SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 1, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11537 Bellinson Law, LLC, Index 600593/09
Plaintiff-Respondent,

-against-

Robert Iannucci,
Defendant-Appellant.

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Law Offices of Michael C. Marcus, New York (Michael C. Marcus of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 23, 2012, after a jury trial, awarding plaintiff attorney fees in the amount of $381,250, plus statutory interest, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial.

Plaintiff, Bellinson Law, LLC, brought this breach of contract claim against its former client, defendant Robert Iannucci, to recover an unpaid contingent fee following its representation of defendant in a federal civil rights action.

Pursuant to a Retainer Agreement and an Addendum to the Retainer Agreement (Addendum), defendant agreed to pay plaintiff a contingent fee if the case settled before jury selection was completed. However, when the case settled prior to trial for the amount of $2.125 million, defendant refused to pay plaintiff the agreed upon fee, asserting that plaintiff failed to perform under the contract. Plaintiff then commenced this action, seeking the unpaid attorney fees.

During the jury charge, the trial court presented the jury with a verdict sheet containing the three following interrogatories: (1) was there a contract between the parties? (2) did plaintiff perform its obligations under the contract? (3) was defendant obligated to pay plaintiff for its services under the contract? Following deliberations, the jury answered question one yes, concluding there was a contract between the parties, but responded no to question two, finding that plaintiff had not performed its obligations under that contract. When asked by the court, in response to the third question, if the defendant was obligated to pay plaintiff for its services under the contract, the jury answered "yes." Before the jury was discharged, defendant's counsel asked to speak to the court and a side bar was held. We do not know what was discussed at the side

bar. The jury was then discharged.

Following the jury's departure, defendant's counsel argued that the jury's findings presented "an inconsistency that is insurmountable." As no quantum meruit claim had been submitted to the jury, defendant's attorney contended that a finding that "[p]laintiff did not perform would not permit a jury to award any money to" plaintiff. The trial court, however, found that "there is a view of the evidence, whereby this verdict is not inconsistent." Under the Addendum, plaintiff was required to keep a list of hours and expenses because defendant was going to seek an award of fees if defendant obtained a winning verdict in the federal action. As the federal case never went to trial, the trial court determined that the jury could have found that, although plaintiff did not fulfill its obligation under the contract, it was not required to do so and, therefore, defendant was still obligated to pay plaintiff for its services. The court then entered a judgment against defendant awarding plaintiff its contingent fee, plus statutory interest from the date of the breach.

On appeal, defendant asserts that the jury's answers to the interrogatories were inconsistent and the trial court erred by failing to resubmit the verdict or, alternatively, order a new

trial (*see* CPLR 4111[c]; *Vera v Bielomatik Corp.*, 199 AD2d 132, 133-134 [1st Dept 1993]; *Mars Assoc. v New York City Educ. Constr. Fund*, 126 AD2d 178, 187 [1st Dept 1987], *lv dismissed* 70 NY2d 747 [1987]). We agree. The jury's responses to the second and third interrogatories are not only in direct conflict with one another, but puzzling given the jury charge. The trial court instructed the jury that "if you find all of the agreed-upon services have been performed, then the [p]laintiff is entitled to recover the fee agreed upon or such part of that fee as you find remains unpaid." In light of these instructions, the jury's finding that defendant is obligated to pay plaintiff, even though plaintiff did not perform its obligations under the contract, is "logically impossible" (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 518 [1980]).

As the verdict was inconsistent, pursuant to CPLR 4111(c), the court was obligated to either resubmit the interrogatories to the jury or order a new trial (*Mars. Assoc.*, 126 AD2d at 187 [when a jury's responses to interrogatories are internally inconsistent, the "trial court's only options are to either order reconsideration by the jury or a new trial"]). The trial court "engaged in improper speculation as to the jury's thought process" by attempting to reconcile the jury's answers with the

evidence (*Dubec v New York City Hous. Auth.*, 39 AD3d 410, 411 [1st Dept 2007]), based upon a theory that was not part of the jury's findings. In the absence of more detailed interrogatories to the jury outlining the different theories under which plaintiff could receive payment and asking the jury to determine the issue on which the trial court ultimately relied, the trial court's theory is pure speculation. The trial court should have required the jury to reconsider the interrogatories or order a new trial, even though defense counsel did not request, on the record, that the verdict be resubmitted to the jury (*see Vera*, 199 AD2d at 134 [because the jury had been discharged and could no longer reconsider its verdict, "justice manifestly" required a new trial even though counsel did not request the verdict be resubmitted to the jury]; *see also Applebee v County of Cayuga*, 103 AD3d 1267, 1268-1269 [4th Dept 2013] [a new trial ordered where the jury's verdict was inconsistent although neither party had objected to the verdict prior to the jury being discharged]). Because it is no longer possible to have the jury reconsider its answers, a new trial is now required (*see Vera*, 199 AD2d at 134).

We note that, although the parties focus their arguments on appeal on the issue of whether the verdict was a special or general verdict, such a determination is unnecessary. In *Nallan*,

the Court of Appeals stated that, although CPLR 4111(c) only considers a new trial "when the jury's answers to interrogatories are accompanied by a general verdict and there is an internal inconsistency," there is "no reason why" a new trial cannot be an available remedy where the jury has rendered a special verdict (50 NY2d at 518 n 5). Indeed, when a verdict is inconsistent and the jury has been discharged, a new trial is the most appropriate remedy (*see DePasquale v Morbark Indus.*, 254 AD2d 450, 450 [2d Dept 1998] [inconsistent special verdict]; *see also Vera*, 199 AD2d at 134).

