SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 8, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10700 The People of the State of New York, Respondent, Ind. 5578/10

-against-

Bernardo Rodriguez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 30, 2012, convicting defendant, after a jury trial, of criminal possession of marijuana in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of nine months, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

The court properly instructed the jury on the subject of constructive possession (*see* Penal Law § 10.00[8]). Following the Criminal Jury Instructions (CJI2d[NY] Possession– Physical and Constructive), the court charged that in order to prove that

defendant exercised dominion and control over the marijuana and stun gun he was charged with possessing, and, therefore, that he constructively possessed them, the People were required to demonstrate that he "exercise[d] a level of control over the area in which the property is found . . . sufficient to give him . . . the ability to use or dispose of the property." The court also instructed the jury on the knowledge element of each crime.

Defendant argues that he was entitled to have the jury instructed that he could be convicted only upon proof that he *intended* to exercise dominion and control over the contraband. In defendant's view, even if he was fully aware that there was contraband in the apartment he shared with his aunt and nephew, and even if he had unfettered control over the areas where the contraband was located, he was not guilty of possessing it since he merely tolerated his drug-dealing nephew's use of the apartment as a repository for the contraband and had nothing else to do with it. We disagree.

There is no element of intent in constructive possession. A long line of authority makes clear that knowing constructive possession of tangible property is established where the People prove knowledge that the property is present and "a sufficient level of control over the area in which the contraband [was] found" (*People v Manini*, 79 NY2d 561, 573 [1992]; *see also People v Muhammad*, 16 NY3d 184 [2011]).

Defendant has identified a number of appellate decisions that speak in terms of "intent" to exercise dominion and control (*see e.g. People v Wesley*, 73 NY2d 351, 361-62 [1989]; *People v Huertas*, 32 AD3d 795 [1st Dept 2006]). However, these decisions do not stand for the proposition that defendant asks this Court to accept. Furthermore, the parties to those cases do not appear to have litigated the issue presented by this appeal, and in each case the Court does not appear to have had occasion to decide that issue (*see e.g. People v Louree*, 8 NY3d 541, 546 n [2007]). While *Wesley*, on which defendant principally relies, did state that the People bear the burden of "establishing defendant's ability and intent to exercise dominion or control," the holding of the case was that a defendant does not have standing to challenge a search that results in the discovery of contraband, based solely on his alleged constructive possession of that contraband (*id.* at 352). The case did not present the question whether intent must be proved to establish constructive possession and the Court did not so hold. Similarly, in *Huertas*, this Court quoted *Wesley*'s "ability and intent" language, but held, on the facts before it, that the evidence of constructive possession was insufficient for lack of proof that the defendant had a sufficient level of control over the garage where drugs were recovered, not because the People failed to prove intent.

Defendant's remaining claim does not warrant reversal. We

agree with defendant that a number of the statements contained in text message conversations recovered from the codefendant's cell phone were nonhearsay, and therefore should have been admitted. However, the error was harmless, particularly because the court admitted into evidence two similar messages and admission of the additional messages would not have affected the verdict.

Similarly, the error did not rise to the level of depriving defendant of his right to present a defense (*see generally Chambers v Mississippi*, 410 US 284, 294 [1973]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10701 In re Alyanna C.,

A Child Under Eighteen Years of Age. etc.,

Administration for Children's Services,
Petitioner-Appellant,

Rene B., et al.,
Respondents-Respondents.

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Michael A. Cardozo, Corporation Counsel, New York (Benjamin Welikson of counsel), for appellant.

Andrew J. Baer, New York, for Rene B., respondent.

Chadbourne & Parke LLP, New York (Marc B. Roitman of counsel), for Cynthia C., respondent.

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about January 8, 2013, which, after a fact-finding hearing, dismissed the petition alleging sexual abuse and neglect of the subject child, unanimously affirmed, without costs.

Petitioner agency failed to demonstrate by a preponderance of the evidence that respondent stepfather sexually abused the child. The child's testimony was inconsistent, vague, and lacking in specific details. It therefore did not meet the required threshold of reliability and cannot provide

corroboration for her previous out-of-court statements (*see Matter of Jared XX.*, 276 AD2d 980, 981-983 [3d Dept 2000]). Family Court's assessment of witness credibility is entitled to considerable deference, and we see no basis for disturbing the court's rejection of the child's testimony that her stepfather sexually abused her (*see Matter of Irene O.*, 38 NY2d 776 [1975]).

The record also fails to demonstrate that respondents neglected the child (*see e.g. Matter of Linda E.*, 143 AD2d 904, 908 [2d Dept 1988]). Although respondents may not have reacted appropriately to every difficulty that arose involving the child, the preponderance of the evidence does not show that they failed to exercise the statutory minimum degree of care (*see* Family Court Act § 1012[f][i][B]; *Nicholson v Scoppetta*, 3 NY3d 357, 370 [2004]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10702 Douglas H. Ashby, Index 111893/11
Plaintiff-Appellant,

-against-

ALM Media, LLC, et al.,
Defendants-Respondents.

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Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Clarick Gueron Reisbaum LLP, New York (Gregory A. Clarick of counsel), for respondents.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about May 18, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Defendant Whittle's statement that plaintiff was "deliberately sabotaging" defendant ALM Media, LLC's IT redesign project was protected by the common-interest privilege because it constituted a communication "made to persons who have some common interest in the subject matter" (*Foster v Churchill*, 87 NY2d 744, 751 [1996]), namely, the people working on the IT system redesign. The statement is also protected as one made by a "management employee[] having responsibility to report on the matter in dispute" (*Murganti v Weber*, 248 AD2d 208, 209 [1st Dept 1998]; *see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept

1999]). Plaintiff's allegations of malice, in an effort to overcome the common-interest privilege, amount to little more than "mere surmise and conjecture" (*Weiss v Lowenberg*, 95 AD3d 405, 406 [1st Dept 2012]).

Plaintiff's tortious interference claims against Whittle were also properly dismissed. "It is well established that only a stranger to a contract, such as a third party, can be liable for tortious interference with a contract" (*Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 157 [1st Dept 1990], *lv denied* 76 NY2d 714 [1990]; *see Baker v Guardian Life Ins. Co. of Am.*, 12 AD3d 285 [1st Dept 2004]). Whittle was not a stranger to plaintiff's contract with ALM as he was one of ALM's executives.

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 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10703 Bruno Maschi, etc., Index 102996/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Malik Armstead, et al.,
Defendants-Appellants.

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Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for Bruno Maschi, appellant.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for Malik Armstead and Kim Armstead, appellants.

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

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 20, 2012, which granted defendant City of New York's motion for summary judgment, dismissing the complaint and cross claims against it, unanimously reversed, on the law, without costs, and the motion denied on the ground that it was untimely.

By order dated June 23, 2011, the motion court required that summary judgment motions be made, if at all, by October 12, 2011. It is undisputed that defendant's motion was dated October 28, 2011. Accordingly, it was untimely (*see* CPLR 3212[a]; *see Brill v City of New York*, 2 NY3d 648, 653-654 [2004]). Defendant's

excuse for filing a tardy motion -- that counsel was on trial in another case -- does not satisfy the "good cause" requirement (CPLR 3212[a]) inasmuch as it is essentially an excuse of law office failure (*see Fofana*, 71 AD3d at 448; *Azcona v Salem*, 49 AD3d 343 [1st Dept 2008]; *Breiding v Giladi*, 15 AD3d 435 [2d Dept 2005]). Also unavailing is defendant's contention that plaintiff's failure to furnish it with the estate's tax return excuses its tardiness since the outstanding discovery is neither relevant nor necessary to the motion for summary judgment (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]; *Tower Ins. Co. of N.Y. v Razy Assoc.*, 37 AD3d 702, 703 [2d Dept 2007]).

In light of the foregoing, we need not reach the remaining arguments.

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10704-
10705 In re Niya Kaylee S.,

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

Yolanda R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about July 18, 2012, insofar as it brings up for review the fact-finding determination that respondent-appellant mother had derivatively neglected the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order, same court and Judge, entered on or about March 26, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the dispositional order.

The finding of derivative neglect is supported by a preponderance of the evidence (Family Ct Act §§ 1012[f][i][B]; 1046[a][i], [b][i]). Prior neglect findings

and a dispositional order placing the mother's then roughly two- and four-year-old children with the mother's aunt were entered less than one year before the filing of the instant petition. Although the mother is no longer in an abusive relationship and has a temporary home at her grandmother's house, the evidence indicates that the underlying conditions that resulted in the prior neglect findings — lack of an income source, medical care, and stable housing — continue to exist (*see e.g. Matter of Kadiatou B.*, 52 AD3d 388, 389 [1st Dept 2008], *lv denied* 12 NY3d 701 [2009]). Her grandmother's agreement to house and support her and the child for "a while," until she obtained public assistance and could move to a shelter, does not warrant a contrary conclusion.

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10706 The People of the State of New York, Ind. 3687/09
Respondent,

-against-

William Paige,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (A. Kirke Bartley, J.), rendered on or about July 1, 2010,

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

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

ENTERED: OCTOBER 8, 2013

CLERK

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

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10707 Ricardo Acosta, etc., et al., Index 15363/99
Plaintiffs-Respondents,

-against-

Josco Realty Co., LLC, et al.,
Defendants-Appellants,

Huffy Sports, et al.,
Defendants.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for Josco Realty Co., LLC, appellant.

