41 NY2d 296, 301 [1977]).

To the extent the record permits review, we find that defendant received effective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). A CPL 710.40(4) motion to reopen the *Wade* hearing based on trial testimony would have been unavailing, because this testimony would not have materially affected the suppression determination (*see People v Clark*, 88 NY2d 552, 555 [1996]), and because the alleged new facts would have been within defendant's own knowledge and thus could not have satisfied the

requirement of reasonable diligence(*see People v Morales*, 281 AD2d 182 [1st Dept 2001], *lv denied* 96 NY2d 922 [2001]).

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3384 Eboni B., etc., Individually and as Parent and Natural Guardian of Skylah N., Plaintiff-Appellant, Index 20175/15E

-against-

New York City Housing Authority, Defendant-Respondent.

_____

Gaines, Novick, Ponzini, Cossu & Venditti, LLP, White Plains (Denise M. Cossu of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered January 25, 2016, which granted defendant's motion to dismiss the complaint and denied plaintiff's cross motion for leave to file a late notice of claim, unanimously modified, on the law and in the exercise of discretion, to deny defendant's motion insofar as it sought dismissal of the claim brought on the infant plaintiff's behalf, and grant plaintiff's cross motion, to the extent that the notice of claim is deemed served on behalf of the infant plaintiff, and otherwise affirmed, without costs.

Although plaintiff did not present a reasonable excuse for the delay in serving a notice of claim (*see e.g. Colarossi v City*

of New York, 118 AD3d 612, 612 [1st Dept 2014]), and although defendant did not have actual knowledge of the facts constituting the claim within the statutory period or a reasonable time thereafter, leave to serve a late notice of claim on behalf of the infant plaintiff is warranted based on other relevant factors (*see* General Municipal Law § 50-e[5]).

The infant plaintiff was approximately nine months old at the time that he allegedly sustained injuries as a result of an exposed hot water pipe in his family's apartment, in a building owned and operated by defendant. This infancy weighs in favor of granting leave to serve a late notice of claim, regardless of the lack of a nexus between the delay and infancy (*see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 538 [2006]). In addition, defendant failed to address plaintiff's showing that defendant would not be substantially prejudiced by the 10-month delay in seeking leave since the condition of the exposed pipes remained unchanged from the time of the accident (*Matter of Richardson v New York City Hous. Auth.*, 136 AD3d 484, 485 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]). Given these factors, which the motion court failed to address, and given the remedial nature of the statute, the motion court improvidently exercised its discretion in dismissing the infant plaintiff's claim (*see Matter*

of Thomas v City of New York, 118 AD3d 537, 537-538 [1st Dept 2014]).

To the extent that the complaint states a derivative claim on behalf of the infant plaintiff's mother, she is not entitled to leave to serve a late notice of claim on her behalf (*see Matter of Bensen v Town of Islip*, 99 AD2d 755, 756 [2d Dept 1984], *appeal dismissed* 62 NY2d 798 [1984]).

Plaintiff's noncompliance with the pleading requirements of Public Housing Law § 157(1) is a nonjurisdictional defect that may be remedied by amendment (*see* CPLR 3025[b]; *Snyder v Board of Educ. of Ramapo Cent. School Dist. No. 2, Town of Ramapo, Rockland County*, 42 AD2d 912 [2d Dept 1973]).

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3387 The People of the State of New York, Ind. 4351/08
Respondent,

-against-

Jawaun Francis,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J.), rendered May 23, 2013, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 23 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of the People's principal witness's explanation for his initial identification of a person other than defendant as the assailant.

The court providently exercised its discretion in ruling that defendant could not, in the absence of additional evidence,

argue that the person initially identified by the witness was the actual perpetrator (*see generally People v Primo*, 96 NY2d 351 [2001]), and this ruling did not deprive defendant of a fair trial or the right to present a defense. The court did not preclude defendant from introducing evidence of third-party culpability; on the contrary, it expressly invited defendant to introduce certain evidence of that nature. Rather than precluding a third-party culpability defense, the court providently ruled that such a defense could not, without more, be supported by the disavowed identification, which the witness explained as a deliberate falsehood. Defendant received a full opportunity to explore the misidentification and all surrounding circumstances, and to use these matters to attack the witness's credibility. While defendant cites additional evidence that would have supported the claim that the misidentified man was the actual perpetrator, he was free to introduce this evidence at trial but failed to do so. Even if the court had permitted defendant to specifically argue third-party culpability in summation, defendant would not have been entitled to argue about matters not in evidence. Defendant did not preserve his claim that the court applied the wrong standard in evaluating proffered third-party culpability evidence, and we decline to review it in

the interest of justice. As an alternative holding, we find that the court's ruling, when viewed in the context of the entire record, essentially applied the correct standard even if the court and prosecutor used imprecise nomenclature in referring to the standard.

The evidentiary rulings challenged by defendant were provident exercises of the trial court's discretion that did not, in any event, cause defendant any prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3388 Nicholas Natoli, Index 154612/12
Plaintiff-Respondent,

-against-

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

_____

Cozen O'Connor, New York (Rachel H. Bevans of counsel), for appellants.

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Jonathan A. Dachs of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 19, 2016, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim, and granted plaintiff's cross motion for partial summary judgment on that claim, unanimously modified, on the law, to deny plaintiff's cross motion, and otherwise affirmed, without costs.

Plaintiff was injured when he and a coworker attempted to move a wooden skid from a vertical position onto an A-frame dolly by tilting it at a 45-degree angle on one corner and toppling it onto the dolly. While plaintiff hoisted his side of the skid overhead with his arms, his coworker apparently lost his grip, and the skid fell on plaintiff, causing tears in his arm and

shoulder.

That plaintiff and the skid were on the same level does not bar application of Labor Law § 240(1) (*see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1 [2011]; *Rodriguez v DRLD Dev., Corp.*, 109 AD3d 409 [1st Dept 2013]).

However, contrary to plaintiff's argument, a triable issue of fact exists as to the weight of the skid and, therefore, whether a safety device was required under the statute.

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

ENTERED: MARCH 15, 2017

CLERK

Friedman, J.P., Andrias, Gische, Webber, JJ.

3389N Rajesh Punwaney, Index 153223/14
Plaintiff-Respondent,

-against-

Lavina Punwaney, et al.,
Defendants-Appellants.

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Rubinstein & Rubinstein, LLP, New York (Kenneth Rubinstein of counsel), for appellants.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 21, 2015, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for a preliminary injunction enjoining defendants from withdrawing or transferring funds from certain State Bank of India bank accounts, unanimously modified, on the law and the facts, to allow defendants to withdraw or transfer funds from the aforesaid bank accounts only for the purpose of paying taxes or penalties assessed thereon, and otherwise affirmed, without costs.

This action concerns the disposition of assets held in several foreign bank accounts after the death of the primary account holder (the decedent), who was the husband of defendant Lavina Punwaney and father of both plaintiff and defendant Juanita Punwaney. Plaintiff seeks to enjoin defendants from

withdrawing or transferring funds from the accounts. Although the motion court properly granted a preliminary injunction, we modify the scope of the injunction.

CPLR 6301 authorizes preliminary injunctive relief enjoining violations of the plaintiff's rights "respecting the subject of the action." The "subject of the action" requirement is satisfied here, because plaintiff claims entitlement to a specific fund — namely, the foreign bank accounts (*Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Assn., Inc.*, 21 AD3d 777, 778 [1st Dept 2005]; *see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11-12 [1st Dept 2009]).

While the facts are disputed, at this point plaintiff has made a sufficient showing of the merit of his conversion and conspiracy claims to justify the relief sought.

Moreover, absent a preliminary injunction, plaintiff would suffer irreparable harm in the form of tax prosecution, including possible criminal liability (*see* 306 AD2d at 5, 6). Although both parties have taken advantage of the Internal Revenue Service's Offshore Voluntary Disclosure Program for reporting previously undisclosed foreign assets, failure to timely pay any taxes or penalties assessed with respect to the subject accounts could lead to removal from the program and the safe harbor it

provides. Withdrawal of funds from the accounts would deprive plaintiff of the ability to pay such taxes or penalties. On the other hand, prohibiting defendants from withdrawing such funds would leave them in the same position — unable to pay taxes or penalties as they come due. Accordingly, to strike a better balance of the equities (*see id.* at 5), the order is modified to allow defendants to withdraw or transfer funds from the accounts only for the purpose of paying taxes or penalties.

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

ENTERED: MARCH 15, 2017

CLERK

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

3391 The People of the State of New York Ind. 4888/12
Respondent,

-against-

Jimmy Torres,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Thomas M. Nosewicz of counsel) and Jenner & Block LLP, New York (Brian J. Fischer of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel McCullough, J.), rendered April 22, 2013, convicting defendant, after a jury trial, of auto stripping in the second degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the inference that defendant was the person who broke the window of the victim's car.

The only one of defendant's challenges to the prosecutor's summation that is even arguably preserved is his claim that the

prosecutor mischaracterized certain evidence relating to a car alarm. However, we find that any minor misstatement in this regard was not prejudicial. Defendant's remaining claims regarding the summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The remarks were fair responses to defense counsel's summation arguments and were based on reasonable inferences drawn from the evidence, and there was nothing so egregious as to warrant a new trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

There was no mode of proceedings error regarding a note from the deliberating jury requesting to see photographs that had been received in evidence. At the outset of deliberations, the court made the routine and unremarkable statement that the attorneys had consented to the exhibits being delivered to the jury in the attorneys' absence. If defense counsel had disagreed with the court's statement, she had the opportunity to say so, and her silence constituted advance consent, satisfying any requirement of an opportunity to be heard. Moreover, the note requesting photographs came only about 10 minutes later, and it is unclear

whether the attorneys had even left the courtroom. In any event, delivery to the jury room of requested exhibits in evidence was ministerial (*see People v Damiano*, 87 NY2d 477, 487 [1996]; *People v Jackson*, 105 AD3d 607, 608 [1st Dept 2013]. *lv denied* 21 NY3d 1016 [2013]; *People v Ziegler*, 78 AD3d 545 [1st Dept 2010], *lv denied* 16 NY3d 838 [2001]).

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

ENTERED: MARCH 15, 2017

CLERK

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

3392 Martha Sanchez, Index 107207/11
Plaintiff-Respondent,

-against-

Mitsui Fudosan America, Inc., et al.,
Defendants-Appellants.

