SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 1, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Gische, Clark, JJ.

10433 The People of the State of New York, Ind. 1730/99
Respondent,

-against-

Angie Codina,
Defendant-Appellant.

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

Ronald R. Benjamin, Binghamton, for appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered June 24, 2004, as amended July 29, 2004, convicting defendant, after a jury trial, of scheme to defraud in the first degree, grand larceny in the third degree (10 counts), grand larceny in the fourth degree, and practicing or appearing as an attorney-at-law without being admitted and registered (12 counts), and sentencing her to an aggregate term of 5 to 15 years, unanimously affirmed.

Defendant is an attorney licensed in Canada who founded and operated a law firm called Codina Partners International (CPI). In 1996, defendant opened an office in Manhattan to handle immigration matters. Defendant has never been a member of the bar of New York or of any other state of the United States. The complainants are former clients of CPI who visited CPI's New York office, and subsequently retained the firm, between January 4, 1996 and February 28, 1999, in connection with their efforts to obtain documents necessary for them to legally live and work in the United States or Canada. The clients all testified at trial that they retained CPI based on their belief that defendant was licensed to practice law in New York. They further testified that they never received the services they paid for and did not receive the refunds that they demanded. After several of the complainants reported defendant to the police and the Departmental Disciplinary Committee, the New York Attorney General (AG) opened an investigation.

The AG executed a search warrant and seized defendant's office files. Defendant was subsequently charged in three indictments, covering crimes including grand larceny, scheme to defraud, and the unlicensed practice of law (28 counts in total). Although the AG acted on the matter as early as March 1998, it

was not until February 4, 1999, that the New York State Police formally requested the AG to act, which gave the latter jurisdiction pursuant to Executive Law § 63(3). Thereafter, the AG presented its case to a grand jury, which returned indictments against defendant.

At her first trial, defendant conceded that she was not admitted to practice law in New York or in any other state and that although she had been admitted as a barrister and solicitor in Ontario, Canada, she had been suspended after she was convicted in Ontario in 1997 of fraud and falsification of books. A jury convicted her of all but a single grand larceny count, and she was sentenced to an aggregate term of 9-1/3 to 28 years. This Court reversed the judgment, finding that the AG had executed the search warrant at defendant's office prior to obtaining jurisdiction under Executive Law § 63(3). The evidence seized pursuant to the warrant was suppressed and a new trial ordered (297 AD2d 539 [1st Dept 2002], *lv dismissed* 98 NY2d 767 [2002]). However, this Court rejected defendant's argument that she was entitled to dismissal of the indictment (*id.* at 540-541). This finding was based on the grand jury's having heard testimony from former clients of CPI who appeared voluntarily.

The AG presented 15 witnesses at the retrial, all of whom

had retained CPI to assist them in obtaining legal immigration status. None of the witnesses testified that defendant ever explicitly represented that she was licensed to practice law in New York, or in the United States for that matter. However, many of the witnesses testified to having learned about CPI through a newspaper advertisement bearing defendant's image and promoting her as an immigration attorney who could assist clients seeking legal status in the United States and Canada. Most of the witnesses further stated that when they first appeared for their appointments at CPI they saw a sign on the door of the office, which they variably described as identifying the office as belonging to "Codina Partners International, attorney-at-law," "Angie Codina, attorney-at-law, Codina Partners International," "Codina, attorney-at-law, law services," or "Codina Partnership, Law Office." Most of the witnesses claimed that defendant assured them that she would achieve the result they desired and then refused to refund their money when they demanded it. They all testified that they would not have retained CPI if they had known Codina was not licensed in New York.

Also testifying for the AG was Richard Friedman, an investigator, who stated that defendant first came to his attention in November of 1997 when one of CPI's clients filed a

complaint with the AG. Friedman testified that he visited CPI's office, where the sign read, "Codina Partners International Limited, Attorneys At Law." During his investigation, he learned that defendant was not admitted to practice law in the United States, but that two or three of her employees were members of the New York bar. He stated that in March 1998 he executed a search warrant at CPI's office and seized computers and boxes of client files. Friedman reviewed the materials and found no evidence that the United States or Canada had approved any of the immigration applications of defendant's clients. One of the advertisements in the materials contained a photograph of defendant, indicated that she was licensed to practice law in Canada, and provided a "generic reference" to attorneys at defendant's firm and where they were admitted.

Defendant testified that she was a Canadian immigration attorney who built an international practice under the CPI name, including opening a New York office in 1996 with 20 employees. She stated that the New York office handled immigration cases exclusively, for clients seeking legal status in either the United States or Canada, although the vast majority of the applications were for Canadian immigration. Defendant conceded that she was not admitted to practice in New York, and did not

practice in the New York State courts, but stated that the office in New York employed four attorneys admitted to practice in New York.

Defendant testified that the sign on her office front door read, "Codina Partners International, attorneys at law," and that she used a "standard" advertisement to promote CPI's services that was translated into various languages and placed in a number of publications. The ad stated that the firm specialized in immigration to the United States and Canada, listed the specific areas of CPI's immigration practice, identified CPI's various offices, and contained a photograph of defendant, which included a statement identifying her as a "barrister, solicitor, or attorney at law in Canada." The ad also described her work in Canada, and stated that she was licensed to practice in Canada. Defendant stated that the ad said nothing "about the practice of law in New York." She acknowledged that the ad did not contain a disclaimer that she was unlicensed in New York or that she was admitted only in Canada, but noted that her profile mentioned her experience and credentials in Canada.

Defendant acknowledged that nothing in the CPI retainer agreement indicated that the client understood that defendant was

not an attorney admitted to practice in New York. However, she testified that she never "expressly misrepresented" that she was licensed to practice in New York, and claimed that her status in New York was "irrelevant" to her immigration practice.

Trial evidence is legally sufficient to support a conviction if, viewed in the light most favorable to the People, it could lead a rational jury to find the defendant guilty beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 349 [2007]). A jury's verdict is supported by sufficient evidence if the evidence presented supports "any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). A weight of the evidence review requires a court "first to determine whether an acquittal would not have been unreasonable" (*see Danielson*, 9 NY3d at 348). If such a determination is made, the court "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*id.*). The court then decides based on the weight of the credible evidence whether the jury was justified in finding defendant guilty beyond a reasonable doubt (*id.*) The reviewing court should afford "great deference to the fact-finder's

opportunity to hear testimony and observe demeanor" (*People v Walcott*, 88 AD3d 517, 517 [1st Dept 2011]).

To establish that defendant committed the crime of larceny by false pretenses, the AG was required to provide evidence proving that the defendant (1) obtained title or possession of money or personal property of another, (2) by means of an intentional false statement, (3) concerning a material fact, (4) upon which the victim relied in parting with the property (*see People v Drake*, 61 NY2d 359, 362 [1984]). The false statement need not be explicit (*see People v Norman*, 85 NY2d 609, 625 [1995]; *People v Rohrberg*, 22 AD3d 421, 422 [1st Dept 2005], *lv denied* 6 NY3d 852 [2006]). With respect to the crime of scheme to defraud in the first degree, the AG was required to prove that defendant "engage[d] in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtain[ed] property with a value in excess of one thousand dollars from one or more such persons" (PL § 190.65[1][b]).

Viewing the evidence in the light most favorable to the AG, as we must (*People v Contes*, 60 NY2d 620, 621 [1983]), we find that the evidence was sufficient to convict defendant. It was

not unreasonable for the jury to have concluded that by promoting herself in an advertisement as being a lawyer specializing in immigration, and having an office in New York, defendant intended to signal that she was licensed to practice in New York. That some of the lawyers working in the office were admitted in New York is of little moment, since defendant traded almost exclusively on her own reputation and expertise in seeking to attract clientele. Further, the fact that defendant's advertisements made clear that she was admitted to practice in Canada did not preclude the possibility that a client would reasonably believe that she was also admitted in New York, but found it unnecessary to publicize that fact based on her location in Manhattan.

It was also not irrational for the jury to conclude that defendant had an economic motive for concealing her lack of a New York license, despite the fact that such a license was not necessary to process her clients' immigration applications. Aside from the cachet that prospective clients would have attributed to having a lawyer who was a member of the New York bar, the jury could have concluded that CPI's clients valued the fact that the attorney they retained was subject to the jurisdiction of local disciplinary authorities if they were

unsatisfied with defendant's work (as many of them were). Indeed, it is clear that CPI's clients placed a large premium on defendant's bar status, given that each of them testified that they would not have retained the firm had they known that defendant was not admitted to practice in New York.

Although our conclusion that defendant deceived her clients is based partially on the fact that her advertisements, retainer agreements and other documents failed to disclose that she was not admitted in New York, we note that those documents were not available for our review. That is because the AG inadvertently lost its files. Defendant maintains that the trial transcript, without the documents, contains sufficient information for us to conclude that the relevant documents were not likely to deceive a reasonable person into believing that she was a member of the New York bar. However, she posits that if we reject that conclusion we are nonetheless required to reverse her conviction because the witnesses' descriptions of the documents were not sufficient to establish the converse proposition - namely, that the documents were likely to lead a reasonable person to conclude that she was admitted in New York. She claims that without the exhibits we are incapable of conducting a meaningful appellate review.

We disagree. First, it is incongruous for defendant to

argue that the testimony regarding the documents was clear enough to acquit her, but not clear enough to convict her. In any event, defendant has not specifically demonstrated how a review of the documents would add to the information that we already know based on witness testimony. Also, because there is no basis to conclude that "the case was 'so wholly or largely dependent upon documentary evidence that there would be no proof and could be no judgment without the documents,'" a reversal based on the AG's loss of its file is not necessary (*People v Yavru-Sakuk*, 98 NY2d 56, 59 [2002], quoting *People v Strollo*, 191 NY 42, 66 [1908]). Indeed, we are able to discern from the witnesses' testimony in the record that the conviction was based on legally sufficient evidence and was not against the weight of the evidence.

Defendant makes several other arguments which she maintains warrant reversal. First, she claims that the indictments should be dismissed, regardless of the evidence against her, based on the AG's procedural error, which led to our reversal of her initial conviction. However, under the law of the case doctrine, an appellate court's resolution of an issue on a prior appeal is binding on the trial court, as well as on the appellate court, and operates to foreclose reexamination of the question absent a

showing of subsequent evidence or change of law (*see Kenney v City of New York*, 74 AD3d 630, 630-631 [1st Dept 2010]; *Board of Mgrs. of the 25 Charles St. Condominium v Seligson*, 106 AD3d 130, 135 [1st Dept 2013]). In the prior appeal, this Court expressly rejected the argument that the indictments should be dismissed. Defendant has failed to show that the prior ruling was manifestly erroneous. Contrary to defendant's position, while the files themselves were properly suppressed, this Court was not required to exclude the grand jury witness testimony of witnesses whose identities were derived from those files as fruit of the poisonous tree. The AG's seizure in violation of the Executive Law was not a constitutional violation giving rise to the operation of that principle (*see Wong Sun v United States*, 371 US 471, 484-485 [1963]), especially since the witnesses testified voluntarily (*see People v Mendez*, 28 NY2d 94 [1971], *cert denied* 404 US 911 [1971]).

Further, unlike in the cases relied on by defendant holding that dismissal of an indictment is required where the AG lacked statutory jurisdiction to prosecute because of the absence of a referral, here the AG obtained the requisite § 63(3) referral before presenting the case to the grand jury. In addition, defendant's claim that the Judiciary Law counts based on

practicing law without a license should be dismissed because they concern matters over which the referring agency, the State Police, has no authority, is without merit. The Division of State Police has general authority to execute all laws within the State of New York (*see* Executive Law § 223[1]), and violations of Judiciary Law § 478 therefore relate to "matters connected with" the Division so as to make the referral effective (*see* Executive Law § 63[3]).

Defendant also contends that she was deprived of her right to counsel because the trial denied her day-of-trial motion to reassign trial counsel. Instead, the court offered her the option of proceeding pro se, or continuing with assigned counsel on the condition that she waive her right to seek a declaration that counsel's assistance was ineffective because he refused to pursue her position that the indictments were invalid, and on the condition that she drop her insistence on counsel filing a speedy trial motion that he believed to be meritless. Defendant contends that she did not make a true voluntary waiver of counsel, and that the court failed to conduct the requisite "searching inquiry" to determine that she had accepted the risks of proceeding pro se.

Where a defendant requests the assignment of new counsel, the

court must exercise its discretion to determine if "good cause" exists by considering whether counsel is reasonably likely to afford a defendant effective assistance and whether the defendant has unduly delayed in seeking a new assignment (*see People v Smith*, 18 NY3d 588, 592-593 [2012]). A conflict of interest or other irreconcilable conflict with counsel may be good cause for a substitution, but courts have upheld refusals to assign substitute counsel where "tensions between client and counsel on the eve of trial were the precipitate of differences over strategy or where a defendant was guilty of delaying tactics" (*id.* at 593 [internal quotation marks omitted]). To be effective, a defendant's waiver of the fundamental right to counsel must be unequivocal, voluntary and intelligent, and trial courts should undertake a sufficiently searching inquiry to be reasonably certain that a defendant appreciates the dangers and disadvantages of giving up that right (*see People v Smith*, 92 NY2d 516, 520 [1998]).

