SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 14, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11042 Isidro Leon, Index 304070/08
Plaintiff-Respondent,

-against-

Citywide Towing, Inc., et al.,
Defendants,

Shlomo Zion,
Defendant-Appellant.

_____

Jay M. Weinstein, Woodmere, for appellant.

Law Offices of Henry W. Davoli, Jr., PLLC, Rockville Centre (Zory Shteyman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered September 21, 2012, which denied the motion of defendant Shlomo Zion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Plaintiff was injured when, while riding his bicycle, he was caused to fall to the ground when the rear wheel of his bike was allegedly struck by a vehicle registered to Zion. Plaintiff stated that the vehicle was driven by a "John Doe" defendant, who, after the collision, exited the vehicle and physically assaulted plaintiff, before driving away. The record shows that

at the time of the accident, Zion's vehicle had been in the possession of defendant Citywide Towing, Inc. (Citywide).

Vehicle and Traffic Law § 388(1) "makes every owner of a vehicle liable for injuries resulting from negligence in the use or operation of such vehicle. . .by any person using or operating the same with the permission, express or implied, of such owner" (*Murdza v Zimmerman*, 99 NY2d 375, 379 [2003] [internal quotation marks omitted]). Proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's express or implied permission, and the presumption may only be rebutted with "substantial evidence sufficient to show that a vehicle was not operated with the owner's consent" (*id.* at 380).

Here, Zion's motion for summary judgment was properly denied since he failed to establish that his vehicle was operated without his consent. The only evidence offered was Zion's affidavit that he left the vehicle with Citywide to repair hinges on the driver's side door, but that he never gave permission to Citywide's employees to drive it. Zion's affidavit states that he chose Citywide because he was friends with the owners, one of whom called Zion after the accident to inform him that they had found a buyer for the vehicle, and Zion subsequently went to Citywide's facility to complete the title transfer and sale

several days after the accident. Thus, triable issues exist as to whether the vehicle was at Citywide solely for repairs or whether Zion authorized Citywide to sell the vehicle in which case the car could be test driven with Zion's consent. Hence Zion's blanket denial that he did not provide consent to Citywide for his car to be driven, without more, does not constitute the evidence required to warrant dismissing the complaint (*see Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 178 [2006]).

Furthermore, the record shows that the John Doe defendant was later identified and charged only with the criminal assault upon plaintiff, but not with operating a stolen vehicle, and Citywide regained possession of the vehicle after the incident, but never reported it as stolen. Significantly, discovery has yet to take place, and the John Doe defendant's relationship to Citywide has not been established.

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

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11043 Dijon Osborne, Sr., Index 309083/10
Plaintiff-Appellant,

-against-

New York City Department of
Parks and Recreation, et al.,
Defendants-Respondents.

_____

Finkelstein & Partners, Newburgh (George A. Kohl, 2nd of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 2, 2012, which, in an action for personal injuries sustained in a motor vehicle accident, denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law by showing that as he was stopped at a traffic light, his vehicle was struck from behind by defendants' truck (*see Agramonte v City of New York*, 288 AD2d 75 [1st Dept 2001]).

In opposition, defendants raised a triable issue of fact as to whether an unanticipated slippery condition on the road caused the subject accident (*see DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489, 490 [2d Dept 2010]). There is also a question as to

whether defendant driver's truck suffered an unexpected brake failure, inasmuch as he testified that although he had checked the brakes in the morning and found them to be in good working order, the brakes failed to hold prior to the accident, and he was uncertain whether they had malfunctioned (*see Jackson v Young*, 226 AD2d 230, 231 [1st Dept 1996]; *Hubert v Tripaldi*, 307 AD2d 692, 694 [3d Dept 2003]).

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

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11044 Sandra J. Requa, Index 106792/10
Plaintiff,

-against-

Apple Inc.,
Defendant-Respondent,

Boston Properties, Inc., et al.,
Defendants-Appellants,

Moed De Armas & Shannon Architects P.C.,
Defendant.

- - - - -

[And A Third-Party Action]

_____

Melito & Adolfsen P.C., New York (Steven I. Lewbel of counsel), for appellants.

Schiff Hardin LLP, New York (Christine W. Feller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 2, 2013, which granted defendant Apple Inc.'s motion for summary judgment dismissing the complaint as against it, and denied as moot defendants-appellants' (collectively, Boston Properties) cross motion for certain discovery from Apple, unanimously affirmed, without costs.

The record demonstrates that Apple owed no duty of care to plaintiff for the defective condition in the plaza outside the entrance to its Fifth Avenue store. The lease agreement between Apple, as tenant, and Boston Properties, as landlord, provided

that Boston Properties would "at its expense maintain the plaza in good condition and repair." Thus, it is Boston Properties that owed a duty to pedestrians such as plaintiff to safeguard them from any defective conditions in the plaza. Apple's right under the lease to review certain aspects of the plaza design does not raise an issue of fact whether it created the condition that allegedly caused plaintiff's accident. The lease did not give Apple veto power over Boston Properties' use of the plaza.

We have considered Boston Properties' remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11045 Richard Hoffman, et al., Index 117738/09
Plaintiffs-Appellants,

-against-

SJP TS, LLC, et al.,
Defendants-Respondents.

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellants.

Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered March 20, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff Richard Hoffman, a glazier, was provided with a scissor lift to perform caulking in a glass lobby at a height of approximately 35 feet. Because of the V-shape of that portion of the lobby, the workers could not place the lift directly adjacent to the windows, leaving a gap of about three feet between the workers and their work. In order to caulk the windows, plaintiff needed to lean out over the lift's railing, place one hand on the glass windows, and operate the caulking gun with the other. When

performing this task, plaintiff fell over the railing to the ground.

While there was no defect in the device, it was clearly inappropriate for the task at hand in light of the configuration of the building (*see Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 597-598 [1st Dept 2013]). Defendants' argument that triable issues exist as to whether plaintiff was the sole proximate cause of the accident, is unavailing, since they failed to provide an adequate safety device in the first instance (*see Felker v Corning Inc.*, 90 NY2d 219 [1997]; *Hernandez v Argo Corp.*, 95 AD3d 782 [1st Dept 2012]). Furthermore, while plaintiff was wearing his safety harness, there was no appropriate anchorage point to which the lanyard could have been tied-off (*see Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 905 [1st Dept 2011]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11046 Board of Managers of The Lenox Grand Condominium, Plaintiff-Respondent, Index 112834/09

-against-

DSW Lenox LLC, Defendant-Appellant,

Country Bank, et al., Defendants.

_____

Rita W. Gordon, New York, for appellant.

Brill & Meisel, New York (Mark N. Axinn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 20, 2012, which granted plaintiff's order to show cause and directed defendant DSW Lenox LLC to pay to plaintiff $61,766.73 by January 15, 2013, plus monthly common charges in the aggregate amount of $7,918.96 from November 2012 onward, unanimously affirmed, with costs.

DSW's contention that plaintiff lacks standing to bring this lawsuit because it was not properly constituted is not properly raised on the instant appeal. In April 2010, the motion court denied DSW's motion to dismiss this action due to plaintiff's lack of standing, and DSW did not appeal from that order. In any event, the board that imposed the charges at issue in the instant

order to show cause is not the same as the board that commenced this action.

The main reason that plaintiff increased common charges effective May 2012 was legal fees in this action and in a derivative action brought by DSW. As DSW acknowledges, it failed to argue to the motion court that plaintiff may not advance board members' cost for defending themselves in the derivative action. We decline to consider this argument for the first time on appeal because, if DSW had argued to the motion court that Business Corporation Law § 723(c) required an undertaking for advancement of defense costs, plaintiff could have submitted evidence thereof. Notwithstanding, we note that a condominium is an unincorporated association governed not by the Business Corporation Law but by Real Property Law article 9-B (*see Pomerance v McGrath*, 104 AD3d 440 [1st Dept 2013]; *4260 Broadway Realty Co. v Assimakopoulos*, 264 AD2d 626 [1st Dept 1999]).

DSW's argument that defense costs are not proper common charges pursuant to the Lenox Grand Condominium's by-laws is unpreserved, but DSW may raise it for the first time on appeal because the by-laws are in the record (*see e.g. Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]). However, the by-laws state, "The common expenses may . . . include such amounts as the Board of Managers

may deem necessary for customary or extraordinary legal expenses incurred with respect to the Condominium Property."

Plaintiff is not bound by the amended purchase agreement signed by nonparty Rosetree on Lenox LLC, the former sponsor of the condominium (*see Board of Mgrs. of 500 W. End Condominium v Ainetchi*, 84 AD3d 603, 604 [1st Dept 2011]; *Leonard v Gateway II, LLC*, 68 AD3d 408 [1st Dept 2009]). We are not persuaded by DSW's argument that the board that imposed the charges at issue in the instant order to show cause was Rosetree's alter ego.

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

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11047 The People of the State of New York, Respondent, Ind. 4616/10

-against-

Rashard Johnson, Defendant-Appellant.

_____

Margaret E. Knight, Office of The Appellate Defender, New York (Jennifer R. Galeon of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Richard D. Carruthers, J. at suppression ruling, plea and sentencing), rendered November 23, 2011, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The totality of the information available to the police provided reasonable suspicion of criminality and thus warranted a stop and frisk, even though each piece of information, viewed in isolation, may have had an innocent explanation (*see e.g. People v Rodriguez*, 71 AD3d 436 [2010], *lv denied* 15 NY3d 756 [2010]).

The events at issue took place at night in a particular location known to the police to be drug prone and dangerous. Defendant and another man fit the general description of two men who had recently committed a robbery at that location. Defendant and the other man made hand motions that appeared to be a furtive transfer of a concealed object, rather than a normal handshake. The police had just observed the other man engaging in a pattern of suspicious behavior, including giving false information when the officers questioned him. While asking defendant for his name and for identification, an officer put his hand on defendant's chest "just to create distance" while he momentarily took his eyes off defendant to look for his partner, whereupon defendant became "nervous" and began "stepping from left to right, moving around his body." Defendant's abrupt change in behavior, when added to the preceding factors, heightened the officer's level of suspicion, justifying a frisk (*see People v Allen*, 42 AD3d 331, 332 [1st Dept 2007], *affd* 9 NY3d 1013 [2008]).

In any event, regardless of whether the frisk was lawful, it did not yield any contraband. Instead, after the frisk had been completed, the officer asked defendant what was in the bag he was carrying. This was a common-law inquiry that was, at least, supported by a founded suspicion of criminality (*see People v Hollman*, 79 NY2d 181, 191 [1992]). At that point, defendant

dropped the bag (which contained a firearm) and ran. This was an independent act of abandonment, constituting a strategic, calculated decision and not a spontaneous reaction to police activity (*see People v Boodle*, 47 NY2d 398, 402 [1979], *cert denied*, 444 US 969 [1979]). The abandonment was not in response to the allegedly illegal frisk, but to the clearly lawful inquiry about the contents of the bag.

Defendant's claim that his conviction violated his Second Amendment right to bear arms is without merit. At a minimum, his Second Amendment claim fails because his status as a previously convicted felon rendered him ineligible to be licensed to carry or possess a firearm (*see* Penal Law § 400.00[1][c]), and the Supreme Court of the United States has said that nothing in its opinion in *District of Columbia v Heller* (554 US 570 [2008]) "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" (*id.* at 626).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11048 In re Akhtar Ali Sheikh, Index 400197/12
Petitioner-Appellant,

-against-

New York City Taxi and Limousine Commission,
Respondent-Respondent.

