SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 26, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10591 The People of the State of New York, Respondent, Ind. 2306/10

-against-

Gregory Robertson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Thomas Farber, J. at plea and sentencing), rendered January 4, 2011, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of four years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. The police had information, provided by identified citizen-witnesses speaking from personal knowledge, that defendant had threatened to shoot one of the witnesses and had conveyed, at least by words and gestures, that he had a

firearm. Accordingly, the police had probable cause to arrest defendant for menacing. The totality of the information in their possession, including defendant's conduct during the incident of returning to his vehicle parked nearby, supported a reasonable conclusion that defendant had a firearm in his car (*see People v Pacifico*, 95 AD2d 215, 220 [1st Dept 1983]; see *also People v Cofield*, 55 AD2d 113, 115 [1st Dept 1976], *affd* 43 NY2d 654 [1977]). Since the police had reason to believe that defendant's vehicle contained evidence related to the crime for which he was arrested, the automobile exception to the requirement for a search warrant authorized the officers to search the vehicle (*see People v Galak*, 81 NY2d 463, 467 [1993]).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10592 In re Kwante H.,

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

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

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about September 28, 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 crime of assault in the third degree, and imposed a conditional discharge for a period of 12 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 victim's testimony established that appellant actively participated in the attack by hitting and physically restraining the victim while other attackers repeatedly punched and kicked him, causing him to sustain a broken nose and other injuries.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and imposing a conditional discharge. This was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Given the serious and violent nature of the underlying assault as well as appellant's poor performance and attendance at school, the court properly concluded that appellant was in need of a full year of supervision.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10593 Timothy H. Williams, Index 8254/04
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Timothy H. Williams, appellant pro se.

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

_____

Order, Supreme Court, Bronx County (Diane A. Lebedeff, J.), entered August 18, 2010, which denied plaintiff's CPLR 4404(a) motion to set aside the jury's verdict in this case alleging intentional tort, unanimously affirmed, without costs.

The motion court correctly determined that the jury's verdict was not against the weight of the evidence (*see Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). The testimony of plaintiff and defendant's witness offered conflicting accounts of the events at issue. The jury weighed the credibility of the

witnesses and the evidence and reached its conclusion based on a fair interpretation of the evidence.

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: SEPTEMBER 26, 2013

CLERK

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

10594-
10595 In re Dayjore Isaiah M.,
etc., and Another,

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

Dominique Shaniqua M., etc.,
Respondent-Appellant,

Lutheran Social Services of New York,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Ballon Stoll Bader & Nadler, P.C., New York (Frederic P. Schneider of counsel), attorney for the children.

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Orders of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about September 28, 2012, which, upon a fact-finding determination that respondent-appellant mother had violated the terms of a suspended judgment, terminated her parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The determination that respondent had violated the terms of a suspended judgment is supported by a preponderance of the

evidence (*see Matter of Isiah Steven A. [Anne Elizabeth Pierre L.]*, 100 AD3d 559, 560 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). The record shows that respondent failed to consistently visit with the children, participate in individual therapy, obtain suitable housing for herself and the children, and obtain a source of income (*see id.; see also Matter of Lourdes O.*, 52 AD3d 203, 203 [1st Dept 2008]).

A preponderance of the evidence also 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]). At the time of the dispositional hearing, respondent had not obtained suitable housing or a source of income. Further, the children have been in the same foster home for at least three years, and their foster mother, who has provided for their special needs, wishes to adopt them (*see Matter of Isiah Steven A.*, 100 AD3d at 560).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10596 Luke Lucas, Index 22883/06
Plaintiff-Respondent, 83823/09

-against-

St. Barnabas Hospital,
Defendant-Appellant,

Pronto Repairs, Inc.,
Defendant.

- - - - -

[And A Third-Party Action]

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Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered September 17, 2012, which, to the extent appealed from, denied defendant-third party plaintiff St. Barnabas Hospital's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against St. Barnabas Hospital. The Clerk is directed to enter judgment accordingly.

Plaintiff, who was employed by third-party defendant Sodexho as a supervisor in the hospital's kitchen and dishwashing room, alleges that he was injured when he slipped and fell on water that had leaked from the commercial dishwashing machine onto its kitchen floor.

To the extent plaintiff alleges that the wet condition resulted from a defective condition in the dishwashing machine, the hospital established it did not have actual notice of a defective condition on the day of the accident (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *DeJesus v New York City Hous. Auth.*, 53 AD3d 410, 411 [1st Dept 2008], *affd* 11 NY3d 889 [2008]; *Dombrower v Maharia Realty Corp.*, 296 AD2d 353 [1st Dept 2002]). While there is evidence of recurring problems with the dishwasher, the hospital established that it addressed such problems by retaining a service company to provide regular maintenance and to repair the machine whenever it broke down. The repair company had serviced the machine weeks before plaintiff's accident, and plaintiff himself testified that the machine appeared to be in good working condition when he left the night before his accident. General awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused

plaintiff's fall (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). In light of the foregoing, we need not reach the hospital's remaining arguments.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10597 The People of the State of New York, Ind. 5018N/10
Respondent,

-against-

Leonardo Acosta,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Robert Stolz, J.), rendered on or about July 27, 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: SEPTEMBER 26, 2013

CLERK

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

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

10598 Thomas F. Cusack, Index 651952/11
Plaintiff-Appellant,

-against-

Greenberg Traurig, LLP,
Defendant-Respondent.

_____

Thomas F. Cusack, appellant pro se.

Steptoe & Johnson LLP, New York (Justin Y.K. Chu of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 15, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint stems from plaintiff's failed efforts to have defendant, counsel for plaintiff's former employer, American Defense Systems, Inc. (ADSI), issue a corrected opinion letter to facilitate removal of restrictive legends on his stock certificate. Defendants had issued an opinion letter that misstated that it represented plaintiff, rather than ADSI. Defendant asserts that ADSI subsequently directed it not to issue a corrected letter because ADSI maintains, in a separate lawsuit, that plaintiff fraudulently procured his employment and the stock.