Here, the trial court providently exercised its discretion in refusing to grant defendant's untimely motion to substitute counsel, based on its finding that counsel was an experienced attorney who was prepared for trial and that the motion was an attempt to delay the trial. Further, the record does not support

defendant's claim that her choice to proceed pro se was involuntary because the court had imposed conditions on the option to proceed with counsel. Although the court told defendant that if she wanted counsel to represent her, she had to withdraw her ineffectiveness claims, defendant ultimately chose self-representation voluntarily, after counsel refused to file motions that he deemed frivolous and refused to subpoena witnesses he considered unhelpful.

In addition, the court's requirement that defendant withdraw her allegations of ineffectiveness was not constitutionally offensive, and was necessary to prevent defendant from strategically introducing error into the trial. As noted by the AG, the court's refusal to permit defendant to proceed with counsel and at the same time accuse him of ineffectiveness was merely an effort to thwart defendant's attempt at gamesmanship. Given the record above, the court's inquiry into whether defendant, who was a Canadian lawyer, appreciated the risks of giving up the right to counsel was sufficient. The court reminded her of those risks and she acknowledged them, but opted to represent herself because of the strategic differences she had with counsel.

Defendant further asserts that she was denied her

constitutional right to present a defense because the court refused to admit evidence of her successes on behalf of satisfied clients, precluded the admission of legal opinions stating that immigration practice is not legal practice, and precluded evidence regarding the AG's purported lack of jurisdiction. Defendant argues that evidence of her successes would have shown that the prosecution's witnesses were a small number of dissatisfied customers and that there was a far larger number of satisfied customers, which would have undermined the prejudicial impression that she and CPI made numerous errors on behalf of clients. This position lacks merit. Evidence that defendant had many satisfied customers was not relevant to the question of whether she stole from and defrauded the identified clients. Since the proffered evidence did not support any valid defense, its exclusion did not impair defendant's right to present a defense (*see People v Schlick*, 45 AD3d 436 [1st Dept 2007], *lv denied* 10 NY3d 771 [2008]).

The court correctly excluded legal opinions holding that immigration practice was not the practice of law. The matter is a question of law to be decided by the court and charged to the jury, not a question of fact to be proven by the parties through the introduction of evidence. Defendant failed to preserve her

claim with respect to the exclusion of evidence relating to the AG's purported lack of jurisdiction to bring the indictments. In any event, as discussed above, the ruling was dictated by the law of the case. The court's preclusion of the testimony of another CPI attorney was appropriate. Further, while defendant challenges the preclusion of a Labor Department application submitted by another CPI attorney on behalf of a client, it appears that the application was ultimately admitted into evidence. We reject defendant's arguments regarding her attempt to introduce evidence of successful visa applications made on behalf of clients, as well as the outcome of civil suits brought by her clients, since the proffered evidence was not relevant. Defendant's other claims asserting improper exclusion of certain proffered evidence are unpreserved, and we decline to review them.

We reject defendant's claim that the court improperly instructed the jury that the false material statement required to support the crimes of scheme to defraud and grand larceny could be "express or implied." As previously noted, larceny by false pretenses may be committed through an express or implied misrepresentation (*see Norman*, 85 NY2d at 625). While there is no question that the court erred in instructing the jury that the

scheme to defraud count required the deception of "one or more persons," the claim is unpreserved and we decline to review it. Moreover, the error was harmless. The jury convicted defendant of all eleven counts of grand larceny, each of which was necessarily based on defendant's having intentionally stolen property from at least eleven people through false representations about her legal credentials. Given that, there is no reasonable possibility that the jury convicted defendant of scheme to defraud based on her intent to defraud, or to obtain property from, only one person.

Nor is reversal warranted by comments made by the court during the trial or by the prosecutor during summations, most of which were made outside the presence of the jury. To the extent the court intervened or made arguably disparaging remarks in the presence of the jury, its conduct did not improperly interfere or pervasively denigrate defendant and her arguments so as to deprive her of a fair trial. Defendant's objections to the AG's summation were unpreserved. Furthermore, the statements were either fair comments on the evidence or within the permissible bounds of rhetorical expression.

Finally, there is no merit to defendant's argument that the unauthorized practice of law counts must be dismissed as

duplicitous because they allege two distinct crimes: holding herself out as an attorney and practicing as an attorney without being licensed in New York. Acts that separately and individually make out distinct crimes must be charged in separate and distinct counts, "and where one count alleges the commission of a particular offense occurring repeatedly during a designated period of time, that count encompasses more than one offense and is duplicitous" (*People v Keindl*, 68 NY2d 410, 417-418 [1986]). However, "[t]he conviction upon a count of an indictment that is originally duplicitous does not mandate reversal if the deficiency is ultimately cured" *(People v Retti*, 224 AD2d 333, 334 [1st Dept 1996], *lv denied* 88 NY2d 940 [1996]).

Here, defendant argued before and during trial that the unauthorized practice of law counts were duplicitous because they alleged both "holding out" and "practicing" without a license. However, in its charge regarding the alleged violations of Judiciary Law § 478, the court instructed the jury to consider

only whether defendant had held herself out as a New York attorney without being licensed and admitted in the State. Thus, even if the counts as alleged in the indictment were duplicitous, the instructions of the court cured that deficiency.

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10610 The People of the State of New York, Ind. 2620/06
Respondent,

-against-

William Hill,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Martin J. Foncello of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles Tejada, J. at suppression hearing; Bruce Allen, J. at jury trial and sentencing), rendered March 1, 2010, convicting defendant of murder in the second degree and robbery in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. The hearing evidence establishes that defendant's confessions were voluntary (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). There is no basis for disturbing the court's credibility determinations, which are supported by the record. The fact that the court may have labeled both prosecution and defense witnesses as generally

"credible," even though they gave testimony that conflicted on material issues, did not render the court's findings contradictory or unworthy of deference. In making its findings, court was entitled to selectively accept or reject portions of each witness's testimony. In particular, the court found that defendant never invoked his right to counsel, either personally or through his brother, and that the police did not make any improper use of defendant's brother as an agent to induce defendant to make a statement.

The court properly admitted a surveillance videotape that was adequately authenticated by the testimony of a detective who, while working a second job for a security company, hooked up the surveillance cameras to the video recorder and checked on a daily basis that the system was functioning properly (*see People v Patterson*, 93 NY2d 80, 84-85 [1999]). The detective's testimony, when viewed in the light of common sense, supports the conclusion that the videotape accurately and completely depicted the events at issue. The detective testified to the unaltered condition of the tape, and any gaps in the chain of custody went to the weight

to be accorded the evidence, not its admissibility (*see People v Hawkins*, 11 NY3d 484, 494 [2008]; *People v McGee*, 49 NY2d 48, 59-60 [1979], *cert denied sub nom. Waters v New York*, 446 US 942 [1980]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10611 In re Myasia C.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about May 23, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of menacing in the second degree and criminal possession of a weapon in the fourth degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The record supports the court's determination that, notwithstanding an identification procedure suppressed by the court, each of the witnesses at issue had an independent source

for his or her identification of appellant (*see Neil v Biggers*, 409 US 188, 199-200 [1972]; *People v Williams*, 222 AD2d 149 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]). Each witness had an ample opportunity to see appellant during the altercation, which occurred over three to four minutes in a well-lit building. Furthermore, although the witnesses did not know appellant by name, they had not only seen her on numerous prior occasions, but were familiar with her as the result of earlier instances of threatening behavior.

The court properly denied that portion of appellant's suppression motion that sought a hearing under *Dunaway v New York* (442 US 200 [1979]) concerning the legality of the arrest that resulted in her identification by the witnesses. The allegations in appellant's moving papers, when considered in the context of the information provided to appellant, were insufficient to create a factual dispute requiring a hearing (*see People v Mendoza*, 82 NY2d 415 [1993]). Appellant was on notice that the factual predicate for her arrest was an incident of alleged menacing and possession of a knife that had occurred several days

before the arrest. Appellant did not specifically deny those allegations or assert any other basis for suppression (*see People v Jones*, 95 NY2d 721, 728-729 [2001]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10612 Amy Rodriguez, Index 301372/10
Plaintiff-Appellant,

-against-

Bronx Zoo Restaurant, Inc., et al.,
Defendants-Respondents.

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Raskin & Kremins, L.L.P., New York (Andrew Metzar of counsel), for appellant.

Law Office of Lori D. Fishman, Tarrytown (Lori D. Fishman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 17, 2012, which granted defendants' motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion denied.

Plaintiff correctly contends that defendants failed to satisfy their prima facie burden since they did not submit evidence sufficient to establish that they did not have constructive notice of the hazardous icy condition on the sidewalk in front of their franchise restaurant on which plaintiff allegedly slipped (*see Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [1st Dept 2009]). In cases involving slip and falls on icy sidewalks, a defendant moving for summary judgment must proffer evidence from a person with personal knowledge as to

when the sidewalk was last inspected or as to its condition before the accident (*see id*; *Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566 [1st Dept 2010]).

Here, the climatological records reflect that the area had last received precipitation two days prior to the January 17, 2009 accident, and that the temperature remained below freezing during the interim period. Defendants' supervisor, who only visited that franchise twice per week, attested that the employees would typically respond to winter storms by shoveling the sidewalk, and then applying rock salt. However, she had no personal knowledge of whether this procedure was followed in response to this storm, did not aver that she was present on either the day of the storm or the accident, and offered no evidence as to when the sidewalk had last been inspected or cleaned of snow, ice, or other debris. Hence, defendants' evidence was "not probative of lack of actual or constructive notice," and the evidence of their general procedures, standing alone, was insufficient to satisfy their burden on summary judgment (*see De La Cruz* at 566). As defendants failed to meet their initial burden, the motion should have been denied regardless of the sufficiency of plaintiff's opposition papers

(*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Were we to find that defendants met their burden on the motion, we would find that plaintiff raised triable issues of fact as to whether defendants had constructive notice of the icy condition, as there had been no further precipitation since the storm two days before the accident, and plaintiff and her mother both described the hazard as a patch of black ice, and averred that the sidewalk was dirty or filthy, raising the inference that the condition could have been present for up to two days (*see e.g. De La Cruz* at 566-567; *Santiago v New York City Health & Hosps. Corp.*, 66 AD3d 435 [1st Dept 2009]; *Gonzalez v American Oil Co.*, 42 AD3d 253, 256 [1st Dept 2007]).

All concur except Friedman, J.P. who concurs in a separate memorandum as follows:

FRIEDMAN, J.P. (concurring)

Although I concur in reversing the order granting defendants' summary judgment motion, I write separately because I believe that the majority addresses issues that need not be resolved to decide the appeal. In brief, plaintiff alleges that she slipped and fell on a patch of black ice on the sidewalk in front of defendants' restaurant. Assuming without deciding that defendants' submissions in support of their summary judgment motion satisfied their burden to establish a prima facie entitlement to judgment as a matter of law, the climatological records submitted by plaintiff in opposition raised a factual issue as to whether defendants had constructive notice of the icy condition on the sidewalk. Specifically, those records reflect that the temperature last rose above freezing on January 14, three days before the date of the accident (January 17), and that accumulated precipitation had been on the ground continuously since January 10. From this data, it may reasonably inferred that the ice patch had formed from the melting and re-freezing of accumulated snow or ice pellets more than two days before the accident, and defendants could reasonably be found to have had constructive notice of an icy condition that had been present for

more than two days (*see Santiago v New York City Health & Hosps. Corp.*, 66 AD3d 435, 435-436 [1st Dept 2009] [the presence of an icy condition for more than 24 hours raised an issue of constructive notice]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10617 The People of the State of New York, Ind. 5458/11
Respondent,

-against-

Martin Kelly,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about February 29, 2012, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10618- Index 100106/08
10618A-
10618B Parvin Amini,
Plaintiff-Appellant,

-against-

Arena Construction Co., Inc., et al.,
Defendants-Respondents,

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

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Milene Mansouri P.C., Kew Gardens (Milene Mansouri of counsel), for appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Arena Construction Co., Inc., respondent.

Pillinger, Miller & Tarallo, LLP, Elmsford (J. McGarry Costello of counsel), for The Halcyon Construction Corporation, respondent.

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Orders, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 12, 2011, which granted the respective motions of defendants Arena Construction Co., Inc. and the Halcyon Construction Corporation for summary judgment dismissing the complaint and any cross claims as against them, and order, same court and Justice, entered on or about August 12, 2011, which, to the extent appealed from, denied so much of plaintiff's cross motion as sought to strike defendants' answers,

unanimously affirmed, without costs.

In this personal injury action arising from plaintiff's alleged trip and fall over a pothole in a crosswalk on 48th Street at Park Avenue, defendant contractors, Halcyon and Arena, made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidence that they did not perform work connected to the defect at issue (*see Jones v Consolidated Edison Co. of N.Y., Inc.*, 95 AD3d 659, 660 [1st Dept 2012]; *Robinson v City of New York*, 18 AD3d 255, 256 [1st Dept 2005]). Although Arena contracted with Metro North to perform surface rehabilitation and underground structural repairs in the area of plaintiff's fall, the evidence shows that this work was not performed until after plaintiff's accident. Further, although Halcyon had a permit permitting it to create an opening large enough to encompass the crosswalk, the evidence shows that its work was performed at least 500 feet away from the crosswalk (*see Bermudez v City of New York*, 21 AD3d 258 [1st Dept 2005]).