_____

Akhtar Ali Sheikh, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered June 18, 2012, denying the petition to annul the determination of respondent, dated December 29, 2011, which affirmed the decision of the Administrative Law Judge finding petitioner guilty of violating 35 RCNY 54-20(a)(1) (refusal to take passenger to destination) and 35 RCNY 54-15(l) (failure to be courteous to passenger) and assessed fines in the amount of $550 and two points against petitioner, and granting respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner did not petition respondent's Chairperson within 30 days after his administrative appeal was denied (*see* 35 RCNY

68-16[a][1]). Accordingly, petitioner failed to exhaust his available administrative remedies, requiring the denial of the petition (*see Matter of Uddin v New York City Taxi & Limousine Commn.*, 106 AD3d 557 [1st Dept 2013]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11050 Bella Gubenko, Index 403941/02
Plaintiff-Appellant, 75149/02
590819/09

-against-

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

- - - - -

Consolidated Edison Company of New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Felix Equities, Inc.,
Third Party Defendant-Respondent.

- - - - -

Felix Equities, Inc.,
Fourth Party Plaintiff-Respondent,

-against-

Nico Asphalt Paving, Inc.,
Fourth Party Defendant-Respondent.

_____

Novo Law Firm, P.C., New York (James S. Paglinawan of counsel), for appellant.

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

Carole A. Borstein, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, Inc., respondent.

London Fischer LLP, New York (James Walsh of counsel), for Felix Equities, Inc., respondent.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Nico Asphalt Paving, Inc., respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered June 21, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to deny the City's motion, and otherwise affirmed, without costs.

Although defendants' motions were made after the 60-day time limit set by the motion court for summary judgment motions (CPLR 3212[a]), the court properly considered the motions because they sought relief nearly identical to that sought in third-party and fourth-party defendants Felix Equities, Inc.'s and Nico Asphalt Paving, Inc.'s timely motions (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]; *see also Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321 [1st Dept 2008]).

Con Edison established prima facie that it did not cause or create the condition that caused plaintiff's accident. Its employee testified that the four excavations, or "cuts," made on Murray Street were outside the area where plaintiff testified her foot got caught in a "deep crack" or hole (*see Jones v Consolidated Edison Co. of N.Y., Inc.*, 95 AD3d 659 [1st Dept 2012]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005]). Plaintiff failed to raise an issue of fact in opposition, since

she did not address the record evidence of the location of the work performed.

The City failed to establish its entitlement to summary judgment since it submitted no evidence indicating that it had no notice of the defective condition in the street (*see Gonzalez v City of New York*, 268 AD2d 214 [1st Dept 2000]). Contrary to the City's sole contention on the motion, plaintiff's description of the defective condition in the street was sufficient to identify the cause of her fall; any ambiguity in her testimony, given through a translator, goes to the weight of her evidence, and does not require dismissal of the complaint (*see Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226 [1st Dept 2002]; *Garcia v New York Tr. Auth.*, 269 AD2d 142 [1st Dept 2000]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11052 The People of the State of New York, Ind. 4596/06
Respondent,

-against-

Lee Carr,
Defendant-Appellant.

_____

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

Lee Carr, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Richard J. Ramsay of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered June 10, 2009, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility. The testimony of the People's main witness was corroborated by other evidence, including testimony that defendant helped dispose of the victim's body under circumstances warranting an inference that defendant had participated in the murder.

Defendant's right to counsel and right to be present at material stages of the trial were not violated when the court had an ex parte, in camera conversation with the People's main witness, regarding the witness's assertion that he was too ill to testify that day. This inquiry was not a hearing, nor part of the trial, and it did not involve the determination of any issue requiring input from defendant or his counsel (*see e.g. People v Hamilton*, 272 AD2d 553 [2d Dept 2000], *lv denied* 95 NY2d 935 [2000]; *People v Valenzuela*, 234 AD2d 219 [1st Dept 1996] *lv denied* 89 NY2d 1041 [1997]; *People v Lovett*, 192 AD2d 326 [1st Dept 1993], *lv denied* 82 NY2d 722 [1993]). The court placed sufficient information on the record about what transpired at the conference, and defendant was not prejudiced by the fact that the conference was unrecorded. There was no impairment of defendant's ability to cross-examine this witness about all matters relating to his credibility, including drug abuse.

The court properly declined to charge assault in the third degree as a lesser included offense. Defendant's arguments on this issue are generally similar to arguments that were unsuccessfully raised on a codefendant's appeal (*People v Cates*, 92 AD3d 553 [1st Dept 2012], *lv denied* 18 NY3d 992 [2012]). To the extent there were any factual differences between defendant's situation and that of the codefendant, we conclude that they do

not warrant a different result.

At sentencing, the court sufficiently accorded defense counsel an opportunity to speak on defendant's behalf (*see* CPL 380.50; *People v McClain*, 35 NY2d 483 [1974], *cert denied sub nom. Taylor v New York*, 423 US 852 [1975]).

Defendant's pro se argument concerning the court's charge is without merit. Defendant's remaining pro se claims are unpreserved or otherwise unreviewable, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11053-
11054 In re Sjuqwan Anthony Zion
Perry M., etc.,

A Dependent Child Under the Age
of Eighteen Years, etc.,

Charnise Antonia M., et al.,
Respondents-Appellants,

Lutheran Social Services for
Metropolitan New York, et al.,
Petitioners-Respondents.

_____

Carol Kahn, New York, for Charnise Antonia M., appellant.

Todd D. Kadish, Brooklyn, for Steven M., appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondents.

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

_____

Order of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about March 28, 2011, which, upon a finding that respondent mother violated the terms of a suspended judgment, terminated the mother's parental rights and, upon the additional finding that respondent father's consent was not required for the adoption of the subject child, committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The father failed to demonstrate that he provided the child with fair and reasonable financial support, according to his means. Therefore, even assuming he visited regularly, he failed to satisfy the requirements of "consent father" under Domestic Relations Law § 111(1)(d) (*see Matter of Latricia M.*, 56 AD3d 275 [1st Dept 2008], *lv denied* 12 NY3d 705 [2009]). As a "notice father," his rights were limited to notice of the proceedings and an opportunity to be heard concerning the child's best interests, which he received (*see Matter of Alyssa M.*, 55 AD3d 505 [1st Dept 2008]).

The record supports the court's finding that the mother failed to comply with the terms and conditions of the suspended judgment by failing to obtain suitable housing for the child during the term of the suspended judgment (*see Matter of Gianna W. [Jessica S.]*, 96 AD3d 545 [1st Dept 2012]; *Matter of Kendra C.R. [Charles R.]*, 68 AD3d 467 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 870 [2010]). During that period, the mother continued to reside in shelter housing for couples with the father. Although she located an apartment after the expiration of the term of the suspended judgment, the court properly determined that her anticipated move to an apartment with the father, who continued to abuse drugs and refuse treatment, would not provide suitable housing for the child.

Thus, the mother failed to demonstrate that she had made any progress in overcoming the specific problems that led to the child's removal (*see Matter of Jonathan J.*, 47 AD3d 992 [3d Dept 2008], *lv denied* 10 NY3d 706 [2008]). Nor does the record present "exceptional circumstances" that would warrant a one-year extension of the suspended judgment (*see* Family Court Act § 633[b]).

A preponderance of the evidence supports the court's conclusion that the termination of the mother's parental rights, and adoption by the kinship foster mother, with whom the child had resided since birth with his three half-siblings, is in the child's best interests (*see Matter of Mykle Andrew P.*, 55 AD3d 305 [1st Dept 2008]; *Matter of Elizabeth Amanda T.*, 44 AD3d 507 [1st Dept 2007]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11057 In re Sara Ashton McK.,
Petitioner-Appellant,

-Against-

Samuel Bode M.,
Respondent-Respondent.

_____

Amed Marzano & Sediva PLLC, New York (Naved Amed of counsel), for appellant.

Barbara J. Schaffer, New York, (Jill M. Zuccardy of counsel), for respondent.

_____

Order, Family Court, New York County (Fiordaliza A. Rodriguez, Referee), entered on or about May 30, 2013, which granted respondent father's motion to dismiss the mother's custody petition, unanimously reversed, on the law, without costs, the motion denied, the petition reinstated, and the matter remanded for further proceedings consistent herewith.

The Family Court properly found that New York is the child's home state, based "on the literal construction of the statute," since the mother gave birth on February 23, 2013, in New York and the child lived in New York continuously until the time of the mother's filing of her custody petition, two days later. However, the court erred in declining to exercise jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (Domestic Relations Law art 5-A) to

determine the mother's petition for initial custody of the child.

The California court did not have "jurisdiction substantially in conformity" with the UCCJEA (*see* Domestic Relations Law § 76-e), since the father's paternity petition, filed in California on November 15, 2012, did not initiate a proper *custody* proceeding, because the child had not yet been born. Under the UCCJEA, courts cannot exercise subject matter jurisdiction over custody proceedings filed prior to the birth of a child (*see e.g. Waltenburg v Waltenburg*, 270 SW3d 308, 316-317 [Tex App, 5th Dist 2008]).

We are unpersuaded that the mother engaged in "unjustifiable conduct" to gain the Family Court's jurisdiction (*see* Domestic Relations Law § 76-g; *Matter of Schleger v Stebelsky*, 79 AD3d 1133 [2d Dept 2010]). While "unjustifiable conduct" is not defined by statute, courts generally apply this provision where a child has been removed contrary to an existing custody order (*see Adoption House v P.M.*, 2003 WL 23354141, *7, 2003 Del Fam Ct LEXIS 227, *22 [Del Fam Ct 2003]). We therefore, disagree with the Referee's finding that the mother's "appropriation of the child while in utero was irresponsible" and "reprehensible" and warranted a declination of jurisdiction in favor of the California court. Rather, the mother's conduct at issue here amounts to nothing more than her decision to relocate to New York

during her pregnancy. Further, we reject the Referee's apparent suggestion that, prior to her relocation, the mother needed to somehow arrange her relocation with the father with whom she had only a brief romantic relationship. Putative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally-protected liberty (*see Matter of Wilner v Prowda*, 158 Misc 2d 579 [Sup Ct, NY County 1993] [refusing the putative father's request to determine custody of the parties' unborn child and restrain his then-pregnant wife from leaving New York]).

Family Court erred in declining jurisdiction on the basis of an inconvenient forum (*see* Domestic Relations Law § 76-f[1]; *Matter of Greenidge v Greenidge*, 16 AD3d 583 [2d Dept 2005]). Although "[a] determination as to whether a court is an inconvenient forum is left to the sound discretion of the trial court after consideration of eight enumerated factors" (*Matter of Frank MM. v Lorain NN.*, 103 AD3d 951, 952 [3d Dept 2013]; *see* Domestic Relations Law § 76-f[2]), the Referee did not consider all of the relevant factors in reaching its determination that New York was an inconvenient forum (*see Matter of Blerim M. v Racquel M.*, 41 AD3d 306 [1st Dept 2007]). The father appears to be in a superior financial position to the mother, there is an approximate 3,000 mile distance between New York and California,

the mother has now established herself as a New York resident, the child was born in New York and has never resided in California, and New York is the child's "home state." The UCCJEA "elevates the 'home state' to paramount importance in both initial custody determinations and modifications of custody orders" (*Gottlieb v Gottlieb*, 103 AD3d 593, 594 [1st Dept 2013], quoting *Matter of Michael McC. v Manuela A.*, 48 AD3d 91, 95 [1st Dept 2007], *lv dismissed* 10 NY3d 836 [2008]). While there is every indication that each court has the ability to decide the issues expeditiously, a court of this State is no less competent to determine the issues and assess the credibility of the parties than a judge of the California court.

Although the Referee found the mother's conduct to be a relevant factor, her relocation to New York with her fetus did not constitute conduct capable of supporting the Referee's decision to decline jurisdiction based on inconvenient forum.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11058 Public Service Mutual Insurance Company, et al., Plaintiffs-Respondents, Index 305267/10

-against-

Tower Insurance Company of New York, Defendant-Appellant,

Ahmed Alhajaji, etc., et al., Defendants.

