SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 2, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2270 The People of the State of New York, Ind. 57/08
Respondent,

-against-

Andranik Sargsyan,
Defendant-Appellant.

Law Offices of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel) for appellant.

Robert M. Morgenthau, District Attorney, New York (Jaime Bachrach of counsel) for respondent.

Judgment, Supreme Court, New York County (Daniel Conviser, J.), rendered January 22, 2009, convicting defendant, after a jury trial, of assault in the second degree (two counts) and vehicular assault in the second degree, and sentencing him to two concurrent terms of 2½ years, concurrent with a term of 1 to 3 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record concerning counsel's strategic decisions (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although defendant does not make any factual assertions outside the record, "[w]ithout the benefit of

additional facts that might have been developed after an appropriate postconviction motion, we cannot conclude that counsel's actions lacked any strategic or other legitimate explanation" (*People v Denny*, 95 NY2d 921, 923 [2000]). This is not one of the rare cases where the trial record itself permits review of an ineffective assistance of counsel claim challenging counsel's strategy (*see People v Brown*, 45 NY2d 852 [1978]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 2, 2010

David Apolony

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2272 In re Shavenon N.,

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

Miledy L.N., also known as Jasmin Miledy L.,
Respondent-Appellant,

Franciso, N.
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

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

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

Order, Family Court, Bronx County (Carol A. Stokinger, J.), entered January 8, 2009, which, insofar as it denied respondent mother's motion to vacate a dispositional order, same court and Judge, entered on or about September 17, 2008, following an inquest upon her default in appearing at the fact-finding and dispositional hearings, which found that respondent had derivatively neglected the child and committed his custody to the Commissioner of Social Services until completion of the next permanency hearing, unanimously affirmed, without costs.

The Family Court properly exercised its discretion in denying the mother's motion to vacate her default in appearing on

September 17, 2008 as she failed to demonstrate a reasonable excuse for the default and a meritorious defense to the neglect cause action (*see* CPLR § 5015(a)(1); *Robert B. v Tina Q.*, 40 AD3d 473 [2007]).

The mother's purported reliance on an adjourn slip for September 19, 2008, was unreasonable given her appearance in court on March 28, 2008 and July 21, 2008, at which time the September 17 date was selected and confirmed. Even if the photocopy of the adjourn slip annexed to the motion were authentic and caused confusion, it was at odds with the selected and confirmed court dates and the mother should have clarified any resulting confusion, especially where she had used the same excuse in connection with an earlier failure to appear (*see Matter of Nicholas S.*, 46 AD3d 830 [2007]; *Matter of Christian T.*, 12 AD3d 613 [2004]). Further, the mother's unsubstantiated and conclusory assertion of partial compliance with a dispositional order entered in neglect proceedings as to her two older children and bald claim that compliance with other aspects of the dispositional order were no longer necessary at the time of the subject child's birth, are insufficient to establish a

meritorious defense to the claim of derivative neglect (*see Matter of Gloria Marie S.*, 55 AD3d 320 [2008], *lv dismissed* 11 NY3d 909 [2009]; *Matter of Kimberly Carolyn J.*, 37 AD3d 174 [2007], *lv dismissed* 8 NY3d 968 [2007]).

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

ENTERED: MARCH 2, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2273-
2274 In re Bibianamiet L.-M., and Another,

Children Under the Age
of Eighteen Years, etc.,

Miledy L.N., et al.,
Respondents-Appellants,

Cardinal McCloskey Services,
Petitioner-Respondent.

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

David M. Shapiro, Bronx, for Francisco N., appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

Order, Family Court, Bronx County (Carol A. Stokinger, J.), entered January 8, 2009, which, insofar as it denied respondents parent's motions to vacate a dispositional order, same court and Judge, entered on or about September 9, 2008, following an inquest upon their default in appearing at the fact-finding and dispositional hearings, which terminated respondent mother's parental rights to Bibianamiet L.-M. and both respondents' parental rights to Jonathon N. on the ground of abandonment and committed the children's custody to the petitioning agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The Family Court properly exercised its discretion in denying respondents' motions to vacate their default in appearing on September 9, 2008 as they failed to demonstrate a reasonable excuse for the default and a meritorious defense to the abandonment cause of action (*see* CPLR 5015(a)(1); *Matter of Robert B. v Tina Q.*, 40 AD3d 473 [2007]).

The parents' purported reliance on an adjourn slip for September 19, 2008, was unreasonable, given that the slip clearly related to a separate neglect proceeding involving the couple's younger child and that the parents appeared in court on March 28, 2008 and July 21, 2008, at which times the September 9 date was selected and confirmed. Even if the photocopy of the adjourn slip annexed to the motion were authentic and caused confusion, it was at odds with the selected and confirmed court dates and the parents should have clarified any resulting confusion, especially where the same excuse had been used in connection with an earlier failure to appear (*see Matter of Nicholas S.*, 46 AD3d 830 [2007]; *Matter of Christian T.*, 12 AD3d 613 [2004]).

Further, a claim for abandonment was established by proof that the parents had no contact with and failed to visit the children in the six-month period preceding the filing of the petition (*see* Social Services Law § 384-b[4][b], [5][a]). The mother's claim that the caseworker did not respect her and was rude to her lacked the requisite specificity and corroboration to

support a claim that she was prevented or discouraged from contacting her children by the agency, on which claim she bore the burden (*see Matter of Gloria Marie S.*, 55 AD3d 320 [2008], *lv dismissed* 11 NY3d 909 [2009]; *Matter of Stefanie Judith N.*, 27 AD3d 403 [2006]). The mother's claim that the petitioning agency made an inappropriate referral is unpersuasive as the agency was not required to prove diligent efforts in an abandonment proceeding (*see Matter of Gabrielle HH.*, 1 NY3d 549 [2003]). The father's claim that he failed to visit more frequently because visits were not scheduled and that only supervised visits were allowed, likewise failed to set forth a meritorious defense.