_____

Jeffrey Samel & Partners, New York (David M. Samel of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered February 8, 2016, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped on a floor that was negligently waxed. Defendants submitted evidence showing that the floor was last waxed approximately three months before plaintiff's fall (*see e.g. Aguilar v Transworld Maintenance Servs.*, 267 AD2d 85 [1st Dept 1999], *lv denied* 94 NY2d 762 [2000]). In opposition, plaintiff raised triable issues as to whether "a dangerous residue of wax was present" (*Ullman v Cohn*, 248 AD2d 200, 200

[1st Dept 1998]). She stated that after she fell, there was wax on her hands and, when she stepped on the waxy area, she saw a "scuff mark" running through a circular area, creating a "sunken stripe through the wax." Plaintiff slid her foot back and forth on the circular patch, and felt the "accumulated, raised, substance on the floor" move with the pressure of her foot, and these actions were captured on the building's security footage.

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

ENTERED: MARCH 15, 2017

CLERK

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

3393 In re Dante Alexander W.,

A Child under 18 Years of Age
Pursuant to § 384-b of the Social
Services Law of the State of New York,

Norman W.,
Respondent-Appellant,

Leake & Watts Services, Inc., et al.,
Petitioner-Respondent.

_____

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

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

_____

Order of fact-finding and disposition (one paper), Family Court, Bronx County (Peter J. Passidomo, J), entered on or about August 4, 2015, which, after a hearing, determined that respondent father abandoned and permanently neglected the subject child, and terminated his parental rights and committed custody and guardianship of the child to petitioner and the Commissioner of Social Services of the City of New York the for purpose of adoption, unanimously affirmed, without costs.

The agency established by clear and convincing evidence that

respondent abandoned the child by failing to communicate with the child or the agency during the six-month period immediately preceding the filing of the petition (*see Matter of Harold Ali D.-E. [Rubin Louis E.]*, 94 AD3d 449, 449-450 [1st Dept 2012]). The Family Court's credibility determinations should not be disturbed as they have a sound and substantial basis in the record (*see Matter of Shatavia Jeffeysha J. [Jeffrey J.]*, 100 AD3d 501 [1st Dept 2012]).

The finding that respondent permanently neglected the child is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]) that the agency made diligent efforts to foster respondent's relationship with the child by, among other things, referring him for alcohol abuse treatment, anger management and parenting skills for special needs children, to address the conditions that led to the child's removal (*see* Social Services Law § 384-b[7][f]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Gina Rachel L.*, 44 AD3d 367 [1st Dept 2007]). However, respondent was uncooperative. He failed to maintain contact with the agency, and avoided the agency's attempts to contact him and engage him in services. He also refused referrals for required services and continued to deny the

conditions that led to the child's removal, and failed to gain insight into the reasons for the child's placement into foster care (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]; *Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]), including excessive corporal punishment and alcohol abuse.

We decline to address respondent's arguments regarding disposition as they are improperly raised for the first time on appeal and are unpreserved (*see Matter of Ana M.G. [Rosealba H.]*, 74 AD3d 419 [1st Dept 2010]). In any event, such arguments are unavailing. The finding that termination of respondent's parental rights was in the child's best interest is supported by a preponderance of the evidence, which shows that the now 16-year-old child was placed into foster care in 2010, and has remained in the same pre-adoptive foster home since that time and wishes to be adopted by his foster mother (*see Matter of Christina Jeanette* C., 168 AD2d 351 [1st Dept 1990]). The child has no relationship with respondent, who has taken no steps to plan for the child's return to his care (*Matter of Alexandria D. [Brenda D.]*, 136 AD3d 604 [1st Dept 2016]). Respondent has failed to show that a suspended judgment was warranted (*Matter of*

David J., 260 AD2d 279 [1st Dept 1999]) as there was no evidence that any additional delay would result in any different result.

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

ENTERED: MARCH 15, 2017

CLERK

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

3395 Marc Messina, Index 160843/13
Plaintiff-Appellant-Respondent,

-against-

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

_____

Hogan & Cassell, LLP, Jericho (Michael D. Cassell of counsel), for appellant-respondent.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 27, 2016, insofar as it denied plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, and denied defendants' cross motion for summary judgment dismissing the Labor Law § 240(1) claim, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs. The appeal from said order, to the extent it denied defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim predicated on Industrial Code (12 NYCRR) § 23-1.21(b)(4)(iv), unanimously dismissed, without costs, as academic.

Plaintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim through his testimony

that he was injured when the A-frame ladder on which he was standing moved underneath him as he applied pressure to it while trying to remove part of the drop ceiling he was demolishing (*see Hill v City of New York*, 140 AD3d 568, 570 [1st Dept 2016]; *Ausby v 365 W. End LLC*, 135 AD3d 481 [1st Dept 2016]). Plaintiff was not required to show that the ladder was defective or that he actually fell off the ladder to satisfy his prima facie burden (*see Hill*, 140 AD3d at 570; *Reavely v Yonkers Raceway Programs, Inc.*, 88 AD3d 561, 565 [1st Dept 2011]).

Defendants failed to raise a triable issue of fact whether plaintiff was the sole proximate cause of the accident. There is no testimony in the record as to whether there were other readily available, adequate safety devices at the accident site that plaintiff declined to use (*see Gove v Pavarini McGovern, LLC*, 110 AD3d 601 [1st Dept 2013]). Moreover, the evidence establishes that the ladder twisted underneath plaintiff because it was unsecured, not because he misused it, and that defendants provided no other safety devices for his use. At most, plaintiff's application of pressure to the ladder while engaged in the work he was directed to do, which caused it to twist, was comparative negligence, no defense to a section 240(1) claim (*Hill*, 140 AD3d at 570; *Noor v City of New York*, 130 AD3d 536,

541-542 [1st Dept 2015], *lv dismissed* 27 NY3d 975 [2016]). "Regardless of the method employed by plaintiff to remove [the drop ceiling], the ladder provided to him was not an adequate safety device for the task he was performing" (*Carino v Webster Place Assoc., LP*, 45 AD3d 351, 352 [1st Dept 2007]).

In view of the foregoing, the Labor Law § 241(6) claim is academic (*see Howard v Turner Constr. Co.*, 134 AD3d 523 [1st Dept 2015]).

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

ENTERED: MARCH 15, 2017

CLERK

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

3396 The People of the State of New York, Ind. 2995/14
Respondent,

-against-

James Waiters,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered February 9, 2015,

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

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

ENTERED: MARCH 15, 2017

CLERK

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

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

3397 Burkha Assets LLC, Index 157998/15
Plaintiff-Appellant,

-against-

Seneca Insurance Company,
Defendant-Respondent.

_____

Lerner, Arnold & Winston, LLP, New York (Johnathan C. Lerner of counsel), for appellant.

Ken Maguire & Associates PLLC, Garden City (Katherine Maguire of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered April 4, 2016, which denied plaintiff's motion for partial summary judgment on its claim for payment under an insurance policy pursuant to an appraisal of damages due to vandalism, unanimously affirmed, without costs.

The motion court correctly determined that issues of fact exist concerning whether, notwithstanding the appraisal award, defendant was required to provide coverage in the first instance (*see Matter of Delmar Box Co. [Aetna Ins. Co.]*, 309 NY 60 [1955]; Insurance Law § 3404).

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: MARCH 15, 2017

CLERK

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

3398-
3399-
3400

Index 805006/13

Ruth Mariani,
Plaintiff-Appellant,

-against-

Ramin Hodjati, M.D., et al.,
Defendants-Respondents.

_____

Sanocki Newman & Turret, LLP, New York (David B. Turret of counsel), for appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Ramin Hodjati, M.D., respondent.

Kaufman Borgeest & Ryan LLP, Valhalla (David Bloom of counsel), for Isabella Geriatric Center, respondent.

_____

Judgments, Supreme Court, New York County (Alice Schlesinger, J.), entered March 17, 2016, dismissing the complaint as against defendants, respectively, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 16, 2015, which granted defendant Isabella Geriatric Center's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment in said defendant's favor.

In opposition to defendants' uncontested prima facie showing that they did not deviate from the accepted standard of medical

care in treating plaintiff's neurologic symptoms and that, in any event, any deviation did not proximately cause her alleged injuries, plaintiff submitted an expert opinion that, had plaintiff been transferred to the hospital, either during the weekend of May 19 and 20, 2012, when she exhibited neurological symptoms, or on May 21, 2012, after those symptoms had resolved, and received different treatment, either her May 23, 2012 stroke would have been prevented or a more favorable prognosis would have resulted. This opinion relies on hindsight and is both speculative and conclusory (see *Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]). Among other things, plaintiff's expert failed to address defendant Hodjati's expert's opinions that plaintiff's history of having a stroke 10 years earlier, without recurrence, gave her a low risk of an imminent stroke, and that, following the 2012

stroke, plaintiff returned to her baseline level of health, which included left-sided hemiparesis with a slight facial droop.

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

ENTERED: MARCH 15, 2017

CLERK

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

3401 Junior Nunez, et al., Index 150346/11
Plaintiffs, 590786/12

-against-

LMJ Vision, Inc., doing business as Visionary Optics and/or The Gelman's Optical, Inc., doing business as Visionary Optics, et al.,
Defendants-Respondents,

Inter-Next NYC, Inc.,
Defendant-Appellant.

- - - - -

LMJ Vision, Inc., doing business as Visionary Optics and/or The Gelman's Optical, Inc., doing business as Visionary Optics, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Inter-Next NYC, Inc.,
Third-Party Defendant-Appellant,

Gilbert Displays, Inc.,
Third Party Defendant.

_____

Farber Brocks & Zane, L.L.P., Garden City (Tracy L. Frankel of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Thomas A. Noss of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 23, 2015, which, to the extent appealed from, granted defendants LMJ Vision, Inc. and the West 17th Street

Company's motion for summary judgment on their claims for common-law indemnification against defendant Inter-Next NYC, Inc., and denied Inter-Next's cross motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to deny LMJ Vision, Inc. and West 17th's motion, and otherwise affirmed, without costs.