_____

Law Office of Steven G. Fauth, LLC, New York (Suma S. Thomas of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 12, 2012, which, to the extent appealed from as limited by the briefs, upon reargument of defendant Tower Insurance Company's motion for summary judgment declaring that it had no duty to defend and indemnify plaintiff 100-120 Hugh Grant Circle Realty, LLC (HGC) in the underlying personal injury action, adhered to the original determination denying the motion, unanimously affirmed, with costs.

Tower's obligation, if any, to reimburse plaintiff Public Service Mutual Insurance Company for fees incurred in defending HGC in the underlying action is not affected by the timeliness of its disclaimer of coverage, since Insurance Law § 3420(d) does

not apply to requests for defense and indemnification between insurers (*see Bovis Lend Lease Lmb., Inc. v Royal Surplus Lines Inc. Co.*, 27 AD3d 84, 92-93 [1st Dept 2005]). However, the record does not demonstrate conclusively that Tower received late notice of the claim and may disclaim coverage on that ground. In an affidavit by its senior liability examiner, Public Service explained that so much confusion was created by the conflicting pleadings, bill of particulars, and deposition testimony in the underlying action that it required six weeks of investigation to determine the facts of the accident and HGC's liability. An issue of fact exists whether Public Service's 48-day delay before issuing its demand to Tower was reasonable under the circumstances (*see Hartford Acc. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310, 313 [1st Dept 1984]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11059 The People of the State of New York, Respondent, Ind. 2710/97

-against-

Carlos Duarte, Defendant-Appellant.

_____

Lucas E. Andino, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Gerald Scheindlin, J. at plea; Megan Tallmer J. at sentencing), rendered January 4, 2008, convicting defendant of attempted criminal sale of a controlled substance in the third degree, and sentencing him to a term of 5 to 10 years, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Defendant, who was represented by new counsel at the plea withdrawal motion, received a sufficient opportunity to present his arguments. Although the plea had been taken before a

different Justice, the motion court properly concluded that defendant did not substantiate his claim that his comprehension had been impaired by medication. We also note that this claim was made for the first time more than nine years after the plea, when defendant was returned on a bench warrant. The record establishes that the plea was knowing, intelligent, and voluntary (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]).

There is no merit to defendant's request for a remand in order to develop a record as to what advice counsel provided concerning the immigration consequences of the plea. The proper mechanism for a defendant to elicit additional facts after a judgment of conviction is by making a CPL 440.10 motion.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11060N Darryl Alladice, Index 100036/12
Petitioner-Appellant,

-against-

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

_____

Gentile & Associates, New York (Laura Gentile of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for The City of New York, respondent.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for The Metropolitan Transportation Authority and The New York City Transit Authority, respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered June 14, 2012, which denied petitioner's motion for leave to file an untimely notice of claim, unanimously affirmed, without costs.

Petitioner's application for leave to file a late notice of claim was properly denied. Respondent the City of New York is an out-of-possession landlord that does not have responsibility for the allegedly hazardous condition of the subway platform, and therefore, petitioner's claim against it lacks merit (*see Arteaga v City of New York*, 101 AD3d 454, 454 [1st Dept 2012]). In addition, contrary to petitioner's contention, law office failure does not constitute a reasonable excuse for failing to timely

serve the notice of claim (*see Matter of Santiago v New York City Tr. Auth.*, 85 AD3d 628, 628-629 [1st Dept 2011]).

Although the absence of a reasonable excuse does not compel denial of the motion (*see Brennan v Metropolitan Transp. Auth.*, _AD3d_, 2013 NY Slip Op 06326, *1 [1st Dept 2013]), petitioner also fails to demonstrate that respondents had actual knowledge of the essential facts constituting the claim within the statutory 90-day period or within a reasonable time thereafter (*see id.; Gonzalez v City of New York*, 92 AD3d 619 [1st Dept 2012]). Petitioner's assertion that respondents' employees observed his fall is speculative since he averred in his affidavit that no one came to his aid and he does not suggest that an employee acknowledged witnessing the accident *(see e.g. Lemma v Off Track Betting Corp.*, 272 AD2d 669, 671 [3d Dept 2000]; *Burns v New York City Tr. Auth.*, 213 AD2d 300, 300-301 [1st Dept 1995]).

Lastly, petitioner's unsupported assertion that the condition which caused his accident has remained unchanged since his fall is insufficient to demonstrate the lack of any prejudice

to NYCTA from his delay (*see Matter of Santiago v New York City Tr. Auth.*, 85 AD3d 628, 628-629 [1st Dept 2011]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11061N Assured Guaranty Municipal Corp., formerly known as Financial Security Assurance Inc., Plaintiff-Respondent, Index 650705/10 590783/10

-against-

DB Structured Products, Inc., et al., Defendants.

- - - - -

DB Structured Products, Inc., Third-Party Plaintiff,

-against-

GreenPoint Mortgage Funding, Inc., Third-Party Defendant-Appellant.

_____

Murphy & McGonigle, P.C., New York (James K. Goldfarb of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Robert W. Lehrburger of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 16, 2012, which granted plaintiff Assured Guaranty Municipal Corp.'s motion for a protective order preventing the discovery of documents and information concerning its pre-complaint repurchase review, unanimously affirmed, with costs.

In this action arising from the securitization of home equity lines of credit originated by third-party defendant GreenPoint, and sold to defendants DB Structured Products, Inc.

and ACE Securities Corp., plaintiff insurer issued a policy guaranteeing payment of certain classes of the securities issued and when the loans began to default at what it considered to be a high rate, it retained a law firm that hired consultants to conduct a forensic re-underwriting review of the loans. Based on the consultant's findings, plaintiff commenced the instant action alleging, inter alia, fraudulent inducement and breach of representations and warranties. Thereafter, defendants served demands seeking any and all records surrounding the loan review conducted by the consultants and plaintiff provided the consultants' conclusions and the raw data used in their analysis but asserted the attorney work product and trial preparation privileges in objecting to the remainder of the demands, including the demand for correspondence between the consultants and plaintiff's counsel and documents concerning the methodology employed by the consultants. Plaintiff moved for a protective order preventing the discovery of these documents and defendants and GreenPoint objected on the ground that plaintiff had placed the consultants' findings "at issue."

The motion for a protective order was properly granted. Plaintiff did not waive any privilege by referencing the pre-litigation repurchase review conducted by its consultants in the

complaint (*Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 93 AD3d 574, 574-575 [1st Dept 2012]). Those references were not made as elements of the claims, but as a good-faith basis for the allegations that are based on defects discovered during the repurchase review of the loans (*see Ambac*, 92 AD3d at 452). Further, plaintiff does not need the documents relating to the pre-litigation investigation to sustain its causes of action or prove them at trial, and upholding the privilege with respect to the pre-litigation review materials will not deprive defendants of information vital to their defense since plaintiff disavows any intention to use such materials to help establish its claim (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 107 AD3d 451 [1st Dept 2013]; *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581, 582 [1st Dept 2009]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

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

10102 Tullett Prebon Financial Services, etc., et al., Petitioners-Respondents, Index 652157/10

-against-

BGC Financial, L.P., et al., Respondents-Appellants.

_____

Saul Ewing LLP, New York (Francis X. Riley III of counsel), for appellants.

Schulte Roth & Zabel LLP, New York (Harry S. Davis of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered November 26, 2012, which granted the application by petitioner Tullett Prebon Information, Ltd. (Tullett) to confirm an arbitration award and denied the cross motion of respondents BGCantor Market Data, L.P., Cantor Fitzgerald & Co., and Cantor Fitzgerald Securities (collectively Cantor) to vacate or modify the award, unanimously affirmed, with costs.

Cantor brought the arbitration under a 2002 agreement between itself and Tullett, its then largest competitor in the interdealer brokerage industry. The agreement provided for the packaging of Tullett's swaps data with Cantor's proprietary U.S. Treasury data into a joint product known as SwapMarker 100. It

was Tullett's duty under the agreement to redistribute the product to third-party customers after having been provided with Cantor's Treasury data. Section 3.2 of the agreement prohibited Tullett from using Cantor's proprietary data in any way that was competitive with its brokerage or data sales business. Section 3.2 provided that any use by Tullett of Cantor's proprietary data in violation of the agreement would constitute wrongful appropriation. Section 3.2 further provided that, in addition to any other available remedies, Tullett would be required to pay Cantor $4,500 per day for each broker who received the information in violation of the agreement. Section 3.2 also provided that this wrongful appropriation fee, which the parties later reduced to $500 per broker per day, would not constitute liquidated damages. The agreement's arbitration clause required the prevailing party's recovery of reasonable attorneys' fees and other costs as part of the arbitral award.

Cantor alleged in its statement of claim that Tullett violated section 3.2 by distributing and permitting access to SwapMarker 100 in violation of the agreement. The relief Cantor requested included the contractual wrongful appropriation fee as well as attorneys' fees. Following a hearing, the arbitrator awarded Cantor $789,998 in damages and denied its application for reasonable attorneys' fees. In rendering the award, the

arbitrator found the $500 per broker per day wrongful appropriation fee to be an unenforceable penalty. The arbitrator found that there was no reasonable relationship between the fee and Cantor's probable loss based on evidence that when the agreement was terminated, Cantor was willing to continue leasing its proprietary data to Tullett for the equivalent of $17 to $20 per broker per day. The arbitrator further declined to award attorneys' fees after determining that Cantor could not be deemed the prevailing party. For reasons that are also set forth below, we are not persuaded by Cantor's arguments that the arbitrator manifestly disregarded the law and exceeded his authority.

As set forth above, section 3.2 precluded the arbitrator from treating the wrongful appropriation fee as liquidated damages. The arbitrator therefore rightly concluded that the fee could only be regarded as either a penalty or compensatory damages. Under New York law, which the arbitrator was required to apply, "breach of contract damages are intended to place a party in the same position as he or she would have been in if the contract had not been breached" (*Wenger v Alidad*, 265 AD2d 322, 323 [2nd Dept 1999], *lv denied* 94 NY2d 758 [2000]). Evidence before the arbitrator established that the $500 per broker per day fee was at least 32 times the price Cantor charged Tullett for access to the same proprietary data. Therefore, there was ample support

for the arbitrator's conclusion that the wrongful appropriation fee did not constitute compensatory damages as there was no reasonable relationship between the fee and Cantor's probable loss. On the contrary, the record established that the wrongful appropriation fee was an unenforceable penalty insofar as it required, "in the event of contractual breach, the payment of sum of money grossly disproportionate to the amount of actual damages" (*see Truck Rent-A-Ctr. v Puritan Farms 2nd,* 41 NY2d 420, 424 [1977]). There is merit to the argument that the arbitrator erroneously assigned the burden of proof to Cantor on the issue of whether the $500 per broker per day was a penalty. On this record, however, there was no manifest disregard of the law that would warrant a vacatur of the award. The arbitrator's conclusion that the wrongful appropriation fee was a penalty was inescapable in light of the express provision that it did not represent liquidated damages and the evidence of the fees Cantor actually charged for leasing the subject data. Under the Federal Arbitration Act (9 USC § 1 *et seq*. [FAA]), an arbitration award will be confirmed if a justifiable ground for the decision can be inferred from the facts of the case even where the explanation for the award is deficient or nonexistent (*see Duferco Intl. Steel Trading v T. Klaveness Shipping A/S*, 333 F3d 383, 390 [2d Cir 2003]). Therefore, a justifiable ground exists for the

arbitrator's finding in this regard.