Curan & Ahlers, LLP, White Plains (Keith J. Ahlers of counsel), for 1452 Beach Avenue Real Estate Inc., appellant.

Gary E. Divis, New York, for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered May 22, 2012, which, to the extent appealed from, denied defendants Josco Realty Co., LLC's and 1452 Beach Avenue Real Estate Inc.'s motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants failed to establish prima facie that they did not breach their duty to maintain their premises in a reasonably safe manner (*see Boderick v R.Y. Mgt. Co., Inc.*, 71 AD3d 144, 147 [1st Dept 2009]). The infant plaintiff was injured while playing on a portable basketball unit in the shared alleyway behind defendants' respective properties. The record presents triable

issues of fact whether, at times during the year or more preceding the accident, each defendant's superintendent exercised control over the unit, including its allegedly negligent and defective assembly and maintenance and its storage on defendants' properties for extended periods of time, with the knowledge or permission of the properties' owners and managers. Material issues of fact also exist whether each defendant had longstanding knowledge of, and acquiesced to, the neighborhood children's regularly being allowed access to the rear alleyway to play upon the basketball unit, thus implicating a duty to prevent foreseeable harm arising from the children's use of the structure brought out for their use by defendants' employees (*see Holtslander v Whalen & Sons*, 70 NY2d 962, 964 [1988], *modifying for reasons stated in dissenting opinion*, 126 AD2D 917, 919-920 [3rd Dept 1987]). The record is also unclear as to when control over the basketball unit transferred from 1452 Beach Avenue's superintendent to Josco Realty's superintendent, and as to whose portion of the rear alleyway the accident occurred on.

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10708- Index 650664/12
10709- 651450/12
10709A Katan Group, LLC, etc.,
Plaintiff-Appellant,

-against-

CPC Resources, Inc., et al.,
Defendants-Respondents,

John Does, etc.,
Defendants.

- - - - -

Katan Group, LLC, etc.,
Plaintiff-Appellant,

-against-

CPC Resources, Inc., et al.,
Defendants-Respondents,

Domino Mezz Holdings LLC, et al.,
Defendants.

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Shapiro Tamir Law Group, PLLC, New York (Mitchell C. Shapiro of counsel), for appellant.

Katsky Korins LLP, New York (Adrienne B. Koch of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered June 28, 2012, which determined that plaintiff could not voluntarily discontinue its first action (index No. 650664-12), unanimously dismissed, without costs. Order, same court and Justice, entered July 2, 2012, which, to the extent appealed from, determined that plaintiff could not

voluntarily discontinue its second action (index No. 651450-12), and granted so much of defendants-respondents' motion in the second action as sought dismissal of the second action, cancellation of the notice of pendency of that action, and an award of attorneys' fees, and referred the matter of attorneys' fees to a Special Referee for a hearing and determination of the amount of those fees, unanimously affirmed with respect to the granting of defendants' motion, and the appeal therefrom otherwise dismissed, with costs. Order, same court and Justice, entered September 21, 2012, which, upon defendants-respondents' motion in the first and second actions, consolidated the second action with an action commenced in Supreme Court, Kings County (*Katan Group, LLC v CPC Resources, Inc., et al.*, under index No. 13071-12), dismissed the complaint in the Kings County action, vacated the notice of pendency of the Kings County action, awarded defendants attorneys' fees incurred in the defense of the Kings County action and costs incurred in the cancellation of the notice of pendency, and referred the matter of attorneys' fees and costs to a Special Referee for a hearing and determination of the amount of those fees and costs, unanimously affirmed, with costs.

The June 2012 order declining to permit plaintiff to voluntarily discontinue the first action, and the portion of the

July 2012 order declining to permit plaintiff to voluntarily discontinue the second action, did not resolve motions made on notice; therefore, no appeal lies therefrom as of right (CPLR 5701[a][2]; *see Reyes v Sequeira*, 64 AD3d 500, 507 [1st Dept 2009]). Contrary to plaintiff's contention, we never granted its request for leave to appeal, and we decline to do so now.

Supreme Court properly granted defendants' motion to dismiss the second action, since the Operating Agreement between the parties does not provide plaintiff a right of first refusal with regard to a sale of the subject property.

Supreme Court providently exercised its discretion in consolidating the Kings County action with the second action (*Murphy v 317-319 Second Realty LLC*, 95 AD3d 443, 445 [1st Dept 2012]). The actions share sufficient common questions of law or fact to permit consolidation and plaintiff did not demonstrate prejudice resulting from consolidation (*see* CPLR 602). Although the complaint in the second action had been dismissed, the action was still "pending" for consolidation purposes (*id.*). Indeed, the court had directed further proceedings with respect to defendants' attorneys' fees in the second action and no judgment had been entered in that action.

New York County is the proper venue for the consolidated actions. The first and second actions were already pending in

New York County when plaintiff commenced the Kings County action, and the forum selection clause in the Operating Agreement provides that New York County is the proper venue for any dispute arising under the agreement.

Supreme Court properly dismissed the Kings County action as barred by the doctrine of collateral estoppel. The second action and the Kings County action involve identical issues — namely, whether the Operating Agreement gives plaintiff a right of first refusal in a sale of the subject property. Further, plaintiff had a full and fair opportunity to litigate that issue when defendants moved to dismiss the second action, and Supreme Court necessarily decided the issue against plaintiff when it dismissed plaintiff's claims in the second action (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 [1985]).

Given the proper dismissal of plaintiff's claims in the second action and the Kings County action, the court correctly

cancelled the notices of pendency of those actions (*Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 74 [1st Dept 2006]) and correctly awarded defendants attorneys' fees and costs pursuant to the Operating Agreement.

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10710 In re Anthony Wayne S., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Damaris S.,
Respondent-Appellant,

Abbott House,
Petitioner-Respondent.

_____

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

Quinlan & Fields, Hawthorne (Jeremiah Quinlan of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Colella of counsel), attorney for the children.

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 11, 2012, which, to the extent appealed from as limited by the briefs, revoked a suspended judgment entered on a finding of permanent neglect, terminated respondent mother's parental rights to the children, and committed custody and guardianship of the children to petitioner Agency for the purpose of adoption, unanimously affirmed, without costs.

The finding that respondent violated the terms of the suspended judgment, entered after respondent admitted to having permanently neglected the children, is supported by a

preponderance of the evidence (*see Matter of Kendra C.R. [Charles R.*], 68 AD3d 467, 467-468 [1st Dept 2009], *lv dismissed and denied* 14 NY3d 870 [2010]). Appellant failed to comply with the judgment which required, inter alia, that she stay away from the children's father with whom there is a history of domestic violence and refrain from abusing alcohol.

A preponderance of the evidence supports the determination that termination of respondent's parental rights is in the children's best interests (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children have been in the same foster homes for most of their lives, and the foster parents, who have provided for their special needs, wish to adopt them (*see Matter of Isiah Steven A [Anne Elizabeth Pierre L.]*, 100 AD3d 559, 560 [1st Dept 2012], *lv denied* 955 NYS2d 10 [2013]). Moreover, respondent failed to demonstrate that there are exceptional circumstances warranting an extension of the suspended judgment (*see Matter of Lourdes O.*, 52 AD3d 203, 204 [1st Dept 2008]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10711 The People of the State of New York, Ind. 303/11
Respondent,

-against-

Abdoulaye Traore,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (Avi Springer of counsel), for appellant.

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about October 27, 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 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10712 Marek Goreczny, Index 103558/10
Plaintiff-Respondent,

-against-

16 Court Street Owner LLC, et al.,
Defendants-Appellants.

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Babchik & Young, LLP, White Plains (Ephraim J. Fink of counsel), for appellants.

Souren A. Israelyan, New York, for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered October 19, 2012, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240(1), and denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim and the Labor Law § 241(6) claim as predicated on Industrial Code (12 NYCRR) § 23-1.21(b)(3)(iv) and (4)(ii), unanimously affirmed, without costs.

Summary judgment was properly granted with respect to plaintiff's Labor Law § 240 (1) cause of action. Plaintiff's deposition is uncontradicted insofar as he testified that he was injured when the unsecured ladder upon which he was working moved, causing him to fall. Accordingly, plaintiff made a prima facie showing of liability under the statute (*see Panek v County*

of Albany, 99 NY2d 452, 458 [2003]). That plaintiff might have chosen to use the wrong type of ladder is immaterial since a worker's comparative negligence is irrelevant to a Labor Law § 240 (1) cause of action (*see Mata v Park Here Garage Corp.*, 71 AD3d 423 [1st Dept 2010]). Defendants have failed to raise a triable issue of fact as to whether plaintiff's conduct was the sole proximate cause of the accident (*see Cuentas v Sephora USA*, 102 AD3d 504 [1st Dept 2013], *see also Ervin v Consolo Edison of New York*, 93 AD3d 4135 [1st Dept 2012]). We are also unpersuaded by defendants' argument that plaintiff's motion should have been denied because he was the only witness to the accident. The fact that a plaintiff is the only witness to an accident does not bar summary judgment where his or her testimony concerning the manner in which the accident occurred is neither inconsistent with nor contradicted by his own account provided elsewhere or other evidence (*see Klein v City of New York*, 222 AD2d 351 [1995], *affd* 89 NY2d 833 [1996]).

