SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 17, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Clark, JJ.

8919-
8919A The People of the State of New York, Respondent,

Ind. 8193/98
8616/00

-against-

Carlos Abreu,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Renee A. White, J.), rendered August 10, 2010, resentencing defendant to an aggregate term of 7 years, with 5 years' postrelease supervision, unanimously affirmed. Order, same court and Justice, entered on or about August 10, 2010, which adjudicated defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). A defendant has no legitimate expectation of finality until he or she has completed an aggregated sentence (*see People v Brinson*, 21 NY3d 490 [2013]). Here, defendant was resentenced prior to the maximum expiration date of his single aggregated sentence. Thus, the Supreme Court properly resentenced defendant to add a period of post release supervision. Although defendant's consecutive sentences were imposed on different dates regarding separate, unrelated indictments, the sentences are added together, yielding a single sentence pursuant to Penal Law 70.30 (*see People v Buss*, 11 NY3d 553, 557 [2008]). We do not find the term of postrelease supervision to be excessive.

The court properly adjudicated defendant a level three sex offender. We reject defendant's arguments that the court improperly included 10 points for defendant's failure to take responsibility, and improperly imposed an override. In any

event, if those 10 points and the override are disregarded, defendant would still be a level three offender, and we find no basis for a discretionary downward departure to level two (*see generally People v Pettigrew*, 14 NY3d 406, 409 [2010]).

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10557 In re Rudranu Toolasprashad, Index 108031/11
Petitioner-Appellant,

-against-

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

_____

Thomas Torto, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about April 5, 2012, insofar as appealed from, as limited by the briefs, denying the petition to compel respondents to vest petitioner police officer's pension and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, and the petition granted to the extent of directing respondents to vest petitioner's pension.

Administrative Code of the City of New York § 13-256 provides that a police officer's pension automatically vests thirty days after he or she "duly execute[s an] application for a deferred retirement allowance," provided, among other things, that the discontinuance of the officer's employment is not "by .

. . dismissal" (§§ 13-256[a][1], [4]; § 13-256[b]). On or about March 7, 2006, petitioner submitted a retirement application. On April 3, 2006, before the date of vesting, respondent Commissioner dismissed petitioner from the police force following a hearing held in his absence. However, in a prior CPLR article 78 proceeding, the Supreme Court vacated the order of dismissal, finding that respondents' attempts to serve petitioner with notice of the charges, which were not "reasonably calculated to give him actual notice and an opportunity to be heard" (*Matter of Toolasprashad v Kelly*, 2007 NY Slip Op 32075[U][Sup Ct, NY County 2007], *affd* 80 AD3d 530 [1st Dept 2011], *lv denied* 16 NY3d 714 [2011]), violated due process, rendering "the final determination . . . arbitrary and capricious and without sound basis in reason" (*id.*). The court granted the petition to the extent of remanding the matter to respondent NYPD for a full hearing on proper notice (*id.*). This Court affirmed the Supreme Court's decision (80 AD3d 530), and the Court of Appeals denied respondents' application for leave to appeal (16 NY3d 714).

The Supreme Court's ruling rendered the order of dismissal a nullity, thus, the thirty-day vesting period set forth in § 13-256 remained in effect upon remand and began running anew following the Court of Appeals' denial of leave to appeal.

Although Supreme Court's remand order was stayed during the pendency of respondents' appeals (CPLR 5519[a]), the stay terminated five days after service of the Court of Appeals' order denying leave to appeal with notice of its entry (CPLR 5519[e][ii]). Because respondents failed to hold a hearing and issue a new order of dismissal within 30 days of that date, petitioner's pension vested automatically and the court should have granted the petition seeking an order compelling them to process the pension (*see Matter of Paniss v Kerik*, 15 AD3d 286 [1st Dept 2012]; *Matter of Tolan v Murphy*, 39 AD2d 197, 198 [1st Dept 1972]).

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10770 The People of the State of New York, Ind. 5203/09
Respondent, 1336/10

-against-

Shanita Lyons,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about June 14, 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 17, 2013

CLERK

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

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, JJ.

10771 In re Desiree L., IDV 239/07
Petitioner-Respondent,

-against-

Lewis N.,
Respondent-Appellant.

_____

Carol L. Kahn, New York, for appellant.

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

_____

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about February 22, 2012, which, to the extent appealed from as limited by the briefs, after a hearing, awarded permanent custody of the child to petitioner mother, unanimously affirmed, without costs.

The record amply supports the court's determination that it is in the best interest of the child to grant sole custody to petitioner (*see Eschbach v Eschbach*, 56 NY2d 167, 171 [1999]). The court properly determined that petitioner's epileptic seizures, standing alone, do not render her unfit to be the custodial parent (*see Janus v Janus*, 239 AD2d 712, 713 [3rd Dept 1997]. Petitioner consistently receives medical care for her condition and is reasonably compliant with her medication, and

her physicians do not suggest that she cannot adequately care for the child. The court also correctly found that petitioner has made adequate arrangements for the child in the event that she experiences a seizure.

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

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10772 Anthony Ciaravino, etc., Index 113095/09
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Dupée & Monroe, P.C., Goshen (Michael A. D'Angelo of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 12, 2012, which granted defendant's motion to dismiss the complaint and denied plaintiff's cross motion for leave to amend the notice of claim, unanimously reversed, on the law and the facts, without costs, defendant's motion denied, and plaintiff's cross motion granted.

Plaintiff's decedent was allegedly injured when she tripped and fell after stepping into a 20-foot-long depressed area in the street, which was about 25 to 30 feet from a subway exit in Union Square Park. Plaintiff's notice of claim mistakenly described the location of a subway exit as between 16th and 17th Streets on Union Square East, rather than Union Square West. However, at the statutory hearing held approximately eight months after the

accident, plaintiff correctly stated that the accident occurred in the location shown in a photograph of a Union Square subway exit with no canopy, amid a farmer's market, by a 16th Street sign. Plaintiff also submitted information obtained from the Internet showing that the other two subway exits in Union Square Park are covered by canopies and are located well south of 16th Street.

Under these circumstances, plaintiff should have been allowed to correct the notice of claim pursuant to General Municipal Law § 50-e(6), since the mistake was not made in bad faith and defendant was not prejudiced by the defective notice (*see Gonzalez v New York City Hous. Auth.*, 107 AD3d 471 [1st Dept 2013]; *Green v City of New York*, 106 AD3d 453 [1st Dept 2013]). Defendant failed to meet its burden of showing prejudice, because the record does not indicate that it sent anyone to investigate the scene of the accident either before or after the correct location had become apparent (*see Gonzalez* at 471-472; *Phillipps v New York City Tr. Auth.*, 68 AD3d 461, 463 [1st Dept 2009]).

Furthermore, defendant's argument that even if the error were corrected, plaintiff failed to identify the location of the accident with sufficient specificity, is unavailing (*see e.g. Brown v City of New York*, 95 NY2d 389, 393 [2000]).

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10774-
10775 S.T.A. Parking Corp., Index 108091/08
401599/09
Plaintiff-Appellant,

-against-

Lancer Insurance Company,
Defendant-Respondent.

[And Another Action]

_____

Baritz & Colman LLP, New York (Russell M. Wolfson of counsel), for appellant.