The court properly dismissed the claim of legal malpractice, as there was no attorney-client relationship (*Waggoner v Caruso*, 68 AD3d 1, 5 [1st Dept 2009], *affd* 14 NY3d 874 [2010]). Defendant represented ADSI, not its shareholders or employees and, thus, not plaintiff (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]). Contrary to plaintiff's contentions, nothing in the parties' actions created an attorney-client relationship (*see Polovy v Duncan*, 269 AD2d 111, 112 [1st Dept 2000]). Defendant's request that plaintiff complete a second shareholder questionnaire to issue a corrected opinion letter does not suffice to create an attorney-client relationship. Defendant represented ADSI in ongoing adversarial litigation against plaintiff after his employment was terminated. Moreover, plaintiff essentially acknowledges the lack of an attorney-client relationship, as his complaint largely stems from the allegation that defendant misstated that it represented plaintiff in the opinion letter.

Nor is there near privity to support a claim of legal malpractice based on an allegedly negligent misrepresentation. As the motion court noted, the opinion letter was addressed to BNY Mellon, and as plaintiff alleged in the complaint, the parties contemplated only that BNY Mellon, not plaintiff, would

rely on the letter (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 384 [1992]).

The motion court correctly dismissed the breach of fiduciary duty claim, as there was no attorney-client relationship and no other factual allegations establishing such a duty (*see Eurycleia Partners*, 12 NY3d at 562).

Plaintiff cites no allegations in the complaint to refute the motion court's conclusion that there was no breach of contract claim. Plaintiff failed to allege that the "contract," defendant's alleged acceptance of plaintiff's offer to issue a letter to remove the restrictive covenant, was supported by consideration. Since a claim for breach of a duty of good faith cannot be plead absent an underlying contract (*see Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010]), that claim was properly dismissed as well.

The motion court correctly dismissed the fraud claim and both negligence claims as duplicative of plaintiff's malpractice claim (*see Dinhofer v Medical Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 [1st Dept 2012], *lv denied* 19 NY3d 812 [2012]; *Weksler v Kane Kessler, P.C.*, 63 AD3d 529, 531 [1st Dept 2009]).

Contrary to plaintiff's contention, in assessing the common-law securities fraud claim, the motion court acknowledged that plaintiff's alleged deceptive practices included not only

issuance of a defective opinion letter but also the subsequent failure to correct it. To allege fraud, however, the complaint must allege, among other things, that plaintiff justifiably relied on an alleged misrepresentation or material omission (*IDT Corp. v Morgan Stanley Dean Witter & Co*, 12 NY3d 132, 140 [2009]). The only alleged misrepresentation here was the misstatement in the opinion letter that defendant represented plaintiff, and the motion court correctly concluded that plaintiff failed to allege that he relied on it to his detriment. The court also properly dismissed plaintiff's securities fraud claim based on General Business Law § 349, as plaintiff's allegations do not encompass consumer-oriented conduct (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 24-25 [1995]).

Plaintiff's conversion claim was triggered on July 9, 2008, when according to the complaint, defendant first refused to correct the defective opinion letter (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]). Plaintiff commenced this action on July 15, 2011, more than three years after the statute of limitations began to run (CPLR 214[3]). Accordingly, the court properly dismissed that claim as time-barred.

As there was no attorney-client relationship and no valid claim of legal malpractice, the doctrine of continuous representation is inapplicable to any statute of limitations (*Shumsky v Eisenstein*, 96 NY2d 164, 167-168 [2001]). Further, plaintiff's allegations do not support a claim of "ongoing concealment" by defendant of its actions and do not warrant a tolling of any statute of limitations.

Plaintiff's aiding and abetting fraud and aiding and abetting breach of fiduciary duty claims consist of bare legal conclusions (*see David v Hack*, 97 AD3d 437, 438 [1st Dept 2012]).

Plaintiff's failure to perform a ministerial act claim fails, as defendant is not a public officer or a government entity (*see generally Tango v Tulevech*, 61 NY2d 34, 40 [1983]).

Plaintiff's allegations are insufficient to show that defendant used wrongful means to interfere with his prospective business relations, or that it acted with the sole purpose of harming him (*see GS Plasticos Limitada v Bureau Veritas*, 88 AD3d 510 [1st Dept 2011]). Nor has plaintiff plead allegations showing that defendant engaged in conduct so outrageous as to support a claim of intentional infliction of emotional distress (*see Suarez v Bakalchuk*, 66 AD3d 419, 419 [1st Dept 2009]). For similar reasons, the complaint does not allege sufficient facts

to support punitive damages (*see Denenberg v Rosen*, 71 AD3d 187 [1st Dept 2010], *lv dismissed* 14 NY3d 910 [2010]).

Plaintiff fails to state how any defects would have been addressed if he had been given leave to amend the complaint and, in any event, any further amendment of the complaint would have been futile (*Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643, 643 [1st Dept 2013]).

We have considered plaintiff's remaining contentions and find them unavailing or not properly before this Court.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10601 Anne Renteria, et al., Index 101110/09
Plaintiffs-Respondents,

-against-

Oleg Yuryevich Simakov,
Defendant,

Patty Taxi Corp., et al.,
Defendants-Appellants.

_____

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for appellants.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Nicole Michelle Gill of counsel), for respondents.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered December 14, 2011, which denied defendants Patty Taxi Corp. and Libardo Daza's motion for summary judgment dismissing the complaint as against them, and granted plaintiffs' cross motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

The record shows that the taxi operated by defendant Daza collided with the rear of plaintiff Renteria's car, which was stopped in the left lane of the FDR Drive in Manhattan, following a collision with the car operated by defendant Simakov. This evidence establishes prima facie that Daza was negligent, which shifts the burden to Daza to establish a non-negligent

explanation for the collision (*Tutrani v County of Suffolk*, 10 NY3d 906 [2008]; *Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]).