Plaintiff Junior Nunez asserts claims for negligence and violations of Labor Law §§ 200, 240 and 241(6), alleging that he fell through an unprotected stairwell opening in the floor, in the course of installing display shelving during a store renovation project. LMJ Vision, Inc. and West 17th, the owner and lessee of the premises, respectively (together, the LMJ defendants), were found liable for plaintiff's injuries under Labor Law § 240(1), and seek indemnification therefor from defendant Inter-Next NYC, Inc., one of two contractors hired by LMJ for the project. The other contractor, plaintiff's employer, Gilbert Displays, was retained to install display shelving and lighting.

In support of their motion, the LMJ defendants submitted evidence that West 17th was not negligent and that LMJ did not supervise or control the means and methods of its contractors' work (*see Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st

Dept 1999]). LMJ's principal said in an affidavit that Inter-Next had been retained to remove the pull-up door over the stairwell, and testified that the stairwell opening was always covered by a board or plank, or the pull-up door, when he visited the premises before the accident. In opposition, Inter-Next pointed out that there was no direct evidence that it had removed the door or plank, that its written contract did not require removal of the door, and that another contractor could have caused the stairwell opening to be uncovered. Inter-Next submitted no witness testimony to support its position, because its sole principal had died.

To the extent the affidavit by LMJ's principal was offered against Inter-Next to show that Inter-Next had agreed to remove the pull-up door, it is barred from consideration by the Dead Man's Statute, because the statement that Inter-Next agreed to remove the pull-up door depends on a transaction or communication with Inter-Next's deceased principal (CPLR 4519; *Poslock v Teachers' Retirement Bd. of Teachers' Retirement Sys.*, 88 NY2d 146, 150 [1996]; *see e.g. Herrmann v Sklover Group*, 2 AD3d 307 [1st Dept 2003]; *Five Corners Car Wash, Inc. v Minrod Realty Corp.*, 134 AD3d 671, 673 [2d Dept 2015]). The remaining evidence, while circumstantial, would support a finding that

Inter-Next removed the pull-up door, but it is insufficient to eliminate any issues of fact as to Inter-Next's negligence with respect to the unguarded opening in the floor (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]). Given the evidence that the stairwell opening was covered by a board or plank and that Gilbert employees went down to the basement while working, a factfinder could conclude that the unguarded condition of the stairwell was not the result of negligence on the part of Inter-Next.

The existence of issues of fact as to Inter-Next's negligence also precludes summary dismissal of the cross claim and third-party claims against it.

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

ENTERED: MARCH 15, 2017

CLERK

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

3402 In re Mid City Electrical Corp., Index 100572/16
Petitioner-Appellant,

-against-

Metropolitan Transportation
Authority et al.,
Respondents-Respondents.

_____

Peckar & Abramson, P.C., New York (Charles E. Williams, III of counsel), for appellant.

Helene Fromm, New York (Mary Fisher Bernet of counsel), for Metropolitan Transportation Authority and Thomas F. Prendergast, respondents.

Sajaa Ahmed, New York, for Port Authority of New York and New Jersey and Patrick J. Foye, respondents.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for New York State Department of Transportation and Matthew J. Driscoll, respondents.

David J. State, Buffalo, for Niagara Frontier Transportation Authority and Kimberley A. Minkel, respondents.

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Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered June 24, 2016, denying the petition to annul a determination of the New York State Unified Certification Program, dated February 12, 2016, which removed petitioner's Disadvantaged Business Enterprise certification, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Contrary to its contention, petitioner was afforded due process (*see Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013]; *see also Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89, 98 [1997], *cert denied* 523 US 1074 [1998]). Thus, it cannot avoid the consequences of its failure to exhaust its administrative remedies (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *see* 49 CFR 26.87[g]; 26.89).

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

ENTERED: MARCH 15, 2017

CLERK

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

3404-
3405 Index 603214/04

Wilfredo Rosado, individually and derivatively as a shareholder on behalf of Castillo Rosado, Inc., et al.,
Plaintiffs-Appellants,

-against-

Edmundo Castillo Inc. et al.,
Defendants-Respondents,

B&D Financial Strategies, Inc., et al.,
Defendants.

_____

Caraballo & Mandell, LLC, New York (Dolly Caraballo of counsel), for appellants.

Edward W. Hayes, P.C., New York (Edward W. Hayes of counsel), for respondents.

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Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered December 15, 2014, to the extent appealed from, dismissing the complaint against Edmundo Castillo (Mr. Castillo) and Edmundo Castillo Inc. (Castillo Inc.), unanimously affirmed, without costs. Order, same court and Justice, entered September 12, 2014, which, to the extent appealed from, denied plaintiff Wilfredo Rosado's motion for contempt against all defendants, dismissed the part of plaintiff's claims that is based on the market value of Castillo Rosado, Inc. (CRI), and sub silentio denied plaintiff's request for sanctions against

defendant Denise Cassano, unanimously affirmed, without costs.

The court providently exercised its discretion in refusing to draw an adverse inference against defendants for failing to produce certain documents (*see Mathis v New York Health Club*, 288 AD2d 56, 57 [1st Dept 2001], *lv denied* 98 NY2d 610 [2002]). To the extent plaintiff seeks to raise spoliation and CPLR 3126 on his current appeal, these issues have twice been decided against him (*see Rosado v Edmundo Castillo Inc.*, 54 AD3d 278 [1st Dept 2008]).

Mr. Castillo and Castillo Inc.'s argument that plaintiff's claims are derivative, and he may not recover individually, is precluded by our most recent decision in this case (*see Rosado v Edmundo Castillo, Inc.*, 89 AD3d 544 [1st Dept 2011]).

The court providently exercised its discretion in declining to accept plaintiff's expert's valuation of CRI and its trademark (*see Matter of Endicott Johnson Corp. v Bade*, 37 NY2d 585, 588 [1975]). The valuation was in part based on CRI's sales, but the expert counted as "sales" all the deposits into CRI's bank account, without determining whether some of them were actually loans. Moreover, even plaintiff's expert concluded that plaintiff's "total ownership value" was "$2,155,747.65 *minus his share of corporate long-term debt"* (emphasis added) (*see Trotter*

v Lisman, 209 NY 174, 180 [1913] ["(T)he assets of a corporation constitute a trust fund for the payment of its debts(,) and ... its creditors have an equitable lien upon the same, superior to the right of the stockholders"]).

The court correctly dismissed plaintiff's contract claim against Mr. Castillo (*see Dorfman v American Student Assistance*, 104 AD3d 474 [1st Dept 2013]). Its conclusion that "[a]s to any agreement between [plaintiff] and [Mr.] Castillo, [plaintiff] effectively withdrew and abandoned the joint project, and thus before any activity alleged against [Mr.] Castillo, [plaintiff] had fractured the relationship" was reached under a fair interpretation of the evidence (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]).

Plaintiff contends that the court should have awarded him $1,461,000 ($769,000 plus interest from January 2005) and punitive damages on his conversion claim. It should be noted that the court awarded him $759,823.40 ($406,973.58 plus interest from May 13, 2005, plus costs and disbursements) as against Cassano, defendant B&D Financial Strategies Inc., and defendant Beverly Whitaker d/b/a The Money Tree. Plaintiff is not entitled to additional relief. First, he does not argue that Castillo Inc. exerted any dominion over CRI's funds. Second, his claim

that Mr. Castillo and Cassano converted $769,000 to their own use is not supported by the record, which shows that many of the payments made by Whitaker d/b/a Money Tree were for CRI's legitimate expenses, such as payments to companies that shipped its products.

While Mr. Castillo may have breached his fiduciary duty to CRI by establishing Castillo Inc. (*see Alexander & Alexander of N.Y. v Fritzen*, 147 AD2d 241, 246 [1st Dept 1989]), plaintiff did not prove that this caused him $2,155,747.65 in losses (*see Gibbs v Breed, Abbott & Morgan*, 271 AD2d 180, 189 [1st Dept 2000]).

The court providently exercised its discretion in denying plaintiff's contempt motion. Cassano's failure to produce Money Tree's books and records on one day's notice falls into the category of "honest mistake" (*Matter of Sentry Armored Courier Corp. v New York City Off-Track Betting Corp.*, 75 AD2d 344, 345 [1st Dept 1980] [internal quotation marks omitted]). Moreover, plaintiff failed to show "actual loss or injury" from the delay in obtaining CRI's and Money Tree's books and records (*Matter of Beiny*, 164 AD2d 233, 236 [1st Dept 1990]). While it is true that he was harmed to the extent defendants improperly transferred CRI's assets, the court awarded him $759,823.40 as against Cassano, B&D, and Whitaker d/b/a Money Tree for these transfers.

The trial court providently exercised its discretion in sub silentio denying plaintiff's renewed motion for sanctions against Cassano. Given that the motion court (Charles E. Ramos, J.), denied plaintiff's original request for sanctions against Cassano and his motion to renew (*see Rosado*, 54 AD3d 278), and this Court affirmed both rulings (*see id.*), to grant sanctions at this stage would allow plaintiff to circumvent our affirmance of the denial of his renewal motion. The key piece of evidence showing that Cassano had forged the November 2004 letter was the 2006 document from American Funds, not her confession at the second trial.

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

ENTERED: MARCH 15, 2017

CLERK

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

3406 The People of the State of New York, Ind. 4608/13
Respondent,

-against-

Kenneth Harris,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered July 18, 2014, convicting defendant, after a nonjury trial, of burglary in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supports the conclusion that a notice had been "personally communicated" (Penal Law § 140.00[5]) to defendant, prohibiting him from entering the store where the crime occurred.

Our review of defendant's ineffective assistance of counsel claim is limited to the trial record (*see People v Evans*, 16 NY3d

571, 575 [2011]), and to the extent that record permits review, we conclude 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]). Counsel candidly explained to the court that, despite having secured a lengthy midtrial delay to bring in a witness, he would not be calling the witness because his testimony would be unhelpful. Notwithstanding that the court was sitting as the trier of fact, defendant has not shown that counsel's revelation of his reason for not calling the witness was objectively unreasonable, or that it affected the outcome or fairness of the trial.

Defendant did not actually request new counsel until after the trial, and the court granted that request. To the extent any of defendant's midtrial complaints about his counsel could be viewed, individually or collectively, as a request for new counsel, defendant did not demonstrate good cause for

substitution (*see generally People v Linares*, 2 NY3d 507, 510 [2004]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 15, 2017

CLERK

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

3410 The People of the State of New York, Ind. 1841/12
Respondent,

-against-

Carlin Batista,
Defendant-Appellant.