Curtis Vasile PC, Merrick (Dominick A. Piccininni Jr. of counsel), for respondent.

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Orders, Supreme Court, New York County (Carol R. Edmead, J.), entered December 27, 2011 and January 10, 2012, which, to the extent appealed from, declared that the insurance policy issued by Lancer Insurance Company to S.T.A. Parking Corp. does not provide coverage to S.T.A. in the underlying actions against it, ordered S.T.A. to reimburse Lancer for indemnification costs already paid, and denied S.T.A.'s cross motion for summary judgment declaring in its favor, unanimously affirmed, with costs.

The subject insurance policy states that there is coverage for property damage only if "[p]rior to the policy period" the

insured does not know that such damage occurred. The record demonstrates that S.T.A. knew about the property damage to neighboring buildings allegedly caused by construction work performed on its garage at 434 East 77th Street before the inception of the policy (*see Henry Modell & Co. v General Ins. Co. of Trieste & Venice*, 193 AD2d 412 [1st Dept 1993]). On February 4, 2005, the date of S.T.A.'s application for the insurance, correspondence was sent to S.T.A. from counsel for 430 Owners Corp. advising that STA's construction project had caused damage to its building at 430 East 77th Street, and advising S.T.A. to notify its general liability carrier that "claims will be made." In addition, Michael Zacharias, president and sole shareholder of S.T.A., testified that "at the end of 2004 or very early 2005" a Department of Buildings inspector reported that there was a crack in the building that had been caused by the work being done on S.T.A.'s premises. In an affidavit, Zacharias stated that in about the first week of January 2005, there was a flood from a broken water pipe in the basement of the building at 436 East 77th Street and that the building owner "intimated that

it wanted STA to pay to repair the neglected [*sic*] conditions in 436's basement."

We have considered S.T.A.'s remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10777 &
M-4854 In re Liza R.,
Petitioner-Appellant,

-against-

Lin F.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Geanine Towers, P.C., Brooklyn (Geanine Towers of counsel), attorney for the child.

_____

Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about July 10, 2012, which to the extent appealed from as limited by the briefs, denied the mother's petition to modify a custody order with respect to the parties' youngest child, unanimously affirmed, without costs.

The court properly found, after a full evidentiary hearing at which both parents testified, that there was an insufficient change in circumstances to warrant a modification of the custody order, and that such a change was not in the best interests of the child (*see Matter of Maureen H. v Samuel G.*, 104 AD3d 470 [1st Dept 2013]). The record shows that the father obtained counseling and tutoring for the child to improve his behavior and academic performance, and that he worked with the child on his

homework. By contrast, the mother failed to demonstrate that the child's problems in school would be ameliorated if custody were transferred to her. The child's stated preference is not determinative (*see Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]), and a forensic examination and report is not necessary.

We have considered the appealing party's remaining contentions and find them unavailing.

M-4854 - *In re Liza R. v Lin F.*

Motion seeking interview with child and related relief denied.

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10778 The People of the State of New York, Ind. 4163/10
Respondent,

-against-

Ali Shakur,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 28, 2011, convicting defendant, after a jury trial, of burglary in the third degree, petit larceny and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of three to six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant challenges the evidence supporting the unlawful entry element of burglary. However, the evidence amply supported the conclusion that defendant knew he had been barred from entering the premises. There is no basis for disturbing the jury's credibility determinations.

Since defendant did not ask for any further relief after the court sustained his objection, he did not preserve his claim that certain testimony went beyond the scope of the court's *Molineux* ruling (*see People v Molineux*, 168 NY 264 [1901]), and we decline to review it in the interest of justice. As an alternative holding, we find that the court's curative action was sufficient, and that the testimony was not unduly prejudicial in any event.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10779 Arrowhead Capital Finance, Ltd., Index 601199/10
Plaintiff-Respondent,

-against-

Seven Arts Pictures PLC, et al.,
Defendants-Appellants.

_____

Ross & Asmar LLC, New York (Steven Ross of counsel), for appellants.

Wollmuth Maher & Deutsch LLP, New York (William F. Dahill of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 22, 2012, which denied defendants' motion for summary judgment and granted in part plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

The motion court properly determined that plaintiff junior lender's action is not barred by the limitation on law suit provisions contained in its agreement with non-party senior lender. The first of those provisions allows suit where the senior lender has been paid in full. Defendants debtors entered into an agreement, which although denominated as an "assignment" of the loan, provided that the senior lender would be "deemed" paid in full in exchange for payment of nearly all that was owed. Accordingly, it would torture the subordination agreement to

construe it as continuing to bar plaintiff from bringing suit on the junior note (*see Perry v Bankers' Life Ins. Co.*, 47 AD 567, 570 [1900], *affd* 167 NY 607 [1901]; *see also Springel v Prosser [In re Innovative Commun. Corp.]*, 2010 WL 1728536, *9-*10, 2010 Bankr. LEXIS 1141, *29-*30 (Bankr. D.V.I. Apr. 27, 2010) (where a party pays creditor for "assignment" of own debt, it is an accord and satisfaction of the debt). Once the senior lender was paid off, the junior lender was not required to obtain its consent to sue. The purpose of the consent was to protect the senior creditor's seniority in all assets of the defendants. Following repayment of the debt, there was no remaining purpose for this condition (*see* Restatement [Second] of Contracts, § 261).

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10781 The People of the State of New York, Ind. 2481/11
Respondent,

-against-

Michael Gonzalez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and DLA Piper LLP (US), New York (Michael P. McMahan of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J. at request for new counsel; Patricia M. Nunez, J. at jury trial and sentencing), rendered April 26, 2012, as amended April 30, 2012, convicting defendant of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The element of forcible taking was established by evidence that defendant overpowered the elderly victim, held him down on a couch, and held his hand over

the victim's mouth, and that defendant thereby compelled the victim to give up his money.

Since there was no request to charge petit larceny as a lesser included offense, "the court's failure to submit such offense does not constitute error" (CPL 300.50[2]). In any event, there was no reasonable view of the evidence, viewed most favorably to defendant, that he took the victim's money without permission, but nevertheless did so without using force (*see e.g. People v Tucker*, 41 AD3d 210 [1st Dept 2007], *lv denied* 9 NY3d 882 [2007], *cert denied* 552 US 1153 [2008]). Similarly, counsel's failure to request this charge did not deprive defendant of effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Regardless of whether counsel should have made the request, defendant has not shown a reasonable probability that the charge would have been granted or that, if granted, it would have affected the outcome.

The calendar court properly exercised its discretion when it denied defendant's request for appointment of new counsel. Contrary to defendant's contention, the record reflects that the court provided defendant an adequate opportunity to state his reasons for substitution (*compare People v Hansen*, 37 AD3d 318

[1st Dept 2007], *with People v Bryan*, 31 AD3d 295 [2006]). The court asked defendant what he wished to say, considered defendant's stated reasons for requesting new counsel, and correctly rejected them.

Defendant did not preserve his claim that he was deprived of a fair trial by the trial court's questioning of the victim, and we decline to review it in the interest of justice. As an alternative holding, we find that the court acted reasonably when it asked a few clarifying questions (*see People v Moulton*, 43 NY2d 944 [1978]), and that it did not take on "either the function or appearance of an advocate" (*People v Arnold*, 98 NY2d 63, 67 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, JJ.