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: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11539 & Index 118873/01
M-6594 Milton Eke,
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

The Triborough Bridge and Tunnel Authority,
Defendant-Appellant.

_____

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

Krieger, Wilansky & Hupart, Bronx (Brett R. Hupart of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (William E. McCarthy, J.), entered October 2, 2012, after a jury trial, in favor of plaintiff and against defendant The Triborough Bridge and Tunnel Authority (TBTA) in the amount of $25,000, bringing up for review an order, same court and Justice, entered on or about July 10, 2012, which denied TBTA's motion for a directed verdict, and an order, same court (Donna M. Mills, J.), entered on or about July 17, 2008, which denied TBTA's motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court properly denied TBTA's motion to dismiss the complaint. The record supports the court's determination

that TBTA waived the statute of limitations defense by failing to assert it in its answer (*see* CPLR 3211[e]).

TBTA's motion for a directed verdict was also properly denied. While a plaintiff's acceptance of an ACD precludes a claim for malicious prosecution, it "does not interdict an action for false imprisonment" (*Hollender v Trump Vil. Coop.*, 58 NY2d 420, 423 [1983]; *see Scherr v City of Lackawanna*, 79 AD3d 1785 [4th Dept 2010]). To the extent that our decisions in *Molina v City of New York*, 28 AD3d 372 (1st Dept 2006) and *Hock v Kline*, 304 AD2d 477 (1st Dept 2003) hold that acceptance of an ACD prevents the latter claim, they are no longer to be followed.

M-6594 - ***Milton Eke v The City of New York***

Motion to supplement record denied.

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

ENTERED: APRIL 1, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11897 Alex Irrizarry Deleon, Index 300612/11
Plaintiff-Appellant,

-against-

New York City Sanitation Department, et al.,
Defendants-Respondents.

_____

Block O'Toole & Murphy, LLP, New York (David L. Scher of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about November 21, 2012, which denied plaintiff's motion for summary judgment on the issue of liability, and granted defendants' motion for summary judgment dismissing the complaint, modified, on the law, to deny defendants' motion, and otherwise affirmed, without costs.

We agree with plaintiff that Vehicle and Traffic Law § 1103(b), which exempts "hazard vehicles" from the rules of the road and limits the liability of their owners and operators to reckless disregard for the safety of others (*Riley v County of Broome*, 95 NY2d 455 [2000]), does not apply to the New York City street-sweeping vehicle involved in the collision with plaintiff's vehicle that gave rise to this action. Therefore,

defendants are subject to the ordinary negligence standard of liability, not the reckless disregard standard on which their motion was based. At the time of the accident, in 2010, Vehicle and Traffic Law § 1103(b) was superseded by Rules of City of New York Department of Transportation (34 RCNY) § 4-02, which excepted street sweepers, among others, from compliance with traffic rules to the limited extent of making such turns and proceeding in such directions as were necessary to perform their operations (34 RCNY 4-02[d][1][iii][A]). While subparagraph (iv) contained a broader exception, expressly invoking Vehicle and Traffic Law § 1103, we find that subparagraph (iv) did not include street sweepers because that would have rendered subparagraph (iii) redundant and meaningless. Indeed, when 34 RCNY 4-02 was amended, in 2013, the City Council explained in its "Statement of Basis and Purpose" that the effect of the adopted rule would be "that operators of DOT and New York City Department of Sanitation snow plows, sand/salt spreaders and sweepers will *now* be subject to the general exemption set forth in subparagraph (iv) of that same subsection" (emphasis added) – a strong indication that they were not so subject before then.

Even holding defendants to an ordinary negligence standard, however, plaintiff has not established prima facie that it was

their negligence that proximately caused the accident. Issues of fact exist as to plaintiff's own negligence, including whether he was the sole proximate cause of the accident. Contrary to plaintiff's contention, this was not a standard rear-end collision for which defendants have offered no non-negligent explanation (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]). The operator of the street sweeper, defendant Falcaro, testified that while he was sweeping on the right side of the street, plaintiff was parked in the center of the street, and that when he started to pass plaintiff, plaintiff suddenly swerved in front of him. Indeed, the photographs in the record demonstrate that plaintiff's vehicle was not struck solely or even primarily in the rear, but in the right rear panel, i.e. primarily on the right side. Moreover, it was not stopped or stopping at the time of the accident.

All concur except DeGrasse, J. who dissents in part in a memorandum as follows:

DEGRASSE, J. (dissenting in part)

I dissent because I disagree with the majority's premise that the reckless disregard standard of care set forth under Vehicle and Traffic Law § 1103(b) does not apply to this case. On the contrary, the reckless disregard standard does apply because Vehicle and Traffic Law § 1103 was incorporated by Rules of the City of New York (34 RCNY) § 4-02(d)(1)(iv) as it existed at the time of the parties' accident.