Plaintiff's expert affidavit failed to raise a triable issue of fact, as his opinion was vague, speculative, and not based on the evidence adduced (*see Ortner v City of New York*, 50 AD3d 475 [1st Dept 2008]). Additionally, his site inspection occurred years after the accident, after the area had been repaved;

accordingly, his observations have no probative value (*see Gilson v Metropolitan Opera*, 15 AD3d 55, 59 [1st Dept 2005], *affd* 5 NY3d 574 [2005]).

Plaintiff failed to demonstrate that facts essential to his opposition to the summary judgment motions may exist but could not be stated (CPLR 3212[f]). The record shows that Halcyon performed no work at the crosswalk at issue, and plaintiff does not point to any item of outstanding discovery that might show otherwise. Although plaintiff demanded subterranean progress photographs and schematics from Arena, Arena submitted, in compliance with a prior court order, an affidavit explaining that, due to security concerns, those items could not be provided without permission from Metro North. In any event, the work logs from the project confirm that no structural work had been performed before plaintiff's accident, and the schematics of Arena's work are irrelevant as to timing.

The court properly denied plaintiff's cross motion to strike

defendants' answers, as plaintiff failed to show that defendants had a willful and contumacious pattern of disobeying court orders and failing to comply with disclosure obligations (*see Marte v City of New York*, 102 AD3d 557, 558 [1st Dept 2013]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10619 The People of the State of New York, Ind. 4696/09
Respondent,

-against-

Derrick Praileau,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered June 17, 2011, as amended June 27, 2011, convicting defendant, upon his plea of guilty, of murder in the first and second degrees and attempted rape in the first degree, and sentencing him to an aggregate term of 23 years to life, unanimously affirmed.

Because defendant never moved to withdraw his guilty plea or to vacate the judgment, his challenge to the voluntariness of his plea is unpreserved, and we decline to review it in the interest of justice (*see e.g. People v Negron*, 222 AD2d 327 [1st Dept 1995], *lv denied* 88 NY2d 882 [1996]). The narrow exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666 [1988]) does not apply here, because nothing in the plea

allocution cast any doubt on defendant's guilt.

As an alternative holding, we reject his argument on the merits. The plea allocution record establishes the voluntariness of the plea. "[D]efendant said nothing about intoxication in his plea allocution itself, regardless of what he may have said on other occasions" (*People v Wilson*, 107 AD3d 532, 532 [1st Dept 2013]), and the court was "not required to make a sua sponte inquiry regarding defendant's mention of intoxication" at other junctures (*People v Fiallo*, 6 AD3d 176, 177 [2004], *lv denied* 3 NY3d 640 [2004]). In any event, there is nothing in the record to suggest that defendant's intoxication rendered him unable to form the requisite intent to commit murder and rape (*see generally* Penal Law § 15.25).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10620 In re Janiyah T.,

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

Nyree T.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about April 11, 2012, which, upon a fact-finding determination that respondent neglected her child by failing to ensure that the child was not exposed to sexually explicit materials and by failing to secure an adequate evaluation after being advised of the child's extreme sexualized behaviors, placed the child in the custody of the Commissioner of Social Services until completion of the next permanency hearing, unanimously affirmed, without costs.

The findings of neglect based upon exposure to sexually

explicit material and failure to provide appropriate care and supervision by refusing to take steps to protect the child from suspected sexual and physical abuse were sufficiently supported by a preponderance of the evidence (*see Matter of Nicole V.*, 71 NY2d 112, 117-119 [1987]; *Matter of Joshua J.P. [Deborah P.]*, 105 AD3d 552 [1st Dept 2013]; *Matter of Selena R. [Joseph L.]*, 81 AD3d 449, 450 [1st Dept 2011], *lv denied* 16 NY3d 714 [2011]; Family Ct Act §§ 1012[f][i]; 1046).

The child informed investigators that she had watched pornographic DVDs with the mother on multiple occasions, which statement was adequately corroborated by the psychologist's opinion that a child would not exhibit the extreme sexualized behavior at issue here, without having either learned, seen, or experienced it (*see Matter of Nicole V.*, 71 NY2d at 118-119; *Matter of Selena R.*, 81 AD3d at 450; *Matter of Shirley C.-M.*, 59 AD3d 360, 360-361 [1st Dept 2009]).

Finally, the excessive corporal punishment count that was dismissed by the court is beyond the scope of this appeal because neither ACS nor the attorney for the child took an appeal from the subject order (*see Hecht v City of New York*, 60 NY2d 57, 61 [1983]; *McHale v Anthony*, 41 AD3d 265, 266-267 [1st Dept 2007]),

and the mother was not aggrieved by that portion of the order (*see Segar v Youngs*, 45 NY2d 568, 572-573 [1978]; *Stark v National City Bank*, 278 NY 388, 394 [1938]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10621 Cannonball Fund, Ltd., et al., Index 651674/11
Plaintiffs-Appellants,

-against-

Marcum & Kliegman, LLP,
Defendant-Respondent,

Dutchess Private Equities
Fund, L.P., et al.,
Nominal Defendants.

_____

Reed Smith LLP, Chicago, IL (John F. Hagan of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

L'Abbate Balkan Colavita & Contini, L.L.P., Garden City (Scott E. Kossove of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 6, 2012, which, in this action alleging auditor malpractice, granted defendant's motion to dismiss the complaint, deemed an appeal from judgment, same court and Justice, entered May 15, 2012, dismissing the complaint (CPLR 5501[c]), and so considered, said judgment unanimously affirmed, with costs.

The court cited and applied the correct standard of review in adjudicating plaintiffs' motion (*see e.g. Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). It cited extensively to the

allegations in the complaint, taking them to be true.

Contrary to plaintiffs' contention, dismissal for failure to allege proximate cause is appropriate on a motion to dismiss for failure to state a cause of action, if the allegations warrant such a determination (*see e.g. O'Callaghan v Brunelle*, 84 AD3d 581, 582 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]; *Turk v Angel*, 293 AD2d 284 [1st Dept 2002], *lv denied* 100 NY2d 510 [2003]; *Fenster v Smith*, 39 AD3d 231 [1st Dept 2007]).

Accepting the facts alleged in the complaint as true and affording plaintiffs the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the court correctly concluded that plaintiffs failed to demonstrate that they would not have suffered damages but for defendant's negligence in preparing its audit opinions in connection with the two funds at issue. Plaintiffs allege that a proper audit by defendant or a statement that it was unable to certify the funds' financial statements would have alerted them to the funds' problems and allowed them to decide whether to remain invested or withdraw their investments by submitting requests for redemptions, replace the management of those funds, or take other action to prevent further losses. However, plaintiffs admit in the complaint that their redemptions were frozen as of February

27, 2008, before defendant's Audit Opinion was issued on June 16, 2008, and that all their requests for redemptions have been denied. Thus, by the time defendant issued the Audit Opinion, plaintiffs could not have withdrawn their investments.

The court also correctly rejected as speculative plaintiffs' argument that any new management could have avoided losses suffered after June 2008, since plaintiffs fail to allege with any particularity the way new management could have prevented any further loss in value by that time (*see Pearlman v Friedman Alpren & Green*, 300 AD2d 203, 203-204 [1st Dept 2002]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10622 The People of the State of New York, Ind. 3314/08
Respondent,

-against-

Rafael Alba,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (A. Kirke Bartley, J.), rendered on or about December 5, 2011,

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

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

ENTERED: OCTOBER 1, 2013

CLERK

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

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10623 Jeffrey I. Katz, File No. 497/08
Plaintiff-Appellant,

-against-

Barbara Fortgang,
Defendant-Respondent.

_____

Jack Dashosh, Sea Cliff, for appellant.

Goldfarb Abrandt Salzman & Kutzin LLP, New York (Michael S. Kutzin of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about August 10, 2012, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

Whether utilizing a "grouping of contacts" test or an interest analysis, Florida law is applicable, since the investment account, a joint account with right of survivorship, was established in Florida by the parties' late mother who, at the time, was a Florida resident (*see Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 317 [1994]). Thus, Florida has a greater interest than New York in regulating issues of possession and ownership of the account. Under Florida law, when a

depositor establishes this type of account and the depositor is the only contributor to the account, the presumed intent of the depositor is not to make an inter vivos gift, but to have the funds remaining in the account distributed to the other account holders, here plaintiff and defendant, upon the depositor's death *(see In re Estate of Combee*, 601 So 2d 1165, 1167 [Fla 1992]; *Katz v Katz,* 666 So 2d 1025, 1027 [Fla Dist Ct App 1996], *review denied* 675 So 2d 927 [Fla 1996]). Further, the testimony of the parties' late mother as well as that of plaintiff established that the mother did not intend to make a gift to her children in her lifetime, and did not relinquish dominion and control over the account since withdrawals required her signature (*see Mulato v Mulato*, 705 So 2d 57, 61 [Fla Dist Ct App 1997], *review denied* 717 So 2d 535 [Fla 1998]). Accordingly, defendant demonstrated that plaintiff was not entitled to any of the funds in the account prior to their mother's death. She further established that funds withdrawn from the account were used solely for her mother's benefit.

In opposition, plaintiff failed to raise a triable issue of fact as to his possessory right or interest in the account *(see Colavito v New York Organ Donor Network, Inc.,* 8 NY3d 43, 50 [2006]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10624 In re Jayline R. and Another,

Children Under the Age of
Eighteen Years, etc.,

Jose M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Fernando H. Silva, J.), entered on or about October 18, 2012, which, upon a fact-finding determination that respondent neglected the subject children, inter alia, issued final orders of protection directing him to stay away from each of the children until their 18th birthdays, unanimously affirmed, without costs.

In light of respondent's apparent refusal to accept the termination of his relationship with the children's mother, as well as his obsessive and violent behavior in violation of the order of protection directing him to stay away from her, the

court correctly concluded that its assistance, including the issuance of separate orders of protection for the children, was necessary to protect the children, and therefore correctly denied respondent's motion to dismiss the neglect petition pursuant to Family Court Act § 1051(c) (*see Matter of Sharnaza Q. [Clarence W.]*, 68 AD3d 436 [1st Dept 2009]; *compare Matter of Eustace B.* [*Shondella M.*], 76 AD3d 428, 428 [1st Dept 2010]).

A preponderance of the evidence supports the court's finding that respondent neglected the children by perpetrating acts of domestic violence against their mother in their presence (*see* Family Court Act §§ 1012[f][i][B]; 1046 [b][i]; *Matter of Kelly A.* [*Ghyslaine G.*], 95 AD3d 784 [1st Dept 2012]). The record shows that the children, particularly Jonel, observed respondent and the mother fighting on several occasions, and saw respondent strike the mother in the head and choke her, which caused the children to be frightened and upset. Respondent's misconduct also extended to the children. The record shows that he forced Jonel to watch a pornographic movie, and threatened to shoot him in the head with a "fake" gun that looked real if he told his mother. There is also evidence of other instances of violence and inappropriate conduct toward the children. We see no reason to disturb the court's evaluation of the evidence, including its

credibility determinations (*see Matter of Ilene M.*, 19 AD3d 106 [1st Dept 2005]).

The court's finding that respondent was a person legally responsible for the children within the meaning of Family Court Act § 1012(g) is supported by the evidence establishing that respondent, who had resided in the household as the mother's boyfriend for a period of approximately nine months, picked the children up from school and cared for them during the day, while the mother worked. He described himself as a father figure to the children, and held himself out as the children's babysitter or caregiver so as to be able to stay with them during the time when the family lived in a shelter after a fire destroyed the mother's apartment (*see Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]; *Matter of Samantha M.*, 56 AD3d 299 [1st Dept], *lv denied* 11 NY3d 716 [2009]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10625 The People of the State of New York, Ind. 1504/00
Respondent,

-against-

Santos Suarez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered May 22, 2009, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, both orally and in writing (*see People v Lopez*, 6 NY3d 248 [2006]), and we have considered and rejected defendant's arguments to the contrary. Accordingly, review of defendant's constitutional challenge to his continued prosecution for first-degree manslaughter following the reversal of his depraved-indifference murder conviction (10 NY3d 523 [2008]) is foreclosed by the waiver (*see People v Muniz*, 91 NY2d 570 [1998]).

In addition to being waived, the issue of whether it was

constitutionally permissible, under the circumstances of this case, to reprosecute defendant for intentional manslaughter was resolved, on the merits, by the Court of Appeals in connection with defendant's CPLR article 78 proceeding (*Matter of Suarez v Byrne*, 10 NY3d 523 [2008]). Accordingly, defendant's present claim is barred by the doctrine of res judicata (*see People v Di Raffaele*, 55 NY2d 234, 243 [1982]). To the extent defendant is making new arguments on the issue of reprosecution, they should have been addressed to the Court of Appeals. Moreover, in addition to being foreclosed by defendant's appeal waiver, these new arguments are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10627 Ricardo Mendez, Index 113227/10
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

Carlos Brizuela,
Defendant-Respondent.