In light of the grant of plaintiff's motion for summary judgment on liability, we need not reach defendants' arguments regarding his Labor Law § 241(6) claims(*see Auriemma v Biltmore Theater, LLC*, 82 AD3d 1, 11-12 [1st Dept 2011]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10713 The People of the State of New York, Ind. 201N/09
Respondent,

-against-

Winston Kingston,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about July 11, 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 8, 2013

CLERK

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

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10714 In re Andrew Arnold, Index 260282/08
Petitioner-Appellant,

-against-

New York State Division of Human Rights,
Respondent,

Beth Abraham Health Services, Inc., et al.,
Respondents-Respondents.

_____

Andrew Arnold, appellant pro se.

Jones Day, New York (Terri L. Chase of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered April 4, 2012, which denied petitioner's motion to amend the caption on this CPLR article 78 proceeding, unanimously affirmed, without costs.

Given that this Court previously determined that the proceeding had been properly dismissed (70 AD3d 605 [2010]), Supreme Court properly denied as moot petitioner's motion to amend the caption to reflect a change in the corporate name of respondent Beth Abraham Health Services, Inc.

Petitioner never filed notices of appeal from orders, entered in June and August 2012, denying his motions to reopen the proceeding. Further, we do not have the authority to deem

petitioner's notice of appeal from the April 2012 order as an application for leave to appeal from the June and August 2012 orders (*see* CPLR 5520). The statutory time limit for seeking permission to appeal from the latter orders has expired (*see* CPLR 5513[b]; *Matter of Haverstraw Park v Runcible Props. Corp.*, 33 NY2d 637 [1973]). In addition, the April 2012 order does not involve the same relief as the June and August 2012 orders (*cf. Gutman v Savas*, 17 AD3d 278, 278-279 [1st Dept 2005]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10717 In re Trustees of Columbia University, Petitioner, Index 102002/12

-against-

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

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Cohen, Hochman & Allen, New York (Bradley Green of counsel), for petitioner.

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

_____

Determination of respondents, dated October 27, 2011, finding petitioner in violation of Administrative Code of City of NY § 28-301.1, and imposing a penalty of $5,000, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alexander W. Hunter Jr., J.], entered May 15, 2012), dismissed, without costs.

The subject petition does not contest that a worker was killed in petitioner's building when he fell from a scaffold into an elevator shaft, which was secured only by plastic sheeting. Since no substantial evidence question is raised, as the issues involve statutory interpretation, the matter should not have been transferred to this Court. However, in the interest of judicial

economy, we will retain jurisdiction and decide the merits (*see Matter of Heisler v Scappaticci*, 81 AD3d 954 [2d Dept 2011]; *see also Matter of DeMonico v Kelly*, 49 AD3d 265 [1st Dept 2008]).

Petitioners were properly found to have violated Administrative Code § 28-301.1. Respondents' interpretation of section 28-301.1 is entitled to deference, since the agency was responsible for administering the statute and its interpretation is reasonable and comports with the plain language of that provision *(see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428-429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). We see no conflict between an owner's duty to maintain its premises in a safe condition under Administrative Code § 28-301.1, and a contractor's duty to safeguard a construction site under New York City Building Code (Administrative Code of City of NY tit 28, ch 33) § BC 3301.2.

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10718 Meyerson Capital V. LLC, Index 380137/10
Plaintiff-Appellant,

-against-

Michael Anderson, etc.,
Defendant-Respondent,

New York Transit Authority, et al.,
Defendants.

_____

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Law Office of Elliot S. Schlissel, Lynbrook (Andrea E. Miller of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 13, 2012, which granted in part defendant Michael Anderson's (defendant) motion to vacate a judgment of foreclosure and sale, unanimously reversed, on the law, without costs, and the motion denied.

As a preliminary matter, defendant's motion to vacate the judgment lacks a basis in law. The judgment was not entered on default, and defendant did not establish any other ground for the motion (*see* CPLR 5015[a]; *see Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities*, 133 AD2d 30, 33 [1st Dept 1987, *affd* 70 NY2d 831 [1987]). The motion should have been denied for this reason alone.

Defendant's sole stated defense was plaintiff's lack of standing. However, defendant, who appeared by counsel in the foreclosure action, never raised this argument, although it is based on documents submitted in that action (*see CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 760-761 [2d Dept 2011]). In any event, plaintiff's showing of standing was adequate. The record reflects the assignment of the mortgage and the note, actual delivery of the note to plaintiff, and recordation of the assignment (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10719 The People of the State of New York, Respondent, Ind. 167/11

-against-

Luis Garcia, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 10, 2012, as amended April 18, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of one year, unanimously affirmed.

The court properly denied defendant's suppression motion. The court had the unique opportunity to see and hear the

witnesses (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), and there is no basis for disturbing its credibility determinations, including its evaluation of inconsistencies in testimony and an officer's inability to recall minor details.

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10720N Tracy D. Carson, Index 303757/11
Plaintiff-Respondent,

-against-

Hutch Metro Center, LLC, etc., et al.,
Defendants,

Otis Elevator Company,
Defendant-Appellant.

_____

Geringer & Dolan LLP, New York (John A. McCarthy of counsel), for appellant.

Nora Constance Marino, Great Neck, for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 29, 2013, which granted plaintiff's motion to quash three subpoenas issued by Otis Elevator Company seeking to depose plaintiff's treating physicians and awarded plaintiff costs and attorney's fees, unanimously modified, on the law and in the exercise of discretion, to vacate the award of costs and attorney's fees, and otherwise affirmed, without costs.

The court providently granted plaintiff's motion to quash subpoenas seeking to depose three physicians who treated her for prior injuries which were allegedly exacerbated as a result of the subject accident. Otis has not shown that the testimony sought is unrelated to diagnosis and treatment and is the only means of discovering the information sought (*see Matter of New*

York City Asbestos Litig., 87 AD3d 467 [1st Dept 2011]; *Ramsey v New York Univ. Hosp. Ctr.*, 14 AD3d 349, 350 [1st Dept 2005]). In this regard, plaintiff has exchanged authorizations allowing Otis to obtain copies of her medical records from these physicians and to speak with them regarding her prior injuries, and has admitted that the handwriting on certain forms contained in those physicians' records belongs to her. In addition, Otis can, to the extent it has not already done so, obtain authorizations for prior diagnostic testing.

Although we find that Otis' position lacks legal merit and is not sufficient to compel disclosure, it was not "so egregious as to constitute 'frivolous conduct' within the meaning of 22 NYCRR 130-1.1" (*Parametric Capital Mgt., LLC v Lacher*, 26 AD3d 175 [1st Dept 2006]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10721N Nancy Ullmann-Schneider, et al., Index 653533/11
Plaintiffs-Respondents,

-against-

Lacher & Lovell-Taylor PC, et al.,
Defendants-Appellants.

_____

Bleakley Platt & Schmidt, LLP, White Plains (Robert D. Meade of counsel), for appellants.

Golenbock Eiseman Assor Bell & Peskoe LLP, New York (Jeffrey T. Golenbock of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered December 11, 2012, which denied defendants' motion to disqualify plaintiffs' attorneys, unanimously affirmed, without costs.

"Disqualification . . . during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants [and] denies a party's right to representation by the attorney of its choice" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 69 NY2d 437, 443 [1987]). The right to counsel is "a valued right [and] any restrictions must be carefully scrutinized" (*id.*). Furthermore, where the rules relating to professional conduct are invoked not at a disciplinary proceeding but "in the context of an ongoing lawsuit, disqualification . . . can [create a] strategic

advantage of one party over another" (*id.*). Thus, the movant must meet a heavy burden of showing that disqualification is warranted (*see Broadwhite Assoc. v Truong*, 237 AD2d 162, 163 [1st Dept 1997]). Disqualification is required only where the testimony by the attorney is considered necessary and prejudicial to plaintiffs' interests (*see id.*). Defendants have not met their burden.

The dispute in this case involves the extent and reasonableness of the fees that defendants charged to Leonard Ullmann, now deceased, during accounting proceedings related to his mother's estate. To justify their fees based on the directives given by their client, defendants can use his deposition taken during the accounting proceedings, and thus, would not need to call to the stand Donald Hamburg, plaintiffs' counsel, who also served, for a time, as Leonard Ullman's co-executor of his mother's estate. Even if Hamburg's testimony is needed, there is no evidence that it would be prejudicial to his client.

Neither are any other partners at counsel's law firm necessary witnesses. The lead trial litigator for plaintiffs affirmed that his involvement with the subject estate and the account proceedings was minimal, and any testimony that could be provided by counsel's co-partner in the firm's trust and estates

department, who did not have first hand experience with the plaintiffs, would be cumulative (*see Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 153 [1st Dept 1994], *affd* 87 NY2d 826 [1995]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Gonzalez, P.J., Mazzarelli, Andrias, DeGrasse, JJ.

10722 & [M-4337] In re Joseph Cunningham, Petitioner, Index 250425/13

-against-

Hon. John A. Barone, et al., Respondents.

_____

Joseph Cunningham, Petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Andrew Meier of counsel), for Hon. John A. Barone, 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 8, 2013

CLERK

Freedman, J.P., Richter, Feinman, Gische, JJ.