10782 The People of the State of New York, Ind. 3422/09
Respondent,

-against-

Ikeem Alexander,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Nancy Killian 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 (Darcel D. Clark, J. at plea; Michael A. Gross, J. at sentencing), rendered on or about January 10, 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 17, 2013

CLERK

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

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

10783 3 East 54Th Street New York, LLC, etc., Plaintiff-Appellant, Index 600176/09E

-against-

Patriarch Partners Agency Services LLC, et al., Defendants,

Petry Media Corp., et al., Defendants-Respondents.

Harwood Reiff LLC, New York (Donald A. Harwood of counsel), for appellant.

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered July 30, 2012, which granted defendant Petry Holding Inc.'s motion to dismiss the first amended complaint as against it, unanimously affirmed, without costs.

Supreme Court properly dismissed the first amended complaint as against defendant Petry Holding Inc. on the ground that plaintiff is collaterally estopped from attempting to litigate the merits of its claims against Petry Holding again (CPLR 3211[a][5]; *see W.O.R.C. Realty Corp. v Town of Islip*, 104 AD3d 677 [2d Dept 2013]). Plaintiff's argument that Petry Holding

cannot invoke collateral estoppel because it "was not even a named party" is erroneous because only the party sought to be collaterally estopped must have been a party to the action when the prior determination was made (*see Buechel v Bain*, 97 NY2d 295, 307 [2001], *cert denied sub nom. Bain v Buechel*, 535 US 1096 [2002]; Siegel, NY Prac § 458 at 795 [5th ed]). New York has long ago abandoned the "mutuality of estoppel" requirement (*Beuchel* at 207; *B. R. DeWitt, Inc. v Hall*, 19 NY2d 141, 147 [1967] ["the 'doctrine of mutuality' is a dead letter"]; *see* Siegel, NY Prac § 460 at 797-798 [5th ed]).

Plaintiff has clearly always been a party to this action, and it was afforded at least three full and fair opportunities to litigate the merits of its claims against Petry Holding (*see Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]). The first time, plaintiff was in opposition to the Petry defendants' cross motion to dismiss, when plaintiff asked Supreme Court to name Petry Holding as a party. The second opportunity was when plaintiff moved to reargue that portion of Supreme Court's order entered January 12, 2010 that deemed Petry Holding was not a party to this action. The third opportunity was when plaintiff took an appeal from that order and devoted a substantial portion of its brief to asserting the merits of its

claims against Petry Holding before this Court (*see 3 E. 54th St. N.Y., LLC v Patriarch Partners, LLC*, 90 AD3d 418 [1st Dept 2011]).

Supreme Court also correctly construed this Court's prior order, deeming Petry Holding as a defendant within the caption to correct a ministerial or de minimis defect (CPLR 2001; *see Albilia v Hillcrest Gen. Hosp.*, 124 AD2d 499 [1st Dept 1986]), followed by a finding that "plaintiff's remaining arguments," including its claims against Petry Holding, were "without merit" (*3 E. 54th St. N.Y.*, 90 AD3d at 420).

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

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10784 Adrianna Becerril, Index 402611/08
Plaintiff-Appellant,

-against-

City of New York Department of
Health and Mental Hygiene, et al.,
Defendants-Respondents.

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 8, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was the assistant director of a facility known as East Bronx Day Care. While employed there, plaintiff applied for a position with defendant Department of Health (DOH) as an Early Childhood Education Consultant (ECEC). In August 2007, DOH notified plaintiff that she was hired. Plaintiff was given a start date of September 4, 2007, and was directed to report to the DOH office at 125 Worth Street, in Manhattan.

Plaintiff alleges in this action that on September 4, 2007

she could not recall the correct address, and, instead of Worth Street, unsuccessfully attempted to go to 125 Wall Street. Plaintiff was also unable to reach anyone at DOH, and, after a few hours, gave up and went home. Once home, plaintiff located another DOH phone number, called in, and was told to report to work the next morning.

At about 5:00 a.m. the next morning, September 5, 2007, plaintiff, who was then at least four months pregnant, felt pain and contractions. Her husband took her to Lincoln Hospital, where she was intravenously hydrated. Plaintiff was released at about 11:00 or 11:30 a.m. After checking her messages, she called DOH and reported what had happened to her.

Plaintiff was initially told to report to work the next day, and bring a doctor's note to explain her absence. Later that afternoon, however, plaintiff was told that DOH could "no longer grant [her] employment." Plaintiff alleges that, about a week later, she contacted East Bronx Day Care, and they agreed to take her back. Plaintiff returned to work there on September 12, 2007. On the same day, she went to see her doctor on her lunch break. She returned to the office with a note from her doctor indicating that she had "preterm labor" and "restrictions" on walking. On either September 13, 2007, or September 17, 2007,

East Bronx Day Care informed plaintiff that she was terminated.[1]

Plaintiff thereafter commenced the instant action against defendants, asserting claims of gender- and pregnancy/disability-based discrimination under the New York City Human Rights Law. In November 2008, plaintiff also commenced an action against East Bronx Day Care (sued as "East Bronx NAACP Child Development Center") in the United States District Court for the Southern District of New York, asserting claims of gender- and pregnancy-based discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, and the New York State and City Human Rights Laws. East Bronx Day Care defaulted, and, in March 2009, the District Court granted plaintiff's motion for a default judgment. In August 2009, based on plaintiff's submissions, the District Court found plaintiff to be entitled to damages against East Bronx Day Care. Among other things, the District Court expressly found

[1] Although plaintiff testified at her 2010 deposition that she was terminated on September 13, 2007, she conceded that she was uncertain of the actual termination date. Based on plaintiff's allegations in the federal lawsuit, she was awarded a default judgment based on a termination date of September 17, 2007. Regardless of which date is actually correct, the outcome of this appeal is the same, as we find that plaintiff is judicially estopped from contradicting her position in the federal litigation.

that plaintiff was employed at East Bronx Day Care "from April 2005 until September 17, 2007."

The doctrine of judicial estoppel prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed (*see D&L Holdings v Goldman Co.*, 287 AD2d 65, 71 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]). Also known as the "doctrine of estoppel against inconsistent positions" (*Environmental Concern v Larchwood Constr. Corp.*, 101 AD2d 591, 593 [2d Dept 1984]), the doctrine "rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise" (*All Terrain Props. v Hoy*, 265 AD2d 87, 93 [1st Dept 2000] [internal punctuation omitted]). Applying this doctrine, we find that plaintiff has failed to show that she was "qualified" for the ECEC position, as required to make out a prima facie case of discrimination (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 35 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]; *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 965 [1st Dept 2009], *lv denied* 14 NY3d 701 [2010]), since plaintiff is judicially estopped from denying that, at the time she was

allegedly discriminated against by defendants, she was actually employed with East Bronx Day Care, which would make it impossible for her to carry out her duties for defendants.

We reject plaintiff's argument that the federal action was commenced in November 2008, after this action was commenced in August 2008, and therefore does not qualify as a "prior legal proceeding" for purposes of the doctrine of judicial estoppel. What is important for purposes of the doctrine is that, based upon plaintiff's submissions, the District Court made a factual determination in her favor in August 2009, more than two years before defendants made the instant motion for summary judgment in September 2011. The fact that the District Court action was commenced later than this action is immaterial.

