SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 29, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8829 Juana Suazo, Index 308261/09
Plaintiff-Respondent,

-against-

Linden Plaza Associates, L.P., et al.,
Defendants-Appellants.

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Cartafalsa, Slattery, Turpin & Lenoff, Tarrytown (Christopher J. Turpin of counsel), for appellants.

Susan R. Nudelman, Dix Hills, for respondent.

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Order, Supreme Court, Bronx County (Lizbeth González, J.), entered March 29, 2012, which denied defendants' motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion seeking, as a spoliation sanction, to strike defendants' answer and to grant her partial summary judgment on the issue of liability, unanimously modified, on the law and the facts, to grant the cross motion only to the extent of reducing the spoliation sanction to an adverse inference charge at trial, and otherwise affirmed, without costs.

Defendants failed to make a prima facie showing of entitlement to summary judgment inasmuch as plaintiff's daughter's deposition testimony, proffered by defendants, does not clearly establish that the assailants were "allowed into the building by another tenant," thus failing to establish that defendants' alleged security breaches were not a proximate cause of the assault on plaintiff (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550-551 [1998]).

Since defendants were "on notice of a credible probability that [they would] become involved in litigation" (*Voom HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 [1st Dept 2012]), plaintiff demonstrated that defendants' failure to take active steps to halt the process of automatically recording over 30- to 45-day-old surveillance video and to preserve it for litigation constituted spoliation of evidence (*id.* at 41, 45). However, spoliation of the video did not "leave[] [plaintiff] prejudicially bereft of appropriate means to confront a claim [or defense] with incisive evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 174 [1st Dept 1997] [internal quotation marks omitted]). At trial plaintiff may present testimony of the two deponents who viewed the video to establish that the assailants were not allowed into the building by a tenant (*see*

Schozer v William Penn Life Ins. Co. of N.Y., 84 NY2d 639, 644-645 [1994]). Therefore, the motion court erred in striking defendants' answer. Accordingly, the appropriate sanction is an adverse inference charge (*see Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 482-483 [1st Dept 2010]; *Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [1st Dept 2002]).

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

ENTERED: JANUARY 29, 2013

CLERK

Acosta, J.P., Saxe, DeGrasse, Richter, JJ.

7897- Index 603479/09
7898-
7898A-
7898B-
7899 Debevoise & Plimpton LLP,
Plaintiff-Respondent,

-against-

Candlewood Timber Group LLC, et al.,
Defendants-Appellants.

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Debevoise & Plimpton LLP,
Plaintiff-Appellant,

-against-

Candlewood Timber Group LLC, et al.,
Defendants-Respondents.

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Clark, Gagliardi & Miller, PC, White Plains (Henry G. Miller of counsel), for Candlewood Timber Group LLC, appellant/respondent.

Hoffman & Pollok LLP, New York (Thomas C. Moore of counsel), for Jeffrey M. Kossak, appellant/respondent.

Roger J. Bernstein, New York, for Debevoise & Plimpton LLP, respondent/appellant.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 25, 2011, which, to the extent appealed from, granted plaintiff's motion for summary judgment dismissing defendants' legal malpractice counterclaim, and denied defendants' cross motion for summary judgment dismissing plaintiff's statute of

limitations defense, unanimously affirmed, without costs. Orders, same court and Justice, entered November 16, 2011, which, insofar as appealed from as limited by the briefs, denied defendants' motion to compel plaintiff to produce nonparty Dietmar Prager for a deposition and nonparties Donald Donovan, Catherine Amirfar, and Dennis Hranitzky for additional depositions, denied defendants' third motion to compel discovery, and granted plaintiff's motion to strike defendants' fourth set of interrogatories and fifth notice for production of documents, unanimously affirmed, without costs. Order, same court and Justice, entered November 16, 2011, which denied defendants' motion to vacate plaintiff's note of issue and strike its certificate of readiness, unanimously modified, on the facts and in the exercise of discretion, to permit defendants to file a late jury demand pursuant to CPLR 4102(e), and otherwise affirmed, without costs. Order, same court and Justice, entered November 17, 2011, which denied plaintiff's second summary judgment motion, unanimously affirmed, without costs.

The court properly found that defendants' legal malpractice counterclaim was time-barred to the extent defendants seek monetary damages (*see* CPLR 214[6]). The most recent allegation of negligence occurred in May 2006 – more than three years before

this action was commenced in November 2009 – and defendants failed to show that the continuous representation doctrine applies. "There were no clear indicia of an ongoing, continuous, developing and dependent relationship between the client and the attorney" (*Matter of Merker*, 18 AD3d 332, 332-333 [1st Dept 2005] [internal quotation marks omitted]), nor was there "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]). Defendants did not submit affidavits showing "that facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]). As both sides agree, defendants' malpractice counterclaim is not time-barred insofar as defendants seek to set off their malpractice damages against any recovery plaintiff might obtain (*see* CPLR 203[d]).

Plaintiff is correct that its second summary judgment motion was not duplicative of its first: Its first motion dealt only with the statute of limitations, whereas its second dealt with the merits of defendants' malpractice counterclaim. However, "[a]s a general rule, parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment"

(*NYP Holdings, Inc. v McClier Corp.*, 83 AD3d 426, 427 [1st Dept 2011] [internal quotation marks and brackets omitted]). Plaintiff has not demonstrated that any of the exceptions to this rule apply (*see e.g. Jones v 636 Holding Corp.*, 73 AD3d 409 [1st Dept 2010]; *Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002]).

The denial of defendants' motion to strike plaintiff's note of issue was not an improvident exercise of the motion court's broad discretion. The court ruled appropriately in denying defendants' second and third motions to compel and granting plaintiff's motion for a protective order (*see generally Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223 [1st Dept 2003]). This is not a case where "the trial court . . . force[d] the parties to trial without first providing them with a reasonable opportunity for the completion of discovery" (*Lipson v Dime Sav. Bank of N.Y.*, 203 AD2d 161, 163 [1st Dept 1994]).

However, defendant has presented grounds for being permitted to file a belated jury demand. While CPLR 4102(a) requires a defendant properly served with a plaintiff's note of issue to demand a jury trial within 15 days, subdivision (e) authorizes the court to "relieve a party from the effect of failing to comply with this section if no undue prejudice to the rights of

another party would result." Plaintiff submitted no evidence that any undue prejudice would result; its assertion on appeal that a jury trial could cause delay, which would apply to every application of CPLR 4102(e), does not state undue prejudice.

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7965-
7965A Ronald Alleva, Index 16510/03
84226/04
Plaintiff-Appellant,

-against-

United Parcel Service, Inc.,
Defendant-Respondent,

Gary Callwood,
Defendant.

- - - - -

United Parcel Service, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Pitt Investigations, Inc.,
Third-Party Defendant-Respondent.

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Law Offices of Edmond J. Pryor, Bronx (William J. Clyne of counsel), for Ronald Alleva, appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for United Parcel Service, Inc., respondent/appellant.

Churbuck, Calabria, Jones & Materazo, Hicksville (Joseph A. Materazo of counsel), for Pitt Investigations, Inc., respondent.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 5, 2011, which denied plaintiff's motion to strike defendant United Parcel Service, Inc.'s (UPS) answer, unanimously affirmed, with costs. Order, same court and Justice, entered May 6, 2011, which, to the extent appealed from as limited by the

briefs, granted UPS's motion for summary judgment dismissing the complaint as against it, and granted third-party defendant Pitt Investigations, Inc.'s motion for summary judgment dismissing the claim for contractual indemnification, unanimously modified, on the law, to deny UPS's motion as to the negligent hiring, retention and supervision claims, to deny Pitt's motion, and to grant UPS's motion for summary judgment on its claim for contractual indemnification against Pitt, and otherwise affirmed, without costs.

Plaintiff, a security guard employed by defendant Pitt at a UPS distribution center, seeks to recover for injuries he sustained when he allegedly was assaulted by defendant Callwood, a UPS employee, while searching Callwood's belongings.

UPS's unexplained failure to provide plaintiff with its "center file" on Callwood, which, inter alia, would document any previous disciplinary issues, and which UPS's counsel asserted, without elaboration, "no longer exist[s]," constitutes spoliation. The file would be critical in determining whether UPS had notice of Callwood's propensity for violence, an issue central to plaintiff's claims. Plaintiff cannot be faulted for his inability to establish that the missing records contained critical evidence (*see Sage Realty Corp. v Proskauer Rose*, 275

AD2d 11, 17 [2000], *lv dismissed* 96 NY2d 937 [2001]). However, the extreme sanction of striking UPS's answer — the only relief plaintiff sought — is not warranted, since the center file does not constitute the sole source of the information and the sole means by which plaintiff can establish his case (*see Schantz v Fish*, 79 AD3d 481 [2010]; *Minaya v Duane Reade Intl., Inc.*, 66 AD3d 402 [2009]). A lesser sanction, such as an adverse inference charge, if sought, at trial, would be more appropriate.

Accordingly, summary judgment in favor of UPS dismissing the negligent hiring, retention and supervision claims is not warranted. However, UPS cannot be held vicariously liable for its employee's assault, since the tort was not committed in furtherance of UPS's interests but was personal in nature (*see Kawoya v Pet Pantry Warehouse*, 3 AD3d 368, 369 [2004], *appeal dismissed* 2 NY3d 752 [2004]; *Adams v New York City Tr. Auth.*, 211 AD2d 285, 294 [1995], *affd* 88 NY2d 116 [1996]).

The agreement between UPS and Pitt provides that Pitt shall indemnify UPS for "any and all claims . . . of any kind or nature whatsoever related to the Work hereunder," and for "any claims . . . arising . . . out of or in consequence of the work hereunder . . . *and any injury suffered by any employee of [Pitt]*, . . . except [for] losses . . . arising out of the sole

negligence of UPS" (emphasis added). Since plaintiff was performing his work as a security guard employed by Pitt when he sustained his injuries, the claim against UPS arises from, and is related to, Pitt's work and falls within the agreement's broad indemnification provision (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Sovereign Constr. Co. v Wachtel, Dukauer & Fein*, 55 NY2d 627 [1981]).

The Decision and Order of this Court entered herein on June 19, 2012 is hereby recalled and vacated (*see* M—3409 decided simultaneously herewith).

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

ENTERED: JANUARY 29, 2013

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8351 In re Obed O., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Veronica G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (David K. Kessler of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the children.

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Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about February 27, 2012, which, following a hearing pursuant to Family Court Act § 1027, granted petitioner agency's application to remand the subject children to the agency pending resolution of the neglect proceeding, unanimously affirmed, without costs, and the stay of the order currently in effect continued for 60 days from the date of entry of this order.

The record supports the court's determination that the children's life or health was at imminent risk of harm (Family Court Act § 1027[b][i]), given the strong evidence of educational

neglect and the prior findings of educational and medical neglect (*see Matter of Annalize P. [Angie D.]*, 78 AD3d 413 [1st Dept 2010]; *see also Matter of Serenity S. [Iyesha A.]*, 89 AD3d 737, 739 [2d Dept 2011]). The court correctly found that reasonable efforts had been made to prevent the children's removal from the home, including agency referrals to various services (*see Nicholson v Scoppetta*, 3 NY3d 357, 378 [2004]). Despite these efforts and prior neglect findings, the children's excessive lateness and absence from school continued. Accordingly, the court properly determined that, despite the harm of removal, it was in the children's best interests to remand them to the agency, rather than return them to respondent mother (*see id.* at 366-367).

However, respondent or any other interested party may move to vacate the Family Court's order (*see* Family Court Act § 1061). At oral argument, the agency indicated that it would not oppose

such a motion, given respondent's compliance with the terms and conditions of this Court's April 2012 order staying the Family Court's order (*see id.*) The stay shall continue in effect for 60 days from the date of entry of this order.

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

ENTERED: JANUARY 29, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8533 Robert Roach, Index 306230/09
Plaintiff-Appellant,

-against-

Citywide Mobile Response Corp., et al.,
Defendants-Respondents.

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Law Office of Neil R. Finkston, Great Neck (Neil R. Finkston of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for Citywide Mobile Response Corp. and Jennifer Rich, respondents.

DeSena & Sweeney, LLP, Hauppauge (Gregory Freedman of counsel), for Brian Caldwell, respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 29, 2011, which, to the extent appealed from as limited by the briefs, granted defendants Citywide Mobile Response Corp. and Jennifer Rich's motion for summary judgment dismissing the complaint alleging serious injury pursuant to Insurance Law § 5102(d), and ordered the entry of judgment in favor of all defendants, unanimously affirmed, without costs.