_____

Rosato & Lucciola, P.C., New York (Paul A. Marber of counsel), for appellant.

The Law Offices of Curtis, Vasile P.C., Merrick (Michael J. Dorry of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about July 18, 2012, which, in an action for personal injuries arising out of a motor vehicle accident, granted defendant Carlos Brizuela's motion for summary judgment dismissing the complaint and all cross claims as against him, unanimously affirmed, without costs.

The motion court providently exercised its discretion in determining that it could consider the emergency doctrine affirmative defense. Although the defense was not pleaded by defendant Brizuela in his answer, the deposition testimony set forth facts that constituted an emergency situation and the facts

were well known to plaintiff (*see Edwards v New York City Tr. Auth.*, 37 AD3d 157, 158 [1st Dept 2007]; *Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 61 [2d Dept 2004]).

Here, defendant submitted evidence sufficient to establish that he was faced with a sudden and unforseen occurrence that was not of his own making (*see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]). Plaintiff testified that he was riding his motorcycle in congested traffic conditions when he was unexpectedly thrown from his motorcycle after hitting a pothole while defendant was driving a minivan behind him. Plaintiff stated that he had been lying in the road for "less than a second" to approximately four seconds when he was hit by the minivan and that the van's two front tires then went onto the sidewalk. Defendant testified that plaintiff's motorcycle was approximately six meters ahead of him when it fell, and that, after he saw the motorcycle fall, he turned his minivan towards the sidewalk to avoid plaintiff.

Given the parties' testimony, the court correctly determined that defendant had met his initial burden of establishing his entitlement to summary judgment based on the emergency doctrine (*see Dattilo v Best Transp. Inc.*, 79 AD3d 432, 433 [1st Dept 2010]; *Coleman v Maclas*, 61 AD3d 569 [1st Dept 2009]). In

opposition, plaintiff failed to raise a triable issue as he presented only unsubstantiated assertions and speculation that defendant may have breached a duty of care (*see Vitale v Levine*, 44 AD3d 935, 936 [2d Dept 2007]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10628 The People of the State of New York, Ind. 3800/99
Respondent,

-against-

Michael Little,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 12, 2011, resentencing defendant to an aggregate term of 16 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). We find that a five-year term of postrelease supervision is not excessive, and

that there is no basis for reducing it in the interest of justice. Accordingly, we find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10629N In re Ki Yung Lee, Index 651749/11
Petitioner-Appellant,

-against-

2MJC, Inc., et al.,
Respondents-Respondents.

_____

Vishnick McGovern Milizio LLP, Lake Success (Jordan M. Freundlich of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Robert L. Lash of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 15, 2013, which, upon respondent Myungjin Chung's voluntary agreement to make respondent 2MJC, Inc.'s books and records available to petitioner for review, sua sponte canceled a hearing set to determine whether or not petitioner was a shareholder of 2MJC and deemed the petition dismissed as moot upon delivery of the demanded books and records, unanimously reversed, on the law, without costs, the petition reinstated, and the matter remanded for a hearing to determine whether petitioner is a shareholder of 2MJC.

Respondents having denied petitioner unconditional access to the corporation's books and records by calling into question his shareholder status, petitioner was entitled to have that status

determined in a proceeding under Business Corporation Law § 624 (*see Matter of Estate of Purnell v LH Radiologists*, 90 NY2d 524 [1997]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10630N In re Taocon, Inc., Index 156668/12
Petitioner-Appellant,

-against-

Urban D.C. Inc.,
Lienor-Respondent.

_____

Pryor Cashman LLP, New York (Joshua D. Bernstein of counsel), for appellant.

Law Offices of Matthew T. Worner, White Plains (Matthew T. Worner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered November 13, 2012, which denied petitioner's application pursuant to Lien Law § 19(6) for an order summarily discharging a mechanic's lien, unanimously affirmed, without costs.

The court correctly denied the petition for summary discharge of the lien on the ground that it was untimely filed, because the notice of lien sets forth dates indicating that the lien was filed within the applicable limitations period (*see Matter of Lowe*, 4 AD3d 476 [2d Dept 2004]; Lien Law § 10[1]). Contrary to petitioner's contention, the lien is not rendered facially defective by the lienor's itemized statement of work

performed showing the last item of work as repair work; this evidence raises a factual issue as to the relationship of the last item of work to the parties' contract (*see 72 Pyrgi v Gkam Corp.*, 293 AD2d 387 [1st Dept 2002]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Friedman, J.P., Moskowitz, Richter, Manzanet-Daniels, Gische, JJ.

10631 In re William Robinson, Ind. 3063/11
[M-3925] Petitioner,

-against-

Hon. Patricia Nunez,
Respondent.

_____

William Robinson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10632 The People of the State of New York, Ind. 2923/04
Respondent,

-against-

Anthony Parker,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Anthony Lekas of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ethan Greenberg, J.), entered May 3, 2012, which specified and informed defendant that the court would resentence him to a term of 15 years, with 5 years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that the proposed resentence run concurrently with an undischarged sentence, and otherwise affirmed.

Although the order is silent as to whether the proposed resentence is to run consecutively to or concurrently with defendant's undischarged sentence imposed on another conviction, we modify to make clear that the sentences are to run concurrently. The sentences originally ran concurrently, and when a defendant is resentenced under the Drug Law Reform Act (L

2004, ch 738, § 23), the issue of concurrent versus consecutive sentencing may not be revisited (*People v Acevedo*, 14 NY3d 828 [2010]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10633-
10634 In re Brett M.D.,
Petitioner-Respondent,

-against-

Elizabeth A.D.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Pat Bonanno & Associates, P.C., White Plains (Pat Bonanno of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (James E. d'Auguste, J.), entered on or about April 10, 2012, which denied respondent-appellant mother's motion to dismiss these custody proceedings on forum non conveniens grounds, unanimously affirmed, without costs. Leave to appeal from the aforementioned order is granted nunc pro tunc. Appeal from order, same court and Justice, entered on or about December 7, 2011, unanimously dismissed, without costs, as abandoned.

The order denying the mother's motion to dismiss is not appealable as of right (*see* Family Ct Act § 1112[a]; *Matter of Holtzman v Holtzman*, 47 AD2d 620, 620-621 [1st Dept 1975]).

However, in the exercise of discretion, we treat the mother's appeal as an application for leave to appeal, and grant the application nunc pro tunc (*see Matter of Gina C.*, 138 AD2d 77, 83 [1st Dept 1988]; *Matter of Yakubov v Bolkvadze*, 85 AD3d 934, 934 [2d Dept 2011]).

The mother does not challenge the determination that New York is the home state, which is soundly based on the child's substantial, albeit intermittent, period of residence in New York from the child's birth in May 2006 until June 2010, when the mother and child moved to Florida (*see* Domestic Relations Law §§ 75-a[7], 76[1][a]). The home state is of "paramount importance" in determining jurisdiction in custody proceedings (*Matter of Michael McC. v Manuela A.*, 48 AD3d 91, 95 [1st Dept 2007], *lv dismissed* 10 NY3d 836 [2008]).

The court providently exercised its discretion and properly weighed all relevant factors in concluding that New York, not Florida, is the more appropriate forum for the custody proceedings (*see* Domestic Relations Law § 76-f[1], [2]). Among other things, the court properly considered that the mother had moved to Florida with the child less than one month before the filing of the custody petition, and that evidence relating to the mother's allegations that the father had engaged in domestic

violence against her and sexually abused the child was located in New York, where these incidents allegedly occurred (*see Gottlieb v Gottlieb*, 103 AD3d 593, 594 [1st Dept 2013]; *see also Vernon v Vernon*, 100 NY2d 960, 971 [2003]). In addition, the father had agreed to pay the child's travel expenses to New York for the proceedings and any related evaluations. Further, whenever feasible, the court would permit the mother to appear at proceedings telephonically from Florida, at little expense to her.

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10635 In re Earl Muldrow, Index 250510/12
Petitioner,

-against-

New York State Department of
Corrections and Community Supervision,
Respondent.

_____

Earl Muldrow, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about October 2, 2012, which denied the petition to set aside respondent's determination, dated December 29, 2011, affirming the decision of the Administrative Law Judge, which, after a hearing, revoked petitioner's parole, unanimously vacated, the petition treated as one transferred to this Court for de novo review, and upon such review, respondent's determination confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78, dismissed, without costs.

The subject petition raised an issue of substantial evidence, and thus, the proceeding should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we treat the substantial evidence issue de novo and decide all issues as

if the proceeding had been properly transferred (*see Matter of Coleman v Rhea*, 104 AD3d 535 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]).

The determination to revoke petitioner's parole is supported by substantial evidence, including petitioner's handwritten admission that he engaged in a physical altercation with his girlfriend and her daughter during which he hit his girlfriend (*see Matter of Swinson v Warden, Rikers Is. Correctional Facility*, 75 AD3d 433 [2010]). This admission was consistent with the photographic evidence and the testimony of the police officer who responded to the emergency call made by the daughter of petitioner's girlfriend. Moreover, there exists no basis to disturb the ALJ's credibility determinations (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Petitioner's due process rights to a fair hearing or cross-examination were not violated by the admission of hearsay statements at the administrative hearing (*see Matter of Rispoli v Waterfront Commn. of N.Y. Harbor*, 104 AD3d 461 [1st Dept 2013]). In light of the evidence that the complainants were unavailable to testify, there is no due process violation in the admission of the police officer's testimony as to what the complainants had

said (*Matter of Laporta v New York State Bd. of Parole*, 251 AD2d 19 [1st Dept 1998]).

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

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10637 Flintlock Construction Services, LLC, Index 109657/11
Plaintiff-Respondent,

-against-

Rubin, Fiorella & Friedman LLP,
Defendant-Appellant.

_____

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman of counsel), for appellant.

Wormser, Kiely, Galef & Jacobs LLP, New York (John T. Morin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 12, 2012, which, to the extent appealed from, denied defendant's motion to dismiss the remaining two counts of the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed, without prejudice. The Clerk directed to enter judgment accordingly.

In this legal malpractice action, plaintiff alleges that defendant law firm negligently represented it in connection with underlying construction litigation by entering into a stipulation, without its authorization, pursuant to which it became obligated to defend and indemnify the owner of the subject premises in the underlying litigation without limitation. Defendant incorrectly argues that plaintiff's claims should be

dismissed as a matter of law based on the Eleventh Circuit's vacatur of the federal district court's finding that the stipulation requires plaintiff to defend and indemnify the premises owner without limitation and for its own negligence (*see Flintlock Constr. Servs. v Well-Come Holdings, LLC*, 710 F3d 1221, 1224 [11th Cir 2013]). The Eleventh Circuit vacated the decision on diversity grounds and did not reach the merits of the subject stipulation.

Contrary to defendant's assertion, the documentary evidence does not conclusively refute plaintiff's allegations (*see Franklin v Winard*, 199 AD2d 220, 220 [1st Dept 1993]), since the premises owner, its consultants and subcontractors are named in the underlying litigation, their contracts are not included in the record on appeal, and the allegations against them include the types of activities which form the basis of the underlying complaints. Nevertheless, even if the stipulation provides for an unlimited obligation, there has been no finding that the project owner was negligent. At this juncture, plaintiff's allegations of proximate cause and damages are premature or speculative, as it is unable to prove that any such damages are

directly traceable to defendant's conduct (*see InKine Pharm. Co. v Coleman*, 305 AD2d 151, 153-154 [1st Dept 2003]). Accordingly, we dismiss without prejudice to raising the malpractice claims upon resolution of the underlying action.

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10638 Elizabeth Schnee, Index 350544/97
Plaintiff-Respondent,

-against-

Jeremiah Schnee,
Defendant-Appellant.

_____

Thomas Torto, New York, for appellant.

Dawn M. Cardi & Associates, New York (Dawn M. Cardi of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered March 11, 2013, which denied defendant's motion to direct plaintiff to provide him with a general release of all claims against him, granted plaintiff's cross motion to enforce the judgment of divorce with respect to the distribution of defendant's retirement accounts, and awarded plaintiff counsel fees, unanimously affirmed, without costs.

The parties' 1998 stipulation of settlement, which was incorporated but not merged into the judgment of divorce, entitled plaintiff to maintenance, half of the equity in the marital residence upon the emancipation of the parties' youngest child, and half the value of defendant's retirement accounts as of the date of transfer.

In July 2011, the parties' youngest child was emancipated. In addition, defendant had failed to make maintenance payments. Plaintiff moved to enforce her right to maintenance arrears and a payout on the division of the marital residence, as well as for counsel fees. Defendant cross-moved for, inter alia, the appointment of an appraiser for the marital residence, and an order directing plaintiff to issue an executed satisfaction of judgment and general release discharging his financial obligations and counsel fees.