We reject Patty Taxi and Daza's contention that Daza's testimony shows that he was confronted with an emergency situation that rendered his actions reasonable (*see e.g. Caristo v Sanzone*, 96 NY2d 172 [2001]). Daza testified that he was traveling up an incline at about 35 to 38 miles per hour, that when he reached the top of the incline he saw the two cars stopped in his lane only about 12 feet in front of him, that he was unable to move into the middle lane because of a vehicle traveling there, and that after he slammed on his brakes, his car skidded for five or six seconds before striking plaintiff's car. Motorists are obligated to drive at a sufficiently safe speed and to maintain sufficient distance from vehicles in front of them to avoid collisions with stopped vehicles, taking into account weather and road conditions (*see LaMasa v Bachman*, 56 AD3d 340 [1st Dept 2008]; *Johnson*, 261 AD2d at 271-272). Given that the incline in the FDR Drive, which Daza's testimony suggests was so steep as to obscure from his sight vehicles more than 12 feet ahead of him, Daza (who moreover admitted to being familiar with that section of the Drive) was traveling too fast to maintain a safe distance from any cars stopped beyond the crest of the

incline.

Vehicle and Traffic Law (VTL) § 1202(a)(1)(j) does not apply to this case, since the FDR Drive is not a designated "state expressway highway" or "state interstate route highway" (*see* VTL §§ 145-a; 145-b; Highway Law §§ 340-a; 340-c). Moreover, under the circumstances, even if plaintiff was negligent in stopping her car in the left lane of the highway, she merely provided the condition or occasion for the occurrence of the rear-end collision but was not a proximate cause of it (*see Iqbal v Thai*, 83 AD3d 897 [2d Dept 2011]).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10602 The People of the State of New York, Respondent, Ind. 1528/10

-against-

Luis Melendez, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered December 7, 2010, convicting defendant, after a jury trial, of robbery in the second degree, perjury in the first degree, attempted bribery in the third degree and falsely reporting an incident in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 12½ 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 evidence established the physical injury element of second-degree robbery (*see* Penal Law § 10.00[9]; § 160.10[2][a]). The victim's testimony, along with medical records, amply

supported the conclusion that her injuries resulted in substantial pain. While the degree of pain may have increased and then diminished over a period of time, it is clear that it was "more than slight or trivial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]).

The perjury charge (*see* Penal Law §§ 210.00[3],[5]; 210.15) was established by evidence that defendant falsely testified before the grand jury about the circumstances of his arrest for the robbery. The false testimony was material to the grand jury proceeding, particularly with regard to the issue of whether defendant was correctly identified as the perpetrator.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10603 In re Mariah A., and Another,

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

Hugo A.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

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

Rosin Steinhagen Mendel, New York (Geoffrey P. Berman of counsel), for respondent.

Neal D. Futerfas, White Plains, attorney for the children.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about August 22, 2012, which denied respondent-father's motion to vacate an order, which, upon his default in failing to appear at the fact-finding hearing, terminated his parental rights on the grounds of abandonment, unanimously affirmed, without costs.

Family Court properly exercised its discretion in denying respondent's motion to vacate the order terminating his parental rights upon his default because he failed to demonstrate a reasonable excuse for his absence from the court's May 17, 2011 proceeding and a meritorious defense to the abandonment

allegation (*see Matter of Cain Keel L. [Derzerina L.]*, 78 AD3d 541 [2010], *lv dismissed* 16 NY3d 818 [2011]). Respondent's proffered excuse that he was in Part 43 of the Family Court in reliance on the permanency hearing notice was unreasonable, since he was in court when the fact-finding hearing was scheduled for May 17, 2011 at 2:00 p.m. in Part 1. However, the notices on which respondent claims to have relied indicate that the permanency hearings were scheduled for 10:30 a.m. If respondent had indeed shown up at Part 43 at 10:30 a.m., he would have learned prior to 2:00 p.m. that he was not at the correct Part. In any event, a conclusory statement that a respondent was confused as to the date or time of a hearing is not a reasonable excuse for failure to appear (*see Matter of Jaynices D. [Yesenia Del V.]*, 67 AD3d 518 [1st Dept 2009]; *Matter of Gloria Marie S.*, 55 AD3d 320 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]). Prior to his default, respondent had also failed to appear at two of the five scheduled hearings without any explanation for such failure to appear.

The record also demonstrates by clear and convincing evidence that respondent abandoned the children. His assertion that he visited them when he was "in the neighborhood and called, at a minimum, on holidays and birthdays" established nothing more

than sporadic and minimal attempts to maintain a parental relationship, which are insufficient to prevent a finding of abandonment (*see Matter of Ravon Paul H.*, 161 AD2d 257 [1st Dept 1990]; *see also Matter of Elvis Emil J.C.*, 43 AD3d 710 [1st Dept 2007], *lv denied* 9 NY3d 814 [2007]).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10605 The People of the State of New York, Respondent, Ind. 5112/08

-against-

Barry Smith, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered September 12, 2011, as amended January 10, 2012, convicting defendant, upon his plea of guilty, of burglary in the first degree, and sentencing him to a term of five years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the conviction to burglary in the second degree and reducing the prison term to 3½ years, and otherwise affirmed. As the People concede, defendant's conviction and sentence should be modified as indicated for the purpose of effectuating the plea bargain agreed upon by the

parties and the court (*see e.g. People v Colon*, 301 AD2d 408 [1st Dept 2003]). We have considered defendant's remaining arguments and find that they do not warrant any relief except as indicated.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10606 The People of the State of New York, Ind. 3716/10
Respondent,

-against-

Geneva Nelson,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about April 12, 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: SEPTEMBER 26, 2013

CLERK

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

10607N Damaris Rosado, etc., et al., Index 21874/03
Plaintiffs,

-against-

Njie Alhati, et al.,
Defendants.

- - - - -

Brand Brand Nomberg & Rosenbaum, LLP,
Nonparty Appellant,

-against-

McMahon & McCarthy,
Nonparty Respondent.

_____

Brand Brand Nomberg & Rosenbaum, LLP, New York (Brett J. Nomberg of counsel), for appellant.