Defendants established prima facie that plaintiff did not suffer serious injury of a permanent nature to his left knee, by submitting an orthopedist's report finding normal ranges of motion and a radiologist's opinion that changes shown in an MRI

of the then-35-year-old plaintiff were degenerative and preexisted the accident. In opposition, plaintiff submitted an arthroscopic surgeon's opinion that there were bilateral meniscal tears in the knee that were not degenerative (*see Salman v Rosario*, 87 AD3d 482, 483-484 [1st Dept 2011]). However, plaintiff failed to show that the meniscal tears resulted in more than minor limitations (*see Tuberman v Hall*, 61 AD3d 441 [1st Dept 2009]).

Moreover, the surgeon states in his affirmation that plaintiff denied having any knee problems before the accident. This assertion is refuted by plaintiff's testimony that his arthritic condition caused pain for which he was treated by three physicians prior to the accident. Although the surgeon makes passing references to the disease, he does not acknowledge or weigh its preexisting painful effect on plaintiff's left knee. In order to raise a triable issue of fact with respect to serious injury a "plaintiff's expert must adequately address how plaintiff's current medical problems, in light of [his or] her past medical history, are causally related to the subject accident" (*see Style v Joseph*, 32 AD3d 212, 214 [1st Dept 2006]).

Here, Dr. Levy could not have performed the analysis required by *Style* because his observations are based on an incomplete medical history relating to plaintiff's left knee (*see e.g. Sky v Tabs*, 57 AD3d 235, 238 [1st Dept 2008]).

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Saxe, Moskowitz, Freedman, Abdus-Salaam, JJ.

8841 In re Pria J. L., and Another,

Dependent Children Under
Eighteen Years of Age, etc.,

Sharon L.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Daniel R. Katz, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 10, 2011, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent mother had neglected her daughter, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed.

Respondent was charged with neglecting her 12-year-old daughter, Pria, and derivatively neglecting her ten-year-old daughter, Amber, by aiding and abetting the infliction of

excessive corporal punishment upon the 12 year old by her 27-year-old brother, Dion, on June 8, 2010 (*see* Family Court Act §§ 1046[b][i], 1012[f][i][B]; *Matter of Joseph C. [Anthony C.]*, 88 AD3d 478 [1st Dept 2011]). Family Court found that respondent had neglected Pria, but not Amber because an isolated event was involved. Respondent and the attorney for the children appeal from the finding of neglect and the latter seeks dismissal of the petition.

Sandra Gracey, a child protective specialist who met with the child the day after the incident at issue, Patricia Sanger, another caseworker, and respondent, Sharon L., testified at the trial in May 2011. The evidence indicated that on or about June 8, 2010 respondent, Sharon L., orally argued with her 12-year-old daughter because the child had not come directly home after school and had convinced her younger sister Amber to stay out as well. Dion, Pria's adult brother, involved himself in the argument, and according to information given to Gracey by Pria, began hitting her. Pria then ran down a staircase and claimed that Dion ran after her and pushed her, causing her to fall and injure her knee. When her brother told her to get up, Pria stated that she could not get up because her knee hurt. Dion then called upstairs, requesting that respondent give him a belt.

Respondent asked Amber to give her a belt to give to Dion, which the latter then used to hit Pria on her "hind leg with the belt." Dion then carried Pria back upstairs, "accidentally" banging her knee against the bannister. Neighbors, hearing the commotion, called the police, who came and, after Pria said she could not get up and walk, called for an ambulance. Pria was taken to Beth Israel Hospital, and Dion was arrested. The caseworker who interviewed Pria the next day observed Pria wearing a brace and using a cane because of the injury to her knee, but Pria was fine when next seen by the caseworker several days later.

Although a temporary order of protection (TOP) was issued on behalf of Pria against her brother as a result of the incident, respondent allowed the brother, who occasionally stayed over, to spend the night of June 24 on an air mattress in the same room with Pria and Amber. No problems were reported.

Respondent testified that, on the day of the incident, Pria had been disrepectful and argumentative with her, and that Pria and Dion got into an argument, with Pria insisting that Dion was not her father. Respondent also stated that when she saw Pria and Dion at the bottom of the stairway, Dion was walking back and forth holding his pants because he had not finished dressing for his work as a security guard. She believed that Dion had asked

for a belt to finish dressing and that he had started to put it on, but, when Pria said, "I hate you," removed the belt and started hitting Pria. Respondent stated that she told Dion to "stop whatever you are doing" and cursed at him. Respondent indicated that she had accompanied Pria to the hospital, but she did not attend any of Dion's court dates and heard nothing about the TOP until her mother told her about it on June 21 or 22. Respondent stated that when she next saw Dion on June 24, he denied that an order of protection had been issued. The caseworker informed respondent the next day that an order had been issued.

There was no evidence of any prior incident of corporal punishment by respondent or anyone on her behalf. Nor was there any evidence of serious injury to Pria. Although ACS removed Pria and Amber from respondent's home, putting them under the care of their fathers and then their maternal grandmother, both girls very much wanted to return to respondent, spoke with her by telephone daily, and visited with her regularly. They were unhappy living with the other relatives and being apart.

On June 28, 2011, the Family Court issued its decision, finding that while ACS had proved that Pria had been neglected, there was no basis for a finding of derivative neglect as to

Amber because there was only a single incident of corporal punishment and Pria had acted provocatively. The court "utterly rejecte[ed]" respondent's claim that Dion needed the belt to get dressed for his security guard position, indicating that it was not "plausible" and that respondent, fully aware of the heated argument between her son and daughter, had aided and abetted the infliction of corporal punishment. The court also stated: "That this was an isolated incident does not in and of itself require dismissal. A single incident may be sufficient . . . where the court finds that the gravamen of the complaint was not accidental . . ."

The court further found that there was "insufficient reliable evidence to establish that respondent knew of the existence of the order of protection" or that she knowingly and voluntarily violated that order by allowing Dion to sleep on the floor in Pria and Amber's room. Indeed, the court found "there is insufficient evidence to show that the respondent, in fact did allow Dion to sleep in his sister's room at all at the time encompassed by the temporary order of protection."

On August 10, 2011, the court ordered that the children be released to the respondent's custody with ACS supervision for 6 months. The court stated that "notwithstanding the finding

itself, which, of course, [is] towards the parent, . . . Pria has issues, and has an attitude, which needs to be addressed, because otherwise, it's just going to continue to put the mother in the same awkward position that she's been in . . ." Among other things, respondent was required to cooperate with a psychological assessment for Pria, resume therapy with Pria, and cooperate with ACS supervision. ACS did not appear before this Court at oral argument, but the attorney for the children reported that there have been no further incidents since the daughters were paroled to respondent's care.

In seeking reversal of the finding of neglect and dismissal of the petition, respondent and the attorney for the children, aver that even when accepting all the findings of the Family Court, respondent at most aided and abetted the infliction of corporal punishment on one of her children on one occasion only. While the child was injured sufficiently to warrant medical intervention, the injury occurred when she either fell running away from her brother or was pushed by her brother, or when her knee hit the bannister, and not as a result of the use of the belt furnished by respondent. Further, the brother was the one arrested by the police and charged with assault, not respondent. In addition, Family Court rejected the claim that respondent

knowingly violated a TOP. We agree with respondent and the Legal Aid Society.

A "neglected child" is defined as one whose "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care . . . by unreasonably inflicting or allowing to be inflicted harm . . ." (Family Ct Act § 1012 [f][i][B]). We find no reason to disturb the court's credibility determination that respondent's explanation for furnishing the belt to her son (i.e., that he needed the belt to complete his work outfit) was not plausible (*see Matter of Amire B. [Selika B.]*, 95 AD3d 632, 632 [1st Dept 2012], *lv denied* 2013 NY Slip Op 60400 [2013]). However, the finding of neglect based on this single incident should be reversed. There is no evidence that any emotional or significant physical injury occurred as a result of this incident. At most the child's provocative behavior caused an overreaction on the part of her brother, condoned by her mother. In cases where a legal guardian is found negligent for condoning infliction of corporal punishment on a child by another, there has been a pattern of punishment, as opposed to an isolated incident (*see e.g. Matter of Rayshawn R.*, 309 AD2d 681, 682 [1st Dept 2003]).

Here we have only one event.

We have previously reversed findings of neglect based on a single incident or isolated event (*see e.g. Matter of Christian O.*, 51 AD3d 402 [1st Dept 2008] [reversing finding of neglect where a parent kicked the child in the ankle, causing injury when the 11 year old came home late, because it was an isolated event in which the parent lost his temper]; *Matter of Joshua R.*, 47 AD3d 465 [1st Dept 2008] [reversing findings of abuse and derivative abuse where a father shoved food into a child's mouth, causing him to vomit, and slapped the child so hard that he had a bloody nose and a bruised and lacerated eye, even though there was evidence that the father hit the child with a belt two years earlier], *lv denied* 11 NY3d 703 [2008]; *Matter of Rosina W.*, 297 AD2d 639 [2d Dept 2002] [reversing finding of abuse based on an isolated incident of slapping an argumentative 17 year old, causing swelling and a bloodshot eye]; *Matter of Kennya S. [Kendader S.]*, 89 AD3d 570 [1st Dept 2011] [reversing finding of neglect based on an isolated incident of excessive corporal punishment resulting in mild physical injuries]; *Matter of Chanika B.*, 60 AD3d 671 [2d Dept 2009] [reversing neglect finding based on an isolated incident of slapping a child and causing a bloody nose]. The incident forming the basis for the finding

here is, if anything, less compelling than those described in the above cited cases.

Accordingly, the finding of neglect should be vacated and the petition dismissed.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9073 The People of the State of New York, Ind. 6449/07
Respondent,

-against-

Michelle Sweeney,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered May 12, 2011, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing her, as a second felony drug offender, to a term of 8 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 4 years, and otherwise affirmed.

Defendant has not preserved her claim that the court failed to advise her of the length of the postrelease supervision component of the sentence she would receive in the event that she violated certain terms of her guilty plea. Since defendant was on notice of this specific information well before sentence was

imposed, she was required to preserve this issue by moving to withdraw her plea (*People v Murray*, 15 NY3d 725, 726-727 [2010]). We decline to review her unpreserved claim in the interest of justice, and as an alternative holding we reject it on the merits. At the proceeding at which defendant pleaded guilty, the court warned defendant that the consequences of failing to comply with the drug treatment requirements of her plea would be spelled out in a written plea agreement. Approximately one month later, after defendant was accepted by a drug program, defendant signed a written plea agreement that set forth the possible sentencing consequences, including the precise terms of imprisonment and PRS. The document was reviewed in open court, and was signed by the court itself as well as defendant and her attorney. Thus, the document was functionally equivalent to oral advice by the court concerning PRS, and the proceeding at which it was signed was essentially a continuation of the plea proceeding.

The court properly denied defendant's motion to dismiss the indictment, made on the ground of delay in sentencing, since the delay was not excessive and was occasioned by "plausible reasons" that should not result in a loss of jurisdiction (*see People v Drake*, 61 NY2d 359, 366 [1984]). The delay was the product of a long and cumbersome process of extraditing defendant from another

state, where she was incarcerated. The People generally exercised diligence in attempting to return defendant to New York for sentencing, and offered reasonable explanations for each aspect of the delay. Even if the People could have avoided a portion of the delay by proceeding more expeditiously, that portion was not so lengthy as to require dismissal of the indictment.

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9074 In re Xiomara M.,
Petitioner-Respondent,

-against-

Robert M., Jr.,
Respondent-Appellant.

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Andrew J. Baer, New York, for appellant.

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

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Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about November 15, 2011, awarding petitioner mother sole legal and physical custody of the parties' children, subject to respondent father's right of visitation, unanimously affirmed, without costs.

The record supports the court's determination that the totality of the circumstances warrants awarding custody of the children to petitioner (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). In determining the best interests of the children, the court considered the appropriate factors, including that petitioner had always been the primary care giver and made sure that the children received the educational and medical attention they required (*see e.g. Matter of Battista v Fasano*, 41 AD3d 712

[2nd Dept 2007], *lv denied* 9 NY3d 818 [2008]), that she was more likely to foster a relationship between respondent and the children than he was to foster a relationship between petitioner and the children (*see Matter of Lionel E. v Shaquana R.B.*, 73 AD3d 434 [1st Dept 2010]), and the history of domestic violence at the hands of respondent (*see* Domestic Relations Law 240[1][a]).