We likewise reject plaintiff's contentions that there is no inconsistency between the positions she took in the federal action and those she has taken in this action. In particular, plaintiff asserts that, although she averred in the federal action that she began working with East Bronx Day Care in April 2005 and was terminated on September 17, 2007, she never expressly stated that her employment there was continuous. Plaintiff neglected to inform the District Court that, while employed at East Bronx Day Care, she pursued and accepted another

job with DOH which she was slated to start on September 4, 2007, left East Bronx Day Care, was allegedly discriminated against by the City, and returned to East Bronx Day Care prior to being discriminated against there and terminated after a single day. These facts would have been highly material to her claim against East Bronx Day Care, and it was highly misleading, at best, for plaintiff to omit her City employment from her submissions to the District Court.

In any event, based on plaintiff's submissions, the District Court expressly found that she was employed by East Bronx Day Care from April 2005 until September 17, 2007. If this finding was incorrect, then it was incumbent upon plaintiff to move to correct the finding, or else be bound by it in subsequent legal proceedings.

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10785 In re Malik A.,

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

_____

Israel P. Inyama, New York, for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 17, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted robbery in the first degree, attempted robbery in the second degree (two counts), menacing in the second degree, criminal possession of a weapon in the fourth degree and possession of an imitation firearm, and placed him with the Office of Children and Family Services for 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for

disturbing the court's determinations concerning credibility.

The placement was a proper exercise of the court's discretion, constituting the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Although appellant had already been on probation for a prior delinquency adjudication, he continued to commit unlawful acts (*see e.g. Matter of Federico R.*, 96 AD3d 692 [1st Dept 2012]). In addition, he exhibited a pattern of misconduct at school and at home. For the same reasons, the length of the placement was not excessive.

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10786 Toys "R" Us-Delaware, Inc., Index 651403/12
Plaintiff-Appellant,

-against-

44-45 Broadway Realty Co., LLC,
Defendant-Respondent.

_____

Sills Cummis & Gross P.C., New York (Mark S. Olinsky of counsel), for appellant.

Pryor Cashman LLP, New York (Todd E. Soloway and Eric D. Sherman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about January 2, 2013, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The terms of the subject lease unambiguously contradict the allegations supporting plaintiff's claims, thereby warranting dismissal of the complaint pursuant to CPLR 3211(a)(1) (*see 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]). The lease provision requiring plaintiff tenant to pay taxes levied against its own signs affixed to defendant landlord's building, but not with respect to signs of other tenants, does not apply to limit a separate lease provision obliging plaintiff to pay a proportionate share of real estate

taxes imposed on the building, even though those real estate taxes are based on a valuation that takes into account income earned from the signs of other tenants. Furthermore, when reviewing the parties' course of conduct, including plaintiff's consistent payment of its share of the real estate taxes for over 12 years without protest, it is clear that defendant's construction of the relevant lease provisions comports with the parties' intent (*see Murray Hill Mews Owners Corp. v Rio Rest. Assoc. L.P.*, 92 AD3d 453 [1st Dept 2012]).

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

ENTERED: OCTOBER 17, 2013

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10789 The People of the State of New York, Ind. 4582/10
Respondent,

-against-

Aldeen Sanders,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Analisa Torres, J.), rendered on or about April 4, 2011,

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

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

ENTERED: OCTOBER 17, 2013

CLERK

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

Tom, J.P., Sweeny, Manzanet-Daniels, Feinman, Clark, JJ.

10790N-
10791N &
M-4868

Index 104675/10
150095/12

DLJ Mortgage Capital, Inc.,
Plaintiff-Respondent,

Thomas Hoey, et al.,
Third-Party Intervenors-Plaintiffs,

-against-

Thomas Kontogiannis, et al.,
Defendants.

- - - - -

DLJ Mortgage Capital, Inc.,
Petitioner-Respondent,

-against-

Thomas Kontogiannis, et al.,
Respondents,

Jeffrey Siegel, et al.,
Respondents-Appellants.

_____

Massoud & Pashkoff, LLP, New York (Ahmed A. Massoud of counsel), for Jeffrey Siegel and Richard Siegel, appellants.

Maizes & Maizes, LLP, Bronx (Michael H. Maizes of counsel), for June Siegel, appellant.

Hahn & Hessen LLP, New York (John P. Amato of counsel), for DLJ Mortgage Capital, Inc., respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 13, 2012, which, inter alia, granted petitioner's motion to consolidate related actions and

proceedings in New York County (Index Nos. 104675/10 and 150095/12) and Kings County (Index Nos. 21968/11 and 24753/11), unanimously affirmed, without costs. Order, same court and Justice, entered on or about July 27, 2012, which, inter alia, denied respondents Jeffrey Siegel and Richard Siegel's and June Siegel's motions for summary judgment on their priority claims as to property and assets owned by certain of the "New Kontogiannis Entity Defendants" and to vacate an order of attachment issued against the assets and properties of the New Kontogiannis Entity Defendants, unanimously affirmed, without costs.

These actions and proceedings arise out of a massive mortgage fraud conspiracy perpetrated over the course of years by the "Kontogiannis Defendants" and the New Kontogiannis Entity Defendants, inter alia, which resulted in nine criminal convictions, and judgments, orders of restitution totaling more than $98 million, and orders of forfeiture in favor of petitioner (and another). Petitioner commenced this action in April 2010 alleging, inter alia, that certain defendants engaged in fraud and fraudulent conveyances for the purpose of hindering, delaying and defrauding petitioner and preventing it from ever receiving restitution. As its investigation continued, petitioner amended its complaint to add new allegations and parties. In November

2012, petitioner moved, inter alia, to file a third amended summons and complaint adding the New Kontogiannis Entity Defendants and for an ex parte order of attachment against the assets owned or controlled by those defendants, based on their knowing and active participation in the mortgage fraud scheme and related fraudulent conveyances. Several monetary and equitable judgments were entered in New York County in petitioner's favor, and in each case petitioner took the steps required to perfect the judgment and the order of attachment.

June Siegel, in September 2011, and Jeffrey Siegel and Richard Siegel, in October 2011, commenced proceedings pursuant to CPLR article 52, in Supreme Court, Kings County, to enforce judgments that had been entered in Kings County in their favor as against defendant Thomas Kontogiannis.

In January 2012, petitioner commenced a special proceeding, pursuant to CPLR articles 52 and 62, against Thomas Kontogiannis, the Kontogiannis Defendants, the New Kontogiannis Entity Defendants, and the Siegels, inter alia, and moved to consolidate its special proceeding and the Siegels' special proceedings in Kings County with its plenary action.

Although the Siegels' consolidated enforcement action does not raise specific questions about the mortgage fraud scheme

alleged in petitioner's plenary action, the matters at issue all arise out of the fraudulent activities of the same defendants, and concern petitioner's and the Siegels' efforts to secure their rights and enforce judgments against the same assets. Indeed, the plenary action gave rise, directly, to petitioner's enforcement action and thus to the priority dispute among the judgment creditors. Accordingly, "the interests of justice and judicial economy will best be served by a joint trial" (*Richardson v Uess Leasing Corp.*, 191 AD2d 394, 396 [1st Dept 1993]). Given that these very parties and assets have been at the epicenter of the plenary action since 2010, separate adjudication of the special proceedings in Kings County would be a tremendous waste of the time, effort and resources of the courts of both New York and Kings Counties.