This case involves an October 2010 collision between plaintiff's vehicle and a mechanical street sweeper that was being operated by defendant Robert P. Falcaro, a City sanitation worker. Falcaro's testimony that he was sweeping a street at the time of the accident is not contradicted. This makes Falcaro's street sweeper a "hazard vehicle" engaged in highway maintenance within the meaning of Vehicle and Traffic Law § 117-a (*see Faria v City of Yonkers*, 84 AD3d 1306 [2d Dept 2011]). 34 RCNY 4-02(d)(1)(iv) specifically adopted and provided for the application of the reckless disregard standard set forth in Vehicle and Traffic Law § 1103 to highway workers. No plausible construction of 34 RCNY 4-02 can take Falcaro out of the category of "highway worker." The reckless disregard standard is therefore controlling with respect to Falcaro's conduct (*cf.*

Riley v County of Broome, 95 NY2d 455, 462-463 [2000]). The majority's contrary position is apparently based on an erroneous interpretation of the then existing 34 RCNY 4-02(d)(1)(iii) which governed the operation of snow plows, sand spreaders, sweepers and refuse trucks. Where relevant, 34 RCNY 4-02(d)(1)(iii) merely provided that an operator of these vehicles

> "[w]hile in the performance of his/her duty and acting under the orders of his/her superior may make such turns as are necessary and proceed in the direction required to complete his/her cleaning, snow removal or sand spreading operations subject to § 1102 of the Vehicle and Traffic Law [which requires compliance with the instructions of police officers and other persons with authority to regulate traffic]."

There is no contradiction between § 4-02(d)(1)(iii) and § 4-02(d)(1)(iv). As shown above, § 4-02(d)(1)(iv) expressly adopted a reckless disregard standard while § 4-02(d)(1)(iii) provided for no standard at all. Therefore, there is no basis for the majority's conclusion that § 4-02(d)(1)(iii) would be rendered meaningless by an application of the § 4-02(d)(1)(iv) standard to the operation of street sweepers. By its decision, the majority is giving § 4-02(d)(1)(iii) a construction that adds a standard of care that the City Council chose to omit. "It is a general rule of construction that omissions in a statute, where the act is clear and explicit in its language, cannot be supplied

by construction" (*Eastern Paralyzed Veterans Assn. v Metropolitan Transp. Auth.*, 79 AD2d 516, 517 [1st Dept 1980], *appeal dismissed* 52 NY2d 895 [1981]; *see also* McKinney's Cons. Laws of NY, Book 1, Statutes §§ 74 and 363). "[T]he failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended" (*Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60-61 [2013] [internal quotation marks and citation omitted]). Inasmuch as the reckless disregard standard of care applies, summary judgment was properly granted by the court below. Specifically, the record contains no evidence of intentional conduct by Falcaro committed in disregard of a known or obvious risk of highly probable harm (*see e.g. Yousef v Verizon, Inc.*, 33 AD3d 315 [1st Dept 2006]). I would affirm the order entered below denying plaintiff's motion for summary judgment and granting defendants' cross motion for the same relief.

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, DeGrasse, Richter, JJ.

11976 Adriana Ferreyr, Index 109256/11
Plaintiff-Respondent,

-against-

George Soros, et al.,
Defendants-Appellants.

_____

Schulte Roth & Zabel LLP, New York (Gary Stein of counsel), for appellant.

Adriana Ferreyr, respondent pro se.

_____

Order, Supreme Court, New York County (Debra James, J.), entered January 25, 2013, which, to the extent appealed from, denied defendants' motion to dismiss the complaint in its entirety, unanimously modified, on the law, to grant the motion except as to the cause of action alleging assault and battery, and otherwise affirmed, without costs.

A claim for intentional infliction of emotional distress has not been stated as there is no allegation of extreme and outrageous conduct (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). As a matter of law, the individual defendant's failure to buy plaintiff a condominium apartment as allegedly promised cannot be said to be extreme and outrageous. The claim for negligent infliction of emotional distress fares no better

because there is no allegation of a "breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for her own safety" (*see Sheila C. v Povich*, 11 AD3d 120, 130 [1st Dept 2004] [citations omitted]). Nor does the complaint sufficiently allege that defendant acted with disinterested malevolence in support of plaintiff's cause of action for prima facie tort (*see Phillips v New York Daily News*, 111 AD3d 420, 421 [1st Dept 2013], citing *Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 333 [1983]; *Freihofer v Hearst Corp.*, 65 NY2d 135, 142–143 [1985]). The promissory estoppel claim also fails since the facts alleged do not show that defendant caused "unconscionable injury" to plaintiff as a result of any reasonable reliance she placed on his alleged promises (*Melwani v Jain*, 281 AD2d 276, 277 [1st Dept 2001]). Finally, defendant's only challenge to the assault and battery cause of action is based upon contradictions in a police

report attached to the complaint. Although it refutes some of plaintiff's assertions, the police report does not contradict the complaint's allegation that defendant committed assault and battery by slapping plaintiff's face and grabbing her throat.

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

ENTERED: APRIL 1, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12020-
12021 Index 301511/10

Anthony J. Ferrara,
Plaintiff-Appellant,

-against-

Shirley Middleton, et al.,
Defendants-Respondents.