McMahon & McCarthy, Bronx (Matthew J. McMahon of counsel), respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered January 15, 2013, which, in a dispute between plaintiffs' outgoing and incoming counsel as to the division of a contingency fee earned in a personal injury action, denied the motion of Brand Brand Nomberg & Rosenbaum, LLP (BBNR) for a charging lien, and allocated to it 5% of the subject fee, unanimously affirmed, without costs.

The motion court's apportionment of the contingency fee was a provident exercise of discretion. The court analyzed "the relevant factors including the amount of time spent by the

attorneys on the case, the nature and quality of the work performed and the relative contributions of counsel toward achieving the outcome" (*Diakrousis v Maganga*, 61 AD3d 469, 469 [1st Dept 2009]), and its apportionment of 5% of the fee to prior counsel (BBBM) and 95% to trial counsel McMahon & McCarthy (M & M) was appropriate (*see e.g. Shabazz v City of New York*, 94 AD3d 569 [1st Dept 2012]).

BBNR's claim that the court held a "cause" hearing, as opposed to a fee hearing or evidentiary hearing, is unpreserved (*see Yahudaii v Baroukhian*, 89 AD3d 557, 558 [1st Dept 2011]), and belied by the record. Moreover, M & M provided the motion court with a detailed spreadsheet showing a total time of 668.6 hours expended, demonstrating that the firm aggressively litigated on behalf of plaintiffs. Among other things, M & M conducted extensive depositions of the parties and nonparty witnesses, obtained the witness statement from a nonparty witness who had moved out of state by the time M & M was retained, obtained all of the infant plaintiff's medical and school records, hired experts, and conducted the trial over 10 days from jury selection to the settlement of $1,550,000 from the non-City defendants.

BBNR, on the other hand, provided no time records (*see Hinds v Kilgallen*, 83 AD3d 781, 783 [2d Dept 2011]), and merely relied

on an affidavit from a BBNR paralegal who said that she had many conversations with plaintiffs, without any detail as to when such conversations took place or how much time was expended. BBNR made no efforts to go forward with any depositions during the 3½ years that it had the file, or to investigate any defendant other than the City of New York.

BBNR's claim that M & M ignored a conditional order of discovery striking the City's answer, thereby allowing a defendant with unlimited funds to be dismissed out of the case, is unavailing. The City substantially complied with the order, and as noted by the trial judge "the heart of this whole matter was the responsibility of [defendant] school" and the actions of the crossing guard, who was employed by the City, were not a factor.

BBNR's claim that it kept in constant contact with plaintiffs and that it was replaced solely because it refused to extend a loan to them was refuted by the testimony of plaintiff

Ivan Rosado, who stated that the firm never returned his calls, and that he never requested a loan.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10608N Miguel DeJesus, Index 301169/08
Plaintiff,

-against-

Triborough Bridge and
Tunnel Authority, et al.,
Defendants.

- - - - -

[And A Third-Party Action]

- - - - -

Law Offices of Lawrence P. Biondi,
Nonparty Appellant,

-against-

Sacks and Sacks, LLP,
Nonparty Respondent.

_____

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 13, 2012, which, after a hearing for the judicial determination of the apportionment of $1.3 million legal fees earned in a personal injury action, apportioned 95% of the net contingency fee to incoming attorneys Sacks and Sacks, LLP (respondent) and the remaining 5% to the outgoing attorneys, the Law Offices of Lawrence P. Biondi (appellant), unanimously modified, on the facts, to increase the apportionment of the net

contingency fee to appellant to 25%, and reduce the apportionment to respondent to 75%, and as so modified, affirmed, without costs.

As the outgoing counsel in this matter, appellant served notices of claim on the municipal defendant, obtained plaintiff's medical records, represented him in a municipal 50-h hearing, commenced the action by filing and serving a summons and complaint, and conducted initial discovery, including responding to defendants' initial discovery demands, drafting and serving a bill of particulars, and drafting and serving discovery demands on behalf of plaintiff. Appellant also represented plaintiff at the preliminary conference. Under these circumstances, appellant performed significantly more work than did outgoing counsel in *Shabazz v City of New York* (94 AD3d 569 [1st Dept 2012]), wherein the award was reduced from 15% to 5%, and upon which the Supreme Court primarily relied in setting appellant's apportionment at 5%. Nonetheless, we recognize that incoming counsel performed the lion's share of the work on this case, including continuing discovery, conducting depositions, retaining experts, obtaining an award of summary judgment on the issue of liability, and successfully mediating a $3.9 million settlement in this personal injury action. Accordingly, we modify the apportionment of the

attorney's fee to the extent indicated (*see Poulas v James Lenox House, Inc.*, 11 AD3d 332 [1st Dept 2004]; *Pearl v Metropolitan Transp. Auth.*, 156 AD2d 281 [1st Dept 1989]).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10609 In re Shaiju Kalathil, Index 110797/11
[M-3488] Petitioner,

-against-

Hon. Doris Ling-Cohan, etc.,
Respondent.

_____

Shaiju Kalathil, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Andrew H. Meier of counsel), for respondents.

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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: SEPTEMBER 26, 2013

CLERK

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

8395 The People of the State of New York, Respondent, Ind. 4386/08

-against-

Victoria Chin, Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered September 22, 2009, convicting defendant, after a jury trial, of burglary in the second degree and grand larceny in the third degree, and sentencing her to concurrent terms of 6 years and 2⅓ to 7 years, respectively, unanimously affirmed.

Defendant failed to preserve her argument that the court should have charged the jury that it could acquit her even if it did not believe the defense witnesses, and we decline to review it in the interest of justice. Although defendant joined in a codefendant's objection to the court's charge, that objection did not preserve the particular issue defendant raises on appeal. As an alternative holding, we find that the court properly instructed the jury that the burden of proof always remained on

the People, and that the fact that the defense called witnesses did not shift the burden of proof. Viewed as a whole (*see generally People v Umali*, 10 NY3d 417, 427 [2008]), the court's charge gave the jury the same information that defendant claims should have been given.

Defendant's challenge to the use of an official court interpreter who was acquainted with the victims is unavailing (*see People v Lee*, 89 AD3d 633 [1st Dept 2011], *affd* 21 NY3d 176 [2013]).

We perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10145-
10146 In re Gregory Stewart Trust, et al.

- - - - -

Barbara Stewart,
Petitioner-Respondent-Appellant,

-against-

William P. Stewart, Jr., et al.,
Respondents-Appellants-Respondents.

Files 3833/05
4776/05
4775/05
4777/05

Thompson Hine, LLP, New York (Simon Miller and Richard A. De Palma of counsel), for appellants-respondents.

Marcus & Cinelli, LLP, New York (David P. Marcus of counsel), for respondent-appellant.

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered March 21, 2012, which, to the extent appealed from, granted petitioner's request for statutory annual trustee commissions for the year 2005 to the extent of awarding her two-thirds of the 2005 annual commissions on the trusts' principal pursuant to SCPA 2309(2) in the total amount of $695,960, payable by each of the four family trusts in the amount of $173,990, based on the established value of each of the four trusts at $85,695,000, and denied, with prejudice, petitioner's request for annual commissions on the trusts' principal for the years 2003 and 2004, as well as annual commissions on the trusts' income for the years 2003, 2004 and 2005, unanimously affirmed,

without costs. Appeals from order, same court and Surrogate, entered February 15, 2012, which adopted the findings and recommendation of the Special Referee granting petitioner's claim to annual commission on the trusts' principal for the year 2005 and denying petitioner's claims for commissions for 2003 and 2004, rejected that portion of the recommendation denying said claims without prejudice to renewal, and dismissed them with prejudice, unanimously dismissed, without costs, as subsumed in the appeal from the decree.

Petitioner, Barbara Stewart (trustee), was removed as cotrustee of four trusts, the beneficiaries of which are her four children, in 2012 for misconduct that occurred primarily after 2005. On appeal, she is seeking commissions pursuant to SCPA 2309(2) for 2003, 2004 and 2005. Respondents, three of the trustee's children and beneficiaries of the trusts (beneficiaries), oppose granting her commission for these years.

The Referee's report recommended that the trustee be denied commissions for 2003 and 2004 for failure to provide competent evidence as to the value of the trusts for those years. As to the annual commission for 2005, the Referee determined that, absent controlling precedent in this state on the issue, trustee misconduct that occurred after the period for which a commission is sought cannot be considered in determining whether to grant

the commission. The Referee therefore recommended the trustee be granted her annual commission for 2005, and the Surrogate adopted these recommendations.

We conclude that courts have the discretion to take into consideration all of a trustee's misconduct in determining the grant of annual commission, even conduct that occurred after the period applicable to the commission. Although there are no appellate cases on point, no New York case holds otherwise. As a basic principle, the Surrogate has broad discretion to deny commission to a trustee if the trustee has engaged in misconduct (*see generally Matter of Donner*, 82 NY2d 574, 587 [1993] [concerning co-executor commissions]; *Matter of Tydings [Ricki Signor Grantor Trust]*, 32 Misc 3d 1204[A] [Sur Ct, Bronx County 2011] [trustee seeking income, annual and compensation commission]). In determining if a commission should be denied, misconduct that is not directly related to the commission being sought may be taken into consideration (*see Tydings*, 32 Misc 3d 1240[A] [court denied trustee commission for services unrelated to the misconduct, finding that her overall mismanagement of the trust did not obligate the trust to pay her commission]; *Smith's Estate*, 24 Pa D 435, 440-441 [Orphan's Ct Pa, Philadelphia County 1915] [court denied trustee commission for years prior to his misconduct, concluding that it would be unjust to allow him to

earn the commission]). The Restatement (Second) of Trusts § 243 supports this conclusion with a multi-factor analysis (Comment *c*). Among the factors to be considered under the Restatement in determining if a commission should be denied are whether the trustee acted in good faith, if the misconduct related to management of the whole trust and if the trustee completed services of value to the trust (*id.*). We conclude, therefore, it is within the court's discretion to determine whether the trustee's later misconduct bars her from receiving commission.

Trustees can be denied commission "where their acts involve bad faith, a complete indifference to their fiduciary obligations or some other act that constitutes malfeasance or significant misfeasance" (*Tydings*, 32 Misc 3d 1240[A], *10). The denial of a commission, however, should not be "in the nature of an additional penalty" (Restatement 243, Comment *a*). Rather, it should be based on the trustee's failure to properly serve the trust, not designed as an additional punishment (*see id.*). Indeed, even the beneficiaries in this case state that it will be rare that a trustee's later misconduct will serve as the basis for a denial of commission.

In his report, the Referee cites *Matter of Williams* (631 NW2d 398, 409 [Minn Ct App 2001]) for the proposition that the court cannot consider later misconduct. *Williams*, which is not

binding on us, addressed whether a professional trustee was required to refund fees it had received for an accounting period during which the district court found it breached its duties to the trust. In determining whether the trustee should refund fees, the court found "that the fees to be reduced or denied [must] relate to a failure by [the trustee] to render services or to render services properly" (*id.*). This case does not explicitly hold that the court cannot consider misconduct which occurs after the period for which commissions are sought. Rather, it underscores the principle that denying a trustee fees cannot be a punishment unrelated to the trustee's actions and, citing the Restatement of Trusts, it concludes that a court has discretion to reduce fees of the trustee who failed to render service properly. Finally, we note that the court in *Williams* did not decide whether the trustee's compensation should be reduced, but merely remanded to the district court for further proceedings on the issue.

We conclude, in our discretion, that the nature of the trustee's misconduct, both during 2005 and afterwards, does not warrant denial of an annual commission for 2005. There is no evidence that the trust suffered any significant loss due to the

trustee's actions (*cf. Smith's Estate*, 24 Pa D at 435 [commission denied where trustee engaged in embezzlement schemes related to the rental of the trust properties]). There are still substantial assets in the trusts. On the record before us, we conclude denying her the 2005 commission would serve only as punishment. Further, the trustee is only receiving two-thirds of the annual commission for 2005. Although the Referee noted that he would recommend that the trustee be denied a commission for 2005 if his legal conclusion about misconduct after 2005 were reversed and the case came back to him, we are not bound by the Referee's statement (CPLR 4403; *see Shultis v Woodstock Land Dev. Assoc.*, 195 AD2d 677, 678 [3d Dept 1993]).[1]

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

[1] There is no need to remand nor is it the primary relief sought by the parties. We have the complete record of the proceedings before the Referee and we accept his credibility determinations. Thus, we can resolve the 2005 commission based on the briefs and record on appeal.