In an order entered on May 10, 2012, Supreme Court awarded plaintiff $98,500 in maintenance arrears as well as $10,000 in counsel fees. The Court held the issue of the marital residence in abeyance and ordered the parties to appear for a conference on that issue. Defendant's cross motion was denied.

Significantly, neither party had executed the documents necessary to effectuate the transfer of plaintiff's interest in defendant's retirement accounts. Defendant apparently refused to cooperate with the preparation or execution of the QDRO and failed to provide information necessary to its preparation.

On July 5, 2012, the parties entered into a settlement with respect to the maintenance arrears, attorney's fees and expenses and the marital residence, resulting in a so-ordered stipulation

on that date. The first paragraph of the July 5, 2012 stipulation states:

> In full satisfaction of plaintiff's claims for: (i) her 50% interest in the former marital residence; (ii) any and all maintenance arrears, whether or not reduced to judgment; and (iii) attorney's fees and expenses, and interest, cash and disbursements, Defendant shall pay plaintiff the sum of $408,000 subject to an increase as may be set forth in an actual payoff letter from the existing mortgage holder on the premises."

At the closing of the refinance, plaintiff was to execute and deliver a bargain and sale deed. Also at the closing, both parties were to "exchange unconditional mutual general releases."

Defendant prepared a general release to be executed by plaintiff which released *any and all* claims arising from this matrimonial action. At the closing, the parties' counsel entered into a mutual undertaking, which, in pertinent part, required plaintiff's counsel to deliver the release prepared by defendant after plaintiff received the $408,000. Plaintiff later refused to deliver that release to defendant on the basis that it was improper, and instead prepared and executed an amended release which preserved her claim in defendant's retirement accounts. Defendant rejected the amended release.

Supreme Court properly found that plaintiff's delivery of the amended release satisfied her obligations under the 2012

stipulation. The 2012 stipulation was unambiguously entered into to settle only the issues of maintenance arrears, plaintiff's interest in the marital residence, and counsel fees, as it sets forth in its first paragraph. The release drafted by defendant does not reflect the parties' intentions as there is no indication that plaintiff intended to waive her interest in defendant's retirement accounts.

Properly read in context, the provision in the 2012 stipulation that calls for the parties to execute "unconditional mutual general releases" requires the parties to execute releases which apply to the issues settled by the stipulation and nothing more. Thus, interpreting the 2012 stipulation in accordance with its plain and ordinary meaning and the clear intent of the parties (*see Matter of Korosh v Korosh*, 99 AD3d 909 [2nd Dept 2012]), and in light of the limited scope of the stipulation, it cannot be concluded that plaintiff intended to waive or actually waived her interest in defendant's retirement accounts.

Nor is plaintiff estopped from denying her obligation to deliver the release drafted by defendant. While it is true that a party who accepts the benefits of an agreement is estopped from later challenging the same agreement (*see Markovitz v Markovitz*, 29 AD3d 460 [1st Dept 2006]), the operative document is the 2012

stipulation and not the release or the mutual undertaking. In any event, defendant did not rely to his detriment on his belief that plaintiff would release him of all claims, including the retirement account claims. Pursuant to the 2012 stipulation, defendant was to pay $408,000 to plaintiff in exchange for her releasing him from claims regarding the marital residence and maintenance arrears, which she has done.

Plaintiff's claim to the retirement accounts is not barred by the 2012 stipulation or the release contemplated by that agreement. Indeed, the stipulation specifically recited the claims which it was settling, there is nothing in the stipulation indicating that plaintiff intended to waive her claim to the retirement accounts, and the agreement cannot be read to include waiver of a matter the parties did not desire or intend to dispose of (*Cahill v Regan*, 5 NY2d 292, 299 [1959]; *Morales v Solomon Mgt. Co., LLC*, 38 AD3d 381 [1st Dept 2007]).

Nor is her claim to the retirement accounts barred by the statute of limitations since a motion to enforce a right to a QDRO pursuant to a stipulation of settlement is not subject to a statute of limitation defense (*see Denaro v Denaro*, 84 AD3d 1148 [2nd Dept 2011], *lv dismissed* 17 NY3d 921 [2011]; *Bayen v Bayen*, 81 AD3d 865, 866 [2nd Dept 2011]).

Plaintiff's claim to the retirement accounts is not barred by laches as defendant is at least partially responsible for the delay in executing the QDROs and he has not shown any prejudice resulting from plaintiff's delay (*see Denaro*, 84 AD3d at 1149-1150). Equitable estoppel is inapplicable here because plaintiff never made any false representation upon which defendant relied to his detriment (*see Melcher v Greenberg Traurig, LLP*, 102 AD3d 497 [1st Dept 2013]). Plaintiff's receipt of the $408,000 does not trigger the doctrine as it was received to satisfy her claims regarding maintenance arrears and equity in the home.

Supreme Court properly awarded plaintiff counsel fees pursuant to DRL 237(c) which directs the court to award fees "[i]n any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award," upon a finding that such failure was willful. There is no question that plaintiff is entitled to her share in the retirement accounts pursuant to the judgment of divorce and that defendant willfully refused to cooperate with the execution of the QDROs.

There was no basis to award defendant counsel fees. 22 NYCRR 130-1.1(a), upon which defendant relies, only permits an

award of counsel fees based on frivolous conduct. Plaintiff did not engage in any frivolous conduct and was not required to waive her right to defendant's retirement accounts or to deliver the release prepared by defendant.

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10639 In re Opportune N.,
Petitioner-Respondent,

-against-

Clarence N.,
Respondent-Appellant.

_____

Lisa H. Blitman, New York, for appellant.

Geanine Towers, P.C., Brooklyn (Geanine Towers of counsel), for respondent.

Julian A. Hertz, Larchmont, attorney for the child.

_____

Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about September 2, 2010, which, after a fact-finding hearing in proceedings brought pursuant to article 8 of the Family Court Act, determined that respondent husband had committed the family offenses of attempted assault in the second degree; attempted assault in the third degree; menacing in the third degree; disorderly conduct; harassment in the second degree (two counts), and aggravated harassment in the second degree (two counts), unanimously affirmed, without costs.

It is undisputed that respondent submitted to the jurisdiction of the Family Court by appearing in the family offense proceeding commenced by petitioner wife, who was then

residing in a shelter in New York State, and the Family Court therefore had personal jurisdiction over him. Family Court's subject matter jurisdiction over a family offense is not limited by geography (*see* Family Court Act §§ 812, 818), and the court therefore could receive evidence and make fact findings concerning incidents that occurred in Pennsylvania before respondent's wife moved to New York with her daughters (*see Matter of Richardson v Richardson*, 80 AD3d 32, 37-38 [2d Dept 2010]).

The determination that respondent committed the family offenses as enumerated above is supported by a fair preponderance of the evidence (*see* Family Court Act §§ 812 [1]; 832). The court's credibility determinations are supported by the record, and there is no basis to disturb them (*see Matter of Lisa S. v William V.*, 95 AD3d 666 [1st Dept 2012]).

Respondent's arguments concerning the order of protection issued on August 24, 2012 are not properly before this Court since he did not appeal from that order. In any event, an appeal from that order, except to the extent it gives rise to a

permanent and significant stigma that might adversely affect respondent in future proceedings, would be moot since it has expired by its terms (*see Matter of Diallo v Diallo*, 68 AD3d 411 [1st Dept 2009], *lv dismissed* 14 NY3d 854 [2010]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10643 Andrew P. Moffatt, etc., Index 651615/10
Plaintiff-Appellant,

-against-

JP Morgan Chase Bank,
Defendant-Respondent.

_____

Mancinelli & Associates, P.C., New York (Steven Mancinelli of counsel), and Mark D. Schwartz, Bryn Mawr, PA, of the bar of the State of Pennsylvania, admitted pro hac vice, for appellant.

Levi Lubarsky & Feigenbaum LLP, New York (Andrea Likwornik Weiss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 10, 2012, which, insofar as appealed from, granted defendant's motion to dismiss the fifth cause of action for fraud, fraudulent misrepresentation and deceit pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

Plaintiff, suing, individually and derivatively on behalf of Dispatch Transportation Corp. (DTC), alleges that defendant, through one of its employees, aided his former business partner and 50% shareholder of DTC, Jud Gittelman, in changing the number of required signatories on the signature cards so as to enable Gittelman to embezzle funds from DTC's bank accounts by issuing checks to himself. Plaintiff further alleges that it was his

understanding that his signature and Gittelman's signature were required in order to issue checks from the accounts.

Plaintiff failed to properly plead a cause of action for fraud by failing to allege any misrepresentation or material omission of fact made by defendant or its employee (*see Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 607 [1st Dept 2010]). In any event, neither misrepresentation or justifiable reliance can be shown since Moffatt's admission that he signed the signature cards negates his contention that the signatures are not genuine and that he was not aware of the execution of the signature cards. In addition, neither the allegations in the complaint nor the surrounding circumstances give rise to a reasonable inference that defendant's employee possessed fraudulent intent in executing the new signature cards (*see* e.g. *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10644-
10644A Adam Plotch,
Plaintiff-Appellant,

-against-

Kapco Industries, Inc., et al.,
Defendants-Respondents.

Index 308271/11

_____

Richard A. Klass, Brooklyn, for appellant.

Sweeney Gallo Reich & Bolz, LLP, Rego Park (Rashel M. Mehlman of counsel), for respondents.

_____

Orders, Supreme Court, Bronx County (John A. Barone, J.), entered on or about August 23, 2012 and September 17, 2012, which, in this action to quiet title to a condominium unit, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff, the winning bidder in a foreclosure action commenced by the condominium board to recover unpaid common charges, purchased the condominium unit subject to defendants' prior mortgage, which was reduced to a judgment lien. The foreclosure proceeding's notice of sale, judgment of foreclosure and referee's deed expressly provided that the property at issue was being sold subject to the winning bidder's payment of

defendants' mortgage lien; therefore, plaintiff is bound by those provisions (*see Grand Pac. Fin. Corp. v Ashkenazi*, 108 AD3d 425 [1st Dept 2013]; *Cashin v Simek*, 59 AD3d 657, 658 [2d Dept 2009]).

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: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10645 In re James P., etc.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

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

_____

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about January 10, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and imposing a conditional discharge. The court adopted the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Positive factors in appellant's background were

outweighed by the violent nature of the underlying incident, by appellant's lack of remorse or acceptance of responsibility for his conduct, and by appellant's acknowledged history of anger management issues for which he had received counseling (*see e.g. Matter of Shariah T.*, 107 AD3d 605 [1st Dept 2013]; *Matter of Mia R.*, 102 AD3d 627 [1st Dept 2013]; *compare Matter of Tyttus D.*, 107 AD3d 404 [1st Dept 2013]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10646 The People of the State of New York, Ind. 2591N/11
Respondent,

-against-

Dammon Nelson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about February 28, 2012,

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

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

ENTERED: OCTOBER 1, 2013

CLERK

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

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10647 Netologic, Inc., doing business as Investars,
Plaintiff-Appellant-Respondent,

-against-

Goldman Sachs Group, Inc.,
Defendant-Respondent-Appellant,

Wall Street on Demand, Inc.,
Defendant-Respondent,

Beverly Westle,
Defendant.

Index 600394/09

Beattie Padovano, LLC, New York (Patrick J. Monaghan, Jr. of counsel), for appellant-respondent.

Paul Hastings, LLP, New York (Douglas H. Flaum of counsel), for respondent-appellant and respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 4, 2011, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint to the extent of dismissing the claims for breach of contract, unjust enrichment, and breach of confidentiality, and denied the motion as to the claim for breach of the implied covenant of good faith and fair dealing, unanimously modified, on the law, to reinstate the causes of action for breach of contract and dismiss the claim for breach of the implied covenant of good

faith and fair dealing, and otherwise affirmed, without costs.

Plaintiff's second cause of action should be reinstated to the extent that it sounds in breach of contract, since plaintiff has sufficiently pled that defendant Goldman Sachs Group, Inc. (Goldman) breached its duty under the parties' Licensing and Distribution Agreement (LDA) to engage in "commercially reasonable efforts" to sell plaintiff's product to Goldman's own customers (*see JFK Holding Co. v City of New York*, 98 AD3d 273, 276-278 [1st Dept 2012]). Plaintiff has likewise sufficiently pleaded that Goldman breached the LDA's confidentiality provisions, warranting reinstatement of that claim.

Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, however, should be dismissed as duplicative of its contract claims, since both claims "arise from the same facts and seek the identical damages for each alleged breach" (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied*, 15 NY3d 704 [2010]).

The motion court properly dismissed plaintiff's cause of action for unjust enrichment, as duplicative of its claims for breach of contract (*see Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382 [1987]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10648 Universal American Corp., Index 650613/10
Plaintiff-Appellant,

-against-

National Union Fire Insurance
Company of Pittsburgh, PA.,
Defendant-Respondent.

_____

Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for appellant.

Nixon Peabody LLP, New York (Barbara A. Lukeman of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered January 8, 2013, which denied plaintiff insured's motion for summary judgment and granted defendant insurer's cross motion for summary judgment, unanimously modified, on the law, to declare that the policy does not provide coverage for the claimed loss, and otherwise affirmed, without costs.