We are also unpersuaded by Cantor's argument that the arbitrator exceeded his authority in determining that Cantor was not the prevailing party and, therefore, not entitled to an award of attorneys' fees and costs under the agreement. Cantor bases its argument on the premise that "[t]he issue of which party 'prevailed' under the [agreement] was not before the Arbitrator as Tullett stipulated and admitted that [Cantor] was 'the prevailing party entitled to reasonable attorneys' fees.'" Cantor's underlying premise is flawed because there was no stipulation as to which party was the prevailing party. Rather, Tullett's counsel merely declared in his opening statement that Cantor "will be a prevailing party . . ." To be sure, the prevailing party issue was before the arbitrator insofar as Cantor's statement of claim, which was never amended, called for an award of attorneys' fees on the basis of that claimed status. This Court has held that issue of who is a prevailing party is largely a factual determination (*see Matter of McAllister v Dowling*, 221 AD2d 443 [2d Dept 1995]). A factual assertion made by an attorney during an opening statement is a judicial admission (*see Kosturek v Kosturek*, 107 AD3d 762 [2nd Dept 2013]). A judicial admission is not itself dispositive but

merely evidence of the fact admitted (*see Bogoni v Friedlander*, 197 AD2d 281, 291-292 [1st Dept 1994], *lv denied* 84 NY2d 803 [1994]).[1] Therefore, the arbitrator's findings regarding entitlement to attorneys' fees were evidentiary in nature and within the arbitrator's authority (*see Matter of R.C. Layne Constr. [Stratton Oakmont*], 228 AD2d 45, 51 [1st Dept 1996]). Any error made with respect to such findings was legal in nature. It is settled that arbitration awards should not be vacated by reason of such errors of law and fact (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]). This is in keeping with the rule that "[a]rbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation" (*Folkways Music Publs. v Weiss*, 989 F2d 108, 111 [2nd Cir 1993][citation omitted]). Under the FAA, an arbitration award may be vacated "where the arbitrators exceeded their powers . . ." (9 USC § 10[a][4]). "It is only when [an] arbitrator strays from the interpretation and application of the agreement

[1]A stipulation, on the other hand, is "[a] voluntary agreement between opposing parties concerning some relevant point . . ." (Black's Law Dictionary 1550 [9th ed 2009]). Cantor's brief conflates the two by referring to the opening statement as "Tullett's admission and agreement."

and effectively dispense[s] his [or her] own brand of [ ] justice" that an arbitration decision may be vacated on this ground (*see Stolt-Nielsen S.A. v AnimalFeeds Intl. Corp.*, 559 US 662, 671 [2010] [internal quotation marks and citations omitted]). That, however, is not Cantor's argument. Instead it posits that the arbitrator was empowered to find in favor of Cantor but not in favor of Tullett on the issue of entitlement to attorneys' fees. This argument does not withstand scrutiny for the reasons stated above.

We also reject Cantor's argument that the arbitrator exceeded his authority by failing to state a reason for his denial of Cantor's claim for punitive damages. Ordinarily, an arbitrator has no obligation to give a reason for an award (*United Steelworkers of Am. v Enterprise Wheel & Car Corp.*, 363 US 593, 598 [1960]). In this case, the agreement required the arbitrator to render a "decision issued in writing, with reasons therefore . . ." In this case, we find the 11-page award which set forth facts, reasoning and a statement that all other

claims not specifically addressed therein were deemed denied sufficient under the agreement (*see generally Green v Ameritech Corp.*, 200 F3d 967, 975-976 [6th Cir 2000]). We have considered Cantor's remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Acosta, J.P., Renwick, Richter, Feinman, JJ.

10220 Sea Trade Maritime Corporation, Index 653407/11
Plaintiff-Respondent,

-against-

Stylianos Coutsodontis,
Defendant-Appellant.

_____

Poles Tublin Stratakis & Gonzalez, LLP, New York (Scott R. Johnston of counsel), for appellant.

Cardillo & Corbett, New York (James P. Rau of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered May 2, 2012, awarding plaintiff the principal sum of $704,066.41, plus interest, costs and disbursements, and bringing up for review an order, same court and Justice, entered March 12, 2012, which granted plaintiff's motion for summary judgment in lieu of complaint and denied defendant's cross motion for summary judgment dismissing the action or, in the alternative, for a stay, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion for summary judgment denied, and plaintiff is directed to file a complaint within 30 days of entry of this order.

Plaintiff's motion brought pursuant to CPLR 3213 to enforce a Spanish court's award of damages as against defendant who improperly commenced a proceeding to arrest plaintiff's ship in

Spain, should not have been granted.

A motion for summary judgment brought in lieu of a complaint (CPLR 3213) is based on an "instrument for the payment of money only or upon any judgment." The statute allows a plaintiff an expedited procedure for entry of a judgment by filing and service of a summons and a set of motion papers that contain sufficient evidentiary detail for the plaintiff to establish entitlement to summary judgment (*see* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:8).

CPLR 5302 provides that New York will recognize foreign decrees that are "final, conclusive and enforceable where rendered even though an appeal therefrom is pending." In addition to a copy of the Spanish document and a certified English translation, the parties provided affidavits by Spanish law experts who cite different articles and sections of Spain's Civil Proceedings Act (LEC) to support their conclusions as to whether the document here, denominated a "ruling" ("auto" in Spanish), is enforceable as a final judgment. Defendant's legal expert asserts that under articles 538 and 811 of the LEC, plaintiff must petition the Spanish court upon notice to "convert" the ruling into a judgment, at which point it becomes enforceable. Plaintiff's legal expert disputes defendant's expert's reliance on the two LEC articles, but also asserts that

defendant has no assets in Spain and no enforcement proceeding in Spain is necessary. He states that in Spanish law, there are two types of "auto," those that are final ("auto definitivo") and others that are interlocutory orders. He concludes that the auto here is final ("auto definitivo"), based on sections 741.3, 742, and 716 of the LEC. Plaintiff has not provided copies of these Spanish statutes with translations, or of the two statutes cited by defendant.

"The construction of foreign law is a legal question," that may be "appropriate for summary resolution" when sufficient information based on documentary and other evidence is presented (*Gusinsky v Genger,* 74 AD3d 539, 540 [1st Dept 2010]). The court may choose to take judicial notice of laws of a foreign jurisdiction, but it is only required to do so when the party requesting the notice provides "sufficient information to enable it to comply with the request" (CPLR 4511[b]). The motion court has broad discretion in considering the evidence presented, which may take a variety of forms (*see* CPLR 4511[d]). Copies of statutes are prima facie evidence of the law when contained in publications generally admitted as evidence of the existing law of the jurisdiction where it is in force (*id.*). Expert affidavits interpreting the relevant legal provisions can be a basis for constructing foreign law when accompanied by sufficient

documentary evidence (*see Gusinsky v Genger*, 74 AD3d at 540, citing *Harris S.A. De C.V. v Grupo Sistemas Integrales De Telecomunicacion S.A. De C.V.*, 279 AD2d 263, 264 [1st Dept 2001], *lv denied* 96 NY2d 709 [2001]). For example, in *Harris*, we affirmed the grant of summary judgment converting a foreign judgment from Mexico to a judgment of execution against the corporate defendants for the amount of their assets in New York because the motion court was able to take judicial notice of the applicable Mexican law based on the evidence which included translations of the judgment at issue and the order confirming the judicial sale, a translated record of the judicial sale, translated provisions of the Mexican codes and judicial decisions, and several affidavits by the parties' experts interpreting the relevant legal provisions. In contrast, we found that the motion court properly declined to take judicial notice of certain French Ordinances in *Warin v Wildenstein & Co., Inc.* (297 AD2d 214, 215 [1st Dept 2002]) because it was not provided with sufficient information to determine the scope and effect of the Ordinances. Specifically, the defendants' French law expert failed to explain the interplay between the time limits in the Ordinances and those in the generally applicable French Civil Code, or to provide French jurisprudence interpreting the Ordinances, and only provided his opinion that

the action was time-barred under both the Ordinances and the Code.

Here, the motion court, finding the contents of the affidavit of plaintiff's expert to be more persuasive than that of defendant's expert's affidavit, concluded that under Spanish law the document at issue is an enforceable judgment and that it is suitable for disposition under CPLR 3213. We disagree. The motion court was provided with the affidavits of the experts whose opinions differed, but was not provided with translated copies of the LEC sections cited by both experts. Thus, the court was not provided adequate information to determine as a matter of law that the document is a final judgment under Spanish law and ripe for enforcement in New York. As plaintiff had the burden of proof, it was required to provide all the information necessary to establish entitlement to summary judgment in lieu of complaint. Having failed to carry its burden, plaintiff's motion should have been denied.

Although not essential to our determination that summary judgment should not have been granted to plaintiff, we have considered defendant's alternative argument regarding the sufficiency of plaintiff's moving papers. The papers did not include a copy of the actual "instrument for the payment of money" and instead contained what appears to be an uncertified

English translation of the Spanish court judgment. The motion court granted plaintiff an adjournment to supplement its papers, and plaintiff submitted a certified copy of the Spanish-language document, a certified English translation that corrected the name of the document, originally called a "brief," to "ruling," and an affidavit by a Spanish legal expert discussing the law.

There is no absolute rule that in a CPLR 3213 motion, a plaintiff cannot supplement its papers in response to a defendant's arguments, so as to establish its entitlement to summary judgment in lieu of complaint. "Nothing that is curable by the mere addition of papers should result in a denial of the motion, unless it is a denial with leave to renew on proper papers" (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3213:8). "Mere omissions from the affidavits" that can be rectified by filing and serving additional affidavits should be cured by a continuance or adjournment in order for the additional affidavits to be served and filed (*id.*). Thus, in *Shaw v Krebs* (85 AD2d 913 [4th Dept 1981]), CPLR 3213 relief was denied because the certified copy of the clerk's minutes was not a substitute for a certified copy of the judgment. However, in *European Am. Bank & Trust Co. v Schirripa* (108 AD2d 684 [1st Dept 1985]), the failure to attach copies of underlying promissory notes to an unconditional

guarantee was not fatal, where the instrument and an affidavit of nonpayment were submitted. In *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda* (68 AD3d 672 [1st Dept 2009]), where the defendant "had made an issue of" missing endorsements to the subject notes, the motion court properly allowed the plaintiff to submit a supplemental affidavit containing the endorsements that had been inadvertently omitted from the initial moving papers.

Here, defendant had an opportunity to address the merits of the later-submitted documents, in the form of a reply in the cross motion, and therefore plaintiff's failure initially to include all the documents did not result in prejudice to defendant and require denial of the motion (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382 [1st Dept 2006]).

Defendant never argued below that public policy precludes recognition of the award; accordingly, the argument is waived (*see CIBC Mellon Trust Co. v Mora Hotel Corp.*, 296 AD2d 81, 101 [1st Dept 2002], *affd* 100 NY2d 215 [2003], *cert denied* 540 US 948 [2003]). In any event, the argument is unavailing, as the cause of action on which the damages award is based is not "repugnant to the public policy of this state" (CPLR 5304[b][4]).

Upon denial of a plaintiff's motion for summary judgment in lieu of complaint, "the moving and answering papers shall be

deemed the complaint and answer, respectively, unless the court orders otherwise" (CPLR 3213). Here, given that the initial motion papers were supplemented as discussed above, it is appropriate to direct plaintiff to file a formal complaint.

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

> The Decision and Order of this Court entered on August 13, 2013 is hereby recalled and vacated (*see* M-4656 decided simultaneously herewith).

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

ENTERED: NOVEMBER 14, 2013

CLERK

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

10763 In re Margarita Santiago, etc., Index 108325/11
Petitioner-Appellant,

-against-

Elizabeth R. Berlin, etc., et al.,
Respondents-Respondents.

_____

Law Offices of Peter Vollmer, P.C., Sea Cliff (Peter Vollmer of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for Elizabeth R. Berlin, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for Robert Doar, respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered May 16, 2012, which dismissed as moot the petition brought in a hybrid CPLR article 78/declaratory judgment proceeding, unanimously affirmed, without costs.