10561 241 Fifth Ave. Hotel, LLC, Index 110513/10
Plaintiff-Appellant,

-against-

GSY Corp.,
Defendant-Respondent,

Jack Hazan,
Defendant.

- - - - -

GSY Corp.,
Cross Claimant Respondent,

-against-

Beekman Partners Group, LLC, et al.,
Cross Claim Defendants,

Beekman Conduit LLC, et al.,
Cross Claim Defendants-Appellants.

_____

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellants.

Goldberg & Rimberg, PLLC, New York (Israel Goldberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 17, 2012, which granted defendant GSY Corp.'s motion to strike cross-claim defendant Dan Shavolian's answer and denied plaintiff 241 Fifth Ave. Hotel, LLC's cross motion for summary judgment, unanimously modified, on the facts, to deny the motion to strike and to reinstate the answer on the condition that, within 30 days of the date of entry of this order, cross-

claim defendant Shavolian finish the deposition begun on December 12, 2011, and to impose as a sanction attorney's fees and costs incurred by defendant GSY Corp. in making the motion to strike below, the matter remanded for calculation of these fees and costs, and otherwise affirmed, with costs.

This action arose out of plaintiff 241 Fifth Ave. Hotel, LLC's (241 Fifth Ave.) alleged default on a bridge loan issued by defendant GSY Corp. When 241 Fifth Ave. failed to repay the loan, GSY filed a UCC-1 financing statement listing 241 Fifth Ave. as a debtor of GSY. In response, 241 Fifth Ave. brought the underlying action seeking damages and to compel GSY to cancel the financing statement.

During discovery, the motion court issued a series of scheduling orders. On October 27, 2011, the court ordered 241 Fifth Ave. and the cross-claim defendants, including Dan Shavolian, to appear for depositions beginning on December 5, 2011. Shavolian began his deposition on December 12, 2011, but did not complete it. On January 26, 2012, the court ordered that Shavolian continue his deposition beginning March 26, 2012. Shavolian did not appear; he has yet to complete his deposition.

GSY moved to strike Shavolian's answer. The cross-claim defendants and 241 Fifth Ave. cross-moved for summary judgment. The motion court granted GSY's motion and struck Shavolian's

answer, finding that Shavolian offered no reasonable excuse for his failure to complete his deposition. The court denied the cross motion for summary judgment as premature.

A party moving to strike a pleading pursuant to CPLR 3126 is required to submit an affirmation that counsel for the moving party has made "a good faith effort to resolve the issues raised by the motion" with opposing party's counsel (Uniform Rules for Trial Cts [22 NYCRR] 202.7). To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to reconcile with opposing counsel (22 NYCRR 202.7[c]; *see Mironer v City of New York*, 79 AD3d 1106, 1107-1108 [2d Dept 2010]).

Here, GSY's affirmation of its good faith effort to resolve the dispute with Shavolian did not substantively comply with the requirements of 22 NYCRR 202.7 (*see Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 45 AD3d 393, 394 [1st Dept 2007]). In its affirmation in support of the motion to strike, GSY stated that it made "good faith efforts to proceed with disclosure," pointing to a letter it faxed to Shavolian's counsel. There is nothing in the letter, which was written before the continued deposition date, indicating that GSY's counsel actually conferred with Shavolian's lawyer in a good faith attempt to resolve the dispute (*see Molyneaux v City of New*

York, 64 AD3d 406, 407 [1st Dept 2009]; *Mironer*, 79 AD3d at 1107-1108 [affirmation of good faith submitted by the moving party was "insufficient, as it did not refer to any communications between the parties that would evince a diligent effort by the plaintiffs to resolve the discovery dispute"]).

Furthermore, even if an argument could be made that such an effort would have been futile, there is no showing that Shavolian's failure to complete the deposition was in bad faith (*see Molyneaux,* 64 AD3d at 407) and "there is a strong preference in our law that matters be decided on their merits" (*Catarine v Beth Israel Med. Ctr.*, 290 AD2d 213, 215 [1st Dept 2002]). Thus, GSY's motion to strike Shavolian's answer should have been denied.

However, Shavolian's lengthy delay in completing his deposition warranted the imposition of a lesser sanction (*see Allstate Ins. Co. v Buziashvili*, 71 AD3d 571, 572-573 [1st Dept 2010]; *Friedman, Harfenist, Langer & Kraut v Rosenthal*, 79 AD3d 798, 801 [2d Dept 2010]). Therefore, attorneys' fees and costs incurred in the making of the motion to strike are to be paid to GSY. Shavolian also must complete the deposition promptly, and this is his final opportunity to comply. In the event he does not comply within 30 days of the date of entry of this order, the motion to strike should be granted.

The motion court was correct in denying the motion for summary judgment as premature since key depositions had not yet taken place (*see Cannon v New York City Police Dept.*, 104 AD3d 454 [1st Dept 2013]). Moreover, in opposition to plaintiff's documentary evidence showing that defendant Jack Hazan is not a member of 241 Fifth Ave., GSY submitted Hazan's prior sworn written statement, submitted in unrelated litigation, in which Hazan stated that he is a member of 241 Fifth Ave. This raises a triable issue of fact regarding his membership.

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

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10678-
10678A The People of the State of New York, Ind. 3124/95
Respondent,

-against-

Daniel Tavarez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (George D. Covington, J.), rendered July 29, 1996, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and two counts of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 9 to 18 years, unanimously reversed, on the law, and the matter remanded for a new trial. Appeal from order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about May 27, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously dismissed as moot.

The court erred in denying defendant's challenge for cause to a prospective juror who stated his belief and concern that he recognized defendant from his neighborhood, along with his fear

that he would "run into" defendant or his friends. After being apprised of defendant's address, the panelist expressed an increased concern, resulting from the fact that he lived near that address. The panelist also expressed a "feeling of defendant's guilt," because he believed the neighborhood was "infected with drugs and drug dealers," After further inquiry regarding whether the panelist could follow the law and remain impartial, he ultimately stated, "I'll try. . . . I can't promise you anything. . . ." Viewing his statements in context and as a whole, they did not amount to an unequivocal assurance of impartiality (*see People v Chambers*, 97 NY2d 417, 419 [2002]; *People v Arnold*, 96 NY2d 358, 362-363 [2001].

In view of this determination, 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 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10679-
10679A

In re Gquan D.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

_____

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

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

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Orders of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about March 13, 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 possession of an imitation pistol, and revoked a prior dispositional order that had placed appellant on probation, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously affirmed, without costs.

Appellant's suppression motion was properly denied. There is no basis for disturbing the court's credibility determinations. The police had probable cause to arrest appellant for first-degree harassment (Penal Law § 240.25), because the gist of the victim's statement to the police was

that, rather than merely engaging in aggressive panhandling, appellant's pattern of conduct had placed the victim in reasonable fear of physical injury. Moreover, a passerby's excited statement, "watch out for his gun," provided further support for this conclusion.

In any event, the police also had probable cause to arrest appellant for second-degree harassment, a violation. Although a delinquency proceeding may not be initiated for such an offense, appellant reasonably appeared to the arresting officer to be over 16 years old (*see Matter of Michael W.*, 295 AD2d 134 [1st Dept 2002], *lv denied* 98 NY2d 614 [2002]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10680 The People of the State of New York, Ind. 1600/00
Respondent,

-against-

Julio Muñoz, also known as Julio Matos,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Joseph Dawson, J.), rendered on or about July 7, 2010,

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

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

ENTERED: OCTOBER 8, 2013

CLERK

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

Friedman, J.P., Richter, Feinman, Gische, JJ.

10681 Hispanic Independent Television Sales, LLC, now known as Hispanic Media Works, Plaintiff-Appellant, Index 600028/10

-against-

Una Vez Mas, LP, Defendant-Respondent.

_____

Blank Rome LLP, New York (Michael A. Rowe of counsel), for appellant.

Zukerman Gore Brandeis & Crossman, L.L.P., New York (John K. Crossman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered June 7, 2012, which, in this action to collect on accounts receivable purchased in an underlying bankruptcy proceeding, insofar as appealed from as limited by the briefs, denied plaintiff's motion to dismiss defendant's fourth affirmative defense for recoupment, unanimously affirmed, with costs.

Nonparties Interep National Radio Sales, Inc. and Azteca America Television Sales, Inc. (collectively Interep) entered into a National Television Sales Representation Agreement (Sales Agreement) with defendant television station. Under the agreement, Interep was to sell television spots and advertising time on behalf of defendant, in exchange for a commission based

on the amount of revenue from the sales. While it is undisputed that Interep sold television spots and advertising time for defendant, defendant alleged that Interep breached various provisions of the Sales Agreement. After defendant terminated the agreement, Interep filed for bankruptcy.

During the bankruptcy proceedings, plaintiff purchased from the trustee Interep's accounts receivable related to defendant's account pursuant to an Asset Purchase Agreement, which the Bankruptcy Court approved under the Bankruptcy Code (11 USC § 363[f]). Plaintiff commenced this action to collect on the accounts receivable, and defendant asserted a "defense" for recoupment of damages arising from Interep's alleged breach of the Sales Agreement. Plaintiff argues that the "defense" should be dismissed because it does not sound in recoupment, but rather, is an independent breach of contract claim against Interep that has been extinguished by the "free and clear" sale under § 363(f).