The court reasonably rejected the recommendation of its appointed forensic psychologist (*see Matter of Kozlowski v Mangialino*, 36 AD3d 916 [2nd Dept 2007]). The court fairly found, inter alia, that the expert did not sufficiently weigh the impact of domestic violence on petitioner's emotional and psychic state, perhaps causing her depression and the other difficulties she faced. The court fairly concluded that the expert disproportionately blamed petitioner for problems in the parties' relationship while ignoring her explanations, and relied too heavily on the reports of the paternal grandparents, who had themselves made false reports of abuse and neglect against petitioner.

The court properly considered the wishes of the children as one of many factors in its determination. There is no support for respondent's contention that the court treated the children's wishes as determinative.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9075	In re Rywa Wilner, et al., Petitioners-Appellants, -against- Suzanne A. Beddoe, etc., et al., Respondents-Respondents.	Index 115362/10 113214/10 113215/10 113726/10

Cohen, Hochman & Allen, New York (Robert B. Hochman of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Michael J. Pastor of counsel), for respondents.

Order and Judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered on or about September 19, 2011, which denied Wilner's, Gladys's, and Palazzdo's petitions seeking an order vacating their defaults before respondent Environmental Control Board (ECB), and granted Plan B Engineering's petition to the extent of remanding that matter to ECB for a determination of Plan B's application to vacate its default, unanimously modified, on the law, to grant Gladys's, Palazzdo's, and Plan B's petitions to the extent of vacating the default judgments against them, and otherwise affirmed, without costs.

Section 1049-a of the New York City Charter, the enabling legislation which underlies Section 3-82 of the Rules of the City

of New York (Rule 3-82), governing procedures for vacating defaults before ECB, requires that notices of violation (NOV) of matters overseen by ECB be "served in the same manner as is prescribed for service of process by [CPLR Article 3] or [Business Corporation Law Article 3]" (NYC Charter § 1049-a[d][2][a]). Among four enumerated exceptions to this provision are two relating to service of NOVs of City Charter or Administrative Code provisions enforced by various departments, including, as pertinent here, the New York City Departments of Buildings and Environmental Protection (*see* NY City Charter §§ 1049-a[d][2][a][i]-[ii]). Such NOVs may be served by delivery to "a person employed by the respondent or in connection with the premises where the violation occurred" (NY City Charter § 1049-a[d][2][a][i]), or "by affixing such notice in a conspicuous place to the premises where the violation occurred" (NY City Charter § 1049-a[d][2][a][ii]), coupled with mailing of a copy of the NOV "to the respondent at the address of such premises" (NYC Charter § 1049-a[d][2][b]). Even with respect to these two exceptions, however, such substituted service may not be effected unless "a reasonable attempt has been made to deliver such notice . . . as provided for by [CPLR Article 3] or [Business Corporation Law Article 3]" (NY City Charter § 1049-a[d][2][b]).

CPLR Article 3, in turn, establishes a regime of service upon, as pertinent here, natural persons, which permits substituted service, such as "nail and mail service," only where service by personal delivery to either the respondent or a person of suitable age and discretion "cannot be made with due diligence" (CPLR 308[4]). BCL Article 3 similarly requires that service of process, as a rule, be made by personal delivery to the corporation's registered agent or to the secretary of state (*see* Business Corporation Law § 306, § 307).

Of the four petitioners here, the record indicates that efforts were made to personally serve only Wilner. Gladys, Palazzdo, and Plan B were all served by alternative means of affixing copies of the NOVs at the premises, coupled with service by mail, but with no prior attempt at personal service. The failure to make any effort at personal service runs afoul of the New York City Charter's directive that a "reasonable attempt" at personal service be made prior to resort to alternative means of service (*see Matter of Oparaji v City of New York*, 2011 NY Slip Op 33265[U] [Sup Ct, Queens County 2011]).

We have considered petitioners' remaining arguments, including their contention that Rule 3-82 is violative of their rights to due process, and find them unavailing.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9076 The People of the State of New York, Ind. 4407/09
Respondent,

-against-

Jimmy Martinez,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas A. Farber, J. at plea; Robert Stolz, J. at sentencing), rendered on or about January 25, 2011,

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: JANUARY 29, 2013

CLERK

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

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9077 Alan D. Gordon, etc., Index 603805/09
Plaintiff-Respondent-Appellant,

-against-

Frederick W. Credno, Jr., etc., et al.,
Defendants-Appellants-Respondents,

Davinder Sehmi, et al.,
Defendants.

_____

Brune & Richard LLP, New York (David Elbaum of counsel), for Frederick W. Credno, Jr., appellant-respondent.

Dechert LLP, New York (Steven A. Engel of counsel), for Donald J. Moss, Skylink Air and Logistic Support (USA), Inc., Sportsflight Air and Harjit S. Kalsi, appellants-respondents.

Law Offices of Edward C. Kramer, P.C., New York (Edward C. Kramer of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered on or about January 9, 2012, which, to the extent appealed from, denied defendant Credno's motion to dismiss plaintiff's claims against him for breach of contract (counts four and five), fraud (counts six and nine) and breach of fiduciary duty (count eight); denied defendants SkyLink Air and Logistic Support (USA), Inc. (SkyLink USA), Harjit S. Kalsi, Donald J. Moss, and Sportsflight Air, Inc.'s (collectively, the SkyLink defendants) motion to dismiss plaintiff's claims against

SkyLink USA for breach of contract (count one), unjust enrichment (count two) and quantum meruit (count three), and against all of the SkyLink defendants for fraud (counts six and nine); and granted defendants' motions to dismiss plaintiff's breach of contract claim (count seven) in its entirety, and those portions of his fraud (counts six and nine) and breach of fiduciary duty (count eight) causes of action alleging derivative claims, unanimously modified, on the law, to dismiss the unjust enrichment and quantum meruit claims, and to dismiss plaintiff's claims in his individual capacity under the fraud and breach of fiduciary duty causes of action, and otherwise affirmed, without costs.

With regard to plaintiff's cross appeal, given the minimal business activities of the corporation, the IAS court correctly found that the derivative claims plaintiff asserted on behalf of the corporation accrued for purposes of CPLR 202 in Wyoming, where the corporation was incorporated (*Verizon Directories Corp. v Continuum Health Partners, Inc.*, 74 AD3d 416 [1st 2010], *lv denied* 15 NY3d 716 [2010]), and were thus barred by that state's statute of limitations. The court also properly dismissed plaintiff's seventh cause of action, a derivative claim for breach of contract. Only one of the defendants is even alleged

to be a party to the contract, and that defendant is alleged to have performed under the contract.

Turning to defendants' appeals, we find that the IAS court erred in failing to dismiss plaintiff's claims in his individual capacity for fraud and breach of fiduciary duty. Plaintiff is a shareholder in a closely held corporation. He alleges that others caused the corporation to sell shares it owned in another corporation, and to have the proceeds of the sale diverted to yet another corporation. This type of looting or diversion of corporate assets is an injury to the corporation, not the individual shareholder, and thus had to be brought as a derivative claim (*Wolf v Rand*, 258 AD2d 401, 403 [1st Dept 1999]).

The IAS court properly sustained plaintiff's contract claim for failure to pay legal fees. There was no need for the complaint to address every possible defense to the claim. It was sufficient for plaintiff to allege, as he did, that he did the work at the request of the corporate defendant, at agreed-upon rates. However, because the express agreement governs the provision of these legal services, the IAS court should have dismissed the parallel claims for unjust enrichment and quantum meruit (*Curtis Props. Corp. v Greif Cos.*, 236 AD2d 237, 239 [1st

Dept 1997]).

The IAS court properly sustained plaintiff's cause of action for legal fees from defendant Credno. While there is an argument that the fee agreement is excessive, in violation of the then DR 2-106, many factors go into such a determination. These include the work done, the compensation actually received or claimed, and the risk undertaken by the attorney (*see King v Fox*, 7 NY3d 181 [2006]). Given the lack of such information in the complaint or elsewhere, the agreement cannot be said to be unenforceable on its face.

Credno also argues that plaintiff failed to plead compliance with DR 5-104 in seeking to enforce two business agreements between Credno and plaintiff. However, given that there are fact issues as to whether Credno would have believed that plaintiff was representing him in those transactions, or was acting other than at arm's length, the IAS court properly declined to dismiss the claims as to the alleged agreements.

Finally, while all of the claims against Kalsi are now dismissed, the IAS court erred in finding personal jurisdiction over him. The only allegation that he "derived substantial revenue from . . . international commerce" was based on work he did as a corporate officer. The revenue of the company is not

imputed to its employees for jurisdictional purposes (*see Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89 [1st Dept 2010]). Nor were unspecified calls and emails to plaintiff in New York a sufficient basis for personal jurisdiction under CPLR 302(a)(1) (*see Warck-Meister v Diana Lowenstein Fine Arts*, 7 AD3d 351 [1st Dept 2004]).

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9078 In re Mitchell Cohn, Index 110409/10
Petitioner-Appellant,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Respondents-Respondents.

_____

Richard E. Casagrande, New York (Ariana A. Gambella of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered October 27, 2011, which denied the petition seeking, inter alia, to annul the determination of respondents denying petitioner's appeal of an unsatisfactory rating (U-rating) for the 2006-2007 school year and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner has failed to show that the U-rating was arbitrary and capricious, or made in bad faith. The detailed observations in reports prepared by the principal and two assistant principals, describing petitioner's poor performance in class management, engagement of students, and lesson planning,

provided a rational basis for the rating (*see Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]; *Batyreva v New York City Dept. of Educ.*, 50 AD3d 283 [1st Dept 2008]). While petitioner complains that he did not receive pre-observation conferences prior to every classroom observation, he has not demonstrated that the U-rating was made in violation of lawful procedure or any substantial right (*see Matter of Brown v Board of Educ. of the City School Dist. of the City of N.Y.*, 89 AD3d 486 [1st Dept 2011]; *Matter of Munoz v Vega*, 303 AD2d 253, 254 [1st Dept 2003]; *compare Matter of Kolmel v City of New York*, 88 AD3d 527 [1st Dept 2011]). To the contrary, the record demonstrates that, after petitioner received a U-rating at the end of the prior school year, he was provided with a professional development plan at the start of the 2006-2007 and, throughout the year, received professional support and had a series of

classroom observations by the principal and two assistant principals, each one documented by a detailed letter to him noting areas of improvement and making specific recommendations for addressing continuing deficiencies.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9079-
9080 Index 108832/09

Bayerische Landesbank, etc.,
Plaintiff-Respondent,

-against-

45 John Street LLC, et al.,
Defendants-Appellants,

My Jamie Joseph Only, Inc., et al.,
Defendants.

- - - - -

45 John Street LLC, et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Bayerische Landesbank, etc.,
Counterclaim Defendant-Respondent.

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Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Gregg L. Weiner of counsel), for appellants.

Proskauer Rose LLP, New York (Michael T. Mervis of counsel), for respondent.

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Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 4, 2011 and on or about November 3, 2011, which, to the extent appealed from as limited by the briefs, granted plaintiff lender's motion for summary judgment on its foreclosure claim and granted its motion for summary judgment dismissing defendants-appellants' counterclaims for breach of contract and breach of the implied covenant of good faith,

unanimously affirmed, with costs.

Defendants borrower and developers' contract counterclaim seeking damages for failure to increase the amount of a construction loan on a condominium conversion project was barred by the no-oral modification and no-waiver provisions of the loan documents, and the email relied upon by defendants, which contained a pre-printed signature, was not a sufficient writing under the statute of frauds (*see Mark Bruce Intl., Inc. v Blank Rome LLP*, 19 Misc 3d 1140[A] [Sup Ct, NY County 2008], *affd* 60 AD3d 550 [1st Dept 2009]; *compare Stevens v Publicis S.A.*, 50 AD3d 253, 255-256 [1st Dept 2008], *lv dismissed* 10 NY3d 930 [2008]). Contrary to defendants' contention, approval of the upsize loan by plaintiff's internal committee was not the only condition for making the loan, but even if it were, it was clear that changed circumstances, including a growing construction budget gap, warranted plaintiff's refusal to proceed with the loan. In the absence of demonstrated detrimental reliance, or even the mention of a specific source of alternative financing that defendants had foregone, plaintiffs cannot be estopped from denying the claimed obligation to make the upsize loan (*see Rotblut v 150 E. 77th St. Corp.*, 79 AD3d 532, 533 [1st Dept 2010]). The counterclaim for breach of the implied covenant of

good faith was not viable, since the loan to be negotiated would have been contrary to the express terms of the loan agreement's requirement of a writing (*see Pullman Group v Prudential Ins. Co. of Am.*, 288 AD2d 2, 4 [1st Dept 2001], *lv denied* 98 NY2d 602 [2002]). There was no violation of the obligation to negotiate in good faith merely because the negotiations failed (*see Mode Contempo, Inc. v Raymours Furniture Co., Inc.*, 80 AD3d 464, 465 [1st Dept 2011]).