Finally, evidence of the parents' limited post-petition visits are insufficient to disturb the disposition (*see Matter of Dennisha Shavon C.*, 295 AD2d 123 [2002]).

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

ENTERED: MARCH 2, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2277 The People of the State of New York, Ind. 3664/04
Respondent,

-against-

Rohan Campbell,
Defendant-Appellant.

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

Rohan Campbell, appellant, pro se.

Robert T. Johnson, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered December 14, 2006, convicting defendant, after a jury trial, of two counts of criminal sexual act in the first degree, and sentencing him to consecutive terms of 12½ years, unanimously affirmed.

The court properly imposed consecutive sentences because the two offenses, despite having occurred during a continuous transaction, were committed through separate acts (*People v Brown*, 80 NY2d 361, 364 [1992]; *People v Ramirez*, 44 AD3d 442, 445 [2007], *lv denied*, 9 NY3d 1008 [2007]). We perceive no basis for reducing the sentence.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record (*see People v Love*, 57 NY2d 998 [1982]).

Defendant's claims regarding the court's denial of his request for reassignment of counsel are without merit. Defendant's remaining pro se claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

M-541 - ***People v Rohan Campbell***

Motion seeking leave to file pro se reply brief denied.

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

ENTERED: MARCH 2, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2280 Jose Luis Toledo, as Administrator of the Estate of Joaquin Martinez, etc., Plaintiff-Respondent, Index 25092/03

-against-

Iglesia Ni Christo, Defendant-Appellant.

Mauro Goldberg & Lilling, LLP, Great Neck (Barbara D. Goldberg of counsel) for appellant.

Edelman & Edelman, P.C., New York (David M. Schuller of counsel) for respondent.

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 6, 2008, in a action for wrongful death, insofar as appealed from as limited by the briefs, awarding interest on future damages calculated on the value of those damages discounted to the date of death and going forward from that date to the date of the verdict, unanimously reversed, on the law, without costs, and the matter remanded for calculation of interest only on the non-lump sum portion of the future damages award going forward from the date of the verdict.

Interest on the award of future damages, which already had been discounted by the jury to the date of the verdict, should have been calculated only on the non-lump sum portion of the

future damages award from the date of the verdict (*Pay v State of New York*, 87 NY2d 1011 [1996]).

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

ENTERED: MARCH 2, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2281 Ivan Rodriguez, Index 7985/02
Plaintiff-Appellant,

-against-

E&P Associates, et al.,
Defendants-Respondents.

[And A Third-Party Action]

Law Offices of Anthony V. Gentile, Brooklyn (Anthony V. Gentile of counsel) for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Andrew Funk of counsel) for E&P Associates, Wayne Eisenbaum, Phyllis Cohen, Dyker Associates, Dyker Associates, Inc., AMPM Enterprises LLC., AMPM Enterprises and Alan J. Helene, respondents.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joanna M. Topping of counsel) for Modell's respondents.

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset (Anton Piotroski of counsel) for Mayer Equity, Inc. and Emil Mayer, respondents.

Law Office of Lori D. Fishman, Tarrytown (Louis H. Liotti of counsel) for Nicholas Para, Inc. and Nicholas Parascondola, respondents.

Sinnreich Kosakoff & Messina LLP, Central Islip (Annalee Cataldo-Barile of counsel) for Leonard Colchamiro, P.C. and Leonard Colchamiro, respondents.

Order, Supreme Court, Bronx County (Nelson S. Román, J.), entered August 14, 2008, which granted the summary judgment motions of all but the Modell's defendants to dismiss the complaint, and denied plaintiff's cross motion for summary judgment against all defendants, unanimously affirmed, without

costs.

The evidence established that defendants did not create a dangerous or blatantly defective condition in constructing a non-weight-bearing window ledge, which collapsed and through which plaintiff fell. The renovation plans, which incorporated plans for the interior build-out by lessee Modell's, did not specify that the area abutting the window was to be weight-bearing, and absent any such instruction from Modell's, there was no basis for designing or building the window ledge to be weight-bearing. The evidence suggesting that the window might be used to display signs, or that the ledge might be used as a display, was not sufficient to put any defendant on notice that the ledge would be used to stand or walk on, and that they were creating a dangerous condition in constructing a non-weight-bearing ledge (*see Diaz v Vasques*, 17 AD3d 134, 135 [2005], *lv denied sub nom. Boggio v Yonkers Contr. Co.*, 5 NY3d 706 [2005]).

Nor did plaintiff submit evidence sufficient to raise an issue of fact as to whether the allegedly dangerous condition was a structural defect in violation of the New York City Building Code. Absent a showing of a dangerous condition or Code

violation that might have supported a finding of negligence per se, plaintiff's cross motion for partial summary judgment, which was untimely filed, was properly denied.

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

ENTERED: MARCH 2, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2282 In re Joseph Flores, Index 112180/05
Petitioner-Respondent,

-against-

John J. Doherty, as Commissioner
of the Department of Sanitation
of the City of New York, et al.,
Respondents-Appellants.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel) for appellants.

Kirschner & Cohen, P.C., Great Neck (Allen Cohen of counsel) for respondent.

Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered February 11, 2009, which granted the petition to vacate the Commissioner's determination to terminate probationary employment to the extent of remanding the matter to the Department of Sanitation (DOS) for further proceedings to consider additional evidence, unanimously reversed, on the law, without costs, the petition denied and the proceeding dismissed.