Supreme Court properly denied plaintiff's motion to dismiss the defense. The affirmative defense of recoupment is not an "interest" that is extinguishable by a "free and clear" sale under the Bankruptcy Code (*see Folger Adam Security, Inc. v DeMatteis/MacGregor JV*, 209 F3d 252, 260-261 [3d Cir 2000]). Further, we reject plaintiff's contention that recoupment may not

be applied because Interep's performance and alleged breach of the Sales Agreement constitute independent and unrelated transactions (*see Westinghouse Credit Corp. v D'Urso*, 278 F3d 138, 147 [2d Cir 2002] ["Recoupment may only be applied in bankruptcy where both debts . . . arise out of a single integrated transaction . . . ."] [internal quotation marks and emphasis omitted]). Defendant's recoupment defense arises out of the same transaction (i.e., the same contract) that forms the basis for plaintiff's action against defendant (*see Hispanic Ind. Tel. Sales, LLC v Kaza Azteca Am. Inc.*, 2012 WL 1079959, *7, 2012 US Dist LEXIS 46239, *20 [SD NY, March 30, 2012, No. 10-Civ-932 (SHS)]).

We have reviewed plaintiff's remaining contentions, including its argument that defendant's defense is barred by the doctrines of res judicata or collateral estoppel, and find them unavailing.

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

ENTERED: OCTOBER 8, 2013

CLERK

Freedman, J.P., Richter, Feinman, Gische, JJ.

10682-
10683 Graeme A. Moss, et al.,
Plaintiffs-Respondents,

-against-

Claudio Garcia-Chamorro, et al.,
Defendants-Appellants.

Index 117067/08

Law Offices of Mark Krassner, New York (Mark Krassner of counsel), for appellants.

Goldberg & Rimberg, PLLC, New York (Joel S. Schneck of counsel), for respondents.

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 3, 2013, in plaintiffs' favor, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 18, 2013, which granted plaintiffs' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The deposition testimony of defendant Claudio Garcia-Chamorro establishes prima facie that he and the corporate defendants are liable for the underlying judgment, entered April 16, 2008, in plaintiffs' favor against CGC Works, Inc., on theories of piercing the corporate veil, corporate successor liability, and fraudulent conveyance (*see e.g. Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]; *Schumacher v Richards Shear Co.*, 59 NY2d 239, 244-245 [1983]).

Defendants failed to raise an issue of fact in opposition, and were in any event precluded from doing so, as a sanction imposed in prior order for that wilful failure to provide discovery. Garcia-Chamorro testified that he was the sole owner and officer of all three corporations, that he transferred assets between the corporations for no value, and that all three corporate businesses were operated out of his personal residence. He acknowledged that he had destroyed the corporate records of CGC Works about a year before his deposition and that he stopped doing construction work for CGC Works and transferred its assets, for no value, to defendant CGC Woodworks, Inc. The record shows that the destruction of CGC Works' records followed the grant to plaintiffs of the arbitration award against CGC Works upon which the underlying judgment was entered.

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

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10684 The People of the State of New York, Respondent, Ind. 2138/10

-against-

Hector Madera-Alvarez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about November 29, 2010, 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 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10688 Yefim Kochman, et al., Index 7577/06
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant-Respondent-Appellant,

780 E. 132nd St. Co. LLC, et al.,
Defendants-Appellants-Respondents.

_____

Mintzer, Sarowitz, Zeris, Ledva & Meyers, LLP, New York (Erika L. Omundson of counsel), for appellants-respondents.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih Sadrieh of counsel), for respondent-appellant.

Finkelstein & Partners LLP, Newburgh (Andrew L. Spitz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered November 30, 2012, which, to the extent appealed from, denied defendants 780 E. 132nd St. Co. LLC and Benenson Capital Company LLC's motion for summary judgment dismissing plaintiffs' Labor Law §§ 240(1) and 241(6) claims against them, and denied defendant City of New York's motion for summary judgment dismissing plaintiffs' common law negligence and Labor Law §§ 200, 240(1) and 241(6) claims against it, unanimously modified, on the law, to dismiss the Labor Law § 241(6) claims against all defendants, and otherwise affirmed, without costs.

Plaintiff Yefim Kochman was a Verizon technician assigned to

move a T-1 line circuit at defendants' building, a garage. The building, located at 780 E. 132nd Street, is owned by defendant 780 E. 132nd Street Co. LLC, operated by defendant Benenson Capital Company LLC (the building defendants), and leased by defendant City of New York for the use of its Department of Sanitation (DSNY), which houses its trucks there. In addition, there was a separate structure within the garage space which housed offices for the DSNY.

When Kochman arrived at the garage, a DSNY employee showed him the room where the circuit was located and the room to which the circuit was to be moved. Kochman noted, and the DSNY employee confirmed, that the walls of the structure were made of concrete, making drilling holes for the wires prohibitive. The DSNY employee recommended running the additional wires through the structure's roof, stating that previous Verizon technicians had done the same thing. Kochman then went to access the roof via a stairway within the garage, but was stopped by different DSNY employees, who told him not to use the stairway, although they said nothing about the roof. Kochman then got his own ladder, climbed to the top of the structure, looked at the roof, which he could not see well because of poor lighting, and stepped on the structure's roof, which he promptly fell through because it could not support his weight.

The City argues that plaintiffs may not maintain a Labor Law § 200 cause of action against it because it did not direct or control Kochman's work and because the roof did not represent a dangerous or defective condition of which it had notice. We disagree. While the DSNY employee's general suggestion that Kochman access the roof to run the wires is not sufficient to confer on the City the "authority or control" over Kochman's work for Labor Law § 200 liability (*see e.g. O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226 [1st Dept 2006], *affd* 7 NY3d 805 [2006]), there is testimony in the record from one of DSNY's employees that they had been warned never to access the roof, as it could not support a person's weight, giving rise, at the very least, to a question of fact concerning whether the roof was a dangerous condition for Kochman's task, of which the City had notice yet failed to warn.

Both the City and the building defendants next argue that Kochman's task that day did not constitute an alteration of the premises within the meaning of § 240(1) or construction within the meaning of § 241(6). We find this argument unpersuasive. Kochman was not merely splicing cables into the existing circuit (*see e.g. Rhodes-Evans v 111 Chelsea LLC*, 44 AD3d 430 [1st Dept 2007]); he was running new wires through the roof of the structure, along the roof, and down into the other room where a

new circuit would be installed. Kochman would have needed to take steps to permanently affix the wires to the roof of the structure, and to protect them from any hazard (*see e.g. Shick v 200 Blydenburgh, LLC*, 88 AD3d 684 [2d Dept 2011], *lv dismissed* 19 NY3d 876 [2012]). Accordingly, the motion court properly denied defendants' motion for summary judgment on the § 240(1) claim.

Turning to the § 241(6) claim, we find the motion court should have dismissed this claim based upon the regulations allegedly violated. Plaintiffs based their § 241(6) claim on violations of §§ 23-1.5, 23-1.7(b) and 23-1.30 of the Industrial Code. However, § 23-1.5 of the Industrial Code is too general to support a cause of action for violating Labor Law § 241(6) (*see e.g. Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 550 [1st Dept 2013]). Section 23-1.7(b) applies to hazardous openings (*see e.g. Ramirez v Metropolitan Transp. Auth.*, 106 AD3d 799 [2nd Dept 2013]), and here Kochman fell not through an opening, but the ceiling itself. Finally, plaintiffs' allegations concerning a violation of Industrial Code § 23-1.30, concerning improper illumination of the worksite, are too vague to support any inference that the lighting fell below the specific statutory

requirements (*see e.g. Carty v Port Auth. of NY & NJ*, 32 AD3d 732 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]).

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

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10689 Kitty Lee, et al., Index 111681/09
Plaintiffs-Respondents,

-against-

Ana Development Corp., et al.,
Defendants-Appellants,

The Hecht Group Corp., et al.,
Defendants.

_____

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for Ana Development Corp., appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas Hurzeler of counsel), for 1133 Lexington Avenue Realty Corp. and Don Filippo Restaurant, appellants.

Shayne, Dachs, Sauer & Dachs, LLP, Mineola (Norman H. Dachs of counsel), for Nail Clarity, Inc., appellant.

Baron Associates P.C., Brooklyn (Jeffrey Mania of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 11, 2012, which, insofar as appealed from as limited by the briefs, denied defendants-appellants' motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

At her deposition, plaintiff Kitty Lee repeatedly testified that she did not know what caused her to fall down the stairs or where precisely she fell, other than somewhere at the top of the

stairs. This evidence establishes prima facie defendants' entitlement to judgment (*see Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555 [1st Dept 2012]; *Daniarov v New York City Tr. Auth.*, 62 AD3d 480 [1st Dept 2009]).

In opposition, plaintiffs failed to raise a triable issue of fact whether defendants' negligence was a proximate cause of Lee's fall.

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10690 The People of the State of New York, Ind. 6350/09
Respondent,

-against-

Radames Pepin,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about July 27, 2010,

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

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

ENTERED: OCTOBER 8, 2013

CLERK

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

Friedman, J.P., Richter, Feinman, Gische, JJ.