_____

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Jill Greenfield of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 15, 2013, dismissing the complaint alleging serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the judgment vacated. Appeal from order, same court and Justice, entered January 17, 2013, which granted defendants' motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants established prima facie that plaintiff did not sustain a serious injury of a permanent nature. They submitted the affirmed report of an orthopedic surgeon who, upon examination, found that plaintiff had full range of motion in his

shoulders and that his surgery was successful, allowing him to resume school, sports and work activities. Defendant also submitted medical records from plaintiff's treating physicians, who reported shortly after the accident that plaintiff had full range of motion in his left shoulder (*see* Insurance Law § 5102 [d]; *Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 350 [2002]; *Newton v Drayton*, 305 AD2d 303, 304 1st Dept [2003]).

In opposition, plaintiff raised a triable issue of fact concerning a significant limitation and a permanent consequential limitation with respect to his left shoulder. The MRI and the surgical reports of plaintiff's arthroscopic surgery provide objective evidence of a superior labrum anterior and posterior tear. Plaintiff's treating orthopedic surgeon, who examined plaintiff on September 19, 2012, three years after the accident, found significantly decreased range of motion and opined that plaintiff suffered permanent significant or consequential limitations as a result of the accident (*see Osborne v Diaz*, 104 AD3d 486 [1st Dept. 2013]). He also noted that, while plaintiff "started feeling better after 6 weeks of intense physical therapy," his condition deteriorated and he started feeling pain, which was corroborated by positive tests for impingement *(see Paulino v Rodriguez*, 91 AD3d 559 [1st Dept. 2012]; *see also*

Morris v Cisse, 58 AD3d 455 [1st Dept 2009]; *Perl v Meher*, 18 NY3d 208, 218 [2011] ["Injuries can become significantly more or less severe as time passes"]).

Defendants also established prima facie that plaintiff did not suffer a 90/180-day injury by submitting plaintiff's bill of particulars alleging that he was a student and that he did not miss any classes and missed only 31 days of work (*see Mitrotti v Elia*, 91 AD3d 449 [1st Dept 2012]). In opposition, plaintiff failed to submit any evidence of a medical determination that he was unable to engage in substantially all of his material and customary daily activities for 90 of the first 180 days after the accident (*see Torain v Bah*, 78 AD3d 588, 589 [1st Dept. 2010]).

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

ENTERED: APRIL 1, 2014

CLERK

CORRECTED ORDER - APRIL 2, 2014

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12090 Christine Semenza, et al., Index 20594/13E
Plaintiffs-Respondents,

-against-

Lilly's Nails,
Defendant-Appellant.

Law Office of Lori D. Fishman, Tarrytown (Michael J. Latini of counsel), for appellant.

Stephen S. Hansen, New Rochelle, for respondents.

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered June 19, 2013, which denied defendant's motion to dismiss the complaint as time-barred, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

On January 9, 2010, plaintiff, Christine Semenza, allegedly sustained a cut to her foot during a pedicure at defendant's salon. Plaintiff sought treatment from several medical providers, and retained an attorney who wrote a letter to defendant on or about February 5, 2010 asserting that she had a claim against it for injuries. However, plaintiff claims she did not learn what caused her pain until March 17, 2010, when an orthopedist found a sliver of a razor embedded in her foot. Plaintiff commenced an action on February 18, 2013, more than three years after the incident.

The action is time-barred (*see* CPLR 214). Plaintiff may not avail herself of the tolling provision of CPLR 214-c(2), as the "types of substances intended to be covered [by that section] are toxic substances" (*Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 767 [1997]). A razor is not a "substance" within the meaning of the statute.

In any event, the action is untimely even if CPLR 214-c(2) applies, as plaintiff was aware of the "primary condition" for which she seeks damages more than three years before the commencement of the action, when she went to doctors and retained an attorney (*Whitney v Quaker Chem. Corp.*, 90 NY2d 845 [1997]).

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12091 In re Alyssa Maureen N.,

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

Gladys R.,
Respondent-Appellant,

Cardinal McCloskey Community Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Anne Marie Jolly, J. at fact-finding; Sidney Gribetz, J., at disposition), entered on or about November 7, 2012, which, upon a fact-finding determination that respondent mother had permanently neglected the subject child, terminated her parental rights, and committed custody and guardianship of the child to petitioner agency and the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly determined that the agency proved by clear and convincing evidence that it exerted diligent efforts to reunite the mother with the child, based on the testimony of the

caseworker that regular visitation and meetings were scheduled, appropriate referrals were made for a mental health evaluation and therapy, and the agency maintained contact with the mother's drug treatment program to monitor her progress (*see Matter of Megan Victoria C-S. [Maria Esther S.]*, 84 AD3d 472, 473 [1st Dept 2011]).

The court properly found that the agency proved by clear and convincing evidence that the mother permanently neglected the child by failing to maintain contact with and plan for the child's future. The mother admitted that she failed to maintain contact with the agency for long periods of time, and that at one point, she relapsed into drug use. Although she reentered a treatment program after detox, she failed to complete the program at the time the petition was filed, despite the fact that the child had been in foster care for almost two years. The mother also was not receiving mental health therapy, despite a diagnosis of bipolar disorder (*see Matter of Danielle Nevaeha S.E. [Crystal Delores M.]*, 107 AD3d 527 [1st Dept 2013]).