DOS established that petitioner's six Time and Leave violations, which were incurred during the first four months of his probationary period, prior to his seeking treatment for substance abuse, constituted a good-faith, rational basis for his termination (*see Matter of Mitchell v Sielaff*, 196 AD2d 692 [1993]). Moreover, petitioner failed to establish bad faith or discrimination on the part of the DOS. He had not sought help

for substance abuse prior to the recommendation and issuance of his termination. He failed to establish that DOS was even aware of his substance abuse prior to his termination, and he did not establish that he was a rehabilitated or rehabilitating alcoholic at the time of his termination (*see Riddick v City of New York*, 4 AD3d 242, 245-246 [2004]; *cf. Matter of McEniry v Landi*, 84 NY2d 554 [1994]). The record was sufficient to enable the court to render a final judgment on the merits, obviating the necessity to remit for further administrative proceedings (*see Matter of Police Benevolent Assn. of N.Y. State Troopers v Vacco*, 253 AD2d 920, 921 [1998], *lv denied* 92 NY2d 818 [1998]).

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

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

ENTERED: MARCH 2, 2010

CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2283 The People of the State of New York, Ind. 6444/06
Respondent,

-against-

Javier Lizardi,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Daniel K. Shin of counsel) for respondent.

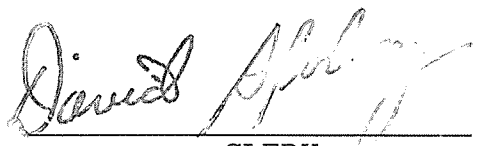
Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered December 12, 2008, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 20 years to life, unanimously affirmed.

After sufficient inquiry, the court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record supports the court's detailed findings of fact, in which it rejected each of defendant's challenges to his plea. Under the circumstances, it was unnecessary to engage in further fact-

finding regarding counsel's pre-plea advice to defendant about the defenses of justification and intoxication.

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

ENTERED: MARCH 2, 2010



CLERK

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2284 Myron Zuckerman, Index 113633/07
Plaintiff-Appellant,

-against-

Sydell Goldstein, et al.,
Defendants-Respondents.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (I. Michael Bayda of counsel), for appellant.

Lance A. Landers, New York, for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 27, 2009, which granted defendants' motion for summary judgment dismissing plaintiff's claim for punitive damages, unanimously affirmed, without costs.

In connection with a pending action for dissolution of defendant Sam-Fay Realty Corp., in which waste and diversion of corporate assets were alleged against plaintiff, defendants, the remaining shareholders, withheld from plaintiff, but not from themselves, a cash distribution from the sale of assets, pending the court's direction. Even accepting the ill will plaintiff imputes to them, defendants' conduct does not meet "the very high threshold of moral culpability" necessary to allow punitive damages, such as "a wanton or reckless disregard of plaintiff's

rights" (*Giblin v Murphy*, 73 NY2d 769, 772 [1988] [internal quotation marks and citation omitted]).

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

ENTERED: MARCH 2, 2010

David Apolony

CLERK

CORRECTED ORDER - APRIL 7, 2010

Gonzalez, P.J., Saxe, McGuire, Acosta, Abdus-Salaam, JJ.

2286N Eulalia Balaguer, Index 15713/07
Plaintiff-Appellant,

-against-

1854 Monroe Avenue Housing Development Fund Corp.,
Defendant-Respondent.

Feldman, Kronfeld & Beatty, New York (Michael C. Beatty of counsel), for appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for respondent.

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered January 28, 2008, which, in an action for personal injuries sustained on defendant's premises, denied plaintiff's motion for a default judgment and granted defendant's motion to compel plaintiff's acceptance of its answer, unanimously affirmed, without costs.

Plaintiff is not entitled to a default judgment because, having served defendant pursuant to Business Corporation Law § 306(b), her motion for a default judgment lacked proof of compliance with the additional service requirements of CPLR 3215(g)(4)(i) (*Admiral Ins. Co. v Marriott Intl., Inc.*, 67 AD3d 526 [2009], citing, inter alia, *Rafa Enters. v Pigand Mgt. Corp.*, 184 AD2d 329 [1992]; *accord Schilling v Maren Enters.*, 302 AD2d 375 [2003]). Although asserted for the first time on appeal, we

reach this issue since the omission is clear on the face of the record and could not have been avoided had it been raised before the motion court (*see Rafa Enters., id.*).

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

ENTERED: MARCH 2, 2010

David Abakony

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1883 David Harris, Index 107649/06
Plaintiff-Respondent,

-against-

170 East End Avenue, LLC, et al.,
Defendants-Appellants.

Jones Hirsch Connors & Bull, P.C., New York (James H. Rodgers of counsel), for appellants.

Arnold E. DiJoseph, III, New York, for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered January 29, 2009, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, and denied so much of defendants' cross motion as sought summary judgment dismissing that claim, unanimously modified, on the law, to the extent of dismissing the claim against defendant Highrise Hoisting and Scaffolding, Inc., and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Highrise.

Plaintiff, a steel worker, was injured during the construction of a 19-story condominium building. At the time of the accident, plaintiff was standing on the eighth floor of the structure. He was assisting in landing steel reinforcing bars on that floor, which were being lowered from the twelfth to the eighth floor by a crane. During the descent, the crane's cable

struck a bundle of several hundred 4-inch by 4-inch by 16-foot wooden beams known as stringers or reshore. The bundle was situated on the tenth floor. The crane cable dislodged the bundle from its perch, causing the bundle to fall to the eighth floor, striking plaintiff and his co-worker. The co-worker died from his injuries.