10692 Alixandra C. Baker, et al., Index 106380/02
Plaintiffs-Appellants, 110697/10

-against-

16 Sutton Place Apartment Corporation,
Defendant-Respondent.

_____

Chadbourne & Parke LLP, New York (Elizabeth M. Miller of counsel), for appellants.

Braverman Greenspun, P.C., New York (Scott S. Greenspun of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered March 7, 2012, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiffs' first action (index No. 106380/02), and pursuant to CPLR 3211 to dismiss the causes of action in the second action (index No. 110697/10) alleging breach of the covenant of good faith and fair dealing, breach of fiduciary duty, for a declaratory judgment that the construction of a roof garden on the subject building would constitute a breach of the lease and that the putative lease amendment would not bind plaintiffs, and for a permanent injunction, unanimously affirmed, with costs.

The court properly dismissed the first action wherein plaintiffs, the tenants-shareholders of a penthouse apartment in

defendant cooperative's residential building, seek an order permanently enjoining defendant from constructing a garden on the roof of the building. Plaintiffs failed to show entitlement to the very "narrow" protections afforded by the frustration-of-purpose doctrine (*Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 265 [1st Dept 2004]). The absence of a roof garden, and the inability of defendant to subsequently install one, was clearly not "so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense" (*id.*). The proprietary lease was the same one used by defendant for all of the cooperative members, the entire remainder of whom were largely unaffected by the presence or absence of a roof garden. Moreover, plaintiffs entered into the lease knowing that a majority vote by the cooperative's shareholders could result in the very garden they claim the lease's purpose was to prevent.

As to the second action, the court properly dismissed the claim alleging breach of the covenant of good faith and fair dealing. The lease gave defendant the right to solicit changes to its terms, defendants did so and, only after the change was approved by an overwhelming majority of the coop, did defendants alter the lease. Plaintiffs may not use the doctrine to negate a right of defendant expressly granted by the lease (*Fesseha v TD*

Waterhouse Inv. Servs., 305 AD2d 268, 268 [1st Dept 2003] ["[w]hile the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights"]). Plaintiffs cannot overcome this well-settled law by asserting, without any support, that defendant acted in bad faith when it solicited the lease amendment.

For the same reason, plaintiffs' reliance on their assertion of bad faith to maintain their breach of fiduciary duty claim fails. Plaintiffs allege no specific facts in support of the claim, relying instead upon conclusory allegations of harassment by defendant (*see DeRaffele v 210-220-230 Owners Corp.*, 33 AD3d 752 [2d Dept 2006], *lv denied* 8 NY3d 814 [2007]).

The court correctly dismissed the declaratory judgment cause of action as advisory or premature, and defendant is not seeking a declaration in its favor on this appeal.

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10693 In re Jamie V.,

A Child under Eighteen Years
of Age, etc.,

Jamie V.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

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

Lisa H. Blitman, New York, attorney for the child.

_____

Order of fact-finding and disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about April 16, 2012, which, insofar as appealed from as limited by the briefs, found that respondent father had neglected the subject child, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b][i]). The record shows that the father was operating his admitted drug dealing out of the family apartment. The father also chose not to testify, which entitled the court to draw the strongest possible inference against him (*see Matter of Eugene L. [Julianna H.]*, 83 AD3d 490 [1st Dept 2011]).

Accordingly, the court properly found that the father's conduct posed an imminent danger to the child's physical, mental and emotional condition (*see* Family Ct Act § 1012[f][i]). The fact that the child had already been removed from the home for approximately a week before the search warrant was executed does not warrant a different result (*see Matter of Jared M. [Ernesto C.]*, 99 AD3d at 474 [1st Dept 2012]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10694 The People of the State of New York, Respondent, Ind. 5961/06 6402/06

-against-

Curtis Brown, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol Berkman, J. at speedy trial motion; Edward J. McLaughlin, J. at jury trial and sentencing), rendered September 15, 2009, convicting defendant of criminal sexual act in the first degree, sexual abuse in the first degree and criminal contempt in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. Even with the periods conceded by the People to have been erroneously excluded, there is insufficient includable time to require dismissal.

In denying the motion, the court properly excluded periods that constituted "reasonable period[s] of delay resulting from . . . proceedings for the determination of competency and the period during which defendant [was] incompetent" (CPL

30.30[4][a]). The period during which defendant was incompetent encompassed periods during which judicial determinations of incompetency were still in effect, regardless of whether psychiatrists at the facility to which defendant had been committed had expressed opinions that defendant was no longer incompetent. Even if the People had some "duty of inquiry" when the facility concluded that defendant was competent, "[i]t is the determination that the defendant is no longer incapacitated that brings the District Attorney back into the proceedings and revives the People's trial readiness obligations under CPL 30.30" (*People v Lebron*, 88 NY2d 891, 895 [1996]), and "[a] finding of trial competency [to stand trial] is within the sound discretion of the trial court and involves a legal and not a medical determination" (*People v Phillips*, 16 NY3d 510, 517 [2011] [internal quotation marks omitted]).

Similarly, each time defendant was found competent, the People were entitled to a reasonable period to prepare for trial (*see People v Green*, 90 AD2d 705 [1982], *lv denied* 58 NY2d 784 [1982]), measured from the judicial determination of competency. Each of these periods constituted "a reasonable period of delay resulting from . . . proceedings for the determination of competency pre-trial motions" within the meaning of CPL 30.30(4)(a). Furthermore, in each instance where the motion court found a delay to be reasonable and thus excludable,

including time to prepare following findings of competency, time to respond to discovery requests, and time to produce grand jury minutes, the court's determination was appropriate.

The court also properly excluded a period that resulted from a pro se motion made by defendant, including the time that it was under consideration by the court (*see* CPL 30.30[4][a]), even though the court ultimately chose not to decide the motion after defense counsel declined to adopt it and instead offered to submit his own motion on the same subject. The record fails to support defendant's assertion that his pro se submission should not be deemed a motion for purposes of CPL 30.30(4)(a).

Turning to trial-related issues, we find no grounds for reversal. The court properly exercised its discretion when it denied defense counsel's midtrial applications for yet another competency examination (*see Pate v Robinson*, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878 [1995]). Defendant made two brief and isolated outbursts. One outburst was a crude exercise in rhetoric, the other was an inartfully stated legal argument, and neither suggested that defendant lacked the ability to understand the proceedings or assist in his defense. On the contrary, defendant took an active role in his defense and otherwise exhibited competence throughout the trial (*see People v Mendez*, 306 AD2d 143 [1st Dept 2003], *lv denied* 100 NY2d 622

[2003]). Even when defendant's outbursts are viewed in the context of the prior findings of incompetency, they did not require the court to order a new examination.

The court properly granted the People's motion to quash defendant's subpoena for the victim's rape crisis counselor records, which were privileged under CPLR 4510. Since defendant did not establish a basis for his claim that these records contained material evidence, he was neither constitutionally nor statutorily entitled to examine the records or to have the court examine them in camera (*see Pennsylvania v Ritchie*, 480 US 39, 58 n 15 [1987]; *see also* CPL 60.76; *People v Gissendanner*, 48 NY2d 543, 548-551 [1979]). Defendant's showing consisted of general and speculative claims that could apply to nearly any case involving confidential records.

We have considered and rejected defendant's arguments concerning the sufficiency of the evidence supporting the contempt charge and the admissibility of evidence received under the prompt outcry exception to the hearsay rule.

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10695 Nilsa Gomez, Index 310046/09
Plaintiff-Respondent,

-against-

Shop-Rite of New Greenway,
Defendant,

Shop-Rite Supermarkets Inc.,
Defendant-Appellant.

_____

Torino & Bernstein, P.C., Mineola (Bruce A. Torino of counsel), for appellant.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered January 14, 2013, which denied the motion of defendant Shop-Rite Supermarkets Inc. (Shop-Rite) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Shop-Rite established entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped and fell on water on the floor of the produce aisle in Shop-Rite's supermarket. Shop-Rite submitted evidence showing that it neither created the subject water condition nor had notice of it (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-501 [1st Dept 2008]).

In opposition, plaintiff raised a triable issue of fact as

to whether Shop-Rite created the subject condition. Reliance upon plaintiff's unsigned deposition transcripts in opposing the motion was proper, since the transcripts were certified by court reporters, and Shop-Rite, which relied upon the same transcripts, did not challenge the testimony as inaccurate (*see Bennett v Berger*, 283 AD2d 374 [1st Dept 2001]). Plaintiff testified that after she fell she was wet and noticed a Shop-Rite employee two feet away unloading produce from boxes, one of which was leaking and creating the puddle in which she claimed to have stepped before her fall. Such testimony allows the inference that Shop-Rite created the condition that caused plaintiff to fall (*see Munoz v Uptown Paradise T.P. LLC*, 69 AD3d 401 [1st Dept 2010]).

We have considered Shop-Rite's remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10696 Lydia Gonzalez, Index 304040/10
Plaintiff-Appellant,

-against-

Dong Yun Corp., et al.,
Defendants-Respondents.

_____

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

Nicolini, Paradise, Ferretti & Sabella, PLLC, Mineola (Joshua H. Stern of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about January 23, 2013, which, upon the summary judgment motion of defendants Dong Yun Corp., Dong Yun d/b/a Busy Town Market, Busy Town Market and Bo Yon Lee, dismissed the complaint as against all of the defendants, unanimously affirmed, without costs.