Foreclosure was properly based on the default in payment of interest, as plaintiff was not obligated under the circumstances to apply the loan proceeds or the letter of credit to the interest due. Defendants were already in default of the project completion date, which default had not been waived and was not subject to cure absent written modification of the loan documents. In addition, although the admitted shortfall did not constitute a default, its existence authorized plaintiff's refusal to advance loan funds for any purpose.

In view of the foregoing, we need not determine whether there were any other defaults or whether they were waived.

We have considered defendants' other contentions and find them unavailing.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9081 In re Angela C.,
Petitioner-Respondent,

-against-

Harris K.,
Respondent-Appellant.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Yisroel Schulman, New York Legal Assistance Group, New York (Amanda Beltz of counsel), for respondent.

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

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Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about December 22, 2010, which, inter alia, granted petitioner mother's motion for summary judgment on her family offense petition, finding that respondent father committed acts that constituted aggravated harassment in the second degree, and awarded her a five-year order of protection directing respondent to, inter alia, stay away from and cease communication with her and the parties' child, unanimously affirmed, without costs.

Contrary to respondent's contentions, his decision to proceed pro se during the family offense proceeding was made knowingly, willingly, and voluntarily. The record reveals that

the court not only informed respondent of his right to counsel (*see* Family Ct Act § 262), but on three separate occasions assigned a different counsel to him. Respondent dismissed each of them without cause in order to represent himself based upon his own strategic reasoning. Under these circumstances, the fact that he was unrepresented did not constitute a denial of due process; he was plainly competent to elect to proceed pro se and did so freely (*see Matter of Emma L.*, 35 AD3d 250 [1st Dept 2006], *lv denied and dismissed* 8 NY3d 904 [2007]; *Matter of James Joseph M. v Rosana R.*, 32 AD3d 725 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]; *Matter of Anthony K.*, 11 AD3d 748 [3d Dept 2004]).

Respondent's conviction on four counts of aggravated harassment in the second degree as to petitioner serves as conclusive proof of the underlying facts in the instant proceeding, since he had a full and fair opportunity to contest the issues raised in the criminal proceeding (*see Grayes v DiStasio*, 166 AD2d 261, 263 [1st Dept 1990], citing *Gilberg v Barbieri*, 53 NY2d 285, 291 [1981]).

We find that the family offense petition was established by a fair preponderance of the evidence (*see* Family Ct Act § 832; *Matter of Nelson-Waller v Waller*, 60 AD3d 1068 [2d Dept 2009]).

The Family Court properly found aggravating circumstances, based on respondent's conduct in sending harassing letters to petitioner from prison in repeated violation of the prior order of protection (*see* FCA § 827[a][vii]), his criminal conviction of four counts of aggravated harassment with regard to petitioner, and his aggressive threatening conduct in court, which the court observed and determined constituted an immediate and ongoing threat to petitioner (*see Matter of Pearlman v Pearlman*, 78 AD3d 711 [2d Dept 2010]; FCA § 827[a][vii]).

Although respondent's threats were directed at petitioner, they impacted upon the child, and thus the Family Court properly issued a five-year order of protection in favor of both the mother and the child *(see Matter of Amy SS. v John SS.*, 68 AD3d 1262 [3d Dept 2009], *lv denied* 14 NY3d 704 [2010]). A full stay-away order was also appropriate, since the father had no

relationship with the then six-year-old child due to his incarceration from the time the child was only four months old (*see id.*).

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9082 Bernice Mosca, Index 600097/07
Plaintiff-Respondent,

-against-

MASS LLC,
Defendant-Appellant.

_____

Harlowtown Community Law Office, New York (T.S.M. Mohammed of counsel), for appellant.

Bernice Mosca, respondent pro se.

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Appeal from decision, Supreme Court, New York County (Eileen Bransten, J.), entered August 22, 2011, deemed an appeal from judgment (CPLR 5520[c]), same court and Justice, entered September 30, 2011, awarding plaintiff the principal amount of $89,269.50, unanimously reversed, on the law and the facts, without costs, the judgment vacated, and the matter remanded to the trial court for further proceedings consistent with this decision.

In this action seeking damages for breach of contract and in quantum meruit, the commission agreement between defendant, an advertising agency, and plaintiff, an advertising consultant, "read as a whole to determine its purpose and intent" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), plainly

manifests the intention to provide plaintiff with a finder's fee of 50% of defendant's first-year revenues under a retainer agreement with a client only if defendant was retained by the client for a period of at least two years. Further, the commission agreement shows that the parties intended to reduce plaintiff's finder's fee from 50% to 25% if the retainer between the client and the defendant ended for any reason within 2 years, and that plaintiff would reimburse defendant for any amount overpaid under the agreement.

The record demonstrates that the client terminated the retainer agreements it had with defendant, and that all work required under the agreements had been performed and billed for, less than two years from the date that defendant had been retained by the client. Thus, contrary to the finding of the trial court, pursuant to the commission agreement, plaintiff was

entitled to 25% of defendant's first-year revenues under the retainer agreements, not 50%. On remand, the trial court shall determine whether defendant is entitled to a refund pursuant to the commission agreement.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9083 The People of the State of New York, Dkt. 56161C/07
Respondent,

-against-

Nathaniel Sealy,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Nicholas J. Iacovetta, J. at waiver of counsel; David Stadtmauer, J. at nonjury trial and sentencing), rendered September 16, 2008, convicting defendant of harassment in the second degree, and sentencing him to an unconditional discharge, unanimously affirmed.

Defendant made a valid waiver of his right to counsel. In a thorough inquiry, the court explored defendant's background and fully warned him of the risks and disadvantages of proceeding pro se (*see People v Crampe*, 17 NY3d 469, 481-482 [2011]; *People v Vivenzio*, 62 NY2d 775, 776 [1984]). The focus in a self-representation inquiry is not on how much the defendant knows about criminal law and procedure, because ignorance does not

preclude self-representation (*see People v Ryan*, 82 NY2d 497, 507 [1993]). Instead, the principal focus is on warning a defendant that his or her *lack* of knowledge, relative to that of a lawyer, will be detrimental if the defendant chooses to waive the right to counsel. Here, the colloquy amply satisfied that requirement. In any event, while proceeding pro se, defendant obtained an acquittal of the misdemeanor charge, as well as an unconditional discharge on his harassment conviction.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9086 The People of the State of New York, Ind. 2778/03
Respondent,

-against-

Tyrone Williams,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about January 5, 2004, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9087 Keven Danow as Trustee of the Rebecca Haber Testamentary Generation Skipping Trust,
Plaintiff-Appellant,

-against-

New York Life Insurance Company,
Defendant/Counterclaim Plaintiff,

-against-

Susana N. Bernardo, etc.,
Counterclaim Defendant-Respondent,

Ronald Krakauer, et al.,
Additional Counterclaim Defendants.

Index 650385/11

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Ezra Huber & Associates, P.C., Carle Place (Ezra Huber of counsel), for appellant.

Mahon, Mahon, Kerins & O'Brien, LLC, Garden City South (Robert P. O'Brien of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered September 20, 2011, which, to the extent appealed from, denied plaintiff's motion for summary judgment, unanimously reversed, on the law, with costs, and summary judgment is awarded to plaintiff.

In his capacity as duly appointed guardian of Allyn Haber, plaintiff trustee changed the beneficiary of the subject life insurance policy from Haber to the trust established by Haber's

mother for her benefit. Pursuant to his appointment as Haber's guardian in a proceeding brought under Mental Hygiene Law § 81.02 (*see* Index No. 10613 Queens Co. 2010), plaintiff was explicitly authorized to change the beneficiary of the life insurance policy, and the change was properly effected under the terms of the policy, *McCarthy v Aetna Life Ins. Co.*, 92 NY2d 436 [1998].

There was no basis to challenge the guardian's decision to change the beneficiary of the policy at issue. The fact that there were two conflicting wills offered for probate after Allyn Haber's death is not a basis for attacking the actions of the guardian. In this case, the guardian's actions were both prudent and consistent with the powers granted by the guardianship court.

Based on the foregoing, New York Life Insurance Company is

directed to pay the proceeds of the policy to the trustee subject to the court's determination of New York Life's claim for attorneys' fees.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9088 Lloyd Johnson, Index 24752/06
Plaintiff-Appellant,

-against-

923 Fifth Avenue Condominium, et al.,
Defendants-Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

McGaw Alventosa & Zajac, Jericho (Dawn C. DeSimone of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered February 23, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

With respect to plaintiff's Labor Law § 200 and common-law negligence claims, the record demonstrates that plaintiff's injury was caused by the way he performed his work, not by a dangerous condition of the work site, and that defendants exercised no supervision or control over plaintiff's work (*see Thompson v BFP 300 Madison II, LLC*, 95 AD3d 543 [1st Dept 2012]). To the extent plaintiff's injury was caused by a tripping hazard on the sidewalk, it does not avail him, since the hazard was created by his employer's placement of the materials on the

sidewalk.

The Industrial Code (12 NYCRR) provisions on which plaintiff predicates his Labor Law § 241(6) claim are inapplicable to the facts of his case. The area of the sidewalk where plaintiff was unloading materials was not a "passageway" within the meaning of 12 NYCRR 23-1.7(e)(1) (*see Dalanna v City of New York*, 308 AD2d 400, 401 [1st Dept 2003]). 12 NYCRR 23-1.7(e)(2) is not applicable because even if the sidewalk may be construed as a floor, platform or similar area where people "work or pass," plaintiff did not trip over loose or scattered material. He tripped over a piece of plywood that had been purposefully laid over the sidewalk to protect it and that therefore constituted an integral part of the work (*see Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010]).

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9089 Endeavor Funding Corp., Index 106712/07
Plaintiff-Respondent, 590557/09

-against-

Ollie Allen, et al.,
Defendants-Appellants,

Pariser Industries, Inc., et al.,
Defendants.

[And a Third-Party Action]

_____

The Whittier Law Firm, New York (Charles A. Whittier of counsel), for appellants.

Fidelity National Law Group, New York (Edward C. Kesselman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered April 15, 2010, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on its foreclosure complaint and dismissed defendant Ollie Allen's defenses and counterclaims, and referred the matter to a special referee for computation of damages, unanimously affirmed, without costs.

By submitting proof of the existence of a mortgage and of default, plaintiff established a prima facie case for foreclosure. In opposition, defendant failed to raise a triable

issue of fact as to plaintiff's involvement in a fraud in connection with the refinancing transaction (*see Deutsche Bank Natl. Trust Co. v Gordon*, 84 AD3d 443 [1st Dept 2011]).

The formation of Ollie Allen Holding Company, LLC was not defective, and the company therefore was capable of taking title to real property (*see Matter of Hausman*, 13 NY3d 408 [2009]). Nor did defendant lack the authority to transfer title of the mortgaged property to the company.

The protections against predatory lending found in the Home Equity Theft Prevention Act (Real Property Law § 265-a) and Banking Law § 6-l are not applicable here. The $475,000 mortgage was executed in 2006, before the February 2007 effective date of

the Home Equity Theft Prevention Act, and the amount of the loan exceeded the then applicable $300,000 monetary limit of Banking Law § 6-l.

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9090 In re Jefferson Rodriguez, Index 109088/10
Petitioner,

-against-

Raymond Kelly, etc., et al.,
Respondents.

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Cronin & Byczek, LLP, Lake Success (Rocco G. Avallone of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for respondents.

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Determination of respondent Commissioner of the City of New York Department of Finance, dated March 12, 2010, terminating petitioner's employment as a deputy sheriff for the City of New York, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Barbara Jaffe, J.], entered February 9, 2011), dismissed, without costs.

Substantial evidence supports the findings that petitioner falsely reported that he was unable to work from October 2008 to June 2009; that he engaged in unauthorized outside employment; and that he lied under oath when he denied engaging in such outside employment at his workers' compensation hearing. There exists no basis to disturb the credibility determinations of the

Administrative Law Judge (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty of termination does not shock our sense of fairness (*see e.g. Matter of Cherry v Horn*, 66 AD3d 556 [1st Dept 2009]).

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

ENTERED: JANUARY 29, 2013

CLERK

Andrias, J.P., Sweeny, DeGrasse, Freedman, Richter, JJ.