Plaintiff moved for summary judgment under Labor Law § 240(1). He claimed that the statute applied because the accident was caused by the operation of gravity, insofar as the bundle of stringers was above him, and fell because of the absence of an adequate safety device. Defendants cross-moved for summary judgment to dismiss the entire complaint, which also alleged violations of Labor Law sections 200 and 241(6). With respect to the section 240(1) claim, they argued that there was no violation because the bundle of stringers which struck plaintiff was properly secured. To support this contention, they submitted the affidavit of an expert who opined that defendants utilized the standard practice and procedure for storing stringers. That protocol, the expert averred, involves leaving bundles of stringers in an overhanging position with two-thirds of the bundle on the floor while the remaining one-third juts over the edge. Additionally, it requires placing one or more metal straps around the bundle and the wedging of a "chock," or vertical strut, between the top of the bundle and the ceiling. The expert

also stated that "[i]t is possible . . . for a properly secured chocked bundle of reshores to fall if sufficient force is applied to the bundle to dislodge the chock and shift the center of gravity of the bundle over the edge of the floor." Defendants further offered the deposition testimony of various workers who stated that the procedure described by the expert was generally followed on the job site. Only one of the workers testified that the bundle which struck plaintiff was secured in accordance with that procedure.

The motion court granted plaintiff's motion and awarded him summary judgment on his section 240(1) claim against all defendants. The court held that none of defendants' witnesses possessed personal knowledge of how the bundle of stringers that fell on plaintiff was secured, so defendants failed to establish, much less create an issue of fact regarding whether, they utilized an adequate safety device. Accordingly, because of the difference in elevation between the tenth floor, where the bundle was situated, and the eighth floor, where plaintiff was standing, the court found that section 240(1) applied. The court did, however, dismiss the claims brought pursuant to Labor Law sections 200 and 241(6), a disposition which plaintiff does not challenge here.

Even assuming, without deciding, that defendants established that the bundle of stringers was secured in accordance with

industry practice, summary judgment was properly granted to plaintiff on his claim pursuant to Labor Law § 240(1). That section "evinces a clear legislative intent to provide 'exceptional protection' for workers against the 'special hazards' that arise when the work site either is itself elevated or is positioned below the level where 'materials or load [are] hoisted or secured'" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993], quoting *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). The statute is one of strict liability. Therefore, it is irrelevant that a safety device was provided if an accident that the device was intended to prevent still befalls the plaintiff. Here, the bundle of stringers fell as a result of a foreseeable construction-related accident, not an act of God or other calamity which defendants could not have anticipated. Thus, section 240(1) was violated, notwithstanding that the bundle may have been chocked in accordance with industry protocol.

This case is similar to *Nimirovski v Vornado Realty Trust Co.* (29 AD3d 762 [2006]). There, the plaintiff was injured after he fell off a scaffold. The scaffold became unstable when a piece of the sign truss he was cutting fell and struck the scaffold. The Second Department held that "under the circumstances, where it was foreseeable that pieces of metal being dropped to the floor could strike the scaffold and cause it

to shake, the scaffold was inadequate in and of itself to protect the plaintiff against hazards encountered in the course of his work, and additional safety devices were necessary to satisfy Labor Law § 240(1)" (29 AD3d at 762 [internal quotation marks and citations omitted]).

Here, it was foreseeable that the crane cable could strike the bundle of stringers, and cause it to fall. Indeed, defendants' own expert conceded that with "sufficient" force, the chocking system would fail. Accordingly, some additional safety device was needed to secure the bundle, especially while a crane obviously having the potential to provide such a force was in close proximity to the bundle.

Notwithstanding the foregoing, the cross motion should have been granted to the extent it sought dismissal of the complaint as against defendant Highrise. The record supports defendants' assertion that Highrise was not the owner or general contractor, nor the agent of either, which would be necessary for bringing it

within the purview of section 240(1) (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 292-293 [2003]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]).

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

ENTERED: MARCH 2, 2010

David Gallagher
CLERK

Andrias, J.P., Friedman, Acosta, Degrasse, Román, JJ.

1907 William Simmons, etc., et al., Index 22045/06
Plaintiffs-Respondents,

-against-

New York City Health and
Hospitals Corporation, etc.,
Defendant-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for appellant.

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell L. Gittin of counsel), for respondent.

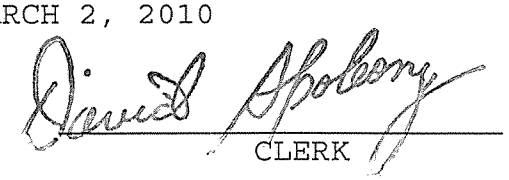
Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered February 26, 2008, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss this medical malpractice action as precluded by res judicata, unanimously reversed, on the law, without costs, defendant's motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

The motion court, by declining to grant defendant's motion to dismiss the complaint and ordering discovery, limited to plaintiff's assertion of the insanity toll, necessarily rejected defendant's res judicata defense. Thus, the order at issue, at least to the extent that it denied defendant's motion to dismiss on grounds of res judicata is appealable insofar as it affects a substantial right (*see Fellner v Morimoto*, 52 AD3d 352, 353 [2008]; CPLR 5701[a][2][v]).