_____

Law Offices of George Vomvolakis, New York (George Vomvolakis of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered November 25, 2014, convicting defendant, after a jury trial, of gang assault in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. An accomplice witness's testimony was amply corroborated by surveillance videotapes and other evidence.

The court correctly denied defendant's request to charge second-degree gang assault as a lesser included offense, because there was no reasonable view of the evidence, viewed in the light most favorable to defendant, that he took part in the attack on

the victim but only intended to cause ordinary physical injury instrument (*see People v Rivera*, 23 NY3d 112, 120-21 [2014]).

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

ENTERED: MARCH 15, 2017

CLERK

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

3411 Mark Salem, Index 150418/11
Plaintiff-Respondent,

-against-

MacDougal Rest. Inc., doing business as Off the Wagon,
Defendant-Appellant,

Trimel A. Roberts, et al.,
Defendants.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Steven H. Rosenfeld of counsel), for appellant.

Jason Levine, New York, for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered June 21, 2016, which, inter alia, denied the motion of defendant MacDougal Restaurant Inc. d/b/a Off the Wagon (defendant) for summary judgment dismissing plaintiff's respondeat superior claim as against it, unanimously affirmed, without costs.

Plaintiff was assaulted by a security guard/bouncer in the employ of defendant after plaintiff, who had been denied admittance to defendant's bar because of perceived intoxication, grabbed the baseball cap from the bouncer's head. Less than 30 seconds elapsed between plaintiff taking the cap and the bouncer

throwing plaintiff to the ground, which occurred approximately 10 feet from the entrance to defendant's bar. On this record, it cannot be concluded, as a matter of law, that the bouncer was acting outside the scope of his employment at the time of the assault (*see e.g. Bilias v Gaslight, Inc.*, 100 AD3d 533 [1st Dept 2012], *affg* 2011 NY Slip Op 32700[U] [Sup Ct, NY County 2011]).

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

ENTERED: MARCH 15, 2017

CLERK

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

3412N In re Global Liberty Insurance Co., Index 25972/16E
Petitioner-Appellant,

-against-

Therapeutic Physical Therapy, P.C.,
as Assignee of Bernardo Hidalgo,
Respondent-Respondent.

_____

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Costella & Gordon, LLP, Garden City (Matthew K. Viverito of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered October 24, 2016, which denied the petition seeking to vacate the award of a master arbitrator, dated August 12, 2016, to the extent it affirmed a lower arbitrator's award of no-fault compensation to respondent in the unadjusted amount of $2,679.39, unanimously reversed, on the law, without costs, the petition granted to the extent of vacating that portion of the master arbitration award, and the matter remanded to a different arbitrator for arbitration of the fee schedule defense on the merits.

Respondent sought recovery for physical therapy services provided to its assignor before April 1, 2013, and petitioner

insurer disclaimed parts of the claim on the ground that it had already reimbursed a different provider for "eight units" for services on some of the same dates. Respondent checked the box on the prescribed disclaimer form indicating that it was relying on a "fee schedule" defense, specifically the "eight unit rule." The lower arbitrator held that respondent was precluded from asserting its defense because the disclaimer was insufficiently specific in that the other provider was not named. Respondent appealed to the master arbitrator, arguing that it adequately preserved its defense. The master arbitrator, without addressing the issue of preservation, incorrectly found that the lower arbitrator had "considered the fee schedule defense" and "determined that [r]espondent failed to provide evidence as to the other provider."

The master arbitrator's award was arbitrary, because it irrationally ignored the controlling law presented on the preservation issue (*Matter of Global Liberty Ins. Co. v Professional Chiropractic Care, P.C.*, 139 AD3d 645, 646 [1st Dept 2016]; *see generally Matter of Smith [Firemen's Ins. Co.]*, 55 NY2d 224, 232 [1982]) — namely, that an insurer adequately preserves its fee schedule defense "by checking box 18 on the NF-10 denial of claim form to assert that plaintiff's fees [were]

not in accordance with the fee schedule" (*Megacure Acupuncture PC v Lancer Ins Co.*, 41 Misc 3d 139[A], 2013 NY Slip Op 51994[U], *3 [App Term, 2d Dept 2013] [internal quotation marks omitted] [alteration in original]; *Surgicare Surgical v National Interstate Ins. Co.*, 46 Misc 3d 736, 745-746 [Civ Ct, Bronx County 2014], *affd sub nom. Surgicare Surgical Assoc. v National Interstate Ins. Co.*, 50 Misc 3d 85 [App Term, 1st Dept 2015]). Accordingly, we remand the matter to the extent indicated.

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

ENTERED: MARCH 15, 2017

CLERK

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

3413N In re Veronica Telemaque, Index 100128/15
Petitioner-Appellant,

-against-

New York City Board/Department of Education,
Respondent-Respondent.

_____

Veronica Telemaque, appellant pro se.

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

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Order and judgment (one paper), Supreme Court, New York County (Shlomo Hagler, J.), entered on or about October 13, 2015, denying petitioner's motion to vacate an arbitration award, dated January 16, 2015, which terminated petitioner's employment with respondent based upon findings of misconduct, and dismissing the proceeding brought pursuant to CPLR article 75, unanimously modified, on the law, to confirm the arbitration award, and otherwise affirmed, without costs. The Clerk is directed to enter judgment confirming the award (CPLR 7514[a]).

The hearing officer's determination was rational and not arbitrary and capricious (*see City School Dist. of the City of N.Y. v McGraham*, 75 AD3d 445, 450 [1st Dept 2010], *affd* 17 NY3d 917 [2011]), given his credibility findings, which are largely

unreviewable (*see Matter of Asch v New York City Bd./Dept. of Educ.*, 104 AD3d 415, 420 [1st Dept 2013]). The motion court properly concluded that petitioner failed to demonstrate by clear and convincing evidence that the hearing officer was biased against her (*see Matter of Moran v New York City Tr. Auth.*, 45 AD3d 484, 484 [1st Dept 2007]). Petitioner voluntarily signed a release for her medical records, and the hearing officer's reference to those records did not show prejudice.

The record reflects that petitioner was accorded due process. She waived her assertion that the principal was not authorized to prefer charges against her, since she failed to raise that argument in the arbitration proceeding (*see Matter of Stergiou v New York City Dept. of Educ.*, 106 AD3d 511, 512 [1st Dept 2013]).

The penalty imposed is not disproportionate to the offense, given petitioner's lack of remorse or appreciation of the seriousness of her threats of violence (*see Matter of Villada v City of New York*, 126 AD3d 598, 599 [1st Dept 2015]).

We modify solely to confirm the arbitration award (*see* CPLR 7511[e]).

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

ENTERED: MARCH 15, 2017

CLERK

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

3414N In re Oak Hill Capital Partners, L.P., Petitioner-Respondent, -against- Anthony J. Cuti, Respondent-Appellant. Index 650667/15

Clinton Brook & Peed, New York (Brian C. Brook of counsel), for appellant.

Susman Godfrey LLP, New York (Barry Barnett of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 2, 2015, which granted Oak Hill Capital Partners, L.P.'s (Oak Hill) petition to stay the subject arbitration, unanimously affirmed, without costs.

"Arbitration is a matter of contract" (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 630 [2013]).

At issue is the interplay of three agreements - a March 16, 2004 employment agreement with an arbitration clause between respondent Cuti and Duane Reade - and subsequent agreements wherein Oak Hill acquired Duane Reade's common stock and wherein certain Duane Reade management stockholders, including Cuti, contracted with Oak Hill entities and Duane Reade to protect

their preemptive rights in light of the acquisition.

The latter agreements contained forum selection clauses, which respondent asserts incorporate the arbitration clause by reference. This argument is unavailing. "'In the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument'" (*BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1st Dept 1985] [citation omitted]). Although these agreements were effective the same date, they were not executed contemporaneously; the March 16, 2004 employment agreement had, with respect to preemptive rights, a contrary intent, i.e., pre-IPO preemptive rights. The preemptive rights agreement applied solely to post-merger preemptive rights. Therefore, Cuti's claims asserted under that agreement are subject to the forum selection clause.

To the extent Cuti asserts claims under the employment agreement, which was entered into solely by Duane Reade and its related entities, successors, and assigns, no evidence was presented to raise an issue of fact as to whether Oak Hill pierced the corporate veil with Duane Reade or participated in

the arbitration. On that basis, Oak Hill should not be compelled to arbitrate these claims, and the order to stay arbitration was properly granted.

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

ENTERED: MARCH 15, 2017

CLERK

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

1911-
1912 The People of the State of New York,
Respondent,

-against-

Travis Telesford,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondents,

-against-

Bernie Celestine,
Defendant-Appellant.

Ind. 3638/13

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

Seymour W. James, Jr., The Legal Aid Society, New York (Andrea L. Bible of counsel), for Bernie Celestine, appellant.

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

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Judgments, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered September 22, 2014, and September 16, 2014, reversed, on the law, the facts, and as a matter of discretion in the interest of justice, the judgments vacated, and the matters remanded for a new trial.

Opinion by Renwick, J. All concur except Tom, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Judith J. Gische
Troy K. Webber, JJ.

1911-12
Ind. 3638/13

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The People of the State of New York,
Respondent,

-against-

Travis Telesford,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Bernie Celestine,
Defendant-Appellant.

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Defendant Travis Telesford appeals from the judgments of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered September 22, 2014, convicting him, after a jury trial, of robbery in the second degree, and imposing sentence. Defendant Bernie Celestine appeals from the judgment of the same court and Justice, rendered September 16, 2014, convicting him, after a jury trial, of

robbery in the second degree, and imposing sentence.

Robert S. Dean, Center for Appellate Litigation, New York (Katharine Skolnick and Sharmeen Mazumder of counsel), for Travis Telesford, appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Andrea L. Bible of counsel), for Bernie Celestine, appellant.

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

RENWICK J.

In this case, we must determine what supplemental instructions are required when a jury repeatedly expresses confusion, during deliberations, about the concept of intent in a robbery prosecution of two defendants charged under an accessorial liability theory. Under the circumstances here, we find that defendants were deprived of a fair trial when the court erred by merely rereading robbery and accessorial liability charges to the jury.