9091N David J. Doyaga, Sr., as Trustee of the Estate of the Debtor, Kevin H. Roberts, Plaintiff-Respondent, Index 303972/11

-against-

Camelot Taxi Inc., et al., Defendants-Appellants.

Law Offices of Nancy L. Isserlis, Long Island City (Lawrence R. Miles of counsel), for appellants.

Sackstein Sackstein & Lee, LLP, Garden City (Mark J. DeCicco of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered November 7, 2011, which denied defendants' motion to change the venue of this personal injury action from Bronx County to Nassau County, unanimously affirmed, without costs.

Plaintiff demonstrated that defendant corporation designated Bronx County as the county in which its office is located in its certificate of incorporation, conclusively establishing defendant's residence in that county for venue purposes (*see* CPLR § 503[c]*; Memminger v Nelson Gardens, Inc.*, 14 AD3d 442, 443 [1st Dept 2005]). In opposition, defendants failed to meet their prima facie burden of establishing that plaintiff's venue designation was improper. The evidence submitted by defendants,

copies of the police accident report and the cover letter from the Department of State (DOS) Division of Corporations used to forward the summons and complaint to the corporate defendant, was insufficient (*see Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]). Notably, the cover letter merely states that the corporate defendant provided the Nassau County address for the forwarding of legal documents and does not state that the address serves as the corporate defendant's principal office.

In their reply papers, defendants submitted evidence, in the form of an affidavit from the corporate defendant's CEO, stating that the principal office has always been in Nassau County. We conclude that the affidavit was improperly submitted in reply, rather than with the motion-in-chief, since it served to address the deficiency noted above, rather than merely addressing plaintiff's argument (*see e.g. Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993]). In any event, the affidavit did not contradict the claim that the corporation listed Bronx County in its filings with the Secretary of State. The claim that the corporation's actual principal office was in another county is of no moment since, for venue purposes, as long as the county designation in the certificate has not been amended, the corporation's residence remains unchanged (*see Marko v Culinary*

Inst. of Am., 245 AD2d 212 [1st Dept 1997]). We further note that defendants submitted no evidence to show that the corporate defendant effectuated any such change with the DOS prior to the commencement of this action, which is the applicable time period (*see* CPLR § 503[a]).

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, JJ.

9092 The People of the State of New York, Ind. 2908/10
Respondent,

-against-

Dwight Pitman,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura Ward, J. at suppression hearing; Bruce Allen, J. at plea and sentencing), rendered June 2, 2011, as amended June 23, 2011, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of three years, unanimously affirmed.

The court properly denied defendant's motion to suppress a pistol he discarded while fleeing from the police. Defendant's flight, coupled with circumstances providing a founded suspicion of criminality, warranted police pursuit (*see e.g. People v Pines*, 281 AD2d 311 [1st Dept 2001], *affd* 99 NY2d 525 [2002]).

Late at night, the police received a radio report that three men had committed a robbery and fled into a particular park. The

description of the robbers was limited to their race, gender and number. The officers were familiar with a pattern of activity whereby criminals would evade the police by crossing this park and emerging on its other side. The officers went to the other side of the park and saw defendant and two other men, who met this limited description, at a location that was consistent with their having just crossed the park and emerged on its other side. There was no one else on the street at that time. Accordingly, despite the limitations of the description, the officers had a founded suspicion that these men might be the three robbers (*see People v Montilla*, 268 AD2d 270 [1st Dept 2000], *lv dismissed* 95 NY2d 830 [2000]).

When the officers turned their car around and began to get out of the car to approach the three men, defendant fled, while holding his hand in his pocket. These circumstances elevated the level of suspicion to reasonable suspicion of criminality and justified pursuit. Although the officers were in plainclothes in an unmarked car, the circumstances permitted the officers to reasonably infer that defendant fled because he realized he was in the presence of the police. We have repeatedly observed that the circumstances of a case may indicate that a suspect

recognized the police, even where the officers were neither in uniform nor in a marked car (*see People v Collado*, 72 AD3d 614 [1st Dept 2010], *lv denied* 15 NY3d 850 [2010], and cases cited therein). Moreover, there was testimony that the unmarked Chevy Impala "stand[s] out as the usual unmarked police vehicle."

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9093 Elaine Blech, et al., Index 109178/08
Plaintiffs-Appellants,

-against-

West Park Presbyterian Church, et al.,
Defendants,

Eagle Scaffolding Services,
Defendant-Respondent.

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

Camacho Mauro Mulholland, New York (Eric L. Cooper of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered October 17, 2011, which granted the motion of defendant Eagle Scaffolding Services (ESS) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

In September 2006, ESS entered into a contract with defendant West Park Presbyterian Church (Church) to erect and install a sidewalk bridge over the sidewalk abutting the Church's property to protect pedestrians from any falling debris as the result of construction being performed at the Church. On September 28, 2007, plaintiff Elaine Blech was injured when,

while walking underneath the bridge, she tripped and fell over a defect in the sidewalk. She testified that she had walked by the Church earlier that morning and had avoided the defect because she could see it, but on that evening the natural light was poor and the lights underneath the bridge were not on.

Summary judgment was properly granted in ESS's favor because the evidence showed that there were no triable issues of fact as to its liability. Pursuant to the terms of the contract between ESS and the Church, as part of ESS's installation of the sidewalk bridge, ESS provided a lighting system underneath the bridge through an independent contractor. The contract specified that the Church was to inspect the bridge and lodge any complaints with ESS within three days after completion of the installation, and if no complaints were made, then the Church had accepted the installation as proper. The contract further specified that the Church, and not ESS, was responsible for inspecting, repairing, and maintaining the lighting system. The evidence showed that the Church accepted the installation in accordance with the contract, and that ESS was never notified of any problem with the lighting system during the three-day period or at any time before Blech's fall.

ESS established that it did not create the lighting problem

alleged to have contributed to Blech's fall, nor did it have any duty to maintain the lighting system. Plaintiffs failed to rebut this showing by presenting evidence that ESS negligently installed the bridge or that it was ever on notice of any problem with the lighting system (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]).

Plaintiffs' argument that the injured plaintiff may have been diverted into the path of the sidewalk defect via ESS's purportedly negligent installation of the bridge was improperly raised for the first time in their reply brief (*see e.g. Ginsberg v Rudey*, 280 AD2d 267 [1st Dept 2001], *lv denied* 96 NY2d 711 [2001]).

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9094-
9094A In re Cherish C.,

A Child Under Eighteen
Years of Age, etc.,

Shanikwa C.,
Respondent-Appellant,

Zakiya C.,
Respondent,

Administration for Children's Services,
Petitioner-Respondent.

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Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for Administration for Children Services, respondent.

Colleen Samuels, New York, attorney for the child.

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about December 12, 2011, which, following a fact-finding determination that respondent-appellant grandmother had neglected the subject child, released the child to the custody of respondent mother, with 12 months of supervision by petitioner agency and under certain conditions, and ordered the grandmother to complete various services and to comply with a 12-month order of protection, unanimously modified, on the law, to vacate the finding of neglect based upon the

grandmother's alleged misuse of drugs, and otherwise affirmed, without costs. Appeal from the fact-finding order, same court and Judge, entered on or about June 28, 2011, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Although the evidence does not support the court's finding that the grandmother had neglected the child by misusing drugs, a preponderance of the evidence does support the finding that the grandmother had neglected the child by perpetrating an act of domestic violence against the mother in the child's presence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]). Indeed, a police officer testified that he had witnessed the grandmother engage in a physical altercation with the child's mother while the mother was holding the child, causing the child to cry (*see Matter of Kelly A. [Ghyslaine G.]*, 95 AD3d 784 [1st Dept 2012]). We see no reason to disturb the court's evaluation of the evidence, including its credibility determinations (*see Matter of Ilene M.*, 19 AD3d 106, 106 [1st Dept 2005]). Contrary to the grandmother's contention, the court stated the grounds for its findings (*see* Family Ct Act § 1051 [a]).

The grandmother failed to preserve her argument that the

neglect petition against her should have been dismissed pursuant to Family Court Act § 1051 (c), and we decline to consider it (*see Matter of Sharnaza Q. [Clarence W.]*, 68 AD3d 436 [1st Dept 2009]). Were we to consider it, we would reject it.

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9096 Crystal Williams, Index 250183/10
Plaintiff-Appellant,

-against-

Shiva Ambulette Service Inc., et al.
Defendants-Respondents,

Umberto Flaim,
Defendant.

_____

Sacco & Fillas, LLP, Astoria (John P. Gloumis of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, New York (Nicholas P. Hurzeler of counsel), for Shiva Ambulette Service, Inc. and Levern Lloyd, respondents.

McCabe, Collins, McGeough & Fowler, LLP, Carle Place (Barry L. Manus of counsel), for Darlene Baguero and Carlos Guzman, respondents.

Murphy & Higgins, LLP, New Rochelle (Richard S. Kaye of counsel), for EMA's Ambulette Inc. and Jessica C. Postell, respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered October 12, 2011, which granted defendants EMA's Ambulette Inc. and Jessica C. Postell's motion to strike the complaint and dismiss the action pursuant to CPLR 3126, unanimously affirmed, without costs.

The court did not abuse its discretion in striking the complaint and dismissing the action (*see* CPLR 3126[3]; *see also*

Arts4All, Ltd. v Hancock, 54 AD3d 286, 286-287 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *cert denied* __ US __, 130 S Ct 1301 [2010]). Plaintiff's unexplained pattern of disobeying four successive court orders and failing to timely provide discovery regarding her medical treatment, prior accidents and preexisting medical conditions involving the same body parts involved in this action demonstrated that her noncompliance was willful, contumacious and in bad faith (*see Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011]; quoting *McGilvery v New York City Tr. Auth.*, 213 AD2d 322, 324 [1st Dept 1995]). Plaintiff's bad faith is further supported by the inadequacy of her initial response to the court's discovery orders, made only after plaintiff missed the deadlines of four prior court orders and defendants filed their motion for sanctions, which omitted several categories of information that had been ordered by the court, and included material, sworn statements of fact regarding her preexisting medical conditions that were later shown to be false by plaintiff's subsequent discovery response.

Were we to consider plaintiff's untimely excuse that her repeated noncompliance was caused by a medical operation, which she asserts for the first time on appeal, we would find the excuse to be without merit because it is unsupported by medical

documentation or a sworn affidavit and, in any event, does not explain why plaintiff violated multiple court orders prior to the time period when she now claims to have had surgery (*see Fish & Richardson, P.C.*, 75 AD3d 219, 222 [1st Dept 2010]).

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: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9097 In re Shawndell F.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Jacob Gardener of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 20, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted robbery in the second degree and menacing in the third degree, and placed him on probation for a period of nine months, unanimously affirmed, without costs.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and placed him on probation, which was the least restrictive dispositional alternative consistent with appellant's needs and

the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The nine-month period of supervision was warranted by the seriousness of the offense, in which appellant intentionally struck the victim and attempted to steal his property with accomplices present, as well as appellant's generally poor academic performance and behavior at school. These factors were not outweighed by the mitigating factors cited by appellant.

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9098 The People of the State of New York, Ind. 869/11
Respondent,

-against-

Shawnta Royster,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Abraham Clott, J. at plea; Larry Stephen, J. at sentencing), rendered on or about May 4, 2011,

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: JANUARY 29, 2013

CLERK

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

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9100 Natasha Ferguson, Index 110409/08
Plaintiff-Appellant,

-against-

Dollar Rent A Car, Inc., et al.,
Defendants-Respondents,

Ride Share Systems, LLC,
Defendant.

_____

Godosky & Gentile, P.C., New York (Emily Kern of counsel), for appellant.

Callan Koster Brady & Brennan, LLP, New York (David A. LoRe of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 28, 2012, which granted defendants Dollar Rent A Car, Inc. and Auto Rental, LLC's motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleges that she was wrongfully arrested and detained after defendants negligently rented to her acquaintance a vehicle that had been reported as stolen by another customer and negligently failed to report to the police that the vehicle had been returned. She was arrested while behind the wheel of the vehicle. On appeal, plaintiff argues that, notwithstanding

the allegations of false arrest and wrongful imprisonment, the gravamen of her complaint is negligence. The theory of her claim is that, in failing to exercise reasonable care in performing their contractual duties, i.e., by renting the vehicle without notifying the police that it had been returned, defendants "'launche[d] a force or instrument of harm'" (*see Espinal v Melville Snow Contrs.* (98 NY2d 136, 140 [2002]).