However, contrary to the lower court's implicit conclusion the instant action is in fact barred by res judicata. Plaintiff's prior action was against a doctor employed by defendant, arose from the same course of treatment alleged in the instant action, and was dismissed on statute of limitations grounds. While defendant was not a party to the prior action, as defendant doctor's employer, required to indemnify defendant doctor in the prior action, it was in privy with defendant doctor (*Beuchel v Bain*, 97 NY2d 295, 304-305 [2001], *cert denied* 535 US 1096 [2002]; *Prospect Owners Corp. v Tudor Realty Servs.*, 260 AD3d 299 [1999]), the real party in interest in that action (*Ebert v New York City Health and Hosp. Corp.*, 82 NY2d 863, 866-867 [1993]), and the abbreviated statute of limitations applicable to defendant was thus applied to him (*see International Shared Servs. v County of Nassau*, 222 AD2d 407, 408 [1995]; *Urraro v Green*, 106 AD2d 567 [1984]). Plaintiff cannot avoid res judicata by varying facts, changing his causes of action and omitting references to the previously named doctor (*see Reilly v Reed*, 45 NY2d 24, 28-30 [1978]; *Marinelli v Assocs. v Helmsley Noyes Co.*, 265 AD2d 1 [2000]).

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

ENTERED: MARCH 2, 2010



CLERK

Mazzarelli, J.P., Friedman, Nardelli, Renwick, Román, JJ.

1952 68-74 Thompson Realty, LLC, Index 570599/06
Petitioner-Appellant,

-against-

Keith McNally, et al.,
Respondents-Respondents.

McGovern Doherty & Kim, PLLC, New York (Kyu O. Kim of counsel), for appellant.

David A. Kaminsky & Associates, P.C., New York (Martin G. Dobin of counsel), for respondents.

Order, Appellate Term of the Supreme Court, First Department, entered May 14, 2008, which reversed a judgment of Civil Court, New York County (Jean T. Schneider, J.), entered December 1, 2005, after a nonjury trial, awarding possession to petitioner landlord, and awarded judgment to respondent Harry McNally dismissing the proceeding, unanimously reversed, on the law, without costs, and judgment of possession to petitioner reinstated.

Petitioner commenced this summary holdover proceeding for possession of a rent-stabilized apartment in Manhattan's West Village on the ground of non-primary residence. Harry McNally claims succession rights to the subject apartment, which his father, Keith McNally, the tenant of record since 1993, vacated in 2002. The father moved to a West Village town house he had purchased two years earlier. Harry's parents were divorced in

1994. At the time of his father's move to the town house, Harry was a 17-year old minor, and his mother resided in her own apartment, also in the West Village.

The burden of presenting legally sufficient proof to establish primary residency rests with the party claiming succession rights (*see Gottlieb v Licursi*, 191 AD2d 256 [1993]). "Primary residence" is judicially construed as "an ongoing, substantial, physical nexus with the . . . premises for actual living purposes" (*Katz Park Ave. Corp. v Jagger*, 11 NY3d 314, 317 [2008], quoting *Emay Props. Corp. v Norton*, 136 Misc 2d 127, 129 [App Term 1987]). Upon our review of the documentary and other evidence, we find, contrary to the view of the Appellate Term, that Harry failed to meet his burden of proof that his father's former residence was his primary residence at all relevant times.

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

ENTERED: MARCH 2, 2010

David Spoleny

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2252 The People of the State of New York, Ind. 2781/06
Respondent,

-against-

Jonathan Astwood,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered July 30, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts), criminal possession of a weapon in the fourth degree and criminal possession of marijuana in the second degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

The court properly admitted, with limiting instructions, a series of items of physical evidence recovered in close temporal and spatial proximity to defendant's arrest that suggested uncharged criminal activity. This evidence was closely connected to the charged crimes, supported the unlawful intent element of the second-degree weapon charges (*see People v Coluccio*, 170 AD2d 523, 524 [1991], *lv denied* 77 NY2d 993 [1991]), and tended to complete the narrative of events leading to defendant's arrest

(*see People v Till*, 87 NY2d 835, 837 [1995]). Contrary to defendant's claim that the disputed evidence was unnecessary to establish intent, the presumption of unlawful intent in Penal Law § 265.15(4) is a permissive inference that the jury may reject. Moreover, the People "were not bound to stop after presenting minimum evidence" (*People v Alvino*, 71 NY2d 233, 245 [1987]). In any event, any error in admitting the challenged evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 2, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2257 Sylvia Williams-Simmons, et al., Index 21666/06
Plaintiffs-Respondents,

-against-

Owen Golden, et al.,
Defendants,

Ralph Lichtenstein, et al.,
Defendants-Appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered on or about August 3, 2009, which denied the motion by defendants Ralph Lichtenstein and University Diagnostic Imaging for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

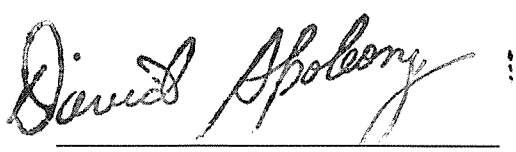
Although not a radiologist, plaintiffs' medical expert, an internist and medical oncologist, was qualified to opine as to the propriety of defendants' care of plaintiff Sylvia Williams-Simmons (*see Matott v Ward*, 48 NY2d 455, 459 [1979]; *Joswick v Lenox Hill Hosp.*, 161 AD2d 352, 354-355 [1990]). While the affirmation of defendants' medical expert showed prima facie that there was no lack of departure from good and accepted standards of medical practice, the affirmation of plaintiffs' medical expert raised triable issues of fact defeating that prima facie

showing. Inconsistent with defendants' recommendation that plaintiff obtain a follow-up mammogram six months after a needle biopsy was performed, plaintiffs' expert opined that, given plaintiff's particular condition, defendants should have recommended a work-up beyond the needle biopsy findings, such as further examinations, MRI, or excisional biopsy, and that the work-up should have been performed one to two months following the needle biopsy. As the motion court found, this difference in opinion creates triable issues of fact "whether the tests were properly interpreted and whether the seriousness of plaintiff's condition was adequately communicated to medical providers so that plaintiff could be properly informed."