Supreme Court properly determined that when, during the pendency of this proceeding, respondent formally retracted the challenged recoupment notice and retroactively restored the portion of public assistance benefits withheld pursuant to that notice, these actions mooted the petition as to both the

injunctive and declaratory relief sought (*see e.g. Eve & Mike Pharm., Inc. v Greenwich Pooh*, LLC, 107 AD3d 505 [1st Dept 2013]; *Duane Reade, Inc. v Local 338, Retail, Wholesale, Dept. Store Union, UFCW, AFL-CIO*, 11 AD3d 406 [1st Dept 2004]).

Petitioner does not raise a substantial and novel issue which the Court should reach, and the narrow exception to the mootness doctrine is inapplicable (*see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 811 [2003], *cert denied* 540 US 1017 [2003]). Petitioner claims that the New York City Human Resources Administration's notices improperly set an arbitrary "effective date" as the deadline for a public benefits recipient to obtain a stay by requesting a fair hearing. However, this does not present a substantial constitutional issue since the 10-day notice period complies with due process and enables the City to automatically process the request for aid-continuing benefits for those who do meet the deadline. As explained by the City respondent, the deadline is set before the actual issuance of the first reduced check (which petitioner argues is the real effective date) so that the City's computer system is able to process fair hearing requests, and automatically implement "aid continuing" directives, thereby avoiding interruption of benefits to those beneficiaries who do timely request a fair hearing by the effective date set in the

notice letter. Federal law gives the State flexibility to set such deadlines, and the deadline set in the notice is reasonable and does not raise due process concerns. Moreover, the deadline procedure was implemented pursuant to a settlement of federal class-action litigation addressing the problem of interruption of benefits pending fair hearing decisions, and the settlement is subject to ongoing supervision by a federal magistrate (*see Morel v Giuliani*, 927 F Supp 622 [SD NY 1995]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Mazzarelli, J.P., Andrias, Freedman, Gische, JJ.

10765 The People of the State of New York, Respondent, Ind. 48932C/05

-against-

Noel Bruno, Jr., Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (David Stadtmauer, J. at severance motion; John W. Carter, J. at jury trial and sentencing), rendered December 3, 2009, convicting defendant of murder in the first degree, murder in the second degree (two counts), attempted murder in the second degree, burglary in the first degree, attempted robbery in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of life without parole, unanimously affirmed.

On the evening of September 20, 2009, Johanna H. and Elvis H. were visiting the apartment that Miguel A. shared with Dilcia T. and her young son. According to Johanna, there was a knock on the door, and three men, one of whom was armed with a gun, forcibly entered and repeatedly threatened to kill everybody if

Miguel did not reveal where the "stuff" was. The men ransacked the apartment, bound the victims with duct tape, and took certain property from them.

Johanna testified that after beating Miguel, one of the men, whom she later identified as defendant, strangled, then shot Miguel. Elvis and Dilcia were also shot to death. Johanna was wounded in the shoulder. Johanna testified that when one of the men saw that she was still alive, defendant straddled her and fired another shot, which Johanna believed struck her right cheek. She also testified that, as the men fled, defendant fired multiple shots behind him and inadvertently struck one of his accomplices, whom she later identified as codefendant Jose Curet, in the arm. After the police arrived, Johanna told them what had happened and described the perpetrators.

The codefendant was arrested at the hospital where he was being treated for his gunshot wound. DNA testing revealed that bloodstains on his clothing belonged to Miguel and Elvis. Police were also given information that led to the arrest of defendant, who had Elvis's cell phone in a bag in his car. Defendant's own cell phone was found under Miguel's body. Defendant made a written statement implicating himself and his codefendant in the crime, but claimed he was not the shooter. Johanna identified defendant in a photo array and defendant and codefendant in

separate lineups.

The court properly exercised its discretion in denying, in part, defendant's request for a severance of his trial from that of his codefendant and instead utilizing separate juries (*see People v Ricardo B.*, 73 NY2d 228, 233-235 [1989]). The court excused defendant's jury during certain portions of the trial pertaining specifically to the codefendant, which minimized any potential prejudice resulting from the two defendants' antagonistic defenses (*see People v Mahboubian*, 74 NY2d 174, 183-184 [1989]). Defendant failed to present sufficiently strong grounds for ordering completely separate trials, given that the proof against the two defendants was supplied by the same evidence (*see id.* at 183). The use of separate juries effectively prevented defendant's jury from hearing unduly prejudicial arguments or evidence relating to the codefendant. To the extent defendant's jury may have heard anything it might not have heard at a separate trial, this did not deprive defendant of a fair trial under the circumstances. In any event, any error in this regard was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). In addition to the eyewitness identification testimony of a surviving victim and defendant's own admissions that tied him to the crime, the evidence showed that defendant

was arrested while in possession of a cell phone belonging to one of the victims and that he left his own cell phone at the scene of the crime. The account of the eyewitness, who had ample opportunity to observe defendant during the commission of the crime, was also consistent with the physical evidence found at the scene. The Crime Scene Unit found that the three deceased victims had been bound with duct tape and that all had gunshot wounds. The medical examiner concluded that Miguel had been strangled and that he had a gunshot wound to the head. A ballistics examination revealed that the shell casings found throughout the apartment were all fired from the same gun.

The court should have permitted defense counsel to conduct some re-cross-examination of a crime scene detective after the codefendant's counsel inquired into new areas on cross-examination that were not addressed in the People's direct examination (*see Spatz v Riverdale Greentree Rest.*, 256 AD2d 207, 208 [1st Dept 1998]). The codefendant's counsel's cross-examination concerned the failure to swab blood from inside the apartment, which, according to defendant, could have led the jury to speculate about whether the codefendant was bleeding in the apartment after being shot by defendant, supporting the codefendant's contention that defendant tried to kill him to eliminate him as a witness. However, the error was harmless. In

addition to the overwhelming evidence of defendant's guilt, it had already been established that the codefendant had been shot and that his DNA matched the blood found in the hallway. The testimony developed by codefendant's counsel related to whether codefendant bled or did not bleed inside the apartment, and did not establish that defendant intended to shoot his codefendant.

Defendant's constitutional argument that the preclusion of his redirect examination violated his right to confront the witness against him is not preserved (*see e.g. People v Lane*, 7 NY3d 888, 889 [2006]; *People v Kello*, 96 NY2d 740, 743 [2001]), and we decline to review it in the interest of justice. As an alternative holding, we find that any constitutional error in this regard was likewise harmless beyond a reasonable doubt (*see People v Eastman*, 85 NY2d 265, 276 [1995]).

When the surviving eyewitness, as a result of an objection by codefendant's counsel, attempted to distinguish defendant from the other perpetrators of the crime by repeatedly referred to him as "the assassin," i.e. the shooter, the court should have promptly directed her to use a more neutral word. However, we find this error to be harmless since the evidence of defendant's guilt was overwhelming, and the error was not unduly prejudicial under the circumstances of the case (*People v Santiago*, 255 AD2d 63, 65-66 [1st Dept 1999], *lv denied* 94 NY2d 829 [1999]).

When asked to elaborate as to why she described defendant as the assassin, the witness, who testified through an interpreter, explained that "he was the one who shot [her]." The term was not defendant's street name or nickname and, thus, did not reference any prior criminal conduct or criminal propensity on his part.

Significantly, the court gave limiting instructions advising the jury that the term assassin was the witnesses's characterization and that "[t]he People have to prove their case beyond a reasonable doubt as to the charges contained in the indictment," and later that it was "allowing [the witness] to use the term 'assassin', solely as a means of identifying and distinguishing among the people that she says were in the apartment that night on September [] 20[,] 2005. Solely for that purpose. You are to draw no other inference from the use of that term" (*see People v Smith*, 97 NY2d 324, 330-331 [2002]). In its final charge the court reiterated that the People must prove each element of the crimes charged beyond a reasonable doubt, including that it was defendant who committed the crime. The court also instructed that the jury should determine whether the testimony of any witness who identified defendant as the perpetrator was both truthful and accurate, setting forth various factors related to identification that the jury should consider. It is presumed that the jury followed the court's instruction

(*see People v Davis*, 58 NY2d 1102, 1104 [1983]). Moreover, the prosecutor did not use the term assassin in his opening statement or closing argument.

Defendant's constitutional argument that the repeated reference to him as the assassin violated his rights to a fair trial and due process is not preserved, and we decline to review it in the interest of justice. Defense counsel's objections were general or evidentiary and failed to alert the trial court of his constitutional claims (*see People v Angelo*, 88 NY2d 217, 222 [1996]). As an alternative holding, we find that the error was not of a constitutional dimension and that in any event the use of the term assassin during trial, which was limited to distinguishing the three perpetrators and their role in the murders, neither absolved the prosecution of having to prove beyond a reasonable doubt that defendant was the shooter, nor undermined the defense that the shooter was the "young kid" referenced in his written statement.

Defendant asserts that his counsel rendered ineffective assistance by referring to him as "the assassin" while cross-examining the witness. This claim is unreviewable on direct appeal because it involves a matter of strategy outside the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent

it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defense counsel may have reasonably decided that after his objection to the use of the term during direct examination was overruled, the best approach was not to attempt to change the witness's word choice but to phrase his questions in a manner clarifying that this was merely the term she had used for defendant. Accordingly, counsel used phrases such as "the person you called 'the assassin'." Defendant has not shown that such a strategy fell below an "objective standard of reasonableness" (*Strickland*, 466 US at 688), or that it had a reasonable probability of affecting the outcome (*id*. at 694).

There is no merit to defendant's assertion that by referring to him as the assassin, his attorney undermined his misidentification defense. At various times during cross-examination, defense counsel attempted to get the eyewitness to admit that she was not focused on and never really got a chance to see "the assassin's" face, that she was not 100% certain when she made her lineup identification of defendant, and that when interviewed after the crime, she did not inform detectives that "the assassin" was wearing a hat. It was obvious to the jury

that the defense was not conceding anything (*see People v Carver*, 234 AD2d 164 [1996], *lv denied* 89 NY2d 1010 [1997]), and the court sufficiently instructed the jury to consider this term only as the witness's way of distinguishing between the participants in the crime.

All of defendant's arguments concerning the autopsy report and the late disclosure of allegedly exculpatory material are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11062-
11063 The People of the State of New York,
Respondent,

-against-

Abdul Rauf,
Defendant-Appellant.

Ind. 571/02

_____

Green & Willstatter, White Plains (Theodore S. Green of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Jodi A. Danzig of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered on or about September 25, 2012, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction of the same court (Phylis Skloot Bamberger, J.), rendered January 15, 2004, unanimously affirmed.

The court properly denied the motion because it was based on claims that were either previously determined on the merits on the direct appeal from the judgment (*see* CPL 440.10[2][a]) or should have been raised on that appeal (*see* CPL 440.10[2][c]; *People v Jackson*, 266 AD2d 163 [1st Dept 1999], *lv denied* 94 NY2d 921 [2000]). In any event, defendant's claims of ineffective assistance by the attorneys who represented him, respectively, at his plea and at a postplea hearing are unavailing.

Under the particular circumstances of this case all of defendant's ineffective assistance claims were reviewable on direct appeal. These circumstances included the presence on the record of defendant's original counsel's advice on the immigration consequences of defendant's plea, and the record of an evidentiary hearing on defendant's plea withdrawal motion, at which defendant was represented by new counsel.

On the direct appeal (90 AD3d 422 [1st Dept 2011], *lv denied* 18 NY3d 927 [2012]), this Court found that defendant failed to establish that he was prejudiced by his first attorney's erroneous immigration advice. We did not suggest that this claim was unreviewable for lack of an expanded record.