However, the damages plaintiff seeks arose from her arrest and detention, and she may not recover under general negligence principles. "[Her] recovery must be determined by established rules defining the torts of false arrest and imprisonment and malicious prosecution, rules which permit damages only under circumstances in which the law regards the imprisonment or prosecution as improper and unjustified" (*Boose v City of Rochester*, 71 AD2d 59, 62 [1979]).

In any event, plaintiff failed to submit evidence of any compensable injury.

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9101 The People of the State of New York, Ind. 2721/09
Respondent,

-against-

Raphael Golb,
Defendant-Appellant.

_____

Ronald L. Kuby, New York, for appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered November 18, 2010, convicting defendant, after a jury trial, of identity theft in the second degree (2 counts), criminal impersonation in the second degree (14 counts), forgery in the third degree (10 counts), aggravated harassment in the second degree (3 counts), and unauthorized use of a computer, and sentencing him to an aggregate term of six months, unanimously modified, on the law and facts, to the extent of vacating the identity theft conviction under the first count of the indictment and dismissing that count, and otherwise affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Defendant's convictions arise out of his use of emails to

impersonate actual persons. Nothing in this prosecution, or in the court's jury charge, violated defendant's First Amendment or other constitutional rights.

Defendant is the son of an expert on the Dead Sea Scrolls. Defendant set up email accounts in which he pretended to be other scholars who disagreed with defendant's father's opinion on the origin of the Scrolls. Among other things, defendant sent emails in which one of his father's rivals purportedly admitted to acts of plagiarism.

Defendant's principal defense was that these emails were only intended to be satiric hoaxes or pranks. However, as it has been observed in the context of trademark law, "[a] parody must convey two simultaneous - and contradictory - messages: that it is the original, but also that it is not the original and is instead a parody" (*Cliffs Notes, Inc. v Bantam Doubleday Dell Pub. Group, Inc.*, 886 F2d 490, 494 [2d Cir 1989]). Here, the evidence clearly established that defendant never intended any kind of parody. Instead, he only intended to convey the first message to the readers of the emails, that is, that the purported authors were the actual authors. It was equally clear that defendant intended that the recipients' reliance on this deception would cause harm to the purported authors and benefits

to defendant or his father.

The court's charge, which incorporated many of defendant's requests, fully protected his constitutional rights, and the court was not required to grant defendant's requests for additional instructions. The court carefully informed the jury that academic discussion, parody, satire and the use of pseudonyms were protected by the First Amendment.

The court also ensured that the jury understood the terms "fraud" and "defraud" by expanding their definition and advised the jury that "without the intent to deceive or defraud as to the source of the speech with the intent to reap a benefit from that deceit, there is no crime." The court was under no obligation to limit the definitions of "injure" or "defraud" - terms used in the forgery and criminal impersonation statutes - to tangible harms such as financial harm (*see People v Kase*, 76 AD2d 532, 537-538 [1st Dept 1980], *affd* 53 NY2d 989 [1981]). The court also properly employed the statutory definition of "benefit" as "any gain or advantage" to defendant or to another person (Penal Law § 10.00[17]).

Defendant argues that it is constitutionally impermissible to include an intent to influence a constitutionally-protected academic debate within the concept of fraud, injury or benefit,

that allowing injury to reputation to satisfy the injury element would effectively revive the long-abandoned offense of criminal libel, and that, in any event, the alleged truth of the content of the emails should have been permitted as a defense. However, the evidence established that defendant intended harm that fell within the plain meaning of the term "injure," and that was not protected by the First Amendment, including damage to the careers and livelihoods of the scholars he impersonated. Defendant also intended to create specific benefits for his father's career. The fact that the underlying dispute between defendant and his father's rivals was a constitutionally-protected debate does not provide any First Amendment protection for acts that were otherwise unlawful.

Defendant was not prosecuted for the content of any of the emails, but only for giving the false impression that his victims were the actual authors of the emails. The First Amendment protects the right to criticize another person, but it does not permit anyone to give an intentionally false impression that the source of the message *is* that other person (*see SMJ Group, Inc. v 417 Lafayette Restaurant LLC*, 439 F Supp 2d 281 (SD NY 2006]).

We have considered and rejected defendant's remaining arguments concerning the court's charge. We similarly reject his

claims that the statutes under which he was convicted were unconstitutionally vague or overbroad. None of these statutes was vague or overbroad on its face or as applied (*see People v Shack*, 86 NY2d 529, 538 [1995]; *Broadrick v Oklahoma*, 413 US 601, 611-616 [1973]). The People were required to prove that defendant had the specific fraudulent intent to deceive email recipients about his identity, and to obtain benefits or cause injuries as a result of the recipients' reliance on that deception. The statutes criminalized the act of impersonation and its unlawful intent, not the content of speech falsely imputed to the victims.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence, with the exception of the identity theft conviction under the first count. The theory of that count was that in the commission of identity theft in the second degree (Penal Law § 190.79[3]), defendant attempted to commit the felony of scheme to defraud in the first degree (Penal

Law § 190.65[1][b]). However, there was no evidence that defendant intended to defraud one or more persons of property in excess of $1,000 or that he attempted to do so (*see id.*). The People's assertions in this regard rest on speculation.

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9104 In re Michael Palleschi, Index 105486/11
Petitioner,

-against-

Salvatore Cassano, etc., et al.,
Respondents.

_____

Kevin P. Sheerin, Mineola, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondents.

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Determination of respondent Commissioner of the New York City Fire Department, dated January 21, 2011, terminating petitioner's employment on the grounds of misconduct in violation of departmental regulations, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Barbara Jaffe, J.], entered December 5, 2011), dismissed, without costs.

Respondent's determination that petitioner violated departmental regulations is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978]). Petitioner admittedly photographed a computer screen containing confidential and privileged

information concerning a 911 caller's complaint of a gynecological emergency, as well as the 911 caller's name, address and telephone number, and uploaded the image to his Facebook account, along with the caption "[c]an't make this up," to which approximately 460 of petitioner's Facebook "friends" had access. Moreover, at the time of the posting, petitioner understood that divulging such patient information was in violation of departmental rules, as well as a serious breach of trust. Petitioner's argument that the administrative law judge improperly admitted and considered evidence of prior Facebook postings is unpreserved by any objection at the hearing and, in any event, the determination is supported by the record as a whole.

In light of the serious nature of the conduct on the part of petitioner, an emergency medical services supervisor and

lieutenant, the penalty imposed does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]; *Matter of Berenhaus v Ward*, 70 NY2d 436, 445 [1987]).

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9105-
9106 Renaissance Art Investors, LLC,
Plaintiff-Appellant,

-against-

AXA Art Insurance Corporation,
Defendant/Plaintiff-Respondent,

-against-

Renaissance Art Investors, LLC,
Defendant-Appellant.

Index 650271/11
651844/10

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Buchanan Ingersoll & Rooney PC, New York (Kristi A. Davidson of counsel), for appellant.

Wade Clark Mulcahy, New York (Dennis M. Wade of counsel), for respondent.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 25, 2011, which denied Renaissance Art Investors, LLC's (RAI) motion to dismiss AXA Art Insurance Corporation's declaratory judgment action and granted AXA's cross motion for summary judgment, declaring that AXA is not obligated to indemnify RAI with respect to its claimed losses; and order (same court and Justice), entered September 7, 2011, which, citing the declaratory judgment order, dismissed RAI's plenary action in its entirety, unanimously affirmed, without costs.

The policies purchased by RAI, which covered "losses" as

that term is defined in the policies, contained an unambiguous exclusion, precluding coverage in the event of "[a]ny fraudulent, dishonest or criminal act or acts by: (a) You, anyone else with an interest in the property or your or their employees whether or not committed alone or in collusion with others, whether or not such act or acts be committed during the hours of employment; or (b) Anyone entrusted with the Covered Property." We reject the assertion that the exclusion does not apply because RAI believed it was purchasing "all risk" coverage and that the term "all-risk" implies comprehensive coverage – including fraud. "[A]s a matter of law[,] insurance coverage, even under an all risk policy, extends only to fortuitous losses" and "[w]hether or not a loss is fortuitous [] is a legal question to be resolved by the Court" (*Redna Marine Corp. v Poland*, 46 FRD 81, 86 [SDNY 1969]), at 87). Here, the motion court correctly determined that the fraud engaged in by Lawrence Salander, one of RAI's principals, and the Gallery, one of RAI's members, created by Salander for the purpose of holding objects of art purchased by RAI, was not fortuitous.

We also reject RAI's assertions that the exclusion clause did not apply to Salander or the Gallery entrusted to hold the objects, simply because Salander turned out to be a thief (*see*

Abrams v Great American Ins. Co., 269 NY 90, 92 [1935]). Because the Policies excluded coverage for fraudulent acts of the very nature which occurred here, summary judgment was properly awarded to AXA since it is not obligated to indemnify RAI for the loss of its art.

RAI's claims in its plenary action were properly dismissed since the breach of contract claim was determined in the declaratory judgment action; the breach of good faith and fair dealing claim is duplicative of the breach of contract claim; and the remaining claims, for negligent misrepresentation and violations of New York and Nevada trade practices statutes, were not adequately pleaded.

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

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9107 The People of the State of New York, Ind. 1056/09
Respondent,

-against-

Tyra Manley,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Emily Perks Quinlan of counsel), for respondent.

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered May 18, 2010, as amended March 10, 2011, convicting defendant, after a jury trial, of two counts of identity theft in the second degree and two counts of unlawful possession of personal identification information in the third degree, and sentencing her, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find

that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's guilt was established by a chain of circumstantial evidence, as well as defendant's own admissions.

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9109 Sharon Bailey, Index 302894/09
Plaintiff-Appellant-Respondent,

-against-

The City of New York,
Defendant-Respondent,

Wallace C. Steidle,
Defendant-Respondent-Appellant.

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellant-respondent.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for respondent-appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 26, 2011, which granted defendant City of New York's motion for summary judgment dismissing the complaint and cross claim against it, and granted plaintiff's motion for summary judgment on the issue of liability as against defendant Steidle, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries she allegedly suffered when the vehicle in which she was a passenger was struck in the rear by the vehicle driven by defendant Steidle at an intersection at which the traffic had been stopped by a police

officer. The officer was part of a motorcycle parade escort and had halted all other traffic entering the intersection so that the parade could proceed. The City cannot be held liable for plaintiff's injuries because the officer was engaged in the discretionary act of traffic control (*see Valdez v City of New York*, 18 NY3d 69, 75 [2011]; *Lewis v City of New York*, 82 AD3d 410 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]).

The record demonstrates that the vehicle in which plaintiff was riding was stopped when Steidle's vehicle struck it in the rear end. Steidle failed to offer a non-negligent explanation for the collision (*see Androvic v Metropolitan Transp. Auth.*, 95 AD3d 610 [1st Dept 2012]; *Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]).

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

ENTERED: JANUARY 29, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9110 The People of the State of New York, Ind. 843/09
Respondent, 1267/09

-against-

Jayquan Lourie,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Analisa Torres, J.), rendered on or about February 9, 2010,

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: JANUARY 29, 2013

CLERK

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

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9111N Renato Tedesco, Index 109766/06
Plaintiff, 109767/06

-against-

Ecobank Transnational Incorporated,
etc., et al.,
Defendants.

- - - - -

Ann G. Kayman, Esq.,
Nonparty Appellant,

Howard L. Blau, et al.,
Nonparty Respondents.

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Ann G. Kayman, New York, appellant pro se.

Marshall R. Isaacs, New York, for Charles A. D'Agostion, Jr., respondent.

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Order, Supreme Court, New York County (Sue Ann Hoahng, Special Referee), entered June 18, 2010, which denied nonparty Ann G. Kayman, Esq.'s motion to vacate a judgment, same court and Special Referee, entered on or about December 14, 2007, as modified by a judgment, same court and Referee, entered on or about December 30, 2007, insofar as the judgments were entered against her upon her default, unanimously reversed, on the law, without costs, the motion granted, and the judgments vacated as against Kayman.

The Special Referee correctly concluded that CPLR 5015(a)(3) is inapplicable here. Kayman alleged misconduct only on the part of nonparty Howard L. Blau, who is not an "adverse party" within the meaning of CPLR 5015(a)(3) (*see Blumes v Madar*, 21 AD3d 518, 520 [2d Dept 2005]; *see also Lins v Lins*, 98 AD2d 608, 608 [1st Dept 1983]).