The court properly determined that the agency proved by a preponderance of the evidence that it was in the best interests of the child to terminate the mother's parental rights and commit custody and guardianship of the child to the agency and

ACS, where she was residing in a satisfactory foster home, the foster mother wanted to adopt her, and the child did not want to visit the mother. A suspended judgment was not warranted because the mother had not made sufficient progress in overcoming her problems, although the child had been in foster care for many years (*see Matter of Mykle Andrew P.*, 55 AD3d 305, 306 [1st Dept 2008]).

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12092 Julio Justino, et al., Index 306404/11
Plaintiffs-Respondents,

-against-

Juan Santiago, et al.,
Defendants,

Doucaure Boubou, et al.,
Defendants-Appellants.

_____

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for appellants.

Law Office of Ryan S. Goldstein, PLLC, Bronx (Ryan S. Goldstein of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 21, 2013, which, to the extent appealable, denied defendants Doucaure Boubou's and Mariam Et Alassane Car Service, Inc.'s (defendants) motion for leave to renew their prior cross motion for summary judgment dismissing the complaint against them, unanimously affirmed, without costs.

In this action arising from a two-vehicle accident, the motion court properly denied defendants' motion for leave to renew since they did not provide any reason, let alone reasonable justification, for their failure to submit the deposition testimony of plaintiff Julio Justino on the prior motion (see

CPLR 2221[e]). Defendants have not proffered any reason for their failure to depose this plaintiff or other relevant parties before moving for summary judgment (*see Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 [1st Dept 2001]; *cf. Luna v Port Auth. of N.Y. & N.J.*, 21 AD3d 324, 325-326 [1st Dept 2005]). In any event, even if renewal were granted, Justino's deposition testimony would not change the prior determination that issues of fact exist as to defendant drivers' negligence. While Justino's testimony shows that the cab was struck on the passenger side, it is not entirely clear that the cab was stopped at a red light at the time of the accident as defendants claim. Indeed, defendant driver Boubou averred that the livery cab was moving at the time of the accident. Such conflicting evidence precludes summary judgment in defendants' favor (*see Belziti v Langford*, 105 AD3d 649 [1st Dept 2013]).

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, JJ.

12093 ACE American Insurance Company, Index 650720/11
As Subrogee of Reed Elsevier, Inc.,
Plaintiff-Appellant-Respondent,

-against-

Freeman Decorating Co.,
Defendant-Respondent-Appellant.

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Anil C. Singh, J.), entered on or about December 6, 2012,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 10, 2014,

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12094 Paz Kaspi, Index 113180/11
Plaintiff-Appellant,

-against-

Michael Wainstein,
Defendant-Respondent.

_____

Tuttle Yick LLP, New York (Jeffrey T. Yick of counsel), for appellant.

Bryan Ha, White Plains, for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about March 19, 2013, which, inter alia, granted defendant's motion to renew and reargue plaintiff's motion for summary judgment, and, upon renewal/reargument, denied plaintiff's motion, unanimously affirmed, without costs.

The motion court properly reconsidered its decision because there are issues of fact whether plaintiff seeks to recover a "finder's/broker's fee" for services rendered in connection with the purchase of real property, although he did not have a broker's license when he rendered the services (*see* Real Property Law § 442-d). That defendant signed a promissory note and a letter agreement (setting forth essentially the same promise as in the promissory note) would not render plaintiff's action

proper (*see Levinson v Genesse Assoc.*, 172 AD2d 400 [1st Dept 1991]; *Sorice v Du Bois*, 25 AD2d 521 [1st Dept 1966]; *Futersak v Perl*, 84 AD3d 1309 [2d Dept 2011], *lv denied* 18 NY3d 943 [2012]). Nor does the general release signed by defendant entitle plaintiff to summary judgment. It is plaintiff who may not bring or maintain this action if the money sought or any portion thereof is for a finder's or broker's fee and he did not have a broker's or salesman's license (*see* Real Property Law 442-d).

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12097 The People of the State of New York, Ind. 1669/03
Respondent,

-against-

Terrence Nesmith,
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 (Alan Gadlin of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 9, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 25 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: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12098 Joel Garcia, Index 112022/08
Plaintiff-Respondent-Appellant, 590803/09

-against-

95 Wall Associates, LLC, et al.,
Defendants-Appellants-Respondents.
- - - - -
[And a Third Party Action]

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler and Dawn C. DeSimone of counsel), for appellants-respondents.

Ephrem J. Wertenteil, New York, for respondent-appellant.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered April 25, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment to the extent of dismissing that portion of plaintiff's Labor Law § 241(6) claim predicated on the alleged violation of Industrial Code (12 NYCRR) 23-1.28(a), and denied the motion as to the claim predicated on (12 NYCRR) 23-1.28(b), unanimously reversed, on the law, without costs, the motion denied as to the claim predicated on 12 NYCRR 23-1.28(a), and granted as to the claim predicated on 12 NYCRR 23-1.28(b).