Factual and Procedural Background

Evidence Adduced at Trial

The robbery charges stem from defendants' alleged forcible taking or retaining of three rings from a small store in Chinatown that sold scarves, jewelry, bags and souvenir hats. At about noon on August 7, 2013, Yu Ying Li, who spoke only limited English, was watching her husband's store while he went to the basement to retrieve some items. Li's friend, Ms. Zheng, was at the store as well. Li was 60 years old, stood about five feet one inch, and weighed about 87 pounds. Zheng was 53 years old, about the same height, but heavier. About a minute after Li's husband had gone to the basement, defendants Telesford and Celestine entered the otherwise empty store. Li greeted them and asked if she could help them. The men told her that they were

"just looking." The men approached the jewelry case, and although Li did not see them trying on men's rings, Zheng did. A short time later, as defendants were about to leave, Li noticed that three men's rings were missing from the display tray. Zheng told Li about the three missing rings, and Li asked her to try to get them back from the two men.

Li approached Celestine, and asked, "Why my ring?" or "Why my ring no more?" while pointing to the empty slots in the display case. Celestine said, "No, I don't know." Telesford "inserted" himself between Li and Celestine, and they both denied that Celestine had taken any rings. Li tried to tell Telesford to ask Celestine to return the rings. Telesford then hit or patted Li on her left shoulder with his right hand. When Li hit Telesford back, Telesford responded, "How dare you hit me," and hit Li a second time.

Li repeatedly told Telesford, "You no good man," and (because she did not know how to say "rude,") that he was a "bad man" and that he had hurt her. He responded, "You said I am no good man?" and hit her with both hands. Li then used both her hands to push Telesford away. At that point, Celestine said, "Stop," opened his hand, and offered to return the rings. He either handed two rings to Li or threw them in the case. Li said, "One more," because three rings had been missing, but

Celestine said, "No. No," then hesitated for a moment and moved his hand slightly in his pocket. Telesford said "Go. Go. Go," and gestured to Celestine in a manner that Li thought meant that the men should go and that Celestine should not return the third ring.

When Celestine moved to leave, Li said she was calling the police. Telesford replied that if Li called the police, he would also call the police because Li "can't speak English," and said something about "illegal," "immigration," and "family together," though Li did not understand what he said. Both men then tried to leave the store. Telesford raised his arm as if he were going to hit Li. Celestine said something to Telesford, who then looked at his cell phone and said something like, "No problem." Telesford looked "so fierce" at that point that Li grew afraid that he was going to hit her again. At one point, one of the men also spat at Li.

Li told Telesford that she would "like to dare" him to hit her, but she covered her head with her arm and "pray[ed]" to God for "help." She then realized that her right arm was being "tightly held" just as Telesford punched her in the right side of her mouth, causing her mouth to bleed. Zheng saw contact between Telesford's hand and Li's mouth and saw blood on the right side of Li's mouth.

Meanwhile, Officers Lamour and Watson were in the vicinity, and heard a woman yell, "Officer, look" or "help police." Lamour looked up and saw Celestine holding a woman while Telesford punched her. Watson also saw Telesford strike an Asian woman in the lip. The officers apprehended defendants. Lamour then frisked both defendants and recovered a ring from Celestine's left front pants pocket. Li identified the ring, which was valued at $25.

Li, who also suffered a bruise to her arm where Celestine had grabbed her, felt dizzy and faint. The police took her to a hospital, where a doctor examined her, treated her for a mild abrasion to her lip with "no active bleeding" and "no loose teeth," and advised her to treat the wound with bacitracin. Later that day, Li felt ill and vomited. Li was not able to go to work the next day and did not return to the store until the following Monday. Two days after the robbery, Li saw a doctor because her mouth was "still not good" and she was dizzy and had headaches. Li's mouth hurt for "[s]everal days," "almost like over a week," and her head hurt for "about one week."

At trial, both defendants testified. Celestine and Telesford, who were college roommates, denied that they entered Yu Ying Li's store with any intent to steal jewelry or anything else. Instead, they claimed that they entered the store because

Celestine wanted to purchase a key chain. As Celestine looked at key chains, Telesford stood nearby using the Internet on his cell phone. About five seconds after they entered the store, Li approached Celestine and asked him why he had stolen something. Celestine told Li he had not taken anything. Li then asked Telesford if he had stolen anything, and he denied having done so. Then, another woman in the store hit Celestine in the shoulder. In response, Celestine asked the woman, "What are you doing, Miss?" and denied that he had taken anything. Li then tried to go into Telesford's pockets, and he brushed off her hand. Li then spat in Telesford's face, and as a "reflex" or a "reaction," his hand "just went up" and he "backhand[ed]" Li to stop her from spitting on him or doing "anything else."

Jury Charge, Notes and Deliberations

Initially, the court instructed the jurors that it was their "obligation" to "evaluate" the evidence as it applied to "each defendant separately"; that the jurors must consider "each instruction on the law" as "referring to each defendant separately"; that they must return a separate verdict for each defendant; and that those verdicts "may be, but need not be, the same." It reminded the jury that the People had the burden of proving beyond a reasonable doubt that "each defendant" acted with the same state of mind required for the commission of the

crime, and, "either personally, or by acting in concert with the other person," committed each of the remaining elements of the crime.

After giving the standard CJI instruction on accessorial liability and robbery (forcible stealing), the court instructed the jury on second-degree robbery under count one, explaining that a defendant is guilty under this count "when that person forcibly steals property and when that person is aided by another person actually present." Specifically, the court charged that with respect to each defendant separately, the People had to prove beyond a reasonable doubt both: (1) that the defendant personally, or by acting in concert with another person, forcibly stole property from Li; and (2) that the person was aided in doing so by another person actually present.

The court next instructed the jury on second-degree robbery under count two, explaining that a defendant is guilty under this count "when that person forcibly steals property and when in the course of the commission of the crime, that person or another participant in the crime, causes physical injury [impairment of physical condition or substantial pain] to any person who is not a participant in the crime." Thus, the court charged again that with respect to each defendant separately, the People had to prove beyond a reasonable doubt both: (1) that defendant

personally or by acting in concert with another person forcibly stole property from Li; and (2) that in the course of the commission of the crime, defendant, or another participant in the crime, caused physical injury to Li.

After the charge concluded, Celestine's counsel objected to the section of the charge regarding the theory of robbery aided by another, arguing "that by charging them acting in concert I don't think that's a correct statement of the law." Rather, she submitted that a correct statement of the law would be, as to each individual, that Celestine stole property, and in the course of doing so, was aided by Telesford, arguing that it requires forcible stealing by one defendant and aid in that stealing by the other, and that either defendant could have used the force in stealing where they both shared the intent to commit the underlying theft. Counsel also noted that it does not matter which one of them inflicts the injury. The court asked if counsel was asking it to re-read the elements without the accomplice liability part, and counsel stated that particularly as to the robbery (aided by another) charge, saying acting in concert makes it "messy," and it has "to be parsed out to the jury for them to understand that they must first find a forcible taking and then find the aiding by another." The court indicated that it would not change its charge. Celestine's lawyer took an

exception and Telesford's lawyer stated that she joined in everything Celestine's counsel had said.

Shortly after deliberations began, the jury sent out a note requesting the court's clarification of intent, as well as a written definition of the charges for both defendants. Celestine's lawyer asserted that the note indicated that the jurors were "confused," and argued that "things need to be separated out, especially with respect to the robbery." Telesford's lawyer agreed. The court declined to charge the jury in a different manner, and merely advised the jury that it could not provide a written charge, but could read back any portion.

Shortly thereafter, the jury asked to "hear the full definition of all the charges for both defendants," and Celestine's counsel said that she "repeat[ed her] objection." The court then re-read its charge regarding the separate consideration of each defendant; its accessorial liability charge; its definitions of larceny and forcible stealing; the elements of both counts of second-degree robbery; and its charge on the elements of petit larceny as to Celestine.

Later, the court followed Telesford's counsel's suggestion that it respond to a jury note by advising that there was no definition of "shared mind intent" and by re-reading the definition of "working in concert." Without an objection, the

court also repeated its original charge on accessorial liability and offered to provide an expanded intent charge. When the jurors sent out a note stating that they were deadlocked, the court asked them to continue deliberating the following day. The next day, the jurors requested to hear an "expanded definition of intent," and the court complied, without any objection from defendants. A few minutes later, the jurors asked to hear the "definition of intent again" and to "hear the charges again." Without any objection from either defendant, the court again repeated its original charges. After the jurors resumed their deliberations, Celestine's counsel noted that she "ha[d]n't waived [her] objection to the charge," while Telesford's attorney said nothing.

The jurors then returned their verdict. Defendants were convicted of second-degree robbery for causing physical injury to Li in the course of stealing a ring from her store. The jury did not reach a decision as to the charge of robbery in the second degree under an aided theory and did not consider the petit larceny charge because it convicted defendants of a robbery charge. The court declared a mistrial as to those counts. After sentencing, the prosecutor moved to dismiss the robbery count under the aided theory.

Discussion

Both Telesford and Celestine initially argue that the verdict was not supported by legally sufficient evidence and was against the weight of the evidence. There is no basis for disturbing the jury's credibility determinations. The evidence supports reasonable inferences that Telesford knew that Celestine had shoplifted merchandise and had only returned part of it to the victim, that at least one of the reasons that Telesford assaulted the victim was to help Celestine retain the remaining stolen property, that Celestine shared Telesford's intent and joined in Telesford's use of force by restraining the victim, and that this violent attack on the victim was not a mere response to insults by her. There was also ample evidence that the victim sustained physical injury (*see generally People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]).

While the jury's verdict was legally sufficient and not against the weight of the evidence, the conclusion is inescapable that defendants were denied a fair trial due to the trial court's failure to meaningfully respond to jury inquiries during deliberations. CPL 310.30 provides that the jury may request further instructions at any time during its deliberations and if it does so the court must "give such requested information or instruction as [it] deems proper." While the court possesses

some discretion in framing its supplemental instructions, it must respond meaningfully to the jury's inquiries (*People v Malloy*, 55 NY2d 296, 301 [1982], cert denied 459 US 847 [1982]; *People v Gonzalez*, 293 NY 259, 262 [1944]). The sufficiency of a trial court's response is gauged by "the form of the jury's question, which may have to be clarified before it can be answered, the particular issue of which inquiry is made, the supplemental instruction actually given and the presence or absence of prejudice to the defendant" (*People v Malloy*, 55 NY2d at 302).