The Special Referee, however, should have granted the motion to vacate the default judgments to the extent based upon CPLR 5015(a)(1). Given the lack of any evidence as to the address the judgments were mailed to, and that Kayman actually received them, the Special Referee erred in finding that Kayman had no excuse in failing to appear or moving more promptly to vacate the judgments. Indeed, it is undisputed that, once Kayman was served with a petition based upon the underlying judgments, she promptly moved to vacate them in that action.

Kayman also raised a meritorious defense. She contends that, despite authorizing the addition of her name to the "masthead" of Blau's law firm and sharing office space with Blau, she was not in a partnership with Blau and therefore cannot be held liable, jointly or severally, for Blau's misconduct. Kayman's defense has merit, given the lack of evidence of a partnership between Blau and Kayman. Indeed, there is no

evidence in the record of a partnership agreement between the nonparties. Further, any claim of a partnership in fact is undermined by the lack of evidence of, among other things, a sharing of profits or losses, joint accounts, joint loans, or shared employees (*see Community Capital Bank v Fischer & Yanowitz*, 47 AD3d 667, 668 [2d Dept 2008]; *Brodsky v Stadlen*, 138 AD2d 662, 663 [2d Dept 1988]). Any claim of a partnership by estoppel is undermined by the lack of evidence that plaintiff relied on the existence of a partnership between Blau and Kayman (*Community Capital*, 47 AD3d at 668-669). Notably, it is undisputed that plaintiff never had any contact with Kayman.

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

ENTERED: JANUARY 29, 2013

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4759- Index 604047/03
4760-
4761-
4762-
4763-
4764 James L. Melcher,
Plaintiff-Appellant,

-against-

Apollo Medical Fund Management L.L.C., et al.,
Defendants-Respondents.

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Patterson Belknap Webb & Tyler, LLP, New York (Stephen P. Younger of counsel), for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Scott R. Matthews of counsel), for respondents.

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Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered February 2, 2010, bringing up for review an order, same court (Donna M. Mills, J.), entered September 8, 2009, reversed, on the law, without costs, the judgment vacated, the equitable estoppel verdict set aside, the cause of action for breach of contract reinstated, judgment on liability granted in favor of plaintiff on the breach of contract cause of action, and the matter remanded for an assessment of damages on that cause of action and for a hearing on plaintiff's allegations of spoliation and fraud. Appeal from the aforesaid order, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
John W. Sweeny, Jr.
Karla Moskowitz
Dianne T. Renwick
Rosalyn H. Richter, JJ.

4759-4764
Index 604047/03

_____x

James L. Melcher,
Plaintiff-Appellant,

-against-

Apollo Medical Fund Management
L.L.C., et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the judgment of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered February 2, 2010, after a jury trial, to the extent appealed from as limited by the briefs, dismissing the causes of action for breach of contract, improper removal, and money had and received, and bringing up for review an order, same court (Donna M. Mills, J.), entered September 8, 2009, which denied his motion to strike defendants' pleadings and to set aside the verdict on equitable estoppel, and from the aforesaid order.

Patterson Belknap Webb & Tyler, LLP, New York (Stephen P. Younger, Sarah E. Zgliniec and Anthony C. DeCinque of counsel), and Jeffrey A. Jannuzzo, New York, for appellant.

Windels Marx Lane & Mittendorf, LLP, New York (Scott R. Matthews and James Tracy of counsel), for respondents.

RICHTER, J.

In 1995, defendant Brandon Fradd formed Apollo Medical Partners (Apollo Partners), a hedge fund that invests in companies in the biotechnology and medical device industries. Fradd also formed defendant Apollo Medical Fund Management L.L.C. (Apollo Management) to manage the investor money on behalf of the hedge fund. Although Apollo Partners was profitable at first, in late 1997, it suffered significant losses and withdrawal of investors. As a result, Fradd decided it would be beneficial to partner with someone who had expertise in technical analysis of the stock market. A mutual friend introduced Fradd to plaintiff James L. Melcher, an investment manager who had more than 30 years of experience on Wall Street. At the time, Melcher was the sole shareholder and president of Balestra Capital, which managed two hedge funds with $50-$60 million in assets. After some initial meetings, Fradd asked Melcher to become his business partner, and Melcher agreed.

By operating agreement dated January 8, 1998, Fradd and Melcher became managers and members of Apollo Management.[1] The operating agreement set forth a formula for dividing net profits between Fradd and Melcher. Melcher and Fradd would equally share

[1] Initially, a third person was also a member and manager, but was removed several months later.

the net profits realized from new investment assets brought into the fund after Melcher became a member. This equal division of net profits would be made regardless of whether Melcher or Fradd introduced the new assets into the fund.

In fact, the allocation of net profits was made in a manner contrary to the terms of the operating agreement. Unbeknownst to Melcher, Fradd instructed Apollo Partners' accountants to use a completely different formula to divide the net profits. According to Fradd, this new formula was memorialized in a May 21, 1998 amendment to the operating agreement (the May 1998 amendment). Pursuant to this purported amendment, Melcher was credited with 50% of the net profits from only those new assets that he himself brought into the fund; he was not paid any portion of net profits based on new assets Fradd brought in. Thus, under the revised methodology, Melcher ended up receiving a lesser share of the net profits than he was entitled to under the operating agreement.

At the end of each year, the accountants split the net profits using the revised formula Fradd had given them. According to Melcher, he complained to Fradd in January 2001, and met with Fradd over the next two years in an effort to resolve the matter. Fradd contends that no such meetings took place, and that Melcher never protested the division of net profits. On

October 27, 2003, Fradd removed Melcher as a member of Apollo Management based on a provision in the operating agreement allowing Fradd to unilaterally discharge a member upon 10 days written notice.

In December 2003, Melcher commenced this action against Apollo Management and Fradd. The second amended complaint, as relevant here, asserted causes of action alleging that (I) Apollo Management breached the operating agreement by not paying Melcher his proper share of the net profits (breach of contract); (ii) Fradd was unjustly enriched by receiving part of Melcher's share of the net profits (money had and received); and (iii) Fradd lacked the authority to remove Melcher as a member of Apollo Management (improper removal).

Defendants answered and asserted several affirmative defenses. In their first affirmative defense, defendants maintained that Melcher was estopped from asserting the breach of contract claim as a result of the purported May 1998 amendment. Defendants claimed that Melcher had been paid his share of net profits in accordance with the formula set forth in the amendment, that he had received financial statements and K-1 forms reflecting those net profits, and that he had never protested or complained about the allocation of profits. Defendants' second affirmative defense asserted that this same

conduct by Melcher resulted in a waiver of the breach of contract claim.

One of the central issues in this litigation is whether or not the May 1998 amendment is genuine. If, as Fradd claims, the operating agreement was amended, then Melcher was paid his proper share of the net profits. If, on the other hand, there was no amendment, then Melcher was underpaid. Fradd maintains that in the spring of 1998, he and Melcher orally agreed to amend the operating agreement to reflect the revised allocation of net profits. According to Fradd, he asked Apollo Management's law firm to prepare an amendment to the operating agreement reflecting the change. Fradd claims that the law firm prepared the amendment and that he signed it on May 21, 1998.[2]

Melcher denied having orally agreed to changes to the operating agreement and disclaimed any knowledge of the May 1998 amendment. According to Melcher, the first time he heard of the supposed amendment was in December 2003 when Fradd faxed it to him. Believing the amendment had been fabricated and backdated, Melcher's counsel asked defense counsel to make the original document available for forensic ink testing to determine whether,

[2] Fradd claims that when he signed the amendment, he believed that it would be effective upon his signature alone, and that Melcher's signature was not required. It is undisputed that Melcher did not sign any amendment to the operating agreement.

as Fradd claimed, it was signed in May 1998.

In response, Fradd produced a document that was missing the first page and that had been scorched over the signature line. Fradd claimed that the day after Melcher's counsel requested production of the amendment, he accidentally burned the original document while making tea. According to Fradd, he placed the document near the kettle in his kitchen, answered the door, and returned to find that the paper had ignited from his gas stove flame. Fradd claimed that the top page was destroyed, and the bottom page got partly browned, scorching a portion of his signature.

Melcher's ink testing expert examined the original document and concluded that the exposure of the document to high heat made it impossible to determine the date of Fradd's signature. The expert opined that the location of the scorching suggested something other than chance or accident. It is Melcher's position that Fradd intentionally burned the document to render any forensic testing ineffective. Melcher unearthed further evidence that the amendment had been recently fabricated and backdated. Specifically, the amendment was not contained in the files of the successor to the law firm that had represented Apollo Management and supposedly drafted the amendment. Furthermore, neither the law firm's time records nor invoices

reflect the drafting of any such amendment, and the lawyers whom Fradd claimed drafted it could not vouch for it.

Fradd denied all allegations that the document was backdated and insisted that the burning was accidental. Defendants retained their own expert to test the paper and attempt to recreate the circumstances that resulted in the burning. Defendants' expert could not determine whether the signature was from May 1998 when the amendment was purportedly executed, but did opine that the ink was no longer aging and was therefore at least eight months old and maybe over two years old.

In July 2007, Melcher moved to strike defendants' pleadings and for entry of a default judgment as a sanction for Fradd's alleged fabrication and spoliation of evidence. In an order entered September 20, 2007, Supreme Court (Herman Cahn, J.), denied the motion, finding issues of fact that should be submitted to a jury. In December 2007, Melcher again moved to strike the pleadings, submitting an affidavit of a fire protection engineer, who said it was impossible for the burning to have occurred in the way Fradd claimed. In an order entered December 12, 2007, Justice Cahn denied the motion, again finding issues of fact to be resolved at trial.

Melcher appealed, and in a decision and order entered June 5, 2008, this Court affirmed both of Justice Cahn's orders. We

concluded that "[d]eceit warranting the striking of the answer was not conclusively demonstrated. Whether the destruction of evidence was intentional or merely negligent presents an issue for the trier of fact, and plaintiff failed to establish that without the evidence he would be unable to prove his case" (52 AD3d 244, 245 [1st Dept 2008] [internal citations omitted]).

Following our decision and prior to trial, defendants reversed course and told the trial court (Donna M. Mills, J.) that they would no longer be relying on the May 2008 written amendment. Instead, they planned to argue before the jury that the operating agreement was orally amended. Defendants asked the court to exclude any evidence of or reference to the burning of the May 1998 amendment. Over Melcher's objection, the court ruled that Melcher could not present evidence about the amendment on his direct case, but could only present evidence in rebuttal if defendants raised the amendment. The court rejected Melcher's arguments that the striking of defendants' pleadings was a threshold issue under this Court's June 5, 2008 decision.

The liability issues in this case were tried before a jury in May 2009.[3] No evidence or cross-examination was permitted about the alleged falsification and burning of the May 1998

[3] Liability and damages had previously been bifurcated.

amendment. The jury heard evidence on Fradd's claims that Melcher had either waived, or was estopped from asserting, the breach of contract claim based on Melcher's alleged failure to have protested or complained about the allocation of profits. In addition, both sides presented evidence about Fradd's unilateral removal of Melcher as a member of Apollo Management. The trial court reserved decision on Melcher's money had and received claim against Fradd.

After its charge, the trial court submitted a number of interrogatories to the jury. In its verdict, the jury rejected defendants' contention that Fradd and Melcher had orally modified the operating agreement in May 1998. The jury further found that Fradd had breached the provision of the operating agreement concerning the division of net profits. The jury also concluded that defendants failed to prove that Melcher knowingly and voluntarily waived his contractual right to the net profits provided for in the operating agreement. However, the jury found that Apollo Management had reasonably relied on Melcher's conduct in accepting less compensation than he was otherwise entitled to under the operating agreement. Put another way, the jury concluded that Melcher was estopped from asserting that Apollo Management had breached the operating agreement. Finally, the jury rejected Melcher's claim that Fradd lacked the authority

pursuant to the operating agreement to unilaterally remove Melcher as a member.[4]

After trial, Melcher moved: (I) to renew his prior motions to strike defendants' pleadings for deceit; (ii) to dismiss defendants' defense of equitable estoppel and to enter judgment against Apollo Management on the breach of contract cause of action; (iii) for judgment on his money had and received cause of action against Fradd, which had been reserved for decision by the court; and (iv) for a new trial on the cause of action alleging that Melcher was improperly removed as a member of Apollo Management. The trial court (Donna M. Mills, J.) denied the motion, and the court (Melvin L. Schweitzer, J.) subsequently issued a judgment in accord with Justice Mills' decision and the jury verdict.