Although the first sentence of Industrial Code (12 NYCRR) 23-1.28(a), requiring hand-propelled vehicles to be maintained in

good repair, is a general directive that cannot serve as a predicate for liability under Labor Law § 241(6) (*see Wegner v State St. Bank & Trust Co. of Conn. Natl. Assn.*, 298 AD2d 211, 212 [1st Dept 2002]), the second sentence of 12 NYCRR 23-1.28(a), providing "[h]and-propelled vehicles having damaged handles or any loose parts shall not be used," sets forth a sufficiently specific, positive command, the violation of which may serve as a predicate for plaintiff's cause of action pursuant to Labor Law § 241(6) (*see Brasch v Yonkers Constr. Co.*, 306 AD2d 508, 509 [2d Dept 2003]; *Gray v Balling Constr. Co., Inc.*, 239 AD2d 913, 914 [4th Dept 1997]).

Defendants demonstrated that 12 NYCRR 23-1.28(b), which provides that the "[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles," is inapplicable. Among other things, plaintiff's own deposition testimony, established that the subject accident was not caused by a defect in the cart's wheels (*see Picchione v Sweet Constr. Corp.*, 60 AD3d 510, 512 [1st Dept 2009]). Rather, plaintiff claimed that he was pushing an empty cart down a wooden

ramp when the left handle came loose, fell through the sleeve and jammed into the ramp, causing the cart to come to an abrupt stop and plaintiff to flip onto the cart.

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12099 The People of the State of New York, Ind. 3335/12
Respondent,

-against-

Jason Viktorow,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Jill Konviser, J.), rendered on or about April 12, 2013,

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: APRIL 1, 2014

CLERK

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

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12101- Index 305875/09
12102 Juan Colon,
Plaintiff-Respondent,

-against-

Corporate Building Groups, Inc., et al.,
Defendants-Appellants.

_____

Lester, Schwab, Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for Corporate Building Groups, Inc., appellant.

Hannum Feretic Prendergast & Merlino, PC, New York (Matthew Zizzamia of counsel), for Security Fence Systems, Inc., appellant.

Koss & Schonfeld, LLP, New York (Jacob J. Schindelheim of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered August 1, 2013, which, to the extent appealed from, granted the motion of defendant Corporate Building Groups, Inc. (CBG) for leave to reargue its cross motion for summary judgment dismissing the complaint as against it, and, upon reargument, adhered to its prior order denying CBG's cross motion, unanimously reversed, on the law, without costs, summary judgment granted, and the complaint dismissed as against defendant CBG. The Clerk is directed to enter judgment accordingly. Order, same court and Justice, entered January 14, 2013, insofar as it denied

the motion of defendant Security Fence Systems, Inc. (SFS) for summary judgment, unanimously affirmed, without costs. Appeal from so much of the January 14, 2013 order as denied CBG's cross motion for summary judgment, unanimously dismissed, without costs, as academic.

Liability for a dangerous condition is generally predicated on ownership, control or a special use of the property (*see Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519, 519-520 [1st Dept 2011]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv dismissed, denied* 73 NY2d 783 [1988]). Defendant CBG had no connection with the premises, other than having previously been the general contractor during its construction. It did not supervise or control the work of defendant SFS, which had installed the fence some four or five months prior to plaintiff's accident (*see Kleeman v Rheingold*, 81 NY2d 270 [1993]; *Lopez*, 83 AD3d at 520).

A contractual obligation does not generally "give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, a contractor is potentially liable in tort to third persons, where "the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of

harm'" (*id.* at 140, quoting *H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]).

Here, SFS failed to proffer any evidence that the fence and gate had been properly installed, and its motion was properly denied.

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12103 The People of the State of New York, Ind. 7256/00
Respondent,

-against-

Rondell Perkins, etc.,
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 (Alan Gadlin of counsel), for respondent.

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Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered April 26, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 20 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: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12104-
12104A The People of the State of New York, Ind. 2294/04
Respondent, 6852/04
SCI 4949/04

-against-

Ibn Mitchell,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about August 10, 2011, which denied defendant's CPL 440.46 motion for resentencing, and order, same court and Justice, entered August 23, 2011, which, upon renewal, adhered to the original determination, unanimously affirmed.

The court providently exercised its discretion in concluding that substantial justice dictated the denial of the motion. Resentencing is a discretionary determination (*People v Sosa*, 18 NY3d 436, 442-443 [2012]), and courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]). Here, defendant did not merely fail to

complete drug treatment. He displayed an extensive pattern of inability to control his behavior, which outweighed the mitigating factors he cited.

Defendant's procedural arguments are unavailing. The record establishes that defendant was brought before the court and given the opportunity to be heard (*see People v Robinson,* 45 AD3d 442 [1st Dept 2007], *lv dismissed* 10 NY3d 815 [2008]). To the extent that the court's original order, which denied the motion on the parties' written submissions, could be viewed as premature, there was no prejudice to defendant. The court effectively permitted defendant to renew his motion, and, after hearing from him personally and expressly taking his statement into account, it adhered to its original determination.

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, JJ.

12105 Janine Mendez, et al., Index 22206/12
Plaintiffs-Appellants,

Walter Sanchez, et al.,
Plaintiffs,

-against-

Legends Hospitality, LLC,
Defendant-Respondent,

New York Yankees Partnership,
Defendant.

_____

Fitapelli & Schaffer, LLP, New York (Brian S. Schaffer of counsel), for appellants.