To the extent the motion court found that defendants "concede[d] at least one departure from good standard medical practice, *i.e.*, movants' failure to advise and ensure that Plaintiff underwent further testing and follow-up after the July 2004 needle biopsy," this finding was erroneous; it apparently was based upon a misinterpretation of defendants' reply affirmation in support of their motion.

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

ENTERED: MARCH 2, 2010



CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2259 The People of the State of New York, Ind. 2043/05
Respondent,

-against-

Jarvis Cromwell,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered March 3, 2008, convicting defendant, after a jury trial, of attempted murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to consecutive terms of 25 years and 10 years, unanimously modified, on the law, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The evidence established that defendant and the codefendant joined in a premeditated act of revenge. It would have been unreasonable for the jury to conclude that the codefendant acted alone, firing both of the pistols proven to have been used, while bringing defendant along on this planned mission as a mere

observer.

Since the evidence against defendant was both direct and circumstantial (*see People v Barnes*, 50 NY2d 375, 380 [1980]), the court did not err in denying defendant's request for a circumstantial evidence charge. In any event, any error in refusing to give such an instruction was harmless.

Defendant did not preserve his claim that the court improperly admitted evidence of uncharged crimes and his related claim that the court did not provide an adequate limiting instruction, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. After forensic evidence established that two pistols recovered from an apartment shared by defendant and the codefendant were used in the crime, the court properly permitted a witness to testify that he recognized the recovered pistols as similar to two weapons he saw in the possession of defendant and the codefendant several times in the weeks leading up to the incident. This testimony was plainly admissible, because rather than simply demonstrating criminal propensity, it specifically linked defendant and the codefendant to the charged crime (*see e.g. People v Del Vermo*, 192 NY 470, 478-482 [1908]; *People v Brooks*, 62 AD3d 511, 512 [2009], *lv denied* 12 NY3d 923 [2009]; *People v Mitchell*, 24 AD3d 103, 104 [2005], *leave denied*, 6 NY3d 778 [2006]). Furthermore, its probative value exceeded any

prejudicial effect. Accordingly, we reject defendant's ineffective assistance of counsel claims relating to this evidence (*see Strickland v Washington*, 466 US 668 [1984]; *People v Caban* 5 NY3d 143, 155-156 [2005]).

The court properly permitted a witness to testify that immediately before the crime, in defendant's presence, the codefendant's nontestifying girlfriend made a statement that could be viewed as urging the codefendant to abandon his plan of revenge. This was not hearsay, as it was not admitted for its truth (*see People v Reynoso*, 73 NY2d 816, 819 [1988]). "The mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind of the hearer or of the declarant" (Prince, Richardson on Evidence § 8-106 [Farrell 11th ed]). Defendant's Confrontation Clause claim is meritless.

The court improperly imposed consecutive sentences (*see* Penal Law § 70.25[2]). The weapon possession charge related to the same event as the attempted murder, and the evidence did not establish that defendant possessed the pistol with a separate purpose from his intent to shoot the victim (*see People v Hamilton*, 4 NY3d 654 [2005]; *People v Rosario*, 26 AD3d 271 [2006], *lv denied* 6 NY3d 897 [2006]). We note that at sentencing

the People did not ask for consecutive sentences.

We perceive no basis for otherwise reducing the sentence.

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

ENTERED: MARCH 2, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2260 In re John Whitfield, Index 401458/08
Petitioner-Appellant,

-against-

Stephen J. Moriello, Record Access Officer,
Individually and as a Member of the
New York City Department of Corrections,
Respondent-Respondent.

John Whitfield, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about May 22, 2009, which denied petitioner's Freedom of Information Law application to compel respondent to provide petitioner with access to copies of New York City Department of Correction records pertaining to the confinement of another individual, and to find respondent in contempt for failing to provide petitioner with such records, unanimously affirmed, without costs.

Assuming the court's interim order was correct in directing additional details of respondent's unsuccessful search for the subject records (*but see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873, 875 [2001] [neither a detailed description of the search nor a personal statement from the person who actually conducted the search is required]), respondent satisfied such directive by providing affidavits from two of its officers

stating that they had diligently searched the two facilities where the records might be stored, and documents showing that, prior to petitioner's FOIL request, 2050 boxes of inmate records stored in one of the facilities had been ruined in a flood and destroyed pursuant to administrative order. Nothing in the record supports petitioner's assertion that the records he seeks have been preserved on CD-ROM. We have considered petitioner's other contentions and find them unavailing.

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

ENTERED: MARCH 2, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2261 Shpetim Hajderlli, Index 7441/07
Plaintiff-Appellant, 86305/07

-against-

Wiljohn 59 LLC, et al.,
Defendants-Respondents.

- - - - -

Wiljohn 59 LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Innovative Electric of New York, Inc.,
Third-Party Defendant-Respondent.

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

McMahon, Martine & Gallagher, LLP, Brooklyn (Patrick W. Brophy of counsel), for Wiljohn 59 LLC, Wiljohn Associates LLC and Broadway Management Co. Inc., respondents/respondents.

B. Jennifer Jaffee, New York, for M. Melnick & Co., Inc., respondent/respondent.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for Innovative Electric of New York, Inc., respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 31, 2009, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment on the issue of defendants' liability under Labor Law § 240(1), and granted defendants' motions for summary judgment dismissing the section 240(1) claims, unanimously affirmed, without costs.