The Decision and Order of this Court entered herein on July 16, 2013 is hereby recalled and vacated (*see* M-4100 and M-4153 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10564 Vigilant Insurance Company, Index 102316/11
Plaintiff-Appellant,

-against-

Ralph Sibbio,
Defendant-Respondent.

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An appeal having been taken to this Court by the above-named appellant from an order and judgment (one paper), of the Supreme Court, New York County (Joan A. Madden, J.), entered on or about November 30, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 9, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10573 The People of the State of New York, Docket 76038C/09
Respondent,

-against-

Christopher Morales,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Lawrence T. Hausman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, J. at speedy trial motion; Richard Lee Price, J. at nonjury trial and sentencing), rendered October 5, 2011, convicting defendant of attempted assault in the third degree, attempted criminal possession of a weapon in the fourth degree and harassment in the second degree, and sentencing him to a term of one year's probation and five days of community service, 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 court's credibility determinations.

The court properly denied defendant's speedy trial motion. When the People filed a superseding information that changed

their theory of the case, this did not render their earlier declaration of readiness illusory (*see People v Armstrong*, 163 Misc 2d 588, 589-590 [App Term, 1st Dept 1994], *lv denied* 84 NY2d 1028 [1995]). Accordingly, the periods of delay following the declaration were governed by the rules relating to postreadiness delay (*see People v Sinistaj*, 67 NY2d 236, 239 [1986]).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10574-
10574A In re Kristian-Isaiah William M.,
and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

Jessenica Terri-Monica B.,
Respondent-Appellant,

Jewish Child Care Agency,
Petitioner-Respondent.

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

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Carol Kahn, New York, attorney for the children.

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Orders of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 23, 2012, which, following a fact-finding determination that respondent mother had permanently neglected the subject children, and presently, and for the foreseeable future, is unable, by reason of mental illness, to provide proper and adequate care for them, terminated her parental rights, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including expert testimony from a court-appointed psychologist who examined the mother for several hours and reviewed her extensive medical history, supports the determination that she is presently and for the foreseeable future unable to provide adequate care for the children, due to mental illness (*see* Social Services Law § 384-b[4][c], [6][a]). The psychologist testified that the mother suffered from schizoaffective disorder, had been hospitalized numerous times for psychiatric conditions, abused alcohol and marijuana, had frequent violent altercations, and lacked insight into her condition (*see Matter of Rosie Shameka S.R. [Tulip S.R.]*, 102 AD3d 480 [1st Dept 2013]). Although the mother had two younger children in her care, the psychologist stated that her mental illness was a chronic condition, characterized by periods of relative stability fluctuating with periods of instability. He also noted that the younger children had been in the mother's care, under court supervision, for a limited time period, and that the addition of the subject children to the household might cause the mother to decompensate.

The finding of permanent neglect is also supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]). The record shows that the agency exerted diligent efforts by assisting the mother in her efforts to obtain suitable housing

and referring her to various programs, but that the mother refused to consent to the disclosure of records from service providers, and refused all referrals and housing (*see Matter of Sukwa Sincere G. [Shamiqua Latisha S.]*, 88 AD3d 592 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]).

A preponderance of the evidence supports the court's determination that it is in the best interests of the children to terminate the mother's parental rights, as she failed to show that she had made any progress in completing the service plan (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Moreover, the children have been in a loving, supportive, stable home for most of their lives, and the foster mother wishes to adopt them. Under the circumstances, a suspended judgment is not warranted (*see Matter of Sukwa Sincere G.*, 88 AD3d at 592).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10575 Herbert Moreira-Brown, Index 26490/99
Plaintiff-Appellant,

-against-

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

_____

Herbert Moreira-Brown, appellant pro se.

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

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 25, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this matter where plaintiff, a public figure, alleges that defendant Detective Rivera made false and defamatory statements about him to the press. The record demonstrates that all of the statements attributed to Rivera about plaintiff were true, namely, that plaintiff was being sought for questioning; that repeated efforts to locate plaintiff had been unsuccessful; and that the case involved an allegation of rape. The fact that these truths may have been fatal to plaintiff's bid for public office have no bearing on whether they were legally defamatory. Moreover,

plaintiff has failed to raise a triable issue of fact as to whether the alleged statements were actuated by ill will (*see e.g. Konrad v Brown*, 91 AD3d 545 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]).

Plaintiff's contention that the motion was untimely is unpreserved and may not be raised for the first time on appeal (*see Shaw v Silver* 95 AD3d 416 [1st Dept 2012]). In any event, the record shows that the motion was timely filed in accordance with a court order extending defendants' time to file the motion.

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: SEPTEMBER 26, 2013

CLERK

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

10578 The People of the State of New York, Ind. 8470/90
Respondent,

-against-

Juan Morales,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross 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 order of the Supreme Court, New York County (Charles Solomon, J.), entered on or about November 5, 2010, resentencing defendant, pursuant to the Drug Law Reform Act of 2004,

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 order appealed from be and the same is hereby affirmed.

ENTERED: SEPTEMBER 26, 2013

CLERK

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

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

10579 In re Peter J. Amador, Index 110574/11
Petitioner,

-against-

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

_____

De Leon & Associates, PLLC, New York (Edgar De Leon of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

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Determination of respondent Police Commissioner, dated May 17, 2011, terminating petitioner's employment as a New York City police officer, 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 [Carol R. Edmead, J.], entered January 30, 2012), dismissed, without costs.