Unlike the typical ineffectiveness claim where a CPL 440.10 motion is necessary to expand the record, here defendant has already had a hearing and is essentially seeking a second bite at the same apple. In the alternative, based on all the circumstances of the case, we conclude that the affidavit defendant submitted on the CPL 440.10 motion still does not establish that he would not have pleaded guilty but for the faulty immigration advice.

Defendant's claim that the attorneys who represented him on the plea withdrawal motion also rendered ineffective assistance is rejected on the merits.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11064 Parvin A. Islam, Index 107749/10
Petitioner-Appellant,

-against-

The City of New York,
Respondent-Respondent.

_____

Law Office of Stuart N. Babich, P.C., Jackson Heights (David Stein of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay NG of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered July 5, 2012, which denied petitioner's motion to renew his motion for leave to file a late notice of claim, granted respondent's cross motion to dismiss the proceeding, and dismissed the petition, unanimously affirmed, without costs.

The motion court properly held that it lacked the discretion to deem the late notice of claim timely filed because the statute of limitations for petitioner's negligence claim had already expired (General Municipal Law § 50-e[5]; *Pierson v City of New York*, 56 NY2d 950, 954-955 [1982]; *Harper v City of New York*, 92 AD3d 505 [1st Dept 2012]).

Petitioner's arguments that the original notice of claim was timely and properly served are unpreserved since they were not raised before the motion court (*see Shaw v Silver*, 95 AD3d 416, 417 [1st Dept 2012]).

We have considered petitioner's remaining contentions and find them either unpreserved or unavailing.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11065 Paul Beaubrun, Index 111310/10
Plaintiff-Respondent,

-against-

Anton Boltachev, et al.,
Defendants-Appellants,

Mouhamed Mbengue, et al.,
Defendants-Respondents.

_____

Brand, Glick & Brand, P.C., Garden City (Andrew B. Federman of counsel), for appellants

Jacob Fuchsberg Law Firm, New York (Christopher M. Nyberg of counsel), for Paul Beaubrun, respondent.

Saretsky Katz Dranoff & Glass, LLP, New York (Patrick J. Dellay of counsel), for Mouhamed Mbengue and Morton C. Koplik, respondents.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered November 26, 2012, which denied the motion of defendants Anton Boltachev and Raneen Taxi, Inc. (collectively Boltachev) for summary judgment on the issue of liability, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was injured when, while attempting to enter Boltachev's taxi, he was struck by a taxi driven by defendant Mbengue. The court properly determined that triable issues of fact exist inasmuch as the drivers provided conflicting accounts of the

accident (*see Ramos v Rojas*, 37 AD3d 291 [1st Dept 2007]). Boltachev contends that his taxi was stopped when he was hit in the rear by Mbengue's taxi. Mbengue, on the other hand, maintains that Boltachev's taxi cut off his vehicle in order to pick up a potential customer (plaintiff). The police accident report also does not reflect damage to the rear of Boltachev's cab, and it is not the court's function on a motion for summary judgment to assess credibility (*see id.* at 292). Furthermore, even accepting Boltachev's version of the accident, issues of fact exist as to whether Boltachev violated 34 RCNY 4-11(c) when picking up plaintiff, and whether this violation was a proximate cause of the accident.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11067 ePlus Group Inc., et al., Index 114208/11
Plaintiffs-Appellants,

-against-

SNR Denton LLP,
Defendant-Respondent.

_____

Michael E. Geltner, New York, for appellants.

Dentons US LLP, New York (Edward J. Reich of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 25, 2013, which granted defendant's motion to dismiss the first, second, fourth and fifth counts of the complaint, unanimously reversed, on the law, with costs, and the motion denied.

This action arises out of the alleged breach of a lease for IT equipment and services entered into by plaintiff and the now defunct law firm of Thacher Profitt & Wood (Thacher), a law firm that was organized as a Delaware limited liability partnership with its principal offices in New York. Plaintiff commenced this action against defendant law firm, also a limited liability partnership organized under Delaware law with offices in New York and elsewhere, alleging that it is Thacher's successor in interest under the doctrine of de facto merger and is therefore

liable for Thacher's non-payment.

Contrary to the motion court's determination, New York law applies. Although both defendant and Thacher were incorporated in Delaware, their offices are in New York and the alleged de facto merger took place in New York. Although the court correctly determined that there is a conflict of law, it failed to properly conduct the choice of law analysis. Accordingly, New York's interest in this litigation is sufficient to warrant the application of New York law (*see Serio v Ardra Ins. Co.*, 304 AD2d 362 [2003], *lv denied* 100 NY2d 516 [2003]). Notably, defendant has not asserted that it has any other ties to its place of organization.

We find that under New York law, the complaint properly alleges the elements of a de facto merger, including continuity of ownership (equity partners of Thacher became SNR equity partners), Thacher's cessation of business, and SNR's opening up at the same location with the same people, clients, management and operations (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573 [1st Dept 2001]). We note that there is no basis to conclude that the law in this State with respect to de facto mergers does not apply to limited partnerships (see Limited Liability Company Law §§ 1213, 1216; *Hamilton Equity Group, LLC v Juan E. Irene, PLLC*, 101 AD3d 1703, 1705 [4th Dept 2012]; *Zito v Fischbein Badillo Wagner*

Harding, 2005 NY Misc LEXIS 3526 [Sup Ct NY 2005]).

Additionally, plaintiff has properly alleged facts sufficient to give rise to its claim that defendant should be estopped from denying that it is Thacher's successor in interest based on the theory of quasi-estoppel. Plaintiff alleges, on information and belief, that defendant represented that it is Thacher's successor in interest for the purpose of obtaining a novation on contracts entered into with the federal government (*see American Mfrs. Mut. Ins. Co. v Payton Lane Nursing Home, Inc.*, 704 FSupp2d 177, 192-194 [ED NY 2010]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11068 In re Ariel S., and Others,

Children Under Eighteen
Years of Age, etc.,

Yesenia L.,
Respondent-Appellant,

Ariel S.,
Respondent,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Latham & Watkins, LLP, New York (Michael J. Raine of counsel), for appellant.

_____

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about June 20, 2012, which, upon appellant's admission that she committed civil contempt, ordered her incarcerated for fourteen days, unanimously modified, on the law, the disposition vacated and a suspended judgment substituted therefor, and otherwise affirmed, without costs.

Appellant admitted that she knowingly and willfully violated a court order suspending her visitation rights of her children. As such, the Family Court correctly found appellant in civil contempt (*Matter of McCormick v Axelrod*, 59 NY2d 574, 582-583 [1983]).

We find under the circumstances that the imposition of fourteen days in prison was inappropriate.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11069-
11070-
11071 Index 450493/12

Fabian A. Onetti, et al.,
Plaintiffs-Respondents-Appellants,

-against-

The Gatsby Condominium, et al.,
Defendants-Appellants-Respondents,

Intell 65 East 96, LLC,
Defendant-Respondent,

Omer Realty, LLC, et al.,
Defendants.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Joseph A.H. McGovern of counsel), for appellants-respondents.

Brill & Meisel, New York (Allen H. Brill of counsel), for respondents-appellants.

Ganfer & Shore, LLP, New York (Virginia K. Trunkes of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol Edmead, J.), entered March 9, 2012, which, to the extent appealed from as limited by the briefs, granted defendant Intell 65 East 96, LLC's (Intell) motion for summary judgment, and denied defendant The Gatsby Condominium's (Gatsby) motion for summary judgment with respect to plaintiffs' negligence and breach of contract claims, unanimously modified, on the law, to the extent of denying Intell's motion for summary judgment dismissing plaintiffs'

negligence claim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered May 29, 2012, which granted Gatsby's motion to reargue, and upon granting reargument, adhered to its original decision denying Gatsby's motion for summary judgment dismissing plaintiffs' negligence and breach of contract claims, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 12, 2012, which denied Gatsby's motion for leave to amend its answer to add three counterclaims, unanimously affirmed, without costs.

Intell did not establish its entitlement to judgment as a matter of law on plaintiffs' negligence claim. Contrary to Intell's claim, as the owner of the apartment building, it had a duty to exercise reasonable care in maintaining the property, including the wiring, in a reasonably safe condition under the circumstances prior to the condominium conversion (*see Kush v City of Buffalo*, 59 NY2d 26, 29-30 [1983]). Thereafter, as the sponsor of the condominium conversion, Intell owed a nondelegable duty to plaintiffs to keep the condominium in good repair (*see Liberman v Cayre Synergy 73rd LLC*, 108 AD3d 426 [1st Dept 2013]). Further, there are issues of fact as to whether Intell had actual or constructive notice of the defective electrical wiring that allegedly caused the fire. Intell has not established as a matter of law that the origin of the fire was not within the

"common elements" of the condominium.

For similar reasons, the court properly denied Gatsby's motion for summary judgment. Gatsby had a duty to repair and maintain the "common elements" of the condominium building, and, as noted above, issues of fact exist as to whether the condition that caused the fire was found within the "common elements" or an area considered part of plaintiffs' unit. In addition, issues of fact exist as to whether Gatsby had actual or constructive notice of the allegedly defective electrical wiring.

The court did not abuse its discretion in denying Gatsby's motion for leave to amend its answer to assert counterclaims arising out of plaintiffs' breach of a by-law provision requiring them to obtain property insurance since Gatsby failed to establish that the proposed amended pleading was meritorious (*see Sullivan v Harnisch*, 100 AD3d 513, 514 [1st Dept 2012]). Although there is no dispute that plaintiffs failed to obtain the required insurance, Gatsby has failed to allege any damages proximately caused by plaintiffs' breach. The subject by-law provision cannot be construed as a contract absolving Gatsby from its own negligence or limiting its liability for such negligence to a nominal sum, as it neither required plaintiffs to look

solely to their insurer in the event of a loss nor included an express waiver of any and all claims for such loss against Gatsby (*cf. Abacus Fed. Sav. Bank v ADT Sec. Svcs., Inc.*, 18 NY3d 675, 681-683 [2012]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11072 In re Elaine D. Ward, Index 100341/12
Petitioner,

-against-

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

_____

Law Offices of Jarred Freeman, LLC, Flushing (Jarred Freeman of counsel), for petitioner.

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

_____

In a proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Donna M. Mills, J.], entered on or about March 1, 2012), seeking to annul a determination of respondent the New York City Department of Buildings (DOB), dated September 13, 2011, which, after a hearing, revoked petitioner's master plumbing license upon a finding that she engaged in conduct that violated the New York City Building Code, the petition is unanimously granted in part, to the extent of annulling the penalty of license revocation, and remanding the matter to the agency for imposition of a lesser penalty, and the determination otherwise confirmed, without costs.

Substantial evidence supports respondent's determination that petitioner violated § 26-142 of the Administrative Code of

the City of New York, a/k/a the 1968 Building Code, since renumbered as § 28-408.1 of the Administrative Code of the City of New York, when she applied for a plumbing permit for work at a property, knowing that the owner had hired her to supervise his own worker, rather than one under her direct supervision or employ as required under the Code (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]; CPLR 7803[4]). There is no merit to petitioner's contention that DOB's failure to establish exactly which portion of the work was performed by the owner's worker as opposed to the superseding licensed master plumber, whose subsequent permit application indicated that he took full responsibility for the entire project, meant that DOB failed to establish that the worker impermissibly performed work under petitioner's permit. Rather, the administrative law judge specifically relied upon petitioner's admissions during her sworn interviews with DOB's investigators that she took the job and obtained the permit knowing that the owner insisted on using his own worker, and that she supervised his work on the project until she was fired for telling the owner that the work was not up to code and would require corrective measures by her company's employees.