A trial court confronted with a request for supplemental instructions must perform the delicate operation of fashioning a response that meaningfully answers the jury's inquiry while at the same time working no prejudice to the defendant (*id.*). There is no per se rule concerning the adequacy of a court's response or prohibiting in every case the rereading of the original charge (where it contains a correct answer to the same question). Indeed, where the jury expresses no confusion and the original charge is clear, a different charge may well be simply an exercise in semantics and could itself create the confusion sought to be avoided (*see People v Santi*, 3 NY3d 234, 248 [2004]). However, where the court fails to give information requested, upon a vital point, a failure to respond may constitute error. The error is not so much that an instruction

is inadequate in some legal respect, but that the jury, misled by or not comprehending the original charge, remains perplexed about the elements of the crime or the application of the law to the facts.

The jury in this case, as the excerpt from the record cited above illustrates, was confused about the element of intent, an essential element of any robbery offense. The crime of robbery, as defined by Penal Law, has two straightforward but critical mens rea (intent) elements. Robbery is defined in Penal Law § 160.00 as follows:

> "Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
>
> "1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> "2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny."

Simply stated: The gist of robbery is larceny by force from the person (*id.*), and the gist of larceny is the taking and carrying away of personal property of another with the specific intent to steal such property (*see* Penal Law § 155.05[1]). The second element of intent of a robbery offense comes from the "for the

purpose" language, which sets forth the mens rea requirement that the use of force be intended to either compel a person to deliver or prevent resistance to the taking of the subject property (*see People v Smith*, 79 NY2d 309, 312 [1992]).

Here, the jury's confusion on intent stems from the insertion of the accessorial liability theory into an otherwise straightforward robbery case. As indicated, the trial court initially instructed the jurors that it was their obligation to evaluate the evidence as it applied to each defendant separately and that they must consider each instruction on the law as referring to each defendant. However, in addition to charging both robbery counts one and two, as to each defendant, the trial court also concomitantly charged the jury on accessorial liability as to each defendant. Thus, accessorial liability was a central component of the case. Yet, faced with the jurors' confusion on intent, the trial court here made no attempt to explain the import of the intent element of the robbery offenses under accessorial liability in determining each defendant's criminal liability. At the outset, to help the jurors understand accessorial liability, the trial court should have made clear that whether a defendant is accused as the perpetrator or as the accomplice is irrelevant. Indeed, in the context of accessorial liability, it is factually and legally impossible to be an

accomplice without being a principal in the commission of the crime *(see People v Duncan*, 46 NY2d 74, 79-80 [1978], *cert denied* 442 US 910 [1979] ["There is no distinction between liability as a principal and criminal culpability as an accessory"]; *cf. People v Rivera* 309 AD2d 881 [2d Dept 2003], *lv denied* 1 NY3d 600 [2004]).

Furthermore, to help the jurors understand the import of the intent element under an accessorial liability charge, the trial court should have made clear to the jurors that when two or more defendants are tried jointly for the commission of a robbery offense under an acting in concert theory, a defendant's conviction or acquittal depends on shared intent. Indeed, under an accomplice liability theory, shared intent is the lynchpin of liability (*see People v Rivera*, 309 AD2d at 881-882 ["The People failed to establish that the defendant was acting in concert with his codefendant [where] [t]he evidence, when considered in the light most favorable to the prosecution, failed to establish that the defendant shared the codefendant's intent to burglarize the complainant's home"] [internal citations omitted]; *People v Taylor*, 141 AD2d 581, 581-582 [2d Dept 1988], *lv denied* 72 NY2d 962 [1988] ["While the prosecution established that the defendant may have unwittingly aided the principal actors to the extent that he drove them away from the scene of the crime, proof that

the defendant harbored any intent to commit robbery or that he intentionally aided in the perpetration thereof was lacking in this case]).

Finally, to help the jurors understand the import of the intent element under an accessorial liability charge, the court should have explained to the jurors that "Where, as here, the codefendants are charged with acting in concert to rob, intent must be independently established as to each defendant; it cannot be imputed to all based upon proof offered against one codefendant" (*People v De Jesus*, 123 AD2d 563, 564 [1st Dept 1986], *lv denied* 69 NY2d 745 [1987]; *see also People v La Belle*, 18 NY2d 405 [1966]). That is, under an accessorial liability theory, it is not sufficient that each defendant's conduct may have aided the other in doing what constituted the robbery, where neither defendant had the intent required to be found guilty of the robbery offense *(see e.g. Matter of Bianca W.*, 267 AD2d 463 [2d Dept 1999] [evidence that the juvenile struck and killed victim during a scuffle was insufficient to establish that she shared her sister's intent to steal from victim]; *People v Alfaro*, 260 AD2d 495 [2d Dept 1999] [when the defendant joined the codefendant in fight arising out of dispute over unsatisfied civil judgment and victim's gold chains were pulled off during the fight and later found on the ground, it was reasonable to

conclude that the codefendant had broken chains without the defendant realizing he had done so]; *People v Morales*, 130 AD2d 366 [1st Dept 1987] [although defendant participated in assault arising from perceived insult to victim's wife, no evidence he participated in surreptitious theft during it]).

With regard to Telesford, the issue of intent was critical in one respect. The evidence adduced at trial undeniably established that Telesford assaulted the complainant. To sustain a conviction for robbery in the second degree based upon accessorial liability, however, the evidence, when viewed in a light most favorable to the prosecution, must prove beyond a reasonable doubt that Telesford acted with the mental culpability necessary to commit the robbery and that, in furtherance thereof, he solicited, requested, commanded, importuned or intentionally aided the principal to commit such crime *(see* Penal Law § 20.00; *People v Karchefski,* 102 AD2d 856 [2d Dept 1984]; *People v Reyes*, 82 AD2d 925 [2d Dept 1981]). Thus, in this case, an inference that Telesford helped Celestine commit the robbery, based on his role as an accomplice, would have been insufficient to prove the requisite intent to steal, in the absence of a specific finding that Telesford intended to do more than commit an assault (*see People v Morales*, 130 AD2d at 367-368).

With regard to Celestine, the issue of intent was critical

in a different respect. Undeniably, the evidence established beyond a reasonable doubt that Celestine took the three rings. Such conduct, however, by itself, constituted no more than a larceny, absent proof that either defendant used force to take or retain the stolen items. Although, as indicated, Telesford did use force to attack the victim, in order to convict either defendant of robbery, the jury needed to find that the violent attack on the victim, by Telesford, was not a mere response to insults and being spat upon by the victim, but that it was rather part and parcel to the taking or retaining of the stolen items. In other words, the jury had to find that Celestine intended to use force to retain the ring(s), either by using his own force or taking advantage of Telesford use of force (*see Morales, at 367-368; Matter of Peter J.*, 184 AD2d 511 [2d Dept 1992], *lv denied* 81 NY2d 705 [1993]; *People v Reyes*, 110 AD2d 663 [2d Dept 1985], *lv denied* 65 NY2d 699 [1985[).

The dissent does not – and cannot – dispute that our recommended supplemental instructions would have been helpful to the jury in understanding the import of the element of intent in a robbery prosecution under an accessorial liability theory. Instead, the dissent accuses the majority of engaging in "mere speculation without any evidentiary or factual support" as to the "state of confusion [of] the jury due to its different requests

to hear certain definitions and a repetition of the charges." The dissent's portrayal of the majority as inventing confusion suffers from a narrow view that there was no confusion in giving a literal reading and response to the jury's multiple questions. Of course, such an inaccurate assessment absurdly suggests that a jury's four successive notes on the same issue is an expression of clarity. More importantly, the dissent's view ignores defendants' theory of defense throughout the trial which was to negate each defendant's intent to forcibly steal the items in question. In this context, the jury's repeated requests for instructions on intent was a clear sign of confusion about the role intent played in an acting in concert prosecution. For the court to essentially repeat the same initial instructions over and over was to effectively close the door on its role of "respond[ing] meaningfully" to the jury's inquiries *(People v Malloy*, 55 NY2d at 301).

In arguing that no confusion ever took place here, the dissent takes the absurd position that "we cannot know the jurors' thought processes or conclude anything from the fact they made multiple inquiries to the court." The fallacy of the dissent's position is based on the false premise that there is nothing "unusual" about the jurors' repeatedly "requesting to hear the charges on different occasions over two days of

deliberations." The dissent's myopic view of the record harks back to a comparable mistake by the trial judge who found no apparent confusion based on his literal reading of the jurors' multiple questions on intent.

Unlike the dissent, we cannot ignore the fact that when a jury seeks multiple re-explanations, it is clear that it is having difficulty understanding the concept as originally explained (*see People v De Groat*, 257 AD2d 762, 763 [3d Dept 1999] [where jury requested instructions on "attempt" four times, it would not have been a meaningful response to simply reread original charge for the fourth re-instruction]; *People v Pyne*, 223 AD2d 910, 912 [3d Dept 1996], *lv denied* 88 NY2d 990 [1996] ["[t]he record makes clear that the jury was confused with regard to intent, having previously requested supplemental instructions thereon"]; *People v Brabham*, 77 AD2d 626, 626 [2d Dept 1980] [where jury asked for re-instruction on justification on six occasions, it was error to re-read the original charge in the face of such "obvious confusion"]; *cf. People v Santana*, 16 AD3d 346, 347 [1st Dept 2005], *lv denied* 5 NY3d 794 [2005] ["[w]hen the deliberating jury requested the elements of depraved indifference assault for the third time, the court properly exercised its discretion in delivering a supplemental charge that expanded upon its original explanation of those elements, since

the jury was clearly in need of additional guidance"]). Thus, the court's refusal to respond directly to the confusion based upon its literal reading of the juror's questions did not constitute a meaningful response to the requests.

Indeed, this Court has made it abundantly clear that more is required in particular circumstances where the statutory language might be misleading or where the jury has expressed uncertainty about the nature and legal significance of the defendant's conduct (*see e.g. People v Wheeler*, 220 AD2d 288, 288 [1st Dept 1995] [evidence warranted "clarifying charge" that "sale" does not include merely handling drugs as prospective buyer); *People v McGruder*, 63 AD2d 947, 948 [1st Dept 1978] [supplemental charge that "sale" includes promise to sell inadequate where promise demonstrated at trial too vague to constitute an offer; judge should have amplified circumstances in which promise can be considered offer]).