The motion court properly interpreted the policy as a matter of law (*see Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708 [2012]; *White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). The court correctly found that the unambiguous plain meaning of defendant's computer systems fraud rider, covering loss from a fraudulent "entry of electronic data" or "change of electronic

data" within the insured's proprietary computer system, was intended to apply to wrongful acts in manipulation of the computer system, i.e., by hackers, and did not provide coverage for fraudulent content consisting of claims by bona fide doctors and other health care providers authorized to use the system for reimbursement for health care services that were not provided.

We modify solely to declare the rights of the parties in this action for declaratory relief (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10649 The People of the State of New York, Ind. 793/11
Respondent,

-against-

Hendrix Castillo,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ellen Coin, J.), rendered on or about July 8, 2011,

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

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

ENTERED: OCTOBER 1, 2013

CLERK

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

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10652 Maria A. Santana, Index 303534/10
Plaintiff-Appellant,

-against-

3410 Kingsbridge LLC, et al.,
Defendants-Respondents.

_____

Melcer Newman PLLC, New York (Jeffrey B. Melcer of counsel), for appellant.

Cascone & Kluepfel, LLP, Garden City (Michael T. Reagan of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered August 3, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges that she slipped and fell on an interior staircase while descending from the fifth to the fourth floor, because the stairs were wet from water that leaked from a skylight over the stairs when it rained, and were slippery from improper waxing. In support of their motion for summary judgment, defendants failed to establish absence of constructive notice of the wet condition since they did not offer specific evidence as to their activities on the day of the accident, including evidence indicating the last time the fifth floor

staircase, landing or skylight was inspected or maintained before plaintiff fell (*see Cater v Double Down Realty Corp.*, 101 AD3d 506 [1st Dept 2012]; *Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323 [1st Dept 2008]). With regard to whether there was a dangerous wax condition, issues of credibility exist which cannot be resolved on a motion for summary judgment (*see Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]).

In any event, plaintiff raised an issue of fact as to whether defendants had notice of an "ongoing and recurring dangerous condition exist[ing] in the area of the accident which was routinely left unaddressed by the landlord" (*David v New York City Hous. Auth.*, 284 AD2d 169, 171 [1st Dept 2001]; *see Santiago v JP Morgan Chase & Co.*, 96 AD3d 642 [1st Dept 2012]).

We note that the affidavit of plaintiff's sister, Angela Bernal, should have been considered by the motion court, since

her name and address had been previously made known to defendants by plaintiff at her deposition (*see Sadler v Brown*, 108 AD2d 739, 740 [2nd Dept 1985]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10653 The People of the State of New York, Ind. 3531/10
Respondent,

-against-

Donna Perry,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about March 10, 2011, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10654N Han Soo Lee, et al., Index 113585/03
Plaintiffs,

-against-

Riverhead Bay Motors, et al.,
Defendants.
- - - - -
Edward H. Suh and Associates, P.C.,
Nonparty Appellant,

Law Office of Kenneth A. Wilhelm,
Nonparty Respondent.

_____

Law Offices of Composto & Composto, Brooklyn (Jill E. Sodafsky of counsel), for appellant.

Law Offices of Kenneth A. Wilhelm, New York (Susan R. Nudelman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 18, 2011, which, after a hearing, apportioned less than 5% of the net contingency fee earned in a personal injury action to plaintiffs' outgoing attorneys, nonparty appellant Edward H. Suh and Associates, P.C., and the remainder to the incoming attorneys, Law Office of Kenneth A. Wilhelm, unanimously affirmed, without costs.

The motion court properly apportioned the legal fee to reflect that, while the Suh firm's services placed plaintiffs on the right path, the Wilhelm firm's extensive and complex work

dwarfed the Suh firm's contribution (*see e.g. Shabazz v City of New York*, 94 AD3d 569 [1st Dept 2012]). The Suh firm, which represented plaintiffs for approximately six months, conducted preliminary investigative work, including interviewing the injured plaintiff, inspecting and taking photographs of the construction site where plaintiff's accident occurred, communicating with plaintiff's employer and treating physicians, and obtaining accident reports, medical records and an unsigned statement from an eyewitness to the accident. It commenced an action and prepared initial discovery demands and responses, and retained counsel to file and prosecute plaintiff's workers' compensation case. Edward H. Suh performed approximately 28 hours of work on the matter, one third of which was devoted to travel, and an associate performed 15 hours of work. In contrast, the Wilhelm firm prosecuted the action for 7½ years and expended thousands of hours. It conducted and defended depositions, obtained summary judgment on liability, participated in mediation sessions, retained experts, represented plaintiffs

in a two-week trial, successfully appealed the verdict in that trial and re-tried the action, settled the action during the second trial, and defended plaintiffs' interests in an ancillary declaratory judgment action.

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10655N In re Michael Brennan, et al., Index 111059/11
Petitioners-Appellants,

-against-

Metropolitan Transportation Authority, et al.,
Respondents-Respondents.

_____

Diamond & Diamond, LLC, New York (Stuart Diamond of counsel), for appellants.

Fabiani Cohen & Hall, LLP, New York (Anthony Lugara of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered January 27, 2012, denying petitioners' motion to file a late notice of claim, unanimously affirmed, without costs.

Petitioners' stated ignorance of the requirements of General Municipal Law § 50-e is not a reasonable excuse for failure to timely file a notice of claim *(see Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538 [1st Dept 2010], *lv denied* 17 NY3d 718 [2011]). Petitioners also failed to demonstrate that the delay was due to petitioner Michael Brennan's injuries since he returned to work well before the motion to serve a late notice of claim was filed.

Although the absence of a reasonable excuse does not compel denial of the motion *(see Renelique v New York City Hous. Auth.,* 72 AD3d 595 [1st Dept 2010]), petitioners also failed to show that respondents or their insurance carrier had actual knowledge of the claim in that there was no evidence that the supervisor's report or witness statement were provided to respondents. Respondents' search of their files failed to disclose these documents or the presence of an inspector employed by respondents on the scene at the time of the accident. The documents provided by petitioners' concerning Michael Brennan's workers' compensation claim are insufficient since they do not state any facts suggesting that his injuries were due to respondents' negligence or that they are vicariously liable for the conduct of petitioner's employer.

Moreover, with respect to prejudice to respondents, it is

uncontested that the conditions at the scene of the accident have changed (*see e.g. Matter of DelValle v City of New York*, 242 AD2d 382 [2d Dept 1997]).

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

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Sweeny, Acosta, Saxe, Clark, JJ.

10656 In re Gilroy Johnson, Ind. 1223/11
[M-3703 Petitioner,

-against-

Hon. Michael A. Gross, etc., et al.,
Respondents.

_____

Gilroy Johnson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for Hon. Michael A. Gross, respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: OCTOBER 1, 2013

CLERK

Andrias, J.P., Friedman, Sweeny, Saxe, Richter, JJ.

10461 In re Kevin McK.,
Petitioner-Respondent,

-against-

Elizabeth A.E.,
Respondent-Appellant.

_____

O'Melveny & Myers LLP, New York (Brad M. Elias of counsel), for appellant.

Kevin McK., respondent pro se.

Andrew J. Baer, New York, attorney for the child.

_____

Order, Family Court, New York County (Ivy I. Cook, Referee), entered on or about April 10, 2012, reversed, on the law and the facts, without costs, the petition granted, and the matter remanded for further proceedings at which provision shall be made regarding liberal visitation and an allocation of travel costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
John W. Sweeny
David B. Saxe
Rosalyn H. Richter, JJ.

10461

In re Kevin McK.,
Petitioner-Respondent,

-against-

Elizabeth A.E.,
Respondent-Appellant.

Respondent appeals from the order of the Family Court, New York County (Ivy I. Cook, Referee), entered on or about April 10, 2012, which, after a hearing, to the extent appealed from, denied her petition to relocate to Mississippi with the parties' child.

O'Melveny & Myers LLP, New York (Brad M. Elias and Andrew J. Frackman of counsel), for appellant.

Kevin McKeown, respondent pro se.

Andrew J. Baer, New York, attorney for the child.

SAXE, J.

In this relocation case, where respondent mother, Elizabeth E., seeks permission to move with the parties' child to Oxford, Mississippi, we are once again confronted with the problem of balancing a child's need for the ongoing presence of both parents in his daily life, with the custodial parent's proven inability to support herself and the child beyond the subsistence level here in New York.

Facts

The parties never married, but were intimately involved for 10 years, during which time their son, Lucas, was born, on January 6, 2003. The father, Kevin McK., moved into the mother's apartment a few months prior to the child's birth, and moved out in November 2007, when the child was about 4½ years old. The mother filed a custody petition in December 2007, and was awarded temporary custody on January 8, 2008; the father filed a custody petition shortly thereafter. Later that year, the mother filed a second petition, seeking to modify the temporary custody order to permit her to relocate with the child to Oxford, Mississippi.

Trial on the issues of custody and relocation commenced on or about November 18, 2009, and was conducted on 13 days over the course of 2½ years. The mother testified that from approximately 1989 through 2007, her primary source of income was from her

employment at the Claremont Riding Academy as a horseback riding instructor, earning approximately $20 per hour, plus tips and commissions. Between 2003 and 2007, she earned approximately $20,000 per year from her work at Claremont, sometimes closer to $30,000. During that period, she also earned approximately $5,000 from a book she published, $2,400 from teaching writing classes at the Jewish Community Center (JCC), in Manhattan, and approximately $5,000 per summer teaching at a riding camp in Mississippi.

However, in April 2007, Claremont closed, and the mother lost her job. Although she sought employment as a riding instructor in the New York metropolitan area, she was only able to find work one day per week, at a stable in Westchester, with a round-trip commute of approximately four hours; she found that the cost of the commute exceeded her earnings from the job. She was unsuccessful in her attempts to find other riding jobs or other writing assignments. She still taught a small number of writing classes at the JCC, earning $4,500 between 2007 and 2011, and found some small editing jobs from which she earned less than $1,000 in total.

From the time Claremont closed in April 2007 until November 2007, and again in 2009 and 2010, the mother collected $300 per week in unemployment benefits, but she has not been eligible for

those benefits since June 2010. In addition, between June 2010 and June 2011, when the mother was entitled to $732 per month in child support from the father, payments were almost always late, and several payments were missed entirely between November 2010 and February or March 2011. Support arrears in excess of $6,000 had accrued by June 2011, which the father paid off after a one year delay, only after the mother filed a violation petition. He has not made any further support payments since then.

Due to the missed child support payments and increases in her rent since 2007, the mother testified that she was barely able to make ends meet, so that to cover her expenses, she had borrowed $10,000 from a friend, as well as $1,800 from the Author's League Fund, and some smaller amounts from her parents, as well as drawing down on her savings, which decreased from approximately $25,000 to $10,000. Essentially, she has supported herself and the parties' child on a combination of her meager earnings, irregular child support payments, unemployment benefits, food stamps, loans from friends and family, and by depleting her savings.

The mother's tax returns were admitted into evidence. According to the returns, in 2007, she earned approximately $31,486; in 2008, approximately $8,074; in 2009, approximately $16,000; and in 2010, approximately $13,000.

The mother established that two stables in Oxford, Mississippi, have offered her year-round employment as a horse trainer and riding instructor. She estimated that, were she to relocate to Mississippi, her expenses would be reduced by approximately 75%, and the combined income from those jobs would exceed $2,000 per month. Testimony from her own mother, the child's grandmother, who lives in Oxford, Mississippi, reflected that if the mother and child are permitted to relocate, the child will have the benefit of a close relationship with his grandparents and cousins as well as other children his age with whom he has developed friendships during previous summers spent in Mississippi.

Oxford, Mississippi was described as a university town, a "safe, wonderful community of loving, caring people," with an exceptional public school, which is more highly rated than his current school in Manhattan. The child would have the opportunity to play in the yard, ride the tractors, and help with the horses. The mother would have emotional and financial support and would no longer have to worry about paying the bills, and an apartment over the maternal grandparents' garage would be made available to the father for free any time he wanted to visit the child.

The court-appointed forensic psychologist, Dr. N.G. Berrill

of the New York Center for Neuropsychology and Forensic Behavioral Science, testified that if the child were to move to Mississippi due to financial circumstances, he would be able to make the necessary adjustment and, provided that ample contact was permitted between the child and the father, such a move would not be damaging to the child. Dr. Berrill did not believe that the mother was moving to Mississippi to interfere with the child's relationship with the father. To the contrary, she seemed to appreciate that the child has a positive relationship with the father. Dr. Berrill further noted that he found no evidence that the mother was "badmouthing" the father or attempting to alienate him from the child.

The father's own testimony cogently demonstrated that the mother would not be able to rely on him for steady and current payments of support. Although he claimed to have filed income tax returns, he could not recall whether he had filed tax returns in the years 2006, 2007 and 2008, and testified that he had "no idea" what income he had reported, and that he "would not be able even to begin" to put together a list of his "various sources of income" that "varie[d] week to week." Nor could he provide an income range for his earned income. While he does not have regular employment, he stated that he was starting a newspaper called the New York Bulletin, which had purportedly received

$200,000 in funding in May 2011, which funding he used to satisfy his debts to the IRS and other people.