The finding that petitioner, while off duty, discharged his firearm in the direction of his former girlfriend during an altercation in the apartment they shared is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180 [1978]). There is no basis for disturbing the credibility determinations of the Assistant

Deputy Commissioner of Trials (ADC) (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Based upon petitioner's guilty plea, the ADC also found petitioner guilty of the charges that he was out of residence while on sick report and provided false information concerning his absence.

We reject petitioner's claim that the ADC improperly placed the burden of proof on him. The record indicates that respondents bore the burden of proving that petitioner committed the acts charged; the ADC found that petitioner's testimony did not rebut respondents' evidence.

The penalty of termination does not shock our sense of fairness (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

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: SEPTEMBER 26, 2013

CLERK

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

10580-
10580A-
10581 Sallie Jackson,
Plaintiff-Appellant,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents.

Index 309377/08

Warren J. Willinger, Mt. Kisco, for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Elizabeth J. Sandonato of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered June 27, 2012, upon a jury trial as to liability, in defendants' favor, and bringing up for review an order, same court (Barry Salman, J.), entered on or about December 14, 2011, which granted defendants' motion for a bifurcated trial, unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court (Barry Salman, J.), entered on or about December 14, 2011, which granted defendants' motion to, among other things, quash a subpoena seeking the production of surgical hardware, unanimously dismissed, without costs, as academic.

This action seeks recovery for damages sustained by plaintiff when, while she was standing at a desk at defendant Montefiore Medical Center, defendant Georgette McToy bumped into her, causing her to fall. The court properly found that bifurcation was warranted, as the questions of liability and damages are distinct and severable issues and plaintiff's injuries are not probative in determining how the accident occurred (*see Gogatz v New York City Transit Authority*, 288 AD2d 115 [1st Dept 2001]).

The trial court, which is vested with "broad authority to control the courtroom" (*Campbell v Rogers & Wells*, 218 AD2d 576, 579 [1st Dept 1995]), did not commit reversible error in limiting plaintiff's use of leading questions upon direct examination of adverse witnesses. The witnesses had not displayed any hostility or evasiveness and the information sought could have been elicited through non-leading questions (*see Matter of Ostrander v Ostrander*, 280 AD2d 793 [3d Dept 2001]). The court's exercise of control over the timing and manner of the use of deposition testimony for impeachment purposes was within its discretion. Moreover, a review of the record does not "demonstrate that the court was biased or that other conduct of the court deprived [plaintiff] of a fair trial" (*Peralta v Grenadier Realty Corp.*, 84 AD3d 486, 487 [1st Dept 2011]).

Given the foregoing determinations, plaintiff's appeal of the order quashing the subpoena, which relates solely to damages, is rendered academic. In any event, the court properly exercised its discretion in quashing the subpoena duces tecum, as plaintiff failed to seek production of the hardware during discovery (*see Orr v Yun*, 74 AD3d 473 [1st Dept 2010]), production was neither material nor relevant to the action, and plaintiff was free to obtain the hardware from the manufacturer or a medical supplier.

We have considered plaintiff's remaining arguments, including those involving the verdict sheet, judicial notice, and the court's instructions to the jury, and find them unavailing.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10582 The People of the State of New York, Respondent, Ind. 09/11

-against-

Emilio Jimenez, Defendant-Appellant.

_____

Watters & Svetkey, LLP, New York (Jonathan Svetkey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J. at suppression hearing; Marcy L. Kahn, J. at jury trial and sentencing), rendered November 18, 2011, convicting defendant of two counts of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to concurrent terms of four years, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

The court properly denied defendant's suppression motion. Defendant did not preserve his contention that the search of his backpack was not properly conducted as a search incident to arrest. Defendant made completely different arguments, and gave no indication that he was challenging the search of his backpack

under the principles expressed in *People v Gokey* (60 NY2d 309 [1983]). Although the People elicited some testimony relevant to a *Gokey* issue, and the hearing court made some reference to such an issue, the court did not "expressly decide[ ]" the issue "in response to a protest by a party" (CPL 470.05[2]; (*see People v Colon*, 46 AD3d 260, 263 [2007]). In particular, while defendant now claims that the record is insufficiently developed with respect to his proximity to the backpack at the time of the search, he never alerted the hearing court to any such deficiency at the time it could have been remedied (*see People v Martin*, 50 NY2d 1029, 1031 [1980]). Accordingly, we find that defendant did not preserve his present claims, and we decline to review them in the interest of justice.

As an alternative holding, we also reject them on the merits. The hearing evidence supports inferences that the arrest and search were contemporaneous, that defendant was not handcuffed at the time of the search, and that the backpack was in defendant's grabbable area while not being in the exclusive control of the police (*see People v Smith*, 59 NY2d 454 [1983]; *People v Wylie*, 244 AD2d 247 [1997], *lv denied* 91 NY2d 946 [1998]). At the time of the search, the officer had a legitimate

concern that defendant could gain access to some type of weapon, or could destroy evidence.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10583 Cole, Schotz, Meisel, Forman & Leonard, P.A., Plaintiff-Appellant, Index 114113/11

-against-

Chris Brown, Defendant-Respondent,

Julio Marquez, et al., Defendants.

_____

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Jason R. Melzer of counsel), for appellant.

Venturini & Associates, New York (Valerie L. Hooker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 19, 2012, which granted the motion of individual defendants Chris Brown, Julio Marquez and Javier Saade to dismiss the complaint as against them, unanimously affirmed, without costs.

In this action to recover legal fees for services rendered to the corporate defendant, the motion court properly dismissed the fraudulent inducement cause of action asserted against the individual defendants. Plaintiff law firm claims that the individual defendants induced it to provide legal services by falsely promising to pay for past services rendered as well as future services to be provided in connection with an action that

was pending in federal court. This alleged promise is not collateral to the contract for legal services entered into between plaintiff and the corporate defendant. Rather, the promise concerns the corporate defendant's performance of the contract itself. Accordingly, the fraud claim against the individual defendants is duplicative of the breach of contract claim asserted against the corporation (*see Fairway Prime Estate Mgt., LLC v First Am. Intl. Bank*, 99 AD3d 554, 557 [1st Dept 2012]). Plaintiff does not contend that the individual defendants were parties to the legal services contract.