Venue in New York County is appropriate, because, of the three actions at issue, the plenary action was the first filed (*see Ali v Effron*, 106 AD3d 560 [1st Dept 2013]).

We reject the Siegels' argument that the attachment order was improperly granted because petitioner makes no specific allegations against each of the New Kontogiannis Entity Defendants. Petitioner alleges a broad-based conspiracy involving all the Kontogiannis defendants, its knowledge of each

defendant's involvement having developed over a period of time, as is common in these types of cases. "[U]nder New York law, the liability of co-conspirators is joint and several, notwithstanding the amount of any direct benefit conferred upon them through a fraudulent transaction" (*American Tr. Ins. Co. v Faison*, 242 AD2d 201, 201 [1st Dept 1997]). We note that the judgments entered in the Siegel's favor are against Thomas Kontogiannis only. Moreover, in their own underlying action, Jeffrey Siegel and Richard Siegel allege that Kontogiannis engaged in fraudulent activity using some of the New Kontogiannis Entity Defendants, and that Kontogiannis is "a convicted criminal involved in immigration fraud, bribery, money laundering, and mortgage fraud" (*see Blue Ridge Farms, Inc. v Kontogiannis*, 26 Misc 3d 1206[A], 2009 NY Slip Op 52673[U], *1 [Sup Ct, Kings County 2009], *affd* 83 AD3d 982 [2d Dept 2011]).

Importantly, petitioner has not merely alleged conspiracy claims against these defendants, but has also succeeded on its claims, obtaining judgments that resulted in the subject attachment order and others. In connection with the application for the attachment order, petitioner submitted, and the court considered, thousands of pages of documentary evidence, including hundreds of pages of affidavits and attachments, as well as

testimonial evidence. Thus, in contrast to the cases relied on by the Siegels, the court had more than supposition and bare conclusion before it in issuing the order.

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

M-4868 - *DLJ Mortgage Capital, Inc. v Kontogiannis, et al.*

Motion to strike portions of respondent's appendix and brief denied.

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10792 The People of the State of New York, Ind. 2358/10
Respondent,

-against-

Louie Raosto,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at *Darden* hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered May 16, 2011, convicting defendant of criminal possession of a controlled substance in the third degree, criminally using drug paraphernalia in the second degree (two counts) and criminal possession of a weapon in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of seven years, unanimously affirmed.

The court properly refused to submit criminal possession of a controlled substance in the seventh degree as a lesser included offense of criminal possession of a controlled substance in the third degree, as there was no reasonable view of the evidence,

viewed most favorably to defendant, that he possessed drugs without intent to sell them (*see People v Negron*, 91 NY2d 788, 792 [1998]). The entire apartment, including the room where defendant was found, contained drug paraphernalia indicating that the drugs were being packaged for sale (*see People v Abreu* (76 AD3d 903 [1st Dept 2010], *lv denied* 15 NY3d 918 [2010]). Defendant argues that there was a reasonable view that he was a mere visitor or house guest. However, under the facts presented, if the People failed to prove that defendant was part of the drug-selling operation, he would have been entitled to a complete acquittal instead of a finding that he possessed drugs without intent to sell (*see id.*). Defendant's theory that he possessed some drugs for his personal use while in the apartment is speculative and unsupported by the evidence. In any event, defendant was not prejudiced because the jury's verdict convicting defendant of the drug paraphernalia counts indicated that it rejected the factual theory under which defendant sought submission of the seventh-degree possession charge (*see People v Lozano*, 282 AD2d 242 [1st Dept 2001], *lv denied* 96 NY2d 864 [2001]).

The court properly refused to give a circumstantial evidence charge with respect to the third-degree possession of a

controlled substance count, which was based on cocaine found in an open drawer in the room where the codefendant was arrested, and one of the paraphernalia counts, which was based on a digital scale found in a closed box in the room where defendant was arrested and a second scale on top of the dresser in the codefendant's room. The testimony established that both bedroom doors were open and that these items were in plain view in sufficiently close proximity to defendant so that no additional inference was required to conclude that defendant exercised dominion and control over these items (*see e.g. People v Perez*, 259 AD2d 274 [1st Dept 1999], *lv denied* 93 NY2d 976 [1999]; *see also* Penal Law § 220.25[2]; *People v Jiminez*, 292 AD2d 196 [1st Dept 2002], *lv denied* 98 NY2d 698 [2002]). As both counts were based at least in part on direct evidence, no circumstantial evidence charge was warranted. In any event, the absence of such a charge could not have affected the verdict, and any error in this regard was harmless (*see People v Brian*, 84 NY2d 887, 889 [1994]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not fully explained by the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Further inquiry

is needed into whether defense counsel had any strategic reasons for not objecting to portions of the prosecutor's direct examination of a police officer and cross-examination of a defense witness. We reject defendant's argument that counsel's omissions could not have had any reasonable strategic justifications. To the extent that the record permits review, it establishes that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that either or both of counsel's alleged errors fell below an objective standard of reasonableness or that there is a reasonable probability that one or both alleged errors affected the outcome.

An in camera review of the minutes of the *Darden* hearing (*People v Darden*, 34 NY2d 177 [1974]) reveals that the hearing procedures adequately safeguarded the defendant's rights, that the confidential informant existed, and that the information he or she provided to the police was based on the informant's

personal observations and sufficed to provide probable cause for the issuance of the search warrant. There is no basis for disclosure of the minutes.

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10793-
10794 In re Todd S.,
Petitioner-Respondent,

-against-

Lauri B.,
Respondent-Appellant.

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Lauri B., appellant pro se.

Todd S., respondent pro se.

Goldweber Epstein LLP, New York (Nina S. Epstein of counsel), attorney for the child.

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Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about June 8, 2011, which denied respondent mother's objection to an order of filiation (same court, Matthew Troy, Support Magistrate), entered on or about January 20, 2011, declaring petitioner to be the child's father, and bringing up for review an order, same court and Justice, entered on or about November 16, 2010, which denied respondent's motion to dismiss the paternity proceeding on the ground of equitable estoppel, unanimously affirmed, without costs.

The evidence presented at the hearing fails to establish that the best interests of the child will be served by estopping petitioner from asserting paternity (*see Matter of Gutierrez v*

Gutierrez-Delgado, 33 AD3d 1133 [3d Dept 2006]). The child, who was three years old at the time of the hearing, was shown to be well adjusted, intelligent, and secure in her family structure. The record does not support respondent's contention that the child would be unduly traumatized or that her relationship with her half-sister or maternal uncle would be harmed by her learning the identity of her father.

Notwithstanding the child's close relationship with her maternal uncle, the court appropriately weighed the absence of an alternative father figure or the existence of an operative parent-child relationship that would be disturbed by the establishment of petitioner's paternity (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]; *Matter of Antonio H. v Angelic W.*, 51 AD3d 1022 [2d Dept 2008]). Nor, under all the circumstances, did petitioner delay inordinately in seeking to establish his paternity (*compare Matter of Rudman v Rubenfeld*, 300 AD2d 79 [1st Dept 2002]; *Terrence M. v Gale C.*, 193 AD2d 437 [1st Dept 1993], *lv denied* 82 NY2d 661 [1993]; *Matter of Mobley v*

Ishmael, 285 AD2d 648 [2d Dept 2001]; *Matter of Glenn T. v Donna U.*, 226 AD2d 803 [3rd Dept 1996]). Family Court appropriately considered the testimony of the competing expert witnesses, and properly excluded the report by respondent's expert.