According to plaintiff, although he did not use the A-frame ladder as intended by unfolding it, but instead, following his

supervisor, used it as a ramp to reach the ground floor approximately four feet below, his use of the ladder was not what caused him to fall. Rather, plaintiff fell because his supervisor, who had himself just reached the ground safely without opening or securing the ladder, apparently forgot or never realized that plaintiff was on the ladder, and pulled it away. That act was not foreseeable in the normal course of events, and was so far removed from any conceivable violation of the statute due to the failure to use, or inadequacy of, a safety device of the kind enumerated in the statute (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]) as to constitute, as a matter of law, a superseding act that broke any causal connection between any such violation of the statute and plaintiff's injuries (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). We have considered plaintiff's other arguments and find them unavailing.

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

ENTERED: MARCH 2, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2262 Demetria Rodriguez, Index 15288/07
Plaintiff-Respondent,

-against-

520 Audubon Associates, et al.,
Defendants-Appellants.

Rivkin Radler, LLP, Uniondale (Harris J. Zakarin of counsel), for appellants.

Gardiner & Nolan, Brooklyn (William Gardiner of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered August 5, 2009, which, in an action for personal injuries allegedly sustained in a slip and fall down interior stairs in a building owned and managed by defendants, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendants established their prima facie entitlement to summary judgment by submitting evidence that they lacked notice of the condition alleged to have caused plaintiff's fall. In opposition, plaintiff failed to raise a triable issue of fact. Although she stated that water accumulated on the lobby floor in the building each time it rained and that the water would be tracked onto the interior stairs, this raised no more than a general awareness that the floor became wet during inclement

weather, which is insufficient to establish constructive notice of the specific condition causing her injury (*see Solazzo v New York City Tr. Auth.*, 6 NY3d 734 [2005]). Plaintiff neither informed defendants of the alleged hazardous condition nor produced competent evidence to raise a factual question as to whether they had received notice from any other source (*see Casado v OUB Houses Hous. Co. Inc.*, 59 AD3d 272 [2009]). Furthermore, plaintiff's claim in her affidavit in opposition that a leak in the wall near the mailboxes resulted in a puddle of water at the bottom of the staircase each time it rained, is not consistent with her earlier deposition testimony and thus, insufficient to defeat defendants' motion (*see Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270 [2009]). Nor did plaintiff raise a triable issue of fact on her other theories of liability, including that the subject stairs were in violation of Administrative Code of City of NY 27-375(h) and that she was caused to fall by a piece of metal nosing that had separated from the stair on which she slipped.

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

ENTERED: MARCH 2, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2263 The People of the State of New York, Ind. 6331/06
Respondent,

-against-

Cornell Curry,
Defendant-Appellant.

Cornell Curry, appellant pro se.

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

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered March 28, 2007, convicting defendant, after a jury trial, of 96 counts of criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to 96 concurrent terms of 2 to 4 years, unanimously affirmed.

Defendant's challenge to the sufficiency of the evidence is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There was overwhelming proof of defendant's possession of forged instruments, consisting of 96 bent MetroCards, with the requisite knowledge and fraudulent intent (*see People v. Mattocks*, 12 NY 3d 326 [2009]). Defendant's challenge to the sufficiency of the grand jury evidence is

unreviewable (*see* CPL 210.30[6]), and his challenge to the sufficiency of the indictment is without merit.

Defendant's claims of unlawful suppression of evidence by the People and ineffective assistance of counsel are unreviewable because they rest primarily upon factual assertions that are outside the record. Although defendant made these assertions in his unsuccessful postconviction motions, they are not properly before this Court because defendant did not obtain leave to appeal. To the extent the existing record permits review, we find these claims without merit.

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

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

ENTERED: MARCH 2, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2264-
2265 In re Raquel N., and Others,

Children Under the Age of
Eighteen Years, etc.,

Evelyn O., et al.,
Respondents-Appellants,

McMahon Services for Children, etc.,
Petitioner-Respondent.

Kenneth M. Tuccillo, Hastings-On-Hudson, for Evelyn O., appellant.

Elisa Barnes, New York, for Jose A., appellant.

Joseph T. Gatti, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about October 1, 2008, which, upon fact-findings of permanent neglect as against respondent mother and abandonment as against respondent father, terminated respondents' parental rights to the subject children and committed the children's guardianship and custody to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The agency demonstrated by clear and convincing evidence

that the mother permanently neglected the children (*see Matter of Myles N.*, 49 AD3d 381, 381 [2008], *lv denied* 11 NY3d 709 [2008]). Although she attended all the programs recommended by the agency, she failed to correct the conditions that led to the placement of the children in foster care, she remained in an abusive relationship with the father of two of the subject children and attempted to hide that relationship from the agency, and she failed to gain insight into either the needs of the children or her own limitations (*see Matter of Nathaniel T.*, 67 NY2d 838, 841-842 [1986]). The evidence indicated that the mother suffered from a deteriorating mental condition, failed to properly assess her daughter's serious mental problems, and remained passive during visits with the children.

Clear and convincing evidence also supports the court's determination that the father abandoned his children (*see Matter of Ruben J.R.*, 303 AD2d 238 [2003], *lv denied* 100 NY2d 507 [2003]). The father admitted that although he was aware of his children's placement with the agency and their residence with the grandmother, he made no attempt to contact the children or the agency after the expiration of the order of protection. Moreover, the order of protection itself did not relieve him of his obligation to maintain contact (*see Matter of Gabrielle HH.*, 1 NY3d 549 [2003]).

The agency established by a preponderance of the evidence

that the best interests of the children would be served by terminating respondents' parental rights so as to facilitate their adoption by the foster mother, the children's maternal grandmother, with whom they have resided for six years and wish to remain (*see Matter of Sean LaMonte Vonta M.*, 54 AD3d 635 [2008]). No evidence was presented that the grandmother's home was not suitable for the children.