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: SEPTEMBER 26, 2013

CLERK

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

10584 The People of the State of New York, Ind. 3936/10
Respondent,

-against-

Jose Brito,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Ronald Zweibel, J.), rendered on or about July 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: SEPTEMBER 26, 2013

CLERK

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

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

10585 The People of the State of New York, Respondent, Ind. 1381/09

-against-

Jose Inoa, Defendant-Appellant.

_____

John R. Lewis, Sleepy Hollow, for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered December 14, 2010, convicting defendant, after a jury trial, of murder in the first and second degrees, attempted murder in the second degree, conspiracy in the second degree, assault in the first degree, and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 73⅓ years to life, unanimously affirmed.

The court properly exercised its discretion in permitting a detective to testify as an expert with regard to coded or unexplained language contained in recorded conversations, and the detective did not go beyond the proper bounds of expert testimony (*see People v Polanco*, 50 AD3d 587, 587 [1st Dept 2008], *lv denied* 11 NY3d 834 [2008]; *see also People v Brown*, 97 NY2d 500, 505 [2002]). The expert's opinion was based on "facts in

evidence or on those personally known and testified to by the expert" (*People v Jones*, 73 NY2d 427, 430 [1989]), and he properly relied on information "of a kind accepted in the profession as reliable" or provided by "a witness subject to full cross-examination" (*id.*). "In interpreting the coded communications...the expert properly placed them in light of other facts already in evidence, including facts personally known and testified to by him" (*People v Contreras*, 28 AD3d 393, 394 [1st Dept 2006], *lv denied* 7 NY3d 847 [2006]). To the extent any of the expert testimony could be viewed as improper, we find the error to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We do not find that there was anything in the testimony of the People's principal fact witness that warrants reversal. While the People employed some leading questions, and the witness sometimes gave her interpretation of facts in evidence, the court acted within its discretion in according the People appropriate leeway in these matters, and the witness's testimony was not so egregious as to deprive defendant of a fair trial. Any hearsay in the witness's testimony constituted declarations made by coconspirators during the course and in furtherance of the conspiracy (*see People v Caban*, 5 NY3d 143, 148 [2005]), or was otherwise admissible. In any event, we likewise find any error to be harmless.

To the extent defendant is raising a Confrontation Clause argument concerning any alleged hearsay introduced through either of the above-discussed witnesses, we find that argument to be without merit. The People did not introduce any testimonial statements made by nontestifying declarants (*see generally Crawford v Washington*, 541 US 36 [2004]).

We have considered and rejected defendant's challenges to the sufficiency of the evidence establishing that he murdered the victim for hire as set forth in Penal Law § 125.27(1)(a)(vi) and to the admissibility of evidence of an uncharged crime.

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10586-
10586A In re Alexander L.,

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

Andrea L.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

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

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

_____

Permanency hearing order, Family Court, New York County (Jody Adams, J.), entered on or about July 10, 2012, which changed the permanency goal for the subject child from return to parent to placement for adoption, unanimously affirmed, without costs. Appeal from order, same court and Judge, entered on or about July 10, 2012, which denied respondent mother's motion to vacate the portions of a dispositional order entered on or about November 16, 2011, requiring her to comply with a referral for a drug treatment assessment and psychiatric evaluation, unanimously dismissed, without costs.

Family Court Act § 1061 provides that "[f]or good cause shown and after due notice," the court may "set aside, modify or vacate any order issued in the course of a [child protective] proceeding." However, respondent abandoned the issue of the requirement that she comply with a drug treatment and psychiatric assessment and any recommendations by failing to raise it in her appeal from the dispositional order (*see Matter of Breeyanna S.*, 52 AD3d 342 [1st Dept 2008], *lv denied* 11 NY3d 711 [2008]). Accordingly, respondent's appeal from the denial of her motion to vacate portions of the dispositional order should be dismissed. Were we to reach the merits, we would find that respondent failed to establish good cause to vacate or modify the dispositional order, since she made no showing that she had already complied with a complete psychiatric or drug treatment evaluation.

Since the July 10, 2012 permanency order changed the permanency goal for the child from return to mother to adoption, it is not moot (*see Matter of Jacelyn TT. [Tonia TT.-Carlton TT.]*, 80 AD3d 1119 [3rd Dept 2011]). On the merits, the court

properly found that petitioner agency met its burden of showing, by a preponderance of the evidence, that the change in Alexander's goal was appropriate (*see Matter of Acension C.L. [Jesate J.]*, 96 AD3d 1059 [2nd Dept 2012]).

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10588 The People of the State of New York, Respondent, Ind. 1397/11

-against-

Troy Glassen, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J., at plea and sentencing), rendered on or about February 3, 2012, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 26, 2013

CLERK

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

10589N Richard S. Weisman, Index 91757/11
Plaintiff-Respondent,

-against-

Jerzy Maksymowicz,
Defendant-Appellant.

_____

Jerzy Maksymowicz, appellant pro se.

Weisman & Calderon LLP, Mount Vernon (Richard S. Weisman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered April 6, 2012, which, among other things, granted plaintiff's motion for an order cancelling a mechanic's lien filed by defendant, unanimously affirmed.

The court properly found that defendant's purported itemized submissions in support of the lien were inadequate (*see* Lien Law § 38). Items such as showering and having a barbecue with neighbors in the name of "community relations" do not constitute an "improvement" to the property within the meaning of the Lien Law (*see id.* at § 2[4]), nor were they related to any improvement. Similarly, the ordinary yard work that defendant may have performed does not constitute an improvement (*see Chase Lincoln First Bank v New York State Elec. & Gas Corp.*, 182 AD2d

906, 907 [3d Dept 1992]). Defendant also failed to submit evidence of an agreement by plaintiff (the guardian of the incapacitated owner) or the owner for any of defendant's alleged services (*see* Lien Law § 3).

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

ENTERED: SEPTEMBER 26, 2013

CLERK