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10795 In re Martin Dekom, Index 103072/12
Petitioner-Appellant,

-against-

New York Department of Financial Services, et al.,
Respondents-Respondents.

_____

Martin Dekom, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for respondents.

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Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered September 12, 2012, denying the petition to annul respondents' determination, dated March 2, 2012, which changed petitioner's Mortgage Loan Originator (MLO) license status to "approved-inactive," and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Banking Law § 599-i(1)(a) provides that respondent superintendent may renew an MLO's license only if the MLO "continue[s] to meet the minimum standards for license issuance set forth in [§ 599-e]." Section 599-e provides that the superintendent shall not issue an MLO license unless the applicant "has demonstrated financial responsibility, character, and general fitness such as to command the confidence of the

community" (§ 599-e[1][c]). Further, an application for the issuance of an MLO license must include an "independent credit report" and "[s]uch other pertinent information as the superintendent may require" (§ 599-d[9][b][i]; [d]).

Although petitioner ultimately made his credit report available to respondents in connection with his MLO license renewal application, he nevertheless refused to provide an explanation as to why his mortgage payments were 120 days past due, as indicated in his credit report. Accordingly, respondents' determination to change petitioner's MLO license status to "approved-inactive" had a rational basis in the record and was not arbitrary and capricious (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only where there exists a clear legal right to the relief sought (*see Matter of Legal Aid Socy. of Sullivan County v Scheinman*, 53 NY2d 12, 16 [1981]). Petitioner has failed to demonstrate a clear legal right to the relief sought. Further, respondents' determination to inactivate petitioner's MLO license was discretionary (*see Matter of Town of Riverhead v New York State Dept. of Envtl. Conservation*, 50 AD3d

811, 813 [2d Dept 2008], citing *Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]).

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

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10798-
10798A The People of the State of New York,
Respondent,

-against-

Ramon Perez,
Defendant-Appellant.

Ind. 2134/86

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Orders, Supreme Court, New York County (Laura A. Ward, J.), entered on or about April 9, 2008 and April 23, 2010, each of which denied defendant's respective motions for resentencing pursuant to the Drug Law Reform Act of 2004 (L 2004, ch 738), unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated that defendant's resentencing application should be denied (L 2004, ch 738, § 23; *People v Sosa*, 18 NY3d 436, 443 [2012]). The court did not place excessive emphasis on the fact that defendant absconded before trial and remained a fugitive for many years, while ignoring defendant's alleged mitigating circumstances (*compare People v*

Cruz, 96 AD3d 693 [1st Dept 2012]). On the contrary, it also considered that the large quantity of drugs related to defendant's underlying conviction evinced a large scale drug operation, rather than mere street-level sales; that defendant was armed with a loaded weapon on the day he was arrested; that he was convicted of another drug distribution charge while he was a fugitive and was sentenced to 2½ years in Massachusetts on that felony; and that defendant has refused to accept responsibility for the underlying conviction or the one in Massachusetts. The court properly found that these factors outweighed the mitigating factors offered by defendant.

Although defendant requests, in the alternative, a reduction of his underlying sentence, we do not find that a direct appeal from that 26-year-old conviction is properly before us (*compare People v Taveras*, 63 AD3d 401 [1st Dept 2009]). In any event, there is no basis for reducing the sentence.

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10799-
10800 In re Savannah Love Joy F., etc.,

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

Andrea D.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent,

The Commissioner of Social Services
of the City of New York,
Petitioner.

- - - - -

In re Savannah Love Joy F., etc.,

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

Freddy F.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for Andrea D., appellant.

Steven N. Feinman, White Plains, for Freddy F., appellant.

Marion C. Perry, New York, for Episcopal Social Services, respondent.

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

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Order, Family Court, New York County (Clark V. Richardson,

J.), entered on or about August 7, 2012, which, upon a fact-finding determination that respondent father's consent was not required for the child's adoption pursuant to Domestic Relations Law § 111, and that respondent mother suffers from a mental illness, terminated the mother's parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The evidence, including testimony from a court-appointed psychologist who examined respondent mother, provided clear and convincing evidence that she is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for the child (*see* Social Services Law § 384-b[4][c], [6][a]; *Matter of Sebastian M.*, 64 AD3d 401 [1st Dept 2009]). The psychologist testified that respondent mother suffers from, inter alia, bipolar disorder, which interferes with her ability to care for the child, placing the child at risk of becoming neglected if she is returned to her mother's care. Moreover, respondent mother's testimony confirms that she lacks insight into the nature and extent of her mental illness (*see Matter of Thaddeus Jacob C.* [*Tanya K.M.*], 104 AD3d 558 [1st Dept 2013]).

Contrary to respondent mother's contention, the Family Court properly exercised its discretion by drawing a negative inference against her for failing to call her treating physician or other medical providers to rebut the allegations raised in the petition and by the testimony after she expressed an intention to call her providers (*see Matter of John HH. v Brandy GG.*, 52 AD3d 879, 880 [2d Dept 2008]).

The Family Court did not err in denying respondent mother's application for a suspended judgment. This dispositional alternative is not available after a fact-finding determination of mental illness (*see* SSL § 384-b [3] [g], [4] [c]; *Matter of Sarah-Beth H.*, 34 AD3d 242, 243 [1st Dept 2006]). Moreover, a preponderance of the evidence demonstrated that it is in the child's best interests to terminate respondent mother's parental rights and free the child for adoption, because respondent has not made significant progress in overcoming the problems that caused the child to enter foster care and the child has bonded with her foster mother with whom she has lived for nearly all of her life.

The record contains clear and convincing evidence that respondent father did not satisfy Domestic Relations Law § 111(d)(1) by providing the child with financial support and

maintaining regular communication with his daughter or the agency. The agency's alleged failure to instruct him to provide financial support for his daughter does not excuse him from doing so (*see Matter of Giovannie Sincere M. [Dennis M.]*, 99 AD3d 635, 635-636 [1st Dept 2012]).

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10801 The People of the State of New York, Ind. 1487/10
Respondent,

-against-

Edison Garcia,
Defendant-Appellant.

_____

Law Offices of Peter J. Guadagnino, New York (Peter J. Guadagnino of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J. at severance motion; Analisa Torres, J. at jury trial and sentencing), rendered November 24, 2010, as amended January 12, 2011, convicting defendant of sexual abuse in the first degree and course of sexual conduct against a child in the second degree, and sentencing him to an aggregate term of nine years, unanimously affirmed.

Defendant did not preserve his challenge to evidence regarding an uncharged incident of improper conduct toward one of the victims, and we decline to review it in the interest of justice. As an alternative holding, we find that any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The arresting detective's brief testimony that he knew

certain pedigree information about defendant before the arrest was likewise harmless. The record does not support defendant's assertion that the prosecutor deliberately elicited this testimony.