Akin, Gump, Strauss, Hauer & Feld LLC, Washington, DC (Lawrence D. Levien of the bar of the District of Columbia, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered July 10, 2013, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion denied, and the complaint reinstated.

Plaintiffs stated a valid claim under Labor Law § 196-d, not preempted by federal law (*see Tamburino v Madison Sq. Garden, L.P.*, AD3d, 2014 NY Slip Op 00895 [1st Dept 2014]). Contrary to

the motion court's determination, defendants did not establish that for all of the pertinent period they sufficiently notified patrons that the mandatory service charge at issue was not a gratuity.

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12106 Giovanni Acevedo, et al., Index 302014/07
Plaintiffs-Appellants,

-against-

Williams Scotsman, Inc.,
Defendant,

Mr. John Inc., et al.,
Defendants-Respondents.

_____

Melucci, Celauro & Sklar, LLP, New York (Jeffrey Sklar of counsel), for appellants.

Lewis, Johs, Avallone & Aviles, LLP, Islandia (Robert A. Lifson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered December 6, 2012, which, to the extent appealed from as limited by the briefs, granted defendants Mr. John Inc. and Russell Reid Waste Hauling and Disposal Service Co., Inc.'s motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff Giovanni Acevedo slipped and fell on ice on the sidewalk outside his employer's premises, sustaining injuries. Plaintiff, and his wife suing derivatively, claim that defendants Mr. John Inc. and Russell Reid Waste Hauling and Disposal Services Co. Inc. (defendants) had negligently installed or

maintained two septic tanks serving the office trailer on the premises occupied by plaintiff's employer, causing the tanks to leak, which resulted in the icy condition. The tanks sat immediately adjacent to the trailer and were connected to it by PVC piping.

Defendants established prima facie their entitlement to summary judgment. The evidence showed that the septic system installed and maintained by defendant was not a proximate cause of plaintiff's accident. The plumbing repair report completed the day after plaintiff's accident, which makes no mention of any problems with the septic tanks or PVC piping, states that a copper pipe running 150 feet from the trailer to a nearby building had broken in two places, pipes had frozen and heat tracing was not working.

The only evidence offered by plaintiff to show that there was leakage from the septic system installed and serviced by defendants was inadmissible hearsay. Specifically, the branch manager for plaintiff's employer at the time of the accident states in an affidavit that the plumbing company came to determine the problem and he "was told" that the septic tank was not working properly. Further, the portion of the accident report attributing the accident to a damaged septic tank and

broken pipes was based on information provided by the branch manager, whose affidavit demonstrates he had no personal knowledge of the problem. Thus, this portion of the accident report is hearsay for which no exception applies (*see Matter of Leon RR*, 48 NY2d 117, 122 [1979]; *see also Buckley v J.A. Jones/GMO*, 38 AD3d 461, 462-463 [1st Dept 2007]).

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12107-
12108N

Index 300881/08

Almando Aponte,
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

1034 A.S.J. Housing Development Fund Corporation, et al.,
Defendants-Appellants.

_____

Paul Bleifer & Associates, New York (Paul E. Bleifer of counsel), for appellants.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 19, 2012, which granted plaintiff's motion to vacate an order striking his complaint upon default, and order, same court and Justice, entered July 3, 2013, which, to the extent appealed from, upon reargument, adhered to the original determination, unanimously reversed, on the law, without costs, and the motion denied.

Although plaintiff presented a reasonable excuse for failing to appear on the return date of the motion, the record, including plaintiff's deposition, shows there is no meritorious claim.

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

ENTERED: APRIL 1, 2014

CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Feinman, JJ.

12109 In re Manuel Soares, Ind. 5819/10
[M-758] Petitioner,

-against-

Hon. Thomas A. Farber, etc.,
Respondent.

_____

Manuel Soares, petitioner pro se.

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

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

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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.

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12112 In re Alicia Echevarria, Index 103396/12
Petitioner-Respondent,

-against-

Matthew M. Wambua, etc.,
Respondent-Respondent,

East Midtown Plaza Housing Company, et al.,
Respondents-Appellants.

_____

Abrams Garfinkel Margolis Bergson, LLP, New York (Andrew W. Gefell of counsel), for East Midtown Plaza Housing Company, appellant.

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for Mark Andermanis and Sandra Andermanis, appellants.

Kevin J. Smith, New York, for Alicia Echevarria, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for Matthew M. Wambua, respondent.

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Judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered May 3, 2013, granting the petition to annul respondent Commissioner's determination to award an apartment to the Andermanis respondents, to the extent of remanding the matter to the Department of Housing Preservation and Development (HPD), unanimously reversed, on the law, without costs, the petition and HPD's cross motion denied, the cross motion to dismiss granted, and the proceeding brought pursuant to CPLR article 78 dismissed.