Finally, we reject the People's argument that the issue of whether the trial court properly responded to the jury's confusion on intent was not preserved. To be sure, the objections to the charge focused on the "aided" count. However, defense counsels' overriding concern was that the charge was confusing to the jury in that it merged everything and issues needed to be "separate[d] out" with respect to the robbery

charges. While counsels' objections and requests could have been more clearly articulated, Celestine's lawyer indicated that one problem was that the charge did not make clear that it did not matter which defendant inflicted the injury, but what did matter was whether both defendants shared the intent to commit the theft. Further, with regard to accessorial liability, both attorneys suggested that inserting each defendant's name in the course of giving separate charges as to each would help clarify matters for the jury in such a confusing robbery case under an accessorial liability theory. While the better practice would have been for counsel to more clearly state that the objections encompassed both types of robbery charges on the narrow issue of intent, we are satisfied that the colloquy was adequate to put the court on notice of both defense counsel's concerns about the adequacy of the court's response to the jury inquiries.

In any event, in our view, this is one of those rare cases where "interest of justice" review is warranted. "[W]here the court fails to give information requested upon a vital point no appellate court may disregard the error" (*People v Cooke*, 292 NY 185, 193 [1944], Lehman, Ch. J., dissenting). Since the issue of each defendant's intent was the primary disputed issue at trial, as evidenced by the jury's repeated requests for clarification of the charge on intent, we find that the prejudicial effect of the

court's inadequate supplemental instruction deprived defendants of a fair trial (*see id. at 190*; *People v Aguilar*, 177 AD2d 197, 200-201 [1st Dept 1992]*; People v Primus*, 178 AD2d 565 [2d Dept 1991]; *see also People v Cataldo*, 260 AD2d 662 [3d Dept 1999], *lv denied* 93 NY2d 968 [2000]).

Conclusion

Accordingly, the judgment of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered September 22, 2014, convicting defendant Travis Telesford, after a jury trial, of robbery in the second degree, and sentencing him to a term of 4 years with 5 years' postrelease supervision, and the judgment of the same court and Justice, rendered September 16, 2014, convicting defendant Bernie Celestine, after a jury trial, of robbery in the second degree, and sentencing him to a term of 3½ years with 2 years' postrelease supervision, should be reversed, on the law, the facts, and as a matter of discretion in the interest of justice, the judgments vacated and the matter remanded for a new trial.

All concur except Tom, J.P. who dissents in an Opinion.

TOM, J.P. (dissenting)

Because the court's main and supplemental charges conveyed the appropriate principles, as set forth in the Criminal Jury Instructions, concerning each defendant's individualized criminal liability, and constituted a meaningful response to the jury's inquiries (*see generally People v Fields*, 87 NY2d 821, 823 [1995]; *see also People v Santi,* 3 NY2d 234, 248 [2004]), I disagree with the majority's conclusion that defendants were denied a fair trial, and would affirm the convictions.

On August 7, 2013, defendants Telesford and Celestine entered a store on Canal Street. While there, Celestine took three rings from a store display and Telesford struck the woman watching the store, Yu Ying Li. Following the robbery, defendants were tried jointly and were each charged with second-degree robbery under an aided theory and second-degree robbery under a physical injury theory.

The evidence at trial showed that on the day of the robbery Li, a 60 year-old woman weighing approximately 87 pounds, was watching her husband's store where they sold scarves, jewelry, bags, and souvenir hats. She was accompanied by her friend Ms. Zheng. Shortly after Li's husband had left them, defendants entered the store.

In response to Li's offer of assistance, the men told her

that they were "just looking." The men then approached the jewelry case, and Zheng saw them trying on rings. Shortly thereafter, the men headed for the exit just as Li observed that three men's rings were missing from the display tray.

Li approached Celestine and asked why the rings were missing from the display case. Celestine denied any knowledge of the missing rings and Telesford stepped between Li and Celestine, and they both denied that Celestine had taken any rings. When Li tried to tell Telesford to ask Celestine to return the rings Telesford hit or patted Li on her left shoulder with his right hand. In response, Li hit Telesford back, who responded, "How dare you hit me," and hit Li a second time.

Li repeatedly told Telesford he was not a "good man" and he reacted by hitting her with both hands. Li then pushed Telesford away. At that time, Celestine offered to return two rings, which he either handed to Li or threw in the case. Li demanded the third ring but Celestine refused to return the stolen property. Telesford then gestured and told Celstine to "Go. Go. Go."

When Celestine moved to leave, Li said she was calling the police. Telesford replied that if Li called the police, he would also call the police and threatened Li based on what he presumed to be her immigration status. Both men then tried to leave the store. Telesford raised his arm as if he were going to hit Li

which frightened Li who feared she would be struck again. One of the men also spat at Li. Li then felt that her right arm was being "tightly held" just as Telesford punched her in the right side of her mouth, causing her mouth to bleed.

Police Officers Gary Lamour and Trevor Watson were in the vicinity, and heard a woman yell for help. The officers saw Celestine holding a woman while Telesford punched her. The officers apprehended defendants, and Lamour then frisked both defendants and recovered a ring from Celestine's left front pants pocket which Li identified as her merchandise.

Li suffered a bruise to her arm where Celestine had grabbed her and from dizziness and headaches, and was treated for a mild abrasion to her lip. Her mouth hurt for several days and her her head hurt for "about one week."

Defendants denied they entered the store with the intent to steal anything. According to their testimony, seconds after they entered the store Li approached the pair and accused them of stealing something. Then, another woman in the store hit Celestine in the shoulder. In response, Celestine asked the woman, "What are you doing, Miss?" and denied that he had taken anything. Li then tried to go into Telesford's pockets, and he brushed off her hand. Li then spat in Telesford's face, and as a "reflex" or a "reaction," his hand "just went up" and he

"backhand[ed]" Li to stop her from spitting on him or doing "anything else."

During its final charge, the court instructed the jurors that it was their "obligation" to "evaluate" the evidence as it applied to "each defendant separately"; that the jurors must consider "each instruction on the law" as "referring to each defendant separately"; that they must return a separate verdict for each defendant; and that those verdicts "may be, but need not be, the same." The court reminded the jury that the People had the burden of proving beyond a reasonable doubt that "each defendant" acted with the same state of mind required for the commission of the crime, and, "either personally, or by acting in concert with the other person," committed each of the remaining elements of the crime.

After giving the standard CJI instruction on accessorial liability and robbery (forcible stealing), as to the count of second-degree robbery of which defendants were convicted, the court explained that a defendant is guilty under this count "when that person forcibly steals property and when in the course of the commission of the crime, that person or another participant in the crime, causes physical injury [impairment of physical condition or substantial pain] to any person who is not a participant in the crime." Thus, the court charged that with

respect to each defendant separately, the People had to prove beyond a reasonable doubt both (1) that defendant personally or by acting in concert with another person forcibly stole property from Li; and (2) that in the course of the commission of the crime, defendant, or another participant in the crime, caused physical injury to Li.

Regarding the charge of second-degree robbery under count one, the court advised that a defendant is guilty under this count "when that person forcibly steals property and when that person is aided by another person actually present." The court charged that with respect to each defendant separately, the People had to prove beyond a reasonable doubt both (1) that defendant personally, or by acting in concert with another person, forcibly stole property from Li; and (2) that the person was aided in doing so by another person actually present. Celestine was also charged with petit larceny, and the court instructed the jury on that count.

When the court concluded its charge, Celestine's counsel objected to the part regarding the theory of robbery aided by another, arguing "that by charging them acting in concert I don't think that's a correct statement of the law." She asserted that a correct statement of the law would be as to each individual that Celestine stole property, and in the course of doing so, was

aided by Telesford, arguing that it requires forcible stealing by one defendant and aid in that stealing by the other, and that either defendant could have used the force in stealing where they both shared the intent to commit the underlying theft. Counsel also noted that it does not matter which one of them inflicts the injury. The court asked if counsel was asking it to re-read the elements without the accomplice liability part, and counsel stated that particularly to the robbery (aided by another) charge, saying acting in concert makes it "messy," and it has "to be parsed out to the jury for them to understand that they must first find a forcible taking and then find the aiding by another." The court indicated that it would not change its charge. Celestine's lawyer took an exception and Telesford's lawyer joined.

The jury began its deliberations and shortly thereafter sent out a note asking for the court's clarification of "intent," as well as a written definition of the charges for both defendants. Celestine's lawyer argued that the note indicated that the jurors were "confused," and that "things need to be separated out, especially with respect to the robbery." Telesford's lawyer agreed. The court declined to charge the jury in a different manner, and merely advised the jury that it could not provide a written charge, but could read back any portion or the entire

charge.

Soon thereafter, the jury asked to "hear the full definition of all the charges for both defendants," and Celestine's counsel said that she "repeat[ed her] objection." The court reread its charge regarding the separate consideration of each defendant. The court also repeated its accessorial liability charge, the definitions of larceny and forcible stealing, the elements of both counts of second-degree robbery, and its charge on the elements of petit larceny as to Celestine.

Later, the court followed Telesford's counsel's suggestion that it respond to a jury note by advising that there was no definition of "shared mind intent" and by rereading the definition of "working in concert." Without objection, the court also repeated its original charge on accessorial liability and offered to provide an expanded intent charge.

When the jurors sent out a note stating that they were "equally divided," the court asked them to continue deliberating the following day. The next day, the jurors requested to hear an "expanded definition of intent," and the court complied, without any objection from defendants. A few minutes later, the jurors asked to hear the "definition of intent again" and to "hear the charges again." Without any objection from either defendant, the court again repeated its original charges.

The jurors then returned a verdict convicting defendants of second-degree robbery under a physical injury theory. The jury did not reach a conclusion as to the other count of second-degree robbery, and did not consider the petit larceny charge.

On appeal, defendants both argue that the court erred in refusing defense requests to instruct the jury as to each defendant by inserting the names of each defendant into the jury instructions, and failed to meaningfully respond to jury inquiries to hear charges for both defendants, which confused the jury about how to correctly apply the intent element to defendants. Specifically, defendants argue that the court's charge would have permitted the jurors to convict them without finding that Telesford shared Celestine's intent to steal property, and that the record shows that the jurors were confused.