Plaintiff saw a supermarket employee unloading items from a cardboard box in the aisle of defendant Busy Town Market before she tripped over the box and hurt her arm. Defendants, relying on plaintiff's deposition testimony, made a prima facie showing of their entitlement to judgment as a matter of law, since the condition described by plaintiff was open and obvious, and was not inherently dangerous (*see Lazar v Burger Heaven*, 88 AD3d 591 [1st Dept 2011]).

In opposition, plaintiff failed to raise a triable issue of fact (*see id.*). There is no evidence that the box was obscured or left unattended (*cf. Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 75-76 [1st Dept 2004]).

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

ENTERED: OCTOBER 8, 2013

CLERK

Friedman, J.P., Richter, Feinman, Gische, JJ.

10699 & [M-3917] In re Jeffrey Wilson
Petitioner,

-against-

Hon. Barbara Newman,
Respondent.

Ind. 2615/08

Jeffrey Wilson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders 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 8, 2013

CLERK

Mazzarelli, J.P., Acosta, Saxe, Renwick, Clark, JJ.

9209 The People of the State of New York, Ind. 4374/08
Respondent,

-against-

Louis Puesan,
Defendant-Appellant.

_____

Samuel E. Rieff, Garden City, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 13, 2010, affirmed.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Dianne T. Renwick
Darcel D. Clark, JJ.

9209
Ind. 4374/08

_____x

The People of the State of New York,
Respondent,

-against-

Louis Puesan,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 13, 2010, convicting him, after a jury trial, of computer trespass (three counts), computer tampering in the third degree (three counts), unlawful duplication of computer related material in the first degree, and criminal possession of computer related material, and imposing sentence.

Samuel E. Rieff, Garden City, for appellant.

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

SAXE, J.

Since 1986, when the New York State Legislature first enacted Penal Law article 156 to define and combat newly emerging computer-related crimes, the statute has undergone repeated review and revision as new forms of these crimes have continued to emerge (see L 1986, ch 514; L 1993, ch 89; L 2006, ch 558; L 2008 ch 590). As Governor Cuomo observed when he signed article 156 into law, rapid technological advances left the State "without adequate protection against the many insidious forms of computer crime" (Governor's Approval Memo, L 1986, ch 514, 1986 McKinney's Session Laws of NY at 3172). Indeed, a task force of the American Bar Association had described the "frightening spectre" of ever-increasing computer crime (*see* June 1984 Report on Computer Crime, ABA Task Force on Computer Crime, at iii). One of the widespread forms of computer crime is the obtaining of unauthorized access to computerized private information (*see* Scott Charney & Kent Alexander, *Computer Crime*, 45 Emory LJ 931, 955 [Summer 1996]). Gaining unauthorized access to computerized information belonging to others is at the heart of the charges against defendant in this matter.

Essentially, it is asserted that, while on leave from his job as a field technician for Time Warner Cable, and therefore unauthorized to enter its offices or use its computers, defendant

entered Time Warner Cable's Northern Manhattan office and installed a keystroke logger[1] (also known as a keylogger) computer program on three of Time Warner Cable's computers, and was able to use the information he wrongfully obtained with the keylogger to gain access to another Time Warner program that stored customers' confidential information.

Defendant was charged with almost every offense defined in article 156, and was convicted after trial of every count: three counts of computer trespass (Penal Law § 156.10), three counts of computer tampering in the third degree (Penal Law § 156.25[1]), one count of unlawful duplication of computer related material in the first degree (Penal Law § 156.30[2]), and one count of criminal possession of computer related material (Penal Law § 156.35). On this appeal, he takes advantage of the paucity of case law addressing these recently defined crimes, and of the constantly changing means by which illicit access to computerized information can be achieved, to buttress his arguments that the proof failed to establish the elements of each of the crimes as defined by the statutes.

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[1] Keystroke loggers "capture every key typed on a particular computer" (*see* Wayne R. Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 UC Davis L Rev 1545, 1552 [April 2006]).

I. The Trial Evidence

On November 9, 2007, defendant was placed on disability leave from his job as a field technician for Time Warner Cable. Tom Allen, Vice President of Security at Time Warner, testified that an employee who is placed on work leave is not considered an active employee; his or her access card is disabled and thus cannot be used to gain access to the company's offices. This policy is announced in employee handbooks provided to employees, and any employee placed on leave is instructed by human resources department personnel regarding that policy. Since the public is not allowed to enter Time Warner Cable's Northern Manhattan office, security guards are stationed outside to ensure that those entering the building have valid ID cards.

David Lopez, a head-end technician for Time Warner Cable, testified that sometime in late January or early February 2008, he arrived at work at the company's Northern Manhattan office, located at 401 West 219th Street, and spotted defendant nearby. During a brief conversation, defendant asked Lopez for Lopez's personal log-in and password for Time Warner Cable's billing and customer information system, CSG, but Lopez refused. Defendant responded that he would find another way to get that information. Specifically, Lopez recounted, defendant said that he "might use a keylogger" to get the password he needed in order to gain

access. Soon thereafter, Lopez warned Monty Harris, a Time Warner Cable crew chief and field technician, and two supervisors, Lance Giancotti and Thomas Bonelli, that defendant might do something to the computers in the company's "service ready room." The service ready room is accessible to all employees, and contains three computers, one main computer and two "thin client" computers. All three computers are installed with a program, CSG, that gives employees access to customers' personal information.

It is undisputed that on February 10, 2008, defendant entered the Time Warner Cable Northern Manhattan office at 5:17 p.m., and left at 6:03 p.m. Lopez testified that at 5:30 p.m., he saw defendant using a computer in the service ready room. However, while both Lopez and Harris saw defendant using all three of those computers during that period of time, neither could see what he was doing with the computers. According to Lopez, there were approximately six other employees in the room while defendant was using the computers, but they were in a separate area of the room, not near the computers.

From the time he first saw defendant using the computers to the time he left at 6:30 p.m., Harris saw no other individual using the computers. Harris did not notify anyone about defendant's use of the computer at the time; nor did he check the

computers after defendant left.

The following morning, on February 11, Harris logged on to the computers in the service ready room and noticed that a program, Cracks, was open and running on the main computer. Harris was curious as to what the program was, and said that he visited the website and found that it was a site that showed "how to generate password keys for software." This website and program was used to gain access to password-protected software. Harris discovered that the same program was open and running on the other two computers in the room. As Harris went to report his findings, he saw Lopez walking in to the room. He and Lopez talked, and then Harris reported his findings to Paul Hart, a foreman. Hart in turn notified supervisor Lance Giancotti about the situation, and Giancotti concluded that there had been a security breach.

Giancotti reported the security breach to Sandip Gupta, Time Warner Cable's Senior Director of Information Technology, and Gupta directed Marc Rosenthal, the IT Manager of Network Support, to go to the Northern Manhattan office to examine the three computers in the service ready room. On examining the three computers, Rosenthal noticed a program, Winvestigator, that was never installed or used by Time Warner Cable. Rosenthal took screen shots of the computers, which showed that Winvestigator

was installed on each of the three computers between 5:45 p.m. and 6:15 p.m. on February 10, 2008. A search through the computers' browser history revealed that a site called Tropical Software was visited on all three computers, and Rosenthal discovered that Winvestigator could be downloaded and purchased from that site. Rosenthal then gathered and secured the computers to take them to Time Warner's 23rd Street office.

When the three computers arrived at Time Warner Cable's lab on 23rd Street, Rosenthal and Gupta discovered that unplugging them had caused the hard drives to be erased on the two "thin client" computers. However, the main computer's hard drive remained intact, and Rosenthal was able to make a copy of it to analyze without damaging the contents of the original hard drive.

Rosenthal testified that he was unable to access Winvestigator's log file, which keeps track of the program's information and data, and discovered it had been password protected. To gain access to that log file, Gupta purchased a "back-door" password to access Winvestigator. Rosenthal was able to gain access to the program. He discovered that the program had stored his own password as well as Giancotti's password. The individual who installed Winvestigator on the Time Warner computers, Rosenthal testified, had set the program's password to "lp."

Tom Allen, Time Warner Cable's Vice President of Security, testified that on February 12, 2008, he was notified of the security problem in the Northern Manhattan office, and reported the security breach to the New York City Police Department.

On April 3, Allen and Rosenthal turned over two hard drives and a desktop computer tower to Detective Jorge Ortiz, a member of the NYPD's Computer Crime Squad, who had received specialized training in computer forensics. Ortiz made copies of the hard drives and desktop tower and then conducted a forensic analysis on the copies. He ran a program named NetAnalysis, which analyzes the computer's Internet history, and two malware detection programs, Gargoyle and Encase. He found that on February 10, 2008, at 5:32:09 p.m., someone visited the website Cracks.com, which provides individuals with access codes and key generators to access specific software. Additionally, between 5:32:58 p.m. and 5:58:19 p.m., someone visited the home page of Tropical Software, which makes Winvestigator, and downloaded the program.

Both Gargoyle and Encase showed that Winvestigator had been installed on the desktop computer on February 10, 2008, during the time period under investigation. Ortiz determined that Winvestigator's settings were set to log keystrokes, user sign-ons, and the times that programs opened and closed.