He refused to estimate his average monthly expenses. He asserted that he pays his rent by bartering personal services. He did not provide a lease for the apartment in which he was living in 2010, but testified that he was responsible for rent of $3,200 per month, although on cross-examination it was revealed that he had reported to the Support Magistrate that his rent was $1,000 per month.

Although the father claimed to be current on his child support obligations, a printout admitted into evidence indicated that as of January 2012 he was in arrears in the amount of $2,196. His assertions that he would receive a large inheritance in the future from which he could pay what was owed were shown to be inaccurate.

Despite these clear indications of the father's inability or unwillingness to regularly make the required child support payments, the attorney for the child took the position that the mother's relocation petition should be denied. He disbelieved her assertion that her financial situation made the relocation necessary; in his view, she failed to establish that she could not find remunerative employment in New York, and failed to sufficiently substantiate her claims regarding available

employment for her in Mississippi. Moreover, he argued that the evidence failed to establish that the mother was in dire need and distress, as she had successfully paid for her and the child's expenses up to that point, and continued to have a balance of funds in her bank account.

The court conducted an in camera interview with the child, at which the attorney for the child was present.

Family Court Order

At the conclusion of the hearing, the Referee found that both parties were good parents and loving toward the child, and that the father's involvement in the child's life has contributed to the child being happy and well-adjusted, but concluded that it was in the child's best interests for the mother to have sole legal custody. However, the court denied the mother's petition for relocation on the ground that she had failed to prove by preponderance of the evidence that her financial circumstances require that she be permitted to move to Mississippi -- a move that, according to the could and the father, would disrupt the very close and steady relationship between the father and child.

The court expressed doubts about the mother's credibility, both in regard to her finances and her assertions that she would attempt to work with the father regarding additional visitation if the child moved to Mississippi. Nor was the court convinced

that the mother's financial situation was as dire as she claimed, citing her continued ability to pay her rent, maintain $10,000 in savings, keep a zero balance on her credit card, and provide for the child; it found that she had not been forthright in regards to her finances, and asserted the belief that the mother has other jobs or income that was not documented.

Discussion

We find that the Family Court's determination denying the mother's petition for relocation lacks a sound and substantial basis in the record, and, further, that the mother established by more than a preponderance of the evidence that relocation is in the best interests of the child, in that it will enhance the child's life both economically and emotionally.

"Where a custodial parent seeks to change her residence in a manner that would detrimentally affect the other parent's ability to enjoy frequent and regular contact with the child, the relocating party bears the burden of establishing that the proposed move is nevertheless in the best interests of the child" (*Salichs v James*, 268 AD2d 168, 170 [1st Dept 2000]). The ultimate determination in any relocation petition is the best interests of the child, and to make that determination, the court considers any relevant factors, including the parents' respective reasons for moving and for opposing the move, the degree to which

the custodial parent's and child's life may be enhanced economically, emotionally, and educationally by the move, the quality of relationship between the custodial and noncustodial parent and the child, and the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent (*Matter of Tropea v Tropea*, 87 NY2d 727, 736, 740-741 [1996]).

Here, the primary factors on which we must focus are the mother's reasons and need for the move, whether the child's life would be enhanced by the move, the impact of the move on the child's relationship with the father and the difficulty of maintaining the father's central role in the child's life.

The mother's petition for relocation was primarily based on the claim that the child's life would be improved by the move, because she has been unable to support herself and the child beyond the subsistence level since she lost her job in 2007. We find that she established the truth of that claim with a showing well beyond a preponderance of the evidence. While a trial court's assessment of the evidence is entitled to deference, there is no sound or substantial basis in the record here for the Family Court's assessment of the mother's truthfulness regarding her earnings and her earning ability (*see Matter of Gloria S. v Richard B.*, 80 AD2d 72, 76 [2d Dept 1981]). The supposition that

the mother could find, or actually did find, other remunerative employment, was not only unsupported, but indeed was contradicted by her receipt of various public assistance benefits such as Medicaid and food stamps. In sharp contrast to the father's evasive testimony and evidence with regard to his finances, the mother made a forthright showing of exactly how she had supported herself and the child.

Admittedly, the mother here is not (yet) destitute. Her financial situation is certainly not as bleak as that of the mother in *Matter of Melissa Marie G. v John Christopher W.* (73 AD3d 658, 658 [1st Dept 2010]), where this Court affirmed the grant of the mother's application to relocate with the parties' child to a stable home near the mother's family in Florida, after she and the child had lived in a series of homeless shelters. However, while the need to improve the mother's and child's economic situation was far more extreme in that case, we find that the present relocation application was prompted by a legitimate, pressing need for a secure economic situation. Not only do we reject the unsupported suggestion that the mother actually had other, hidden, means of support, but we observe that proof of economic necessity does not require the parent to wait until she has used up every last dollar of her savings before taking steps to ensure that she will be able to care for the

child's future economic needs.

Where the proposed move will provide economic, emotional and educational benefits for the child, relocation may be appropriate even where it will disrupt the frequency of visits between the child and the noncustodial parent (*see Aziz v Aziz*, 8 AD3d 596, 597 [2d Dept 2004], *lv dismissed and denied* 7 NY3d 739 [2006]). Several factors in *Aziz* justified the wife's proposed relocation to Texas with the parties' child: she had "an extensive support network in Texas, which include[d] her parents, a brother, aunts, uncles, cousins, and a large Muslim community," "the child ha[d] a strong emotional bond with his maternal grandmother," and "[t]he lower cost of living in Texas for the wife [would] allow her to improve their lifestyle and save for the child's college education" (*id.*). Similarly, here, the proposed move to Mississippi will give the mother and child an extensive network of family support, and the child has strong emotional bonds with his maternal grandparents, whom he has visited in previous summers. The requested relocation will provide the benefits of living near, and having the financial and emotional support of, the child's maternal extended family, enabling the child to enjoy a comfortable life free of economic distress, among a loving and supportive extended family. That powerful consideration would be less weighty if the father were providing consistent, steady, and

sufficient support to ensure the child's lifestyle at a level above subsistence; however, nothing in the record provides such assurance.

The present case stands in stark contrast with the facts in *Salichs v James* (268 AD2d 168 [1st Dept 2000]). There, this Court denied a mother's petition to relocate to Puerto Rico because she failed to prove that she had sought alternative work in New York, and in fact there was evidence that she could have successfully found another job here (*id.* at 172). Nor was there any claim in that case that the father could not be relied on to provide steady child support (*id.* at 170-171). Also, the father's employment as an architect licensed in New York precluded him from having any substantial flexibility so as to allow for frequent visiting with the child in Puerto Rico (*id.* at 172). Another consideration in *Salichs* was the evidence that the mother had previously attempted to limit the time her daughter spent with the father, an impulse which could have been exacerbated by the move to Puerto Rico (*id.* at 173).

Here, although the Family Court expressed serious concerns that the mother might interfere with the father's ability to maintain a meaningful relationship with the child, and believed the mother's affect and demeanor to support those concerns, nothing in the record establishes any actual interference by the

mother. There is no history of the mother preventing or overtly interfering with father-child visits, or subtly interfering with the father-child relationship. On the contrary, the mother asserted in court that the father could come to Mississippi as often as he liked, and assured the court that he would be provided with transportation and accommodations. Additionally, the forensic psychologist did not believe that the mother sought to move to Mississippi to interfere with the child's relationship with the father, and observed that on the contrary, she seemed to appreciate that the child has a positive relationship with the father.

The important counterweight to the benefits of the relocation is the disruption that the relocation would necessarily cause in the close relationship between father and son. However, while the impact of the move on the quantity and quality of the child's future contact with the father is a central concern, it is not "the" central concern (*see Matter of Alaire K.G. v Anthony P.G.*, 86 AD3d 216, 219 [1st Dept 2011]). In *Matter of Alaire K.G.*, the mother's petition for relocation to California was granted, despite the disruption the move would cause in the strong and healthy relationship between the child and his father, because this Court found that the mother's move to California to live with her new husband would provide the

child with more financial stability, and a better life, than that available with the father (86 AD3d at 220). Although this Court acknowledged that the child would see his father less frequently, it observed that extended holiday and weekend visits along with summer visits would allow for the father and child to maintain a strong relationship (*id.* at 221-222). Indeed, since the father was unemployed, this Court observed that a parallel move by the father could be feasible (*id.* at 220). A similar observation was made in support of a grant of relocation in *Matter of Scialdo v Cook*, which allowed the mother to relocate to Florida with the parties' child, noting that "[a]lthough the relocation will affect the frequency of the father's visitation, we note that the court ordered that the father 'shall be entitled to visit his son in the state of Florida at any time that he is able to do so'" (53 AD3d 1090, 1092 [4th Dept 2008]).

Similarly, here, our grant of relocation is issued with the proviso that the father shall be allowed broad access to the child in Mississippi as well as a liberal visitation schedule for visits to New York, the specifics to be addressed by the Family Court on remand.

Lastly, we take judicial notice of certain court orders rendered subsequent to the preparation of the record on this appeal, since the contents of the orders are undisputed (*see*

Matter of Khatibi v Weill, 8 AD3d 485, 485 [2d Dept 2004]). While not dispositive, those documents tend to indicate that the father will not likely be contributing financially to the care of the child, at least in the near future, which adds support to the conclusion that the relocation is in the child's best interests.

Accordingly, the order of the Family Court, New York County (Ivy I. Cook, Referee), entered on or about April 10, 2012, which, after a hearing, to the extent appealed from, denied respondent mother's petition to relocate to Mississippi with the parties' child, should be reversed, on the law and the facts, without costs, the petition granted, and the matter remanded for further proceedings at which provision shall be made regarding liberal visitation and an allocation of travel costs.

All concur.

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

ENTERED: OCTOBER 1, 2013

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Clark, JJ.

10590 Ind. 3306/12
[M-3684] In re James Smith,
Petitioner,

-against-

Hon. Patricia Williams, etc., et al.,
Respondents.

_____

The Bronx Defenders, Bronx (Robyn Mar and Gregg Stankewicz of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for Hon. Martin Marcus, respondent.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for The People of the State of New York, respondent.

_____

Application for a writ of prohibition granted, without costs and disbursements, respondents prohibited from retrying petitioner on Bronx County Indictment No. 3306/12, and the indictment dismissed.

Opinion Per Curiam. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Leland G. DeGrasse
Sallie Manzanet-Daniels
Darcel D. Clark, JJ.

10590
[M-3684]
Ind. 3306/12

_____x

In re James Smith,
Petitioner,

-against-

Hon. Patricia Williams, etc., et al.,
Respondents.

_____x

In this article 78 proceeding, petitioner seeks to prohibit respondents from retrying him under Bronx County Indictment Number 3306/12.

The Bronx Defenders, Bronx (Robyn Mar and Gregg Stankewicz of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for Hon. Martin Marcus, respondent.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson and Joseph N. Ferdenzi of counsel), for The People of the State of New York, respondent.

PER CURIAM

Petitioner, James Smith, brings this CPLR Article 78 proceeding for a writ of prohibition barring his retrial upon Bronx County Supreme Court Indictment No. 3306/12 and granting such other and further relief as this Court may deem just and proper. Petitioner contends, and the People concede, that retrial would twice place him in jeopardy for the same offenses in violation of his state and federal constitutional rights.

Petitioner is charged with auto stripping in the second degree and criminal possession of stolen property in the fifth degree. Respondent Justice Patricia Anne Williams presided over a jury trial that commenced on July 2, 2013. During the People's case and at Justice Williams's suggestion, the People and petitioner entered into a written stipulation that was amended, received in evidence and then read to the jury as a substitute for the testimony of Hernandez, the owner of the subject motor vehicle. Although the court expressed misgivings about the sufficiency of the stipulation, the trial continued. The People rested and petitioner did not put on a case. During petitioner's summation, the court sustained an objection to a comment by counsel apparently on the ground that petitioner was trying to take unfair advantage of the stipulation. At sidebar, the following colloquy took place:

> "THE COURT: I went through this whole long explanation about why I intervened with respect to the stipulation, because it was my suggestion that you might want to consider a stipulation to replace Mr. Hernandez. You chose to agree to a set of facts, which did not include the name of Mr. Hernandez even. I told you if you went that way I would take whatever steps were necessary. Apparently, you did not care, as you have not cared what my rulings were in the past. Congratulations. This trial is at an end. Step back."

Justice Williams then sua sponte declared a mistrial, discharged the jury and sent the case to Justice Marcus's part for retrial.

Jeopardy attaches once a jury has been selected and sworn (*Matter of Capellan v Stone*, 49 AD3d 121, 126 [1st Dept 2008], *lv denied* 10 NY3d 716 [2008]). When a mistrial is declared without the consent or over the objection of a criminal defendant, the prohibition against double jeopardy contained in the Fifth Amendment of the United States Constitution and in section 6 of article I of the New York State Constitution bars retrial for the same offense or offenses unless there is a manifest necessity for the mistrial or the ends of public justice would otherwise be defeated (*Matter of Enright v Huntzinger*, 59 NY2d 195, 199 [1983]). Here, as the People concede, counsel's summation comment was not overly prejudicial and provided no basis for a mistrial on "manifest necessity" or "ends of public justice" grounds.