"In considering a challenge to a jury instruction, the 'crucial question is whether the charge, in its entirety, conveys an appropriate legal standard and does not engender any possible confusion'" (*People v Hill*, 52 AD3d 380, 382 [1st Dept 2008], quoting *People v Wise*, 204 AD2d 133, 135 [1st Dept 1994], *lv denied* 83 NY2d 973 [1994]; *see also People v Medina*, 18 NY3d 98, 104 [2011] ["In evaluating a challenged jury instruction, we view the charge as a whole in order to determine whether a claimed

deficiency in the jury charge requires reversal"]).

Further, a trial court "must respond meaningfully" to inquiries from a deliberating jury (*People v Almodovar*, 62 NY2d 126, 131 [1984]). Significantly, however, the trial court possesses discretion in framing supplemental instructions as it must "give such requested information or instruction as [it] deems proper" (CPL 310.30; *see also People v Santi*, 3 NY3d at 248). The sufficiency of a court's response to a jury note is gauged by the form of the jury's question, the particular issue of which inquiry is made, and the response actually given (*see Almodovar*, 62 NY2d at 131-132). Speculation or assumptions about the jurors' thought processes are not sufficient to show "serious prejudice" to a defendant such that reversal of the conviction is warranted (*see People v Agosto*, 73 NY2d 963, 967 [1989]).

Initially, the majority does not and cannot take issue with the court's main charge. First, the court's instructions for both counts of robbery in the second degree tracked the model language in the CJI. Regarding the claims raised by defendants, the court specifically instructed the jury that it was their obligation to evaluate the evidence as it applied to "each defendant separately," and that they must consider "each instruction on the law" as "referring to each defendant separately." The court also instructed the jurors to return a

separate verdict for each defendant and advised that those verdicts "may be, but need not be, the same."

In addition, the court properly advised the jurors regarding the intent required to convict either defendant of robbery. It defined robbery as "forcible stealing," and stated that a person steals property and commits larceny when, "with intent to deprive of another [sic] of property or to appropriate the property to himself," such person wrongfully takes, obtains, or withholds property from the owner of the property. The court added that a person forcibly steals property when, in the course of committing a larceny, he uses or threatens the use of physical force on another person "for the purpose of," inter alia, preventing or overcoming resistance to the taking of the property or for the purpose of preventing or overcoming resistance to the retention of the property immediately after the taking.

Moreover, the court delivered verbatim the standard CJI instruction on accessorial liability. The court instructed that, when one person "engages in conduct" that constitutes an offense, another person is criminally liable for such conduct when "acting with a state of mind required for the commission of that event," he "solicits, requests, commands, importunes or intentionally aids such person to engage in such conduct." And, the court instructed the jury that the People have the burden of proving

beyond a reasonable doubt that "each defendant" acted with the "same state of mind required for the commission of the crime," and either personally or acting in concert with "the other person," committed each of the elements of the crime.

In sum, the court's charge was extensive, correct and did not stray from the model jury instructions. Thus, the only conclusion to be drawn is that the jury was told the correct legal standards for evaluating each defendant's guilt.

Furthermore, there is no basis for the majority's position that the court's responses to the jury's inquiries were not meaningful. Indeed, as the majority concedes, "when the original instruction is accurate and '[w]here the jury expresses no confusion [regarding the original charge],' a simple reiteration of the original instruction suffices as a meaningful response" (*People v Santi*, 3 NY3d at 248, quoting *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]) And, as the majority notes, "a different charge may well be simply an exercise in semantics and could itself create the confusion sought to be avoided."

Here, there is no record evidence that the jury was confused by the court's instructions and the majority's finding to the contrary is conclusory and based in pure speculation. This case involved some complex legal theories and tricky concepts

regarding what each defendant had to have intended that may be difficult for laypersons to apprehend after hearing the legal standards only once. It is therefore reasonable that the jury might request multiple repetitions of portions of the instructions during deliberations so that they may completely understand the court's instructions and render a correct and appropriate verdict. In such circumstances, the court's rereading of its original charge was a proper and meaningful response that was well within the court's discretion (*see People v Santi*, 3 NY2d at 248).

Contrary to the majority's description of this case, the record reveals that the jury's first two requests merely sought a repetition of the full charges for both defendants and the definition of intent. The court properly responded to these requests by rereading its charge. Likewise, when the jury asked for a definition of "shared state of mind" and a rereading of the definition of "working in concert," the court responded exactly as defense counsel suggested by advising the jury there was no definition of "shared mind intent" and by rereading the definition of "working in concert." Finally, the next day when the jurors twice asked for the definition of intent, and to hear the charges again, the court complied with these requests without any objections. Almost immediately after the court responded to

the jury's final note by rereading its original charge, the jury returned its verdict.

While the majority projects a state of confusion onto the jury due to its different requests to hear certain definitions and a repetition of the charges, this is mere speculation without any evidentiary or factual support. The fact that the jurors were deadlocked at one point during the deliberations and may have needed more time to comprehend the charges and legal principles before them does not mean they were confused. After a lengthy trial involving two defendants, requesting to hear the charges on different occasions over two days of deliberations is not unusual or proof of confusion.

The issue is not whether the supplemental instructions recommended by the majority might have been helpful to the jury. Rather, the discrete issue in this appeal is whether the trial court properly exercised its discretion in responding to the jury's inquiries and whether its responses were meaningful. Given that the original charge was clear and legally correct, and the jury never expressed any confusion, the court in repeating its original charge meaningfully responded to the jury notes.

Contrary to the majority's position, we cannot know the jurors' thought processes or conclude anything from the fact they made multiple inquiries to the court. As the Court of Appeals

explained in *Malloy*,

> "When the jury requests further instructions on [a specific] legal point, such request does not necessarily import that the jury was perplexed or misled by the original charge. Rather, the jury simply may wish to have that critical concept refreshed in their minds or explained in isolation, without the distractions of the remaining portions of the full charge" (55 NY2d at 303).

Moreover, here the jury never gave any indication that the court's responses to its inquiries did not satisfy its concern. Finally, "[g]iven the subject of inquiry and the adequacy of the charge, it cannot be said that the court's exercise of discretion was improper" (*id.* at 303).

The majority misplaces reliance on distinguishable cases finding it to be error to reread the original charge in response to repeated jury questions. For instance, in *People v Pyne* (223 AD2d 910 [3d Dept 1996], *lv denied* 88 NY2d 940 [1996]) the record made clear that the jury was confused with regard to intent and immediately following the court's supplemental instructions, a juror exclaimed, "I still don't understand," (id. at 912) a circumstance not present in this case. Once again, contrary to the majority's assertion that the "jury repeatedly expresse[d] confusion," none of the jurors in this case claimed, at any time, that they were confused or that they did not understand the court's charge. Further, in *People v Brabham* (77 AD2d 626 [2d

Dept 1980]), the jury deliberated for four days and asked for further instructions on the issue of the defense of justification six times. Regardless, none of the cases cited by the majority stand for the proposition that the mere repeated requests mean per se that a jury is confused or necessarily require certain supplemental instructions. To do so would create an unenviable result. How many requests or inquiries would be deemed jury confusion? Nevertheless, the Court of Appeals' holding in *Malloy* explicitly holds to the contrary.

In contrast to the majority's cited cases, here the jury requested the reading of the definition of "intent" on three occasions and the court pursuant to a question by the jury advised it that there was no definition of "shared mind intent" and reread the definition of "working in concert." The court also reread the entire charge to the jury on two other occasions. There is no indication that there was confusion on the part of the jury. Rather, it appears that the lay jurors diligently performed their civic duties by making different inquiries to fully comprehend the lengthy and complex legal principles of the court's charge concerning a joint trial of two defendants in order to render a fair and just verdict. To hold otherwise would be an improvident exercise of discretion.

Nor is this case like those relied on by the majority where

the evidence warranted a specific supplemental charge (*see* e.g. *People v Wheeler*, 220 AD2d 288 [1st Dept 1995]). As the majority notes, this was a "straightforward robbery case" and the verdict was legally sufficient and not against the weight of the evidence. While the jury required repetitions of the controlling legal standards, nothing about the evidence suggests the need for supplemental instructions such as those recommended by the majority, and the majority's conjecture about the jurors' purported confusion is not sufficient to show "serious prejudice" to defendants such that reversal of the conviction is warranted (*People v Agosto*, 73 NY2d at 967).

Nor can it be concluded that the jurors were confused because they failed to reach a decision on the second-degree robbery count under an aided theory. Defendants are merely speculating when they argue that the jurors could not agree that defendants were working in concert or that defendants had the requisite intent. Indeed, where, as here, the verdict is not repugnant, it is "imprudent to speculate concerning the factual determinations that underlay the verdict because what might appear to be an irrational verdict may actually constitute a jury's permissible exercise of mercy or leniency" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v. Brito*, 135 AD3d 627 [1st Dept 2016], lv denied 27 NY3d 1066 [2016]).

Although the majority would prefer if the court gave additional instructions on accessorial liability, intent, and acting in concert, all of the court's instructions on these issues accurately informed the jury about the legal principles it had to apply, and it cannot be said the charge or responses to the jury's inquiries were legally deficient or prejudicial. Further, as noted above, a different charge may have created the confusion about which the majority is concerned.

Defendants claim that by not inserting the name of each defendant in its charge and thereby "spelling out the charges" for each defendant individually, the court left the jurors free to convict on a finding that Celestine alone forcibly stole property, and Telesford alone caused physical injury to Li. Yet, the instructions informed the jury that with respect to Telesford, it could only convict if it found that "the defendant" then under consideration forcibly stole property either alone or acting in concert, acted with the intent to steal property, and that he or Celestine caused physical injury in the course of committing the robbery. With respect to Celestine, the instructions informed the jury that it could only convict if it found that he forcibly stole property either personally or acting in concert, and that he or Telesford caused physical injury during the commission of the crime.

It is also notable that the jurors never told the court that they needed clarification as to the interplay of the elements of the charges, and the majority can only speculate that the jurors could not agree that defendants were working in concert or that defendants had the requisite intent. If the jurors had had specific questions about the charge or wanted more detail or clarity than the original charge provided, they would have asked, just as they did when they asked for the court's "clarification of intent" and asked about "shared state of mind." Because they instead merely indicated that they wanted to hear the definitions the court had already provided, the court acted appropriately in restating the charge.

Accordingly, I would affirm the convictions.

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

ENTERED: MARCH 15, 2017

CLERK