However, we find that the penalty of revocation was excessive upon considering the following factors: the license is

petitioner's sole means of livelihood; this was the only instance of misconduct in an otherwise unblemished history as a licensed master plumber since 2001; there was no resultant harm to the public or the agency; and petitioner seemingly acknowledged the potential for harm when she informed the owner that his worker's performance was inadequate and proposed that her workers correct the violations (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234-235 [1974]; *cf. Matter of Maggiore v Department of Bldgs. of City of N.Y.*, 294 AD2d 304 [1st Dept 2002]). We note that the record demonstrated that DOB's precedent indicates that in several other instances where licensees have committed similar acts of misconduct by performing work prohibited by the Code and/or submitting false reports or documents to DOB, which potentially placed the public at greater risk of harm than the misconduct at issue here, the agency imposed far less severe penalties.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11073 Ruth Wachspress, etc., Index 107512/09
Plaintiff-Respondent,

-against-

Central Parking System of New York, Inc.,
Defendant-Appellant.

_____

Fixler & LaGattuta, LLP, New York (Jason L. Fixler of counsel), for appellant.

Law Offices of Everett N. Nimetz, Kew Gardens (Everett N. Nimetz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered August 13, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Summary judgment in favor of defendant is warranted in this action where the decedent Marcia Wachspress (decedent) was injured when she tripped and fell over a wheel stop in defendant's parking lot. Defendant established, through photographs, that the particular wheel stops over which decedent fell were open and obvious, readily observable by anyone employing the reasonable use of their senses, and not inherently

dangerous (*see Philips v Paco Lafayette LLC*, 106 AD3d 631 [1st Dept 2013]; *Buccino v City of New York*, 84 AD3d 670 [1st Dept 2011]; *Albano v Pete Milano's Discount Wines & Liqs.*, 43 AD3d 966 [2d Dept 2007]; *Cardia v Willchester Holdings, LLC*, 35 AD3d 336 [2d Dept 2006]).

Contrary to plaintiff's arguments, decedent never testified that she was instructed by the parking lot attendant to take a particular path to the shuttle bus. However, even if she were, that does not render the wheel stops any less open and obvious, or readily observable, nor does it render them dangerous or defective. Similarly, while plaintiff asserts that the wheel stops were not being used in a proper manner, but were used as a barricade, decedent never testified that this use caused her confusion, or contributed to her fall. Nor is there any evidence that such use violated any standard. Plaintiff's argument, that decedent was distracted by the attendant pointing to the shuttle and saying "over there," in response to her inquiry about the shuttle's location, is belied by the record, as the attendant had already pointed and said "over there" before plaintiff turned and

walked several steps. Furthermore, the record is devoid of evidence that defendant failed to maintain the premises in a reasonably safe condition (*cf. Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [1st Dept 2004]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11075 Joseph Kleinplatz, Index 108314/08
Plaintiff-Appellant,

-against-

Karen Burstein,
Defendant-Respondent,

John Does I through X,
Defendants.

_____

Joseph Kleinplatz, appellant pro se.

Judd Burstein, P.C., New York (Judd Burstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 2, 2013, which, after directing a traverse hearing in this action alleging legal malpractice, dismissed the complaint due to improper service, unanimously affirmed, without costs.

Plaintiff commenced this action by service of a summons with notice on October 13, 2008. On October 15, 2008, defendant's counsel served on plaintiff a notice of appearance and demand for complaint. Defendant averred that the complaint was never received following the demand. Plaintiff contended that he served the complaint on October 14, 2008, sending it via first-class mail to defendant's counsel, but he failed to submit clear evidence indicating that such mailing occurred. Under these

circumstances, dismissal of the complaint was proper (*see Forty Cent Park S., Inc. v Kiss*, 40 AD3d 236 [1st Dept 2007]).

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: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11076 Effreny Martinez, et al., Index 302278/12
Plaintiffs-Appellants,

-against-

Alubon, LTD., et al.,
Defendants-Respondents.

_____

Tuckner, Sipser, Weinstock & Sipser, LLP, New York (William J. Sipser of counsel), for appellants.

Paduano & Weintraub, LLP, New York (Meredith Cavallaro of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 2, 2012, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiffs allege that one of defendants' supervisors, who was responsible for assigning plaintiffs work, demanded kickbacks from plaintiffs in exchange for assigning them to a high-paying federally funded project at Pace University (the Pace Project). Plaintiffs refused to pay the kickbacks. They reported the demands to defendant Boneh, who they allege was defendant Alubon's chief executive officer and responsible for all its business decisions. Boneh said he would look into the matter, but, instead, because of their complaints, he directed or authorized that plaintiffs be terminated.

Taking these well pleaded allegations as true and granting plaintiffs the benefit of every favorable inference (*see Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]), we find that plaintiffs have stated a cause of action under Labor Law § 198-b, the anti-kickback statute (*see Chu Chung v New Silver Palace Rest., Inc.*, 272 F Supp 2d 314, 317 [SD NY 2003]). They have stated a cause of action under Labor Law § 193, which prohibits employers from making deductions from employees' wages, except as authorized by the statute (*see Matter of Angello v Labor Ready, Inc.*, 7 NY3d 579, 585-586 [2006]). The protections of section 193 extend not only to completed deductions, but also to "attempted wage deductions" that would violate the statute if consummated (*see Cohen v Stephen Wise Free Synagogue*, 1996 WL 159096, *3-4, 1996 US Dist LEXIS 4240, *11-13 [SD NY 1996]; *Nowicki v Toll Bros., Inc.*, 2012 WL 14258, *2, 2012 US Dist LEXIS 887, *5-6 [ED NY 2012]).

Plaintiffs have stated a cause of action for retaliation under Labor Law § 215 (*see Higueros v New York State Catholic Health Plan, Inc.*, 526 F Supp 2d 342, 347 [ED NY 2007]).

Plaintiffs' allegations support holding their employer vicariously liable for the supervisor's alleged malfeasance (*see Amendolare v Schenkers Intl. Forwarders, Inc.*, 747 F Supp 162, 171 [ED NY 1990]). Their allegations support holding Boneh

personally liable for the Labor Law violations as an "employer" (*see Bonito v Avalon Partners, Inc.*, 106 AD3d 625 [1st Dept 2013]).

Having alleged substantive violations of Labor Law §§ 193, 198-b, and 215, plaintiffs have stated a basis for recovery of damages under Labor Law § 198 (*see Slotnick v RBL Agency*, 271 AD2d 365 [1st Dept 2000]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11078-
11079 In re Jaileen X. M., and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

Annette M., et al.,
Respondents-Appellants,

The Children's Aid Society,
Petitioner-Respondent.

_____

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

Daniel R. Katz, New York, for Herve M., appellant.

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

Michael S. Bromberg, Sag Harbor, attorney for the children.

_____

Orders of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about August 28, 2012, which, upon a fact-finding determination that respondents permanently neglected their children, terminated respondents' parental rights and transferred the custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children Services for the purpose of adoption, unanimously affirmed, without costs.

The agency proved by clear and convincing evidence that it exercised diligent efforts to reunite respondents with their

children and that, despite these efforts, respondents failed to submit to drug testing, and tested positive for narcotics during the statutory period (*see* Social Services Law § 384-b[7][a], [f]; *Matter of Jules S. [Julio S.]*, 96 AD3d 448, 449 [1st Dept 2012], *lv denied* 19 NY3d 814 [2012]; *Matter of Angelica G. [Frank G.]*, 74 AD3d 470 [1st Dept 2010]; *Matter of Dade Wynn F.*, 291 AD2d 218, 218 [1st Dept 2002], *lv denied* 98 NY2d 604 [2002]). Respondents also failed to complete their mental health evaluations and failed to address the anger management issues that interfered with their ability to care for the children (*see Matter of Alexis C. [Jacqueline A.]*, 99 AD3d 542, 542-543 [1st Dept 2012], *lv denied* 20 NY3d 856 [2013]).

Despite the agency's twice referring them for parenting skills classes, respondents did not seem to improve or to gain insight into their children's special needs or the reasons for their placement in foster care. Indeed, the unsupervised visitation extended to respondents twice by the agency had to be suspended because the children were found with bruises and scratches, which respondents failed to adequately explain (*see Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]). A caseworker testified that when the children returned from family visits, their clothing was stained and reeking of urine, and one of the children's diaper

rash was more severe after the children were left in respondents' care (*see Matter of Brandon R. [Chrystal R.]*, 95 AD3d 653, 653 [1st Dept 2012], *lv denied* 20 NY3d 998 [2013]).

While respondent mother contends that the agency failed to provide her with more assistance in overcoming her long battle with drug addiction, the record supports the court's finding that the mother ignored the agency's repeated efforts to reach out to her (*see Matter of Jabar H. [Gabrielle P.]*, 104 AD3d 440, [1st Dept 2013]). In any event, the agency was not charged with guaranteeing respondent's success in overcoming her problems (*id.*). The fact that respondents consistently visited with the children does not preclude a finding of permanent neglect, since clear and convincing evidence established that they failed to plan for their children's future by taking effective steps to correct the conditions leading to the children's removal or to advance a realistic, feasible plan (*see Matter of Nathaniel T.*, 67 NY2d 838 [1986]; *Matter of Jonathan Jose T.*, 44 AD3d 508 [1st Dept 2007]).

A preponderance of the evidence supports the court's conclusion that it was in the best interests of the children to be freed for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Mark Eric R. [Juelle Virginia G.]*, 80 AD3d 518 [1st Dept 2011]). A suspended judgment is not

warranted, since the children have been living for most of their lives with the foster mother, who is equipped to handle their special needs, and they are thriving in her care (*see Matter of Carol Anne Marie L. [Melissa L.]*, 74 AD3d 643 [1st Dept 2010]). Contrary to respondents' contention, they offered no evidence of realistic plans for providing an adequate and stable home for the children (*see Matter of Rutherford Roderick T. [Rutherford R.T.]*, 4 AD3d 213 [1st Dept 2004]). The children have spent six years in foster care, and should not be denied permanence through adoption so that respondents will have more time to demonstrate that they can be fit parents (*see Matter of Isabella Star G.*, 66 AD3d 536, 537 [1st Dept 2009]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11080 The People of the State of New York, Dkt. 12149/12
Appellant,

-against-

Raymond Velez,
Defendant-Respondent.

_____

Robert T. Johnson, District Attorney, Bronx (Clara Salzberg of counsel), for appellant.

Weil, Gotshal & Manges LLP, New York (Layne S.R. Behrens of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about August 9, 2012, which dismissed a misdemeanor information in furtherance of justice, unanimously affirmed.

The court properly exercised its discretion in dismissing the information in furtherance of justice. Contrary to the People's assertions, the court fully considered all of the

relevant factors set forth in CPL 170.40, and reached an individualized decision (*see People v Rickert*, 58 NY2d 122, 126 [1983]; *People v Rivera*, 108 AD3d 452 [1st Dept 2013]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11081- Index 650969/10
11082-
11082A Irv Tregerman, D.D.S.,
Plaintiff-Appellant-Respondent,

-against-

Neal Auerbach, D.D.S.,
Defendant-Respondent-Appellant.

_____

Gallet Dreyer & Berkey, LLP, New York (Morrell I. Berkowitz of counsel), for appellant-respondent.

Ira Daniel Tokayer, New York, for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered August 29, 2012, awarding defendant-counterclaim plaintiff the sum of $174,322.37 as against plaintiff, unanimously affirmed, without costs. Orders, same court and Justice, entered June 15, 2012, and August 15, 2012, which, respectively, to the extent appealed from, upon reargument, vacated the provision in an order, same court and Justice, entered on or about September 15, 2011, granting defendant-counterclaim plaintiff's motion for summary judgment for acceleration of a note, and, inter alia, set forth a payment schedule, with appropriate interest rates, for past due and future amounts owed defendant, consistent with the terms of the note, unanimously affirmed, without costs.