The court properly exercised its discretion in denying defendant's mistrial motion, made when the mother of one of the victims volunteered uncharged crime evidence while being cross-examined by defense counsel. The drastic remedy of a mistrial was not warranted, because the curative instruction that the court provided in accordance with defense counsel's request was sufficient to prevent defendant from being prejudiced (*see People v Santiago*, 52 NY2d 865 [1981]).

The court properly exercised its discretion in precluding defendant from inquiring into whether the father of one of the victims raped the mother of the other victim, years before the children were born. The proffered evidence was collateral to the charges that defendant sexually abused the two victims (*see People v Aska*, 91 NY2d 979, 981 [1998]), and defendant's theory of third-party culpability is speculative and meritless (*see People v Gamble*, 18 NY3d 386, 398-399 [2012]). Since defendant never asserted a constitutional right to introduce this evidence, his constitutional claim is unpreserved (*see People v Lane*, 7

NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]; *Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

The motion court properly exercised its discretion in denying defendant's severance motion. The counts were properly joined as "similar in law" pursuant to CPL 200.20(2)(c), and defendant did not make a sufficient showing to warrant a discretionary severance (*see* CPL 200.20[3]; *People v Lane*, 56 NY2d 1, 8 [1982]; *People v Streitferdt*, 169 AD2d 171, 176 [1991], *lv denied* 78 NY2d 1015 [1991]).

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10802 Maurice New, et al., Index 309390/08
Plaintiffs-Respondents,

-against-

New York State Urban Development Corp., et al.,
Defendants-Appellants.

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Cartafalsa, Slattery, Turpin & Lenoff, Tarrytown (Patricia A. Hughes of counsel), for New York State Urban Development Corp., Twin Parks Southeast Houses Incorporated, D.U. Second Realty, BSR Management Corp. and Riverside Management Corporation, appellants.

Lewis Johs Avallone Aviles, LLP, Islandia (Robert A. Lifson of counsel), for Madison Security Group, Inc., appellant.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered August 8, 2012, which, insofar as appealed from as limited by the briefs, denied defendant Madison Security Group, Inc.'s motion for summary judgment dismissing the complaint, and denied defendants New York State Urban Development Corp., Twin Parks Southeast Houses Incorporated, Inc., D.U. Second Realty, BSR Management Corp., and Riverside Management Corporation's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motions granted, and the

complaint dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

Defendants met their prima facie burdens by proffering evidence that there was no proof that the assailant who shot plaintiffs was an intruder as opposed to a building resident or guest. Specifically, plaintiffs testified that they could not even ascertain the assailant's race or gender (*see Price v New York City Hous. Auth.*, 92 NY2d 553, 558 [1998]). Thus, plaintiffs contention that negligence on part of defendants was a proximate cause of the incident is entirely speculative (*see Maria S. v Willow Enters.*, 234 AD2d 177, 178 [1st Dept 1996]). Inasmuch as plaintiffs' arguments in opposition failed to refute defendants' evidence, defendants' motions should have been granted (*see Pagan v Hampton Houses*, 187 AD2d 325, 325-326 [1st Dept 1992]).

We add that the affidavit of Madison's former employee was irrelevant inasmuch as it does not address the issue of how the assailant gained entry into the building (*see Maria S.*, 234 AD2d at 178). Moreover, the affidavit appears to have been tailored to avoid the consequences of plaintiffs' depositions (*see Perez v Abbey Assoc. Corp.*, 103 AD3d 573 [1st Dept 2013]; *Morrissey v New York City Tr. Auth.*, 100 AD3d 464 [1st Dept 2012]).

We have considered the parties' remaining contentions and find them unavailing or rendered academic in light of the foregoing.

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10803 The People of the State of New York, Ind. 5440N/10
Respondent,

-against-

Rashawn Chapple,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J.), rendered on or about June 15, 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 17, 2013

CLERK

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

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

10804 Frener & Reifer America Inc., Index 603679/09
Plaintiff-Appellant,

-against-

Dormitory Authority of the State
of New York,
Defendant-Respondent,

Sure Iron Works, Inc.,
Defendant,

-against-

Turner Construction Company,
Additional Cross Claim and
Counterclaim Defendant-Respondent,

U.S. Specialty Insurance Company,
Additional Cross Claim and
Counterclaim Defendant-Appellant.

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Richardson & Patel, LLP, New York (David B. Gordon of counsel), for appellants.

Holland & Knight LLP, New York (Henry A.H. Rosenzweig of counsel), for Dormitory Authority of the State of New York, respondent.

Peckar & Abramson, P.C., New York (David Fultz of counsel), for Turner Construction Company, respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 28, 2012, which, to the extent appealed from as limited by the briefs, denied the motion of plaintiff Frener & Reifer America, Inc. and additional cross claim and counterclaim

defendant U.S. Specialty Insurance Company insofar as it sought summary judgment on Frener's breach of contract claims against defendant Dormitory Authority of the State of New York (DASNY), granted the motion of defendant DASNY for summary judgment dismissing Frener's breach of contract claims, and granted the cross motion of additional cross claim and counterclaim defendant Turner Construction Company for summary judgment declaring that Frener is obligated to indemnify Turner against the claim of Sure Iron Works (SIW), unanimously affirmed, without costs.

In this action arising from the general contractor agreement between plaintiff Frener & Reifer and defendant DASNY, Frener & Reifer sought to obtain indemnification from DASNY for the financing costs of the surety bond the agreement required it to obtain, fees it paid to a consultant whom it claimed provided services related to the project, and any monies that defendant SIW claimed was due and owing.

The motion court correctly rejected these claims. The evidence established that DASNY had not agreed to pay for the financing costs of the surety bond; those costs were deemed part of the overhead and not recoverable by Frener & Reifer (*see Affirmative Pipe Cleaning/Edenwald Contr. Co. v City of New York*, 159 AD2d 417 [1st Dept 1990]). The consultant fees were also not

recoverable, as the evidence established that the fees paid were finder's fees by Frener & Reifer to the consultant for helping locate business opportunities, including the contract here.

Insofar as defendant SIW claims that it is still owed money for the project, the motion court correctly found that the only amount due to SIW was $4,640.00 for shop drawings. Furthermore, Frener & Reifer was liable to additional cross claim and counterclaim defendant Turner, the construction manager who retained SIW as a subcontractor, for this amount and the motion court properly granted Turner summary judgment in its favor on that claim. It is uncontradicted that Frener & Reifer continued work on the project after a stop work order was issued by DASNY and before the contract was terminated, and that the work undertaken by Turner and SIW was at Frener & Reifer's direction.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10806 The People of the State of New York, ex rel. Woodrow Flemming, Petitioner-Appellant, Index 402955/11

-against-

Warden: David Rock, etc., Respondent-Respondent.

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Woodrow Flemming, appellant pro se.

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

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Order, Supreme Court, New York County (Larry Stephen, J.), entered January 24, 2012, which denied petitioner's application for a writ of habeas corpus and dismissed the petition, unanimously affirmed, without costs.