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

ENTERED: MARCH 2, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2266 Richard B. Cohen, Index 103900/07
Plaintiff-Appellant,

-against-

Akabas & Cohen, etc., et al.,
Defendants-Respondents.

Ciampi LLC, New York (Arthur J. Ciampi of counsel), for appellant.

David E. Bamberger, P.C., New York (David E. Bamberger of counsel), for respondents.

Order, Supreme Court, New York County (Louis Crespo, Special Referee), entered December 8, 2008, which, inter alia, in this action seeking an accounting in connection with the dissolution of a certain law firm, awarded plaintiff a one-third interest in the law firm with interest at the rate of 4½ percent, unanimously affirmed, without costs.

The decision of a fact-finding court should not be disturbed upon appeal unless it is obvious that its conclusions could not have been reached under any fair interpretation of the evidence, particularly where the findings of fact largely rest upon considerations relating to the credibility of witnesses (*see Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Citibank, N.A. v Angst, Inc.*, 61 AD3d 484, 485 [2009], *lv dismissed* 13 NY3d 753 [2009]). In that connection, the special referee, as the trier of fact, considered the proof before him, as well as the

credibility of the witnesses, including the experts, and determined that the lease had no value on the date that plaintiff departed defendant law firm, providing a detailed, well-reasoned explanation for his ruling. There is, thus, no basis for setting aside his decision, which is supported by the evidence presented at the hearing.

Similarly, the special referee was warranted in affording plaintiff a one-third interest in the distribution of the firm's assets, as set forth in the three-member firm's partnership agreement, and also did not improvidently exercise his discretion in imposing 4½ percent interest on the principal of the sum awarded to plaintiff inasmuch as the allowance of interest is, insofar as concerns partnership accountings, a matter for decision on equitable principles (*see* CPLR 5001[a]; *Shubert v Lawrence*, 27 AD2d 292, 297 [1967]).

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

ENTERED: MARCH 2, 2010

CLERK

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

2268N MF Global, Inc., et al., Index 603274/08
Petitioners-Appellants,

-against-

Morgan Fuel & Heating Co., Inc.,
Respondent-Respondent.

Herrick, Feinstein LLP, New York (Therese M. Doherty of counsel), for appellants.

Rich & Intelisano LLP, New York (John G. Rich of counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 22, 2009, which denied the petition to stay arbitration of claims involving derivative swaps transactions and a motion to stay a related claim in a separate arbitration, unanimously reversed, on the law, with costs, the petition and motion granted and the arbitration and related claim permanently stayed.

It was for the court to determine whether the parties had agreed to arbitrate (*see Matter of Fiveco Inc. v Haber*, 11 NY3d 140, 144 [2008]), since they did not invoke the exception to the foregoing rule by clearly and unmistakably providing that such determination be made by the arbitrators (*see Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 46 [1997]). That the determination may require interpretation of the Financial Industry Regulatory Authority (FINRA) Code does not make it any

less a matter for the court. The International Swap Dealers Association, Inc. (ISDA) agreement under which the swaps dispute arose did not contain an arbitration clause, but selected the courts of Manhattan as the forum, and, in this regard, the Uniform Submission Agreement in another matter did not specifically incorporate by reference the FINRA Code of Arbitration Procedure (*see PaineWebber Inc. v Bybyk*, 81 F3d 1193, 1201 [2d Cir 1996]).

There was no agreement to arbitrate the swaps dispute. The guaranties were unconditional (*see Raven El. Corp. v Finkelstein*, 223 AD2d 378 [1996], *lv dismissed* 88 NY2d 1016 [1996]; *Manufacturers Hanover Trust Co. v Green*, 95 AD2d 737 [1983], *appeal dismissed* 61 NY2d 760 [1984]) and barred any defenses to the obligation they guarantied (*see Sterling Nat. Bank v Biaggi*, 47 AD3d 436 [2008]), so, although executed as part of the same transaction, they were intended to entail completely separate obligations (*see BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1985]). Thus, it cannot be said that MFG Market Service, as a signatory to the guaranties and their arbitration provisions, was also bound to arbitrate the swaps claim on the ground that the obligations are intertwined (*see Denney v BDO Seidman, L.P.*, 412 F3d 58, 70 [2005]). The Uniform Submission Agreement by which MFG Market Service agreed to arbitrate "third party claims" in the guaranty arbitration, and the definition of

third party claims in the FINRA Code, did not constitute an agreement to arbitrate the claims asserted by Morgan in that arbitration, which, we note, were barred by a temporary restraining order when interposed. Nor do the guaranties provide a basis for compelling non-signatory MFG, Inc. to arbitrate on the ground that it was the alter ego of MFG Market Service, since the requisite showing was plainly lacking (*see Thomson-CSF, S.A. v American Arbitration Assn.*, 64 F3d 773, 777-778 [1995]; *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339-340 [1998]). Nor was MFG, Inc. subject to arbitration on the ground that Morgan was its customer, since Morgan dealt only with MFG Market Service on the swaps transactions; in opposition to the sworn denial of Bellino, the individual with whom Morgan dealt in the subject unregulated transactions, that he had acted on behalf of MFG Market Service only, Morgan failed to submit any evidentiary proof to show that he actually acted on behalf of MFG, Inc. or that it had been given reason to believe so (*cf. Financial Network Inv. Corp. v Becker*, 305 AD2d 187, 188 [2003]).

We have considered the parties' other contentions and find them unavailing.

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

ENTERED: MARCH 2, 2010

David Spolony

CLERK