Accordingly, the petition for a writ of prohibition should be granted, without costs, respondents should be prohibited from retrying petitioner James Smith on Bronx County Indictment No. 3306/12, and the indictment should be dismissed.

All concur.

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

ENTERED: OCTOBER 1, 2013

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
David Friedman
John W. Sweeny
David B. Saxe
Rosalyn H. Richter, JJ.

10461

_____x

In re Kevin McK.,
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-against-

Elizabeth A.E.,
Respondent-Appellant.
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Respondent appeals from the order of the Family Court, New York County (Ivy I. Cook, Referee), entered on or about April 10, 2012, which, after a hearing, to the extent appealed from, denied her petition to relocate to Mississippi with the parties' child.

O'Melveny & Myers LLP, New York (Brad M. Elias and Andrew J. Frackman of counsel), for appellant.

Kevin McKeown, respondent pro se.

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SAXE, J.

In this relocation case, where respondent mother, Elizabeth E., seeks permission to move with the parties' child to Oxford, Mississippi, we are once again confronted with the problem of balancing a child's need for the ongoing presence of both parents in his daily life, with the custodial parent's proven inability to support herself and the child beyond the subsistence level here in New York.

Facts

The parties never married, but were intimately involved for 10 years, during which time their son, Lucas, was born, on January 6, 2003. The father, Kevin McK., moved into the mother's apartment a few months prior to the child's birth, and moved out in November 2007, when the child was about 4½ years old. The mother filed a custody petition in December 2007, and was awarded temporary custody on January 8, 2008; the father filed a custody petition shortly thereafter. Later that year, the mother filed a second petition, seeking to modify the temporary custody order to permit her to relocate with the child to Oxford, Mississippi.

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those benefits since June 2010. In addition, between June 2010 and June 2011, when the mother was entitled to $732 per month in child support from the father, payments were almost always late, and several payments were missed entirely between November 2010 and February or March 2011. Support arrears in excess of $6,000 had accrued by June 2011, which the father paid off after a one year delay, only after the mother filed a violation petition. He has not made any further support payments since then.

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The court-appointed forensic psychologist, Dr. N.G. Berrill

of the New York Center for Neuropsychology and Forensic Behavioral Science, testified that if the child were to move to Mississippi due to financial circumstances, he would be able to make the necessary adjustment and, provided that ample contact was permitted between the child and the father, such a move would not be damaging to the child. Dr. Berrill did not believe that the mother was moving to Mississippi to interfere with the child's relationship with the father. To the contrary, she seemed to appreciate that the child has a positive relationship with the father. Dr. Berrill further noted that he found no evidence that the mother was "badmouthing" the father or attempting to alienate him from the child.

The father's own testimony cogently demonstrated that the mother would not be able to rely on him for steady and current payments of support. Although he claimed to have filed income tax returns, he could not recall whether he had filed tax returns in the years 2006, 2007 and 2008, and testified that he had "no idea" what income he had reported, and that he "would not be able even to begin" to put together a list of his "various sources of income" that "varie[d] week to week." Nor could he provide an income range for his earned income. While he does not have regular employment, he stated that he was starting a newspaper called the New York Bulletin, which had purportedly received

$200,000 in funding in May 2011, which funding he used to satisfy his debts to the IRS and other people.

He refused to estimate his average monthly expenses. He asserted that he pays his rent by bartering personal services. He did not provide a lease for the apartment in which he was living in 2010, but testified that he was responsible for rent of $3,200 per month, although on cross-examination it was revealed that he had reported to the Support Magistrate that his rent was $1,000 per month.

Although the father claimed to be current on his child support obligations, a printout admitted into evidence indicated that as of January 2012 he was in arrears in the amount of $2,196. His assertions that he would receive a large inheritance in the future from which he could pay what was owed were shown to be inaccurate.

Despite these clear indications of the father's inability or unwillingness to regularly make the required child support payments, the attorney for the child took the position that the mother's relocation petition should be denied. He disbelieved her assertion that her financial situation made the relocation necessary; in his view, she failed to establish that she could not find remunerative employment in New York, and failed to sufficiently substantiate her claims regarding available

employment for her in Mississippi. Moreover, he argued that the evidence failed to establish that the mother was in dire need and distress, as she had successfully paid for her and the child's expenses up to that point, and continued to have a balance of funds in her bank account.

The court conducted an in camera interview with the child, at which the attorney for the child was present.

Family Court Order

At the conclusion of the hearing, the Referee found that both parties were good parents and loving toward the child, and that the father's involvement in the child's life has contributed to the child being happy and well-adjusted, but concluded that it was in the child's best interests for the mother to have sole legal custody. However, the court denied the mother's petition for relocation on the ground that she had failed to prove by preponderance of the evidence that her financial circumstances require that she be permitted to move to Mississippi -- a move that, according to the could and the father, would disrupt the very close and steady relationship between the father and child.

The court expressed doubts about the mother's credibility, both in regard to her finances and her assertions that she would attempt to work with the father regarding additional visitation if the child moved to Mississippi. Nor was the court convinced

that the mother's financial situation was as dire as she claimed, citing her continued ability to pay her rent, maintain $10,000 in savings, keep a zero balance on her credit card, and provide for the child; it found that she had not been forthright in regards to her finances, and asserted the belief that the mother has other jobs or income that was not documented.

Discussion

We find that the Family Court's determination denying the mother's petition for relocation lacks a sound and substantial basis in the record, and, further, that the mother established by more than a preponderance of the evidence that relocation is in the best interests of the child, in that it will enhance the child's life both economically and emotionally.

"Where a custodial parent seeks to change her residence in a manner that would detrimentally affect the other parent's ability to enjoy frequent and regular contact with the child, the relocating party bears the burden of establishing that the proposed move is nevertheless in the best interests of the child" (*Salichs v James*, 268 AD2d 168, 170 [1st Dept 2000]). The ultimate determination in any relocation petition is the best interests of the child, and to make that determination, the court considers any relevant factors, including the parents' respective reasons for moving and for opposing the move, the degree to which

the custodial parent's and child's life may be enhanced economically, emotionally, and educationally by the move, the quality of relationship between the custodial and noncustodial parent and the child, and the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent (*Matter of Tropea v Tropea*, 87 NY2d 727, 736, 740-741 [1996]).

Here, the primary factors on which we must focus are the mother's reasons and need for the move, whether the child's life would be enhanced by the move, the impact of the move on the child's relationship with the father and the difficulty of maintaining the father's central role in the child's life.

The mother's petition for relocation was primarily based on the claim that the child's life would be improved by the move, because she has been unable to support herself and the child beyond the subsistence level since she lost her job in 2007. We find that she established the truth of that claim with a showing well beyond a preponderance of the evidence. While a trial court's assessment of the evidence is entitled to deference, there is no sound or substantial basis in the record here for the Family Court's assessment of the mother's truthfulness regarding her earnings and her earning ability (*see Matter of Gloria S. v Richard B.*, 80 AD2d 72, 76 [2d Dept 1981]). The supposition that

the mother could find, or actually did find, other remunerative employment, was not only unsupported, but indeed was contradicted by her receipt of various public assistance benefits such as Medicaid and food stamps. In sharp contrast to the father's evasive testimony and evidence with regard to his finances, the mother made a forthright showing of exactly how she had supported herself and the child.

Admittedly, the mother here is not (yet) destitute. Her financial situation is certainly not as bleak as that of the mother in *Matter of Melissa Marie G. v John Christopher W.* (73 AD3d 658, 658 [1st Dept 2010]), where this Court affirmed the grant of the mother's application to relocate with the parties' child to a stable home near the mother's family in Florida, after she and the child had lived in a series of homeless shelters. However, while the need to improve the mother's and child's economic situation was far more extreme in that case, we find that the present relocation application was prompted by a legitimate, pressing need for a secure economic situation. Not only do we reject the unsupported suggestion that the mother actually had other, hidden, means of support, but we observe that proof of economic necessity does not require the parent to wait until she has used up every last dollar of her savings before taking steps to ensure that she will be able to care for the

child's future economic needs.

Where the proposed move will provide economic, emotional and educational benefits for the child, relocation may be appropriate even where it will disrupt the frequency of visits between the child and the noncustodial parent (*see Aziz v Aziz*, 8 AD3d 596, 597 [2d Dept 2004], *lv dismissed and denied* 7 NY3d 739 [2006]). Several factors in *Aziz* justified the wife's proposed relocation to Texas with the parties' child: she had "an extensive support network in Texas, which include[d] her parents, a brother, aunts, uncles, cousins, and a large Muslim community," "the child ha[d] a strong emotional bond with his maternal grandmother," and "[t]he lower cost of living in Texas for the wife [would] allow her to improve their lifestyle and save for the child's college education" (*id.*). Similarly, here, the proposed move to Mississippi will give the mother and child an extensive network of family support, and the child has strong emotional bonds with his maternal grandparents, whom he has visited in previous summers. The requested relocation will provide the benefits of living near, and having the financial and emotional support of, the child's maternal extended family, enabling the child to enjoy a comfortable life free of economic distress, among a loving and supportive extended family. That powerful consideration would be less weighty if the father were providing consistent, steady, and

sufficient support to ensure the child's lifestyle at a level above subsistence; however, nothing in the record provides such assurance.

The present case stands in stark contrast with the facts in *Salichs v James* (268 AD2d 168 [1st Dept 2000]). There, this Court denied a mother's petition to relocate to Puerto Rico because she failed to prove that she had sought alternative work in New York, and in fact there was evidence that she could have successfully found another job here (*id.* at 172). Nor was there any claim in that case that the father could not be relied on to provide steady child support (*id.* at 170-171). Also, the father's employment as an architect licensed in New York precluded him from having any substantial flexibility so as to allow for frequent visiting with the child in Puerto Rico (*id.* at 172). Another consideration in *Salichs* was the evidence that the mother had previously attempted to limit the time her daughter spent with the father, an impulse which could have been exacerbated by the move to Puerto Rico (*id.* at 173).

Here, although the Family Court expressed serious concerns that the mother might interfere with the father's ability to maintain a meaningful relationship with the child, and believed the mother's affect and demeanor to support those concerns, nothing in the record establishes any actual interference by the

mother. There is no history of the mother preventing or overtly interfering with father-child visits, or subtly interfering with the father-child relationship. On the contrary, the mother asserted in court that the father could come to Mississippi as often as he liked, and assured the court that he would be provided with transportation and accommodations. Additionally, the forensic psychologist did not believe that the mother sought to move to Mississippi to interfere with the child's relationship with the father, and observed that on the contrary, she seemed to appreciate that the child has a positive relationship with the father.

The important counterweight to the benefits of the relocation is the disruption that the relocation would necessarily cause in the close relationship between father and son. However, while the impact of the move on the quantity and quality of the child's future contact with the father is a central concern, it is not "the" central concern (*see Matter of Alaire K.G. v Anthony P.G.*, 86 AD3d 216, 219 [1st Dept 2011]). In *Matter of Alaire K.G.*, the mother's petition for relocation to California was granted, despite the disruption the move would cause in the strong and healthy relationship between the child and his father, because this Court found that the mother's move to California to live with her new husband would provide the

child with more financial stability, and a better life, than that available with the father (86 AD3d at 220). Although this Court acknowledged that the child would see his father less frequently, it observed that extended holiday and weekend visits along with summer visits would allow for the father and child to maintain a strong relationship (*id.* at 221-222). Indeed, since the father was unemployed, this Court observed that a parallel move by the father could be feasible (*id.* at 220). A similar observation was made in support of a grant of relocation in *Matter of Scialdo v Cook*, which allowed the mother to relocate to Florida with the parties' child, noting that "[a]lthough the relocation will affect the frequency of the father's visitation, we note that the court ordered that the father 'shall be entitled to visit his son in the state of Florida at any time that he is able to do so'" (53 AD3d 1090, 1092 [4th Dept 2008]).

Similarly, here, our grant of relocation is issued with the proviso that the father shall be allowed broad access to the child in Mississippi as well as a liberal visitation schedule for visits to New York, the specifics to be addressed by the Family Court on remand.

Lastly, we take judicial notice of certain court orders rendered subsequent to the preparation of the record on this appeal, since the contents of the orders are undisputed (*see*

Matter of Khatibi v Weill, 8 AD3d 485, 485 [2d Dept 2004]). While not dispositive, those documents tend to indicate that the father will not likely be contributing financially to the care of the child, at least in the near future, which adds support to the conclusion that the relocation is in the child's best interests.

Accordingly, the order of the Family Court, New York County (Ivy I. Cook, Referee), entered on or about April 10, 2012, which, after a hearing, to the extent appealed from, denied respondent mother's petition to relocate to Mississippi with the parties' child, should be reversed, on the law and the facts, without costs, the petition granted, and the matter remanded for further proceedings at which provision shall be made regarding liberal visitation and an allocation of travel costs.

All concur.

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

ENTERED: OCTOBER 1, 2013

CLERK