The petition was improperly brought in a county other than the county of incarceration (*see People ex rel. Harris v Conway*, 48 AD3d 353 [1st Dept 2008], *appeal dismissed, lv denied* 10 NY3d 884 [2008]). Furthermore, to the extent the petition raises claims that could have been raised on direct appeal or in a CPL article 440 motion, habeas corpus relief is not available (*People ex rel. Ragland v Bellnier*, 83 AD3d 1351 [3d Dept 2011], *lv denied* 17 NY3d 706 [2011]), and such claims are unavailing in any

event. "[A] writ of habeas corpus is not an appropriate vehicle for raising a claim of ineffective assistance of appellate counsel" (*People ex rel. Grant v Scully*, 190 AD2d 543, 544 [1st Dept 1993], *appeal dismissed* 92 NY2d 946 [1998]).

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10807 Josette Linton, Index 308184/10
Plaintiff-Respondent,

-against-

Eduardo Gonzales, et al.,
Defendants-Appellants.

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Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for appellants.

Taller & Wizman, P.C., Forest Hills (Regis A. Gallet of counsel), for respondent.

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Order, Supreme Court, Bronx County (Faviola A. Soto, J.), entered on or about March 19, 2013, which denied defendants' motion for summary judgment dismissing the complaint alleging serious injuries under Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendants made a prima facie showing of entitlement to judgment as a matter of law. They submitted the report of their expert orthopedic surgeon who, based on an examination of plaintiff and review of her medical records and MRI film, concluded that her shoulder symptoms were not caused by the subject accident but were secondary to degeneration, chronic impingement, and diabetes (*McDuffie v Rodriguez*, 72 AD3d 568 [1st

Dept 2010]). The surgeon also stated that plaintiff's emergency room records and EMS reports noted no complaints of pain in the shoulder.

In opposition, plaintiff failed to provide any contemporaneous objective evidence of injuries to the left shoulder sufficient to raise an issue as to causation (*see Perl v Meher*, 18 NY3d 208, 217-218 [2011]; *Jean v Kabaya*, 63 AD3d 509, 510 [1st Dept 2009]). Reports from her chiropractor and neurologist show only treatment to the spine, and make no mention of any left shoulder injuries. Although the affirmation and reports of plaintiff's orthopedic surgeon show range of motion limitations, positive impingement sign, and a tear in the left shoulder, he did not evaluate the left shoulder until about eight months after the accident, which is insufficient to raise an issue as to causation (*Rosa v Mejia*, 95 AD3d 402, 403-404 [1st Dept 2012]; *Soho v Konate*, 85 AD3d 522, 523 [1st Dept 2011]).

Given the lack of evidence of causation, plaintiff cannot establish her 90/180-day injury claim (*see Barry v Arias*, 94 AD3d 499, 500 [1st Dept 2012]).

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10808 Thomas R. Purcell, Index 653183/12
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

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Thomas R. Purcell, New York, appellant pro se.

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

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about March 7, 2013, which granted defendant's motion to dismiss the action, pursuant to CPLR 3211(a)(7), and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

Plaintiff, a former New York County Deputy Public Administrator, seeks compensation for unused annual and sick leave time. By letter, dated November 1, 2010, after plaintiff's retirement, the Office of the Public Administrator determined that plaintiff was not owed any compensation for unused leave and that, in fact, his final leave balance was negative. Plaintiff challenged this determination in an Article 78 proceeding,

resulting in an order (Supreme Court, New York County [Saliann Scarpulla, J.], entered December 14, 2011) that remanded the matter for issuance of a revised determination based upon correct information.

On March 6, 2012, the Office of the Public Administrator issued a revised determination, asserting that its earlier calculation as to plaintiff's annual leave balance was correct. Approximately six months later, plaintiff commenced this action alleging, inter alia, a cause of action for breach of contract arising out of defendant's failure to compensate him for the value of his unused annual and sick leave time.

The instant action, although framed as one for breach of contract, is actually a challenge to the Office of the Public Administrator's administrative determination that, based upon its calculations, plaintiff was not entitled to compensation for unused sick and annual leave. The appropriate vehicle for such a challenge is an Article 78 proceeding, which is barred by the four-month statute of limitations (*see* CPLR 317[a]; *Todras v City of New York*, 11 AD3d 383, 384 [1st Dept 2004]). While plaintiff accurately states that a party seeking damages arising from a breach of contract against a public official or governmental body

may pursue an action at law (*see Steve's Star Serv. v County of Rockland*, 278 AD2d 498 [2d Dept 2000]), he has failed to establish the existence of such a contract here.

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10809 The People of the State of New York, Ind. 7290/01
Respondent,

-against-

Demond Tyler,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 25, 2012, as amended August 15, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 35 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: OCTOBER 17, 2013

CLERK

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

10810N Tribeca Technology Solutions, Inc., Index 651878/11
Plaintiff-Respondent,

-against-

David Goldberg, et al.,
Defendants-Appellants.

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Rapuzzi, Palumbo & Rosenberger, P.C., Wantagh (Michael C. Rosenberger of counsel), for appellants.

Altman & Company, P.C., New York (Steven Altman of counsel), for respondent.

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Order, Supreme Court, New York County (Anil Singh, J.), entered on or about July 23, 2012, which granted plaintiff's motion to vacate orders, same court and Justice, entered on or about January 13, 2012 and May 4, 2012, on its default, respectively, granting defendants Edward Schapiro, American Medical Data Management, LLC, AMDM LLC, and AMDM Inc.'s motion to dismiss the second, fourth and fifth causes of action as against them, and granting defendants David Goldberg and Scott Simon's motion for a default judgment on their counterclaims, unanimously modified, on the law, to deny plaintiff's motion as to the May 4, 2012 order, and otherwise affirmed, without costs.

We agree with the motion court that plaintiff's excuse for its default in opposing the motion to dismiss was reasonable, in

view of the absence of any history of willful neglect or abandonment on the part of plaintiff's counsel, who until that early stage had prosecuted the action, but candidly admitted to and apologized for his oversight in failing to oppose the motion (*see e.g. To Yiu Yeung v City of New York*, 282 AD2d 217 [1st Dept 2001]; *Brady v Paris Maintenance Co.*, 281 AD2d 162 [1st Dept 2001]; *Mediavilla v Gurman*, 272 AD2d 146 [1st Dept 2000]). We note that counsel had previously sought an adjournment of the motion for the purpose of interposing opposition, that within three weeks of receiving entry of the order he made several attempts to challenge the dismissal, and that after being instructed by the court to file a proper vacatur motion, he did so within three months, which was only six months after being served with the notice of entry and, thus, well before the one-year deadline for moving for relief from the order (*see* CPLR 5015[a][1]). We also agree that plaintiff established the merits of its action by submitting its principal's affidavit attesting to the veracity of its claims.

With respect to the May 4, 2012 order, we find that the court erred in considering the sufficiency of plaintiff's excuse for failing to oppose defendants Goldberg and Simon's motion for a default judgment on their counterclaims, rather than its excuse

for failing to answer the counterclaims themselves, which plaintiff's counsel never denied receiving (*see* CPLR 5015[a][1]). Since plaintiff never proffered an excuse for the initial default, consideration of the merits of its defense to the counterclaims is unnecessary (*see Admiral Ins. Co. v Marriott Intl., Inc.*, 79 AD3d 572 [1st Dept 2010], *lv denied* 17 NY3d 708 [2011]).

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

ENTERED: OCTOBER 17, 2013

CLERK