On appeal, Melcher argues that the court should have granted his posttrial motion to renew his previous motions to strike defendants' pleadings on the ground that defendants fabricated and spoliated the May 2008 amendment. It is axiomatic that a motion to renew must be based upon new facts not offered on the

[4] The jury also returned verdicts in Melcher's favor on causes of action not at issue on this appeal. Defendants appealed from those parts of the verdict but this Court affirmed (84 AD3d 547 [1st Dept 2011], *revd on other grounds* 18 NY3d 915 [2012]).

prior motion that would change the prior determination (CPLR 2221[e][2]; *see Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617 [1st Dept 2012]). Melcher's posttrial motion to renew was properly denied because it contained no new facts. This Court already determined that issues of fact existed about whether the burning of the amendment was intentional or negligent (52 AD3d at 245). In the absence of new evidence, the trial court could not have granted the relief sought.

In the alternative, Melcher asks this Court to remand for an evidentiary hearing on whether defendants fabricated, backdated and intentionally burned the amendment, and to direct the court to strike the pleadings if they did. Although we agree that a hearing is necessary, given the postverdict posture of the case, striking the pleadings would not be an appropriate sanction. CPLR 3126 provides that if a party "wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regard to the failure or refusal as are just." Thus, sanctions may be imposed under CPLR 3126 "when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order or destroys evidence prior to an adversary's inspection" (*Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 17 [1st Dept 2000], *lv dismissed* 96 NY2d 937 [2001]).

CPLR 3126 provides a court with a broad range of options in addressing a party's discovery abuses. In making its determination of the appropriate sanction, the court must consider the degree to which the contumacious conduct or destruction of evidence prejudiced the other party (*Sienkiewicz v 370/CPW Owners Corp.*, 74 AD3d 781 [2d Dept 2010] [prejudice must be considered in determining whether striking a pleading is necessary as a matter of elementary fairness]; *Baldwin v Gerard Ave., LLC*, 58 AD3d 484 [1st Dept 2009] [party seeking sanction for spoliation has burden of establishing prejudice]; *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 139 [1st Dept 2000] ["In deciding whether to impose sanctions . . . courts will look to the extent that the spoliation of evidence may prejudice a party"] [internal quotation marks omitted]). The drastic remedy of striking a pleading "is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability" (*Russo v BMW of N. Am., LLC*, 82 AD3d 643, 644 [1st Dept 2011]).

Where spoliation of evidence deprives a plaintiff of any means of establishing a prima facie case, striking the answer is an appropriate remedy (*Gray v Jaeger*, 17 AD3d 286 [1st Dept 2005]; *Herrara v Matlin*, 303 AD2d 198 [1st Dept 2003]). Likewise, striking a pleading may be justified where the

spoliation deprives the plaintiff of the ability to confront a defense (*Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58 [1st Dept 2002]; *see Sage Realty*, 275 AD2d at 18, [striking pleading justified by deliberate conduct that "effectively impedes the ability of the deprived party to assert a claim or a defense"]; *Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004] [party must be fatally prejudiced]). Striking a party's pleading "would be too drastic a remedy where [the opposing party is] not entirely bereft of evidence tending to establish [its] position" (*Cohen Bros. Realty v Rosenberg Elec. Contrs.*, 265 AD2d 242, 244 [1999], *lv dismissed* 95 NY2d 791 [2000]; *see Hannah v Chorney*, 79 AD3d 468 [1st Dept 2010]).

Applying these principles, we conclude that the striking of defendants' pleadings, given the postverdict posture of the case, would not be an appropriate sanction. Even if defendants fabricated or spoliated the evidence, in view of the jury's verdict, any such misconduct did not prejudice Melcher in establishing or defending his case. First, Melcher's breach of contract claim rested on the original unamended operating agreement, and the May 2008 amendment was not part of his case-in-chief. Thus, any mischief concerning the amendment could not have prejudiced Melcher's ability to present his prima facie case

(*see Cohen Bros. Realty*, 265 AD2d at 244). Nor, in light of the jury's verdict, did defendants' alleged misconduct prejudice Melcher in challenging defendants' defense. The May 2008 amendment was not introduced at trial and defendants instead argued that there was an oral amendment. Although not fully articulated on appeal, it appears that Melcher had planned to introduce evidence of the alleged fabrication of the written amendment to discredit defendants' claim that an oral amendment existed. But even if such evidence were admissible for that purpose, it would not have made any difference given the jury's verdict rejecting defendants' claim that the operating agreement had been orally amended. Thus, Melcher prevailed on the only issue to which the written amendment could have had any possible relevance.

Melcher places undue reliance on this Court's decision in *317 W. 187 Assocs. v Dannenberg* (159 AD2d 245 [1990]). In that case, the principal of the third-party defendant created a backdated document and used it in the litigation. The motion court granted the plaintiffs' motion to strike the third-party answer, and we affirmed. Nothing in the case creates a per se rule that the answer must be struck in all cases where fraud is shown (*see e.g. Kasoff v KVL Audio Visual Servs., Inc.*, 87 AD3d 944 [1st Dept 2011] [denying motion to strike answer and imposing

lesser sanction where the defendants admittedly altered document and produced it during discovery as if it were an original business record]).

Although we conclude that striking defendants' pleadings would be an inappropriate sanction here, we are troubled that the allegations of fraud and deceit remain unaddressed. Defendants' alleged misconduct should not be immune from inquiry merely because they made a last-minute decision not to rely upon the allegedly fabricated and spoliated document. By the time defendants altered their position at trial, Melcher had spent substantial time and expense in attempting to prove the falsity of the amendment. Fundamental fairness and maintaining the integrity of the judicial system require that Melcher's allegations be subject to an evidentiary hearing. We cannot countenance purposeful fabrication of evidence, if that is what occurred, and ignore it simply because the document was not introduced at trial. Thus, in the exercise of our discretion, we remand the matter to the trial court to conduct a hearing. If Melcher's allegations are proven, the court should impose a monetary sanction, such as attorney/expert fees and disbursements, based on the nature and extent of defendants' wrongdoing.

Although the jury found in Melcher's favor that the

operating agreement had been breached, it concluded that he was equitably estopped from collecting the amounts due to him under the contract. The equitable estoppel defense was based on evidence that Melcher had received financial statements and K-1 forms reflecting lesser net profits than he was entitled to under the contract, and that he had never protested or complained. In an interrogatory, the jury found that Apollo Management had reasonably relied on Melcher's conduct in accepting less fees than he was otherwise entitled. Based on that verdict, the court entered judgment dismissing Melcher's breach of contract claim.

Melcher argues that the jury's finding on equitable estoppel should be set aside because there was no proof that Apollo Management relied on Melcher's conduct to its detriment. The standard for setting aside a jury verdict is well-settled. A verdict may be reversed on the grounds of legal insufficiency where "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards,* 45 NY2d 493, 499 [1978]). In making this assessment, the evidence must be viewed in the light most favorable to the prevailing party (*Bello v New York City Tr. Auth.*, 50 AD3d 511 [2008]).

Applying these standards, we find that no rational

interpretation of the evidence supports a finding of equitable estoppel. The operating agreement provides that Delaware law governs the construction of its terms and the interpretation of the rights and duties of the parties. Under Delaware law, "estoppel applies when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to h[er] detriment" (*Bantum v New Castle County Vo-Tech Educ. Assn.*, 21 A3d 44, 51 [Del 2011] [internal quotation marks omitted]). Thus, a party asserting an estoppel defense must show that he or she relied on the conduct of the party against whom estoppel is claimed and suffered a prejudicial change of position as a result of such reliance (*id.*).

Apollo Management points to no evidence in the record that it changed its position to its detriment as a result of Melcher's failure to protest the division of net profits. Apollo Management was a "pass through" entity that paid no taxes on its earnings and simply passed them on to its members. Thus, it could not have been harmed even if Melcher failed to protest the profit split. Moreover, at the time Melcher commenced this litigation, there were sufficient retained earnings held in Apollo Management to rectify Melcher's underpayment. Thus, Apollo Management suffered no detriment as a result of Melcher's conduct.

In addition to instructing the jury on detrimental reliance, the trial court also charged that estoppel was established when a party to a contract "puts himself in a position which cannot be undone without substantial expense."[5] Apollo Management argues on appeal that Melcher should be estopped because Apollo Management would incur substantial expenses in paying accountants, tax preparers and lawyers to reallocate the net profits. It is difficult to understand how this could be detrimental reliance in any case. In any event, the record is devoid of proof of how much time or money Apollo Management would have to spend to calculate Melcher's proper share of the fees, and thus the evidence was insufficient to establish an estoppel. Likewise, Apollo Management's claims that there "could be" tax penalties and it "may" have to make reimbursements to members are not supported by record proof and is entirely speculative (*see Benton v 673 First Realty Co.*, 33 AD3d 533, 535 [1st Dept 2006]). In the absence of any evidence of detrimental reliance or substantial expense, the jury's verdict on equitable estoppel should be set aside, the breach of contract claim reinstated and judgment should be entered in Melcher's favor on that cause of action.

[5] Melcher did not object to this charge.

Melcher asserts a cause of action for money had and received against Fradd individually. This cause of action requires proof that "in the absence of an agreement . . . one party possesses money that in equity and good conscience [it] ought not to retain and that belongs to another" (*Board of Educ. of Cold Spring Harbor Cent. School Dist. v Rettaliata*, 78 NY2d 128, 138 [1991] [internal quotation marks omitted]). A cause of action for money had and received is one of quasi-contract (*id.*), and "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Here, Melcher's claim for money had and received alleges that he was not allocated his proper share of the net profits. Since the operating agreement governs the same subject matter, Melcher's quasi-contract claim for money and received against Fradd was properly dismissed (*see id.*).

Melcher argues that because he has no breach of contract claim against Fradd, he can properly assert a quasi-contact claim against him. However, *Clark-Fitzpatrick* did not draw that distinction, and this Court has repeatedly rejected this argument (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]

["there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim"]; *Paragon Leasing, Inc. v Mezei*, 8 AD3d 54 [1st Dept 2004] [quasi-contract claim precluded by the plaintiff's written contract with a nonparty governing its right to compensation for the services that allegedly unjustly enriched the defendants]; *Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313 [1st Dept 1995] [existence of an express contract governing the subject matter of the plaintiff's claim bars quasi-contractual claims against third-party nonsignatory]; *Feigen v Advance Capital Mgt. Corp.*, 150 AD2d 281, 283 [1989], *lv dismissed and denied* 74 NY2d 874 [1989]).

Melcher is not entitled to a new trial on the cause of action alleging that he was improperly removed as a member of Apollo Management. Melcher was removed based on a provision in the operating agreement allowing Fradd to unilaterally discharge a member upon 10 days written notice. Melcher concedes that the operating agreement as signed allows for unilateral termination by Fradd, but argues that there was no meeting of the minds concerning this provision. Melcher contends that the previous draft of the contract did not allow for unilateral termination, and that Fradd had secretly inserted the provision into the finalized agreement, without Melcher's knowledge or approval, and

then tricked Melcher into signing it.

In a prior appeal, we found that evidence of the earlier draft was relevant to Melcher's improper removal claim (*see* 25 AD3d 482, 483 [1st Dept 2006]). Although the trial court erred in excluding the previous draft and certain testimony about it, the error was harmless (*see Hernandez v Vavra*, 62 AD3d 616, 617 [1st Dept 2009], *lv denied* 13 NY3d 714 [2009]). Evidence about the draft was introduced through a combination of Melcher's testimony and that of Apollo Management's attorney, Jack Governale. Indeed, Governale specifically explained the difference between the draft and the final agreement.

Finally, even if the court erred by admitting certain settlement testimony by Alan Gettner, its instruction to the jury cured any prejudice (*see Messinger v Mount Sinai Med. Ctr.*, 15 AD3d 189, 190 [1st Dept 2005], *lv dismissed* 5 NY3d 820 [2005]).

Accordingly, upon remittitur from the Court of Appeals (18 NY3d 915 [2012]), the judgment of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered February 2, 2010, after a jury trial, to the extent appealed from as limited by the briefs, dismissing the causes of action for breach of contract, improper removal, and money had and received, and bringing up for review an order, same court (Donna M. Mills, J.), entered September 8, 2009, which denied plaintiff's motion to strike

defendants' pleadings and to set aside the verdict on equitable estoppel, should be reversed, on the law, without costs, the judgment vacated, the equitable estoppel verdict set aside, the cause of action for breach of contract reinstated, judgment on liability granted in favor of plaintiff on the breach of contract cause of action, and the matter remanded for an assessment of damages on that cause of action and for a hearing on plaintiff's allegations of spoliation and fraud. The appeal from the aforesaid order should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: JANUARY 29, 2013

CLERK