Plaintiff appealed from the September 2011 order (the original decision granting defendant's motion for summary judgment dismissing the complaint and on his counterclaim); according to plaintiff's preargument statement, that appeal would have raised the same issues as his current appeal. After granting him an enlargement of time within which to perfect his prior appeal (*see Tregerman v Auerbach*, 2012 NY Slip Op 86288[U] [1st Dept 2012]), we dismissed it for failure to prosecute (*see Tregerman v Auerbach*, 2013 NY Slip Op 63982[U] [1st Dept 2013]).

"[A] dismissal for want of prosecution bars litigation of the issues which could have been raised on the prior appeal" (*Bray v Cox*, 38 NY2d 350, 354 [1976]). Although we have discretion to entertain a second appeal (*see e.g. Faricelli v TSS Seedman's*, 94 NY2d 772, 774 [1999]), we decline to exercise it in this case (*see Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 756 [1999]). Contrary to plaintiff's claim, the *Bray* rule applies even when there has been a subsequent judgment (*see Cohen v Akabas & Cohen*, 79 AD3d 460, 461-462 [1st Dept 2010]; *Combier v Anderson*, 34 AD3d 333, 334 [1st Dept 2006]).

Furthermore, plaintiff is not aggrieved by the August 2012 orders from which he appeals; they *granted* the relief he had requested by reducing the amount of interest he had to pay.

With respect to the remaining orders, the motion court

properly granted reargument; plaintiff mentioned section 12 of the parties' dissolution agreement in his opposition to defendant's summary judgment motion, so he did not improperly raise it for the first time on reargument. On the merits, the motion court properly determined that, due to the interplay of section 12 and the promissory note, plaintiff was not in default, that, therefore, defendant was not entitled to acceleration of the note, and that statutory interest was not owed from the "date of the breach," but from the date, June 11, 2012, that plaintiff's obligation to pay under the note was determined.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11083 VFS Financing, Index 651434/11
Plaintiff/Counterclaim-Defendant-Respondent,

-against-

Insurance Services Corporation, et al.,
Defendants/Counterclaim-Plaintiffs-Appellants.

- - - - -

Insurance Services Corporation, et al.,
Third-Party Plaintiff-Appellants,

-against-

GE Capital Corporation,
Third-Party Defendant-Respondent.

_____

Stevens & Lee, P.C., New York (Bradley L. Mitchell of counsel), for appellants.

Reed Smith LLP, New York (John L. Scott of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about October 9, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff and third-party defendant's motion to dismiss defendants' counterclaims, second, fourth, sixth, seventh and ninth affirmative defenses, and the third-party complaint, unanimously affirmed, with costs.

Plaintiff seeks to collect the outstanding balance of a loan made to defendants to finance their May 2006 purchase of an aircraft. The integrated loan documents associated with the one-

time transfer of funds to defendants in May 2006 flatly contradict defendants' counterclaims and third-party claims of fraud in the inducement, breach of contract, tortious interference with contract, mutual mistake (reformation), and breach of the duty of good faith and fair dealing (*see* CPLR 3211[a][1]; *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [1st Dept 2006]). Defendants allege that plaintiff, or third-party defendant GE Capital Corporation, plaintiff's parent corporation, either surreptitiously or by mistake, inserted into the May 2006 loan documents a "Prepayment Premium" and a "Make Whole Amount" provision that were not part of the original loan proposal they "accepted." These provisions were included in the re-documentation of the loan in December 2006, which reflected defendant James Loomis's assumption of loan obligations and plaintiff's replacement of GE as the secured party on the loan. Defendants argue that the re-documenting of the loan in December 2006 provided for new, superseding loan terms that obviated their guarantees of the original loan made by GE to defendant Insurance Services Corporation's predecessor in interest in May 2006, and the guarantees were not extended to plaintiff under the re-documented loan. However, the combined documents on this loan transaction were, by their terms, integrated; the original obligations were incorporated by reference into the re-documented

loan, and they did not alter the terms of the guarantees made by defendants or the terms of the consent and transfer agreement signed by each of the guarantors. Further, the original loan documents expressly provided that defendants' obligations on the loan, as obligors and/or guarantors, extended not only to GE, but to GE's subsidiaries and/or assigns. Plaintiff is a wholly owned subsidiary of GE, as plaintiff alleges in the verified amended complaint. This fact is a matter of public record; thus, contrary to defendants' contention, no discovery is required to substantiate plaintiff's corporate relationship to GE. Pre-discovery dismissal of defendants' counterclaims and third-party claims is not premature, since the loan proposal terms relied upon by defendants were expressly stated to constitute nothing more than a proposal, GE and plaintiff reserved their right to require additional documentation if warranted, and the final re-documented terms (i.e., the Prepayment Premium and Make Whole Amount provisions) are not unlike the terms included in the original note. Moreover, not unlike the original loan documents, the re-documented loan included a merger clause, whereby the parties acknowledged that the final loan terms overrode any prior negotiations and/or promises with regard to the financing of the purchase of the aircraft. In this arm's-length transaction between sophisticated, counseled business entities and a

principal – which had had a prior course of dealing – the parties are deemed to have read and understood the terms of the loan documents, which are unambiguous on their face (*see generally*, *HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept 2012]; *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87 [1st Dept 2001]; *see also Silvers v State of New York*, 68 AD3d 668 [1st Dept 2009], *lv denied* 15 NY3d 705 [2010]; *Chemical Bank v Alco Gems Corp.*, 151 AD2d 366 [1st Dept 1989]).

Defendants failed to support their request for leave to amend their pleadings with a proposed amended pleading, or otherwise identify any proposed new pleadings or defenses (*see Dragon Head v Elkman*, 102 AD3d 552 [1st Dept 2013]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11084 Holly Schepisi, et al., Index 650344/08
Plaintiffs-Appellants,

-against-

Todd Roberts, et al.,
Defendants-Respondents.

_____

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for appellants.

Dewey Pegno & Kramarsky LLP, New York (Keara A. Bergin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 21, 2012, which denied plaintiffs' motion for partial summary judgment, and denied plaintiffs Holly Schepisi, Neil McPherson, and Kevin Dragan's (the individual plaintiffs) motion to dismiss defendant Todd Roberts's counterclaims against them, unanimously affirmed, with costs.

In addition to the individual plaintiffs, plaintiffs consist of Aegis Alabama Venture Fund, LP (Alabama Fund), Aegis Alabama Venture Fund GP, LLC (Alabama GP), Aegis Texas Venture Fund II, LP (Texas II Fund), and Aegis Texas Venture Fund II GP, LLC (Texas II GP) (collectively, the fund entities).

The motion court correctly denied plaintiffs' motion for summary judgment in their favor on several issues that would be dispositive of the majority of their causes of action. The

contractual terms in the applicable operating agreements are ambiguous, and, pursuant to Delaware and Alabama law, which govern the operating agreements, there are triable issues of fact (*GMG Capital Invs., LLC v Athenian Venture Partners I, L.P.*, 36 A3d 776, 784 [Del 2012]; *Employees' Benefit Assn. v Grissett*, 732 So2d 968, 975 [Ala 1998]). One provision in the agreements seems to authorize defendant Todd Roberts to contract with and retain defendant TMR Bayhead Securities, LLC, which he wholly owned, notwithstanding any other provision. The other provision requires that any transactions involving a conflict of interest have supermajority approval of the non-conflicted members, notwithstanding any other provision. As it is unclear which provision authorized or did not authorize Roberts's conduct in entering into the disputed transaction with Bayhead, the agreements are ambiguous as written, and, in finding that triable issues of fact exist, the court properly relied on Roberts's testimony that the provision requiring supermajority approval was intended to apply only after the funds closed.

The court also correctly relied on Roberts's detailed testimony, notwithstanding the lack of certain documentary evidence, in concluding that issues of credibility exist whether Bayhead performed any services in exchange for their payment.

In light of these conclusions, plaintiffs cannot prevail on their motion for summary judgment regarding whether defendant Roberts's interests in the funds at issue were properly terminated for cause and regarding the damages they seek. Similarly, as plaintiffs acknowledge, Roberts's counterclaims against the individual plaintiffs relate to the same factual issues regarding the propriety of his conduct in entering into an agreement with and making payments to Bayhead; accordingly, the motion court correctly denied the individual plaintiffs' motion to dismiss.

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11085N TMR Bayhead Securities, LLC, et al., Index 115387/08
Plaintiffs-Respondents,

-against-

Aegis Texas Venture Fund II, LP, et al.
Defendants-Appellants.

_____

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for appellants.

Dewey Pegno & Kramarsky LLP, New York (Keara A. Bergin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered May 30, 2012, which, inter alia, granted plaintiffs TMR Bayhead Securities LLC and Todd Roberts's motion to compel defendants (fund entities) to reimburse and advance legal fees and costs incurred on behalf of Roberts in defending against a suit commenced by, inter alia, the fund entities, unanimously affirmed, with costs.

The motion court properly granted Roberts' request for advancement of fees. Contrary to the fund entities' contentions, the requested fees were not excessive or unreasonable, and Roberts's counsel submitted detailed documentation to substantiate those fees. Roberts's counsel's representation that the work done during the relevant time period would not have been any less had Bayhead, wholly owned by Roberts, not been named as

a defendant, sufficed for the court to conclude that a portion of legal fees need not be allocated to Bayhead for this time period (*Ficus Invs., Inc. v Private Capital Mgt., LLC*, 63 AD3d 611, 612 [1st Dept 2009]). Pursuant to the applicable laws governing the agreements regarding advancement of legal fees, Roberts was entitled to advancement of costs to cover his counterclaims, which largely arise from the same facts as the fund entities' claims against him in the companion action (*see Duthie v CorSolutions Med., Inc.*, 2009 WL 1743650, *2-3 [Del Ch June 16, 2009]; *Zaman v Amedeo Holdings, Inc.*, 2008 WL 2168397, *34-35 [Del Ch 2008]).

The fund entities' argument as to the motion court's denial of their motion to renew is not properly before this Court, since the fund entities have not yet filed a notice of appeal from that order (*see Weinstein v Gindi*, 92 AD3d 526, 540 [1st Dept 2012]), and their arguments refer to matters outside the scope of the

appellate record that were not before the motion court when it decided the order on appeal (*see Matter of Kent v Kent*, 29 AD3d 123, 130 [1st Dept 2006]; *Hecht v City of New York*, 60 NY2d 57, 61-62 [1983]).

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

ENTERED: NOVEMBER 14, 2013

CLERK

Tom, J.P., Mazzarelli, Freedman, Richter, Feinman, JJ.

11086N Geraldine Hopper, Index 22431/05
Plaintiff-Respondent,

-against-

Premier Coach, Inc., et al.,
Defendants,

Bianka Perez Vega,
Nonparty Appellant.

_____

Herman Kaufman, Rye, for appellant.

Rheingold, Valet, Rheingold, McCartney & Giuffra LLP, New York (Sherri L. Plotkin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Barry Salman, J.), entered on or about April 13, 2012, which granted the motion of plaintiff's current counsel to confirm the report of the Judicial Hearing Officer recommending the division of a contingency fee award between current counsel and nonparty appellant, unanimously affirmed, without costs.

The report of a JHO should be confirmed "whenever the findings contained therein are supported by the record and the [JHO] has clearly defined the issues and resolved matters of credibility" (*Nager v Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997]). Here, the JHO considered the appropriate factors in apportioning the contingency fee, including the hours

worked, the quality of the work and the result (*Castellanos v CBS Inc.*, 89 AD3d 499 [1st Dept 2011]). Appellant former counsel points to nothing in the record that indicates the JHO overlooked or misconstrued any of the relevant facts or law. As such, the IAS court properly confirmed the recommendation.

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

ENTERED: NOVEMBER 14, 2013

CLERK