Additionally, Winvestigator was programmed to self-encrypt and not warn others that the program was running, so that anyone without the programmed password would be unable to look at the Winvestigator log file, because it would display only incomprehensible text. Ortiz determined that Winvestigator had started to log keystrokes at 5:37 p.m. on February 10, 2008.

II. Discussion

To determine the legal sufficiency of the evidence to support a conviction, the Court must view the evidence in the light most favorable to the People to decide whether any rational trier of fact, using any valid line of reasoning, could have found the elements of each crime beyond a reasonable doubt (*see People v Ramos*, 19 NY3d 133, 136 [2012]; *People v Bleakley*, 69 NY2d 490, 495 [1987]).

A. Computer Trespass

To convict an individual of computer trespass under Penal Law § 156.10, it must be shown that the individual "knowingly use[d] . . . or accesse[d] a computer … or computer network without authorization and . . . knowingly gain[ed] access to computer material." Defendant argues that he cannot be properly convicted of accessing "computer material" because he did not gain access to the types of materials defined in the statute, and that the evidence failed to prove that he lacked authorization to

use the three computers.

The term "without authorization" is defined as "access of a computer service by a person without permission . . . or after actual notice to such person, that such access was without permission" (Penal Law § 156.00[8]). While there is apparently no appellate authority on this point, the question of how to prove that use of a computer was not authorized was addressed in *People v Klapper* (28 Misc 3d 225 [Crim Ct, NY County 2010]), which considered a charge of unauthorized use of a computer (Penal Law § 156.05). The *Klapper* court held that no allegations supported the claim that the defendant's access was unauthorized, because for access to be without authorization, the defendant must have had knowledge or notice that access was prohibited or "circumvented some security device or measure installed by the user" (28 Misc 3d at 230). Of course, here, evidence fully supports the finding that defendant gained access to Time Warner's computers when he was unauthorized to do so. There is proof that Time Warner announced in its employee handbook that employees on disability leave were prohibited from entering the building, and the company deactivated those employees' access cards; this establishes that defendant had actual notice that he lacked authorization to enter the building and to use the company's computers. Furthermore, defendant's request of David

Lopez to use his log-in information, Lopez's refusal, and defendant's reply that he would find another way to access the system, support the finding that defendant was aware of his lack of authorization.

Defendant's reliance on *People v Katakam* (172 Misc 2d 943 [Sup Ct, NY County 1997]) is misplaced. There, unlike here, the defendant obtained materials during a period of time when he was given free access to them; thus, his access was not "without authorization" (172 Misc 2d at 947-948). To the extent defendant argues that proof of computer trespass requires the People to show that he engaged in his conduct to gain a competitive advantage, and that they failed to do so, we note that the statute contains no such intent element; therefore, the People had no such obligation. The *Katakam* court discussed the defendant's intent to gain a benefit only in the context of the charge of criminal possession of computer related material (*id.* at 947).

As to whether the information defendant gained access to constituted "computer material" for purposes of Penal Law § 156.10, the statutory definition of the term includes "any computer data or computer program" that "is not and is not intended to be available to anyone other than the person . . . rightfully in possession thereof . . . and which accords or may

accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof" (Penal Law § 156.00[5]). With the use of user log-in information and passwords obtained through his installation of the keystroke-logging program Winvestigator, defendant was able to access information not intended to be available to anyone but the rightful user, namely, Time Warner and its authorized employees. Specifically, he gained access to information contained in Time Warner's CSG system, comprising confidential information about customers' accounts, including address, phone number, subscription, service call records, and billing and payment information, as well as a list of any problems customers reported or services they requested. Customer information such as that contained in Time Warner's CSG system is the sort of information that businesses have an interest in protecting and keeping away from competitors (*see Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 308 [1976]). Accordingly, it qualifies as computer data that is not intended to be available to anyone other than the rightful possessor and that gives (or may give) the rightful possessor an advantage over competitors.

Notably, the statute requires only that defendant "knowingly gain[] access to computer material"; it does not require that he actually make use of the material in any way. The evidence is

sufficient to establish that with the information defendant obtained by illicitly installing Winvestigator he gained access to the confidential customer information in Time Warner's CSG system. Moreover, the testimony of David Lopez that defendant asked him for his personal log-in and password for access to the CSG system adds weight to the evidence that defendant's actions were purposefully geared toward gaining access to information in that system.

Therefore, all the elements of computer trespass under Penal Law § 156.10 were properly found to have been established.

B. Computer Tampering

The crime of computer tampering in the third degree (Penal Law § 156.25) is established by proof of the commission of fourth-degree computer tampering (Penal Law § 156.20) along with proof of one of four aggravating factors. The fourth-degree crime is committed when the individual uses or accesses a computer without authorization and "intentionally alters in any manner or destroys computer data or a computer program of another person" (Penal Law § 156.20). We have already concluded that the evidence supports the finding that defendant used or accessed three Time Warner computers without authorization. The question is whether there is proof that defendant intentionally altered or destroyed computer data or a computer program.

In *People v Versaggi* (83 NY2d 123 [1994]), the defendant, a computer technician who worked for Eastman Kodak, was convicted of computer tampering in the second degree based on proof that he accessed the computers that operated the company's telephone system, and issued commands that caused those computers to shut down thousands of the company's telephone lines. He challenged the conviction by contending that he did not change the computer programs, but merely activated existing instructions which commanded the computers to shut down. The Court upheld the conviction, explaining that a computer program can be "altered," as that term is defined by the Penal Law, merely by making it "different in some particular characteristic . . . without changing [it] into something else" (*id.* at 129, quoting Webster's Third New International Dictionary at 63 [Unabridged]). Therefore, when the defendant entered Kodak's computer systems and input commands, he "made the system 'different in some particular characteristic" even if he did not add or delete program material (*id.* at 131-132).

Defendant's actions here amounted to an even clearer alteration of programs than the actions of the defendant in *Versaggi*. The installation of a program that secretly monitors and replicates other users' keystrokes, and self-encrypts if the wrong password is used to attempt access to it, constitutes an

alteration of the computer programs or programs on of the computers on which it was installed.

Of the four aggravating factors that can elevate fourth-degree computer tampering to the third degree, the People rely on the one specifying that the defendant did so "with an intent to commit or attempt to commit or further the commission of any felony" (Penal Law § 156.25[1]). Defendant argues that the evidence failed to establish the commission of computer trespass, a class E felony, or the intent to commit it. However, we have already determined that there was sufficient proof that defendant knowingly accessed Time Warner's computers without authorization, and altered their programming, thereby knowingly gaining access to computer material, specifically, Time Warner's CSG system. Therefore, the evidence established defendant's intent to commit a felony.

C. Unlawful Duplication of Computer Related Material

"A person is guilty of unlawful duplication of computer related material in the first degree when having no right to do so, he or she copies, reproduces or duplicates in any manner . . . any computer data or computer program with an intent to commit or attempt to commit or further the commission of any felony" (Penal Law § 156.30[2]). Defendant argues that there is insufficient evidence that he duplicated or copied computer

materials. Additionally, he again challenges the sufficiency of the evidence supporting the finding that he committed felony computer trespass.

The act of installing a keystroke logging program to reproduce other employees' user ID's and passwords amounts to arranging for the duplication of that log-in information, to which defendant alone gained access. The finding that defendant arranged for the duplication of the user log-in information in furtherance of his commission of the felony of computer trespass is fully supported by the evidence.

D. Criminal Possession of Computer Related Material

As defined by Penal Law § 156.35, "A person is guilty of criminal possession of computer related material when having no right to do so, he knowingly possesses, in any form, any copy, reproduction or duplicate of any computer data or computer program which was copied, reproduced or duplicated in violation of section 156.30 of this article, with intent to benefit himself or a person other than an owner thereof." The term "benefit" is defined as "any gain or advantage to the beneficiary" (Penal Law § 10.00[17]). Defendant argues that it was not proven that he "possessed" computer related materials with the intent to "benefit" himself or that he violated Penal Law § 156.30 (unlawful duplication of computer related material in the first

degree).

Having determined that there is legally sufficient evidence to establish that defendant arranged for the duplication of computer data in violation of Penal Law § 156.30, we turn to the requirement that defendant knowingly possessed the illicitly duplicated computer data. There is no requirement that defendant physically, tangibly possess the copies or duplicates of the information stored by the Winvestigator program; the statute expressly states that possession "in any form" is sufficient. Since defendant alone had access to and exercised control over the information Winvestigator duplicated, it follows that he constructively possessed such duplicated materials.

As to whether his possession of the illicitly duplicated computer data was "with intent to benefit himself or a person other than an owner thereof," defendant's expressed desire to gain access to Time Warner's CSG program, as well as the actions he took to gain that access, permit the inference that he intended to benefit either himself or someone else with the information he could obtain from the CSG system.

Accordingly, the judgment of the Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 13, 2010, convicting defendant, after a jury trial, of computer trespass (three counts), computer tampering in the third degree (three

counts), unlawful duplication of computer related material in the first degree, and criminal possession of computer related material, and sentencing him to an aggregate term of five years' probation, should be affirmed.

All concur.

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

ENTERED: OCTOBER 8, 2013

CLERK