HPD granted approval of the Andermanis respondents' application to transfer their five-person household from a two-bedroom apartment to a four-bedroom apartment in the Mitchell-Lama cooperative building where they resided. HPD granted the approval by waiving the six-person occupancy requirement for a four-bedroom apartment. It is undisputed that petitioner, also the head of a five-person household living in a two-bedroom apartment in the building, was not eligible for the four-bedroom apartment at issue due to the same HPD rule, and although she expressed interest, she never actually submitted an application for the apartment. Moreover, HPD has stated that it has since concluded that it did not have the authority to grant an occupancy waiver for the reasons presented here, and that if a remand were granted it would rescind the approval granted to the Andermanises, and would instead conduct an external search for applicants meeting the six-person occupancy requirement. Hence, petitioner remains ineligible for the four-bedroom apartment and cannot show that she has suffered an injury that is personal and distinct from that of the general public, or that she has an actual legal stake in the outcome of this proceeding. Accordingly, petitioner did not have standing to initiate this

proceeding (*see New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207 [2004]; *Matter of Clark v Town Bd. of Town of Clarkstown*, 28 AD3d 553 [2d Dept 2006]; *Roberts v Health & Hosps. Corp.*, 87 AD3d 311, 318 [1st Dept 2011], *lv denied* 17 NY3d 717 [2011]).

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12113- Index 600311/10
12113A-
12114 John Stefatos, et al.,
Plaintiffs-Respondents,

-against-

Fred-Doug Manager, LLC, et al.,
Defendants-Appellants.

_____

Welby, Brandy & Greenblatt, LLP, White Plains (Geoffrey S. Pope of counsel), for appellants.

Law Office of Joanne Cassidy, Bronx (Joanne Cassidy of counsel), for respondents.

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Orders, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 17, 2012, and, same court and Justice, entered December 14, 2012, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the breach of contract cause of action, unanimously modified, on the law, to grant the motion to the extent of dismissing the breach of contract claim as against defendant Fred-Doug 117, LLC (FD-117), dismissing plaintiff John Stefatos's breach of contract claim against defendant Fred-Doug Manager, LLC (FD-Manager), and permitting plaintiffs to file a second amended complaint alleging FD-Manager's breach of the June 2003 letter with respect to plaintiff James Stefatos, and otherwise affirmed, without costs.

Appeal from order, same court and Justice, entered on or about August 22, 2013, which, to the extent appealed from, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

The only adequately stated basis for the breach of contract claim in the amended complaint is a letter agreement dated June 1, 2003. Contrary to the trial court's conclusion, the amended complaint fails adequately to allege a breach of an oral joint venture agreement or any other agreement, oral or written, apart from the June 2003 letter.

Although the June 2003 letter is sufficiently specific and complete with respect to plaintiff James Stefatos, it lacks a material term needed to qualify it as a valid contract, or a note or memorandum under General Obligations Law § 5-701(a)(1), with respect to plaintiff John Stefatos, and the omitted term cannot reasonably be inferred (*see Willmott v Giarraputo*, 5 NY2d 250, 253 [1959]). Contrary to the trial court's suggestion, General Obligations Law § 5-701(b)(3)(d) does not apply here, nor, if applicable, would it negate the impact of the June 2003 letter's

omission of an essential material term with respect to John Stefatos.

There is no basis for any breach of contract claim against defendant FD-117, as it is not a party to the June 2003 letter.

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12115 The People of the State of New York, Ind. 4905/11
Respondent,

-against-

Melvin Tindall,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Bonnie Wittner, J.), rendered on or about April 18, 2013,

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: APRIL 1, 2014

CLERK

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

CORRECTED ORDER - APRIL 9, 2014

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12116 Maria Rosado, Index 20373/06
Plaintiff,

Theresa Christmas, etc., et al.,
Plaintiffs-Respondents,

-against-

State Material & Masonry
Supply Corp., etc.,
Defendant-Appellant,

Dimitrios S. Tseperkas, et al.,
Defendants.

Lester Schwab Katz & Dwyer, LLP, New York (Dennis M. Rothman of counsel), for appellant.

Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about August 12, 2013, which, to the extent appealed from, denied defendant State Material & Masonry Supply Corp.'s motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

This personal injury action arises out of a fatal multi-vehicle accident in which a vehicle occupied by Theresa Foti Christmas and Charles Christmas and their children Theresa and Victoria, was struck by a tractor-trailer owned by defendant DTF

Logistics, Inc. (DTF) and operated by DTF's owner, defendant Dimitrios Tseperkas. Of the members of the Christmas family, only the child Theresa survived. At the time of the accident, Tseperkas was transporting bricks for State Material from Maryland to New York.

State Material established prima facie that it was not negligent in retaining Tseperkas or DTF by submitting evidence that it had a long, successful relationship with Tseperkas, who had a valid commercial driver license and, at the time of the accident, was operating under DTF's status as a federally licensed "motor carrier" (*see* **49** CFR 390 *et seq.*). Tseperkas, and later DTF, had hauled hundreds of loads of goods for State Material for more than 20 years without incident (*see Maristany v Patient Support Servs.*, 264 AD2d 302, 303 [1st Dept 1999]; *Toscarelli v Purdy*, 217 AD2d 815 [3d Dept 1995]). State Material was not on notice of any propensity on Tseperkas's part to commit the acts alleged (*see White v Hampton Mgt. Co. L.L.C.*, 35 AD3d 243, 244 [1st Dept 2006]).

In opposition, plaintiffs failed to raise a triable issue of fact. While State Material was, in its own right, a federally licensed "motor carrier," authorized to use its own vehicles and drivers to transport goods interstate, it was acting as a "shipper" in the subject transaction (49 CFR 376.2[k]; *see Camp v TNT Logistics Corp.*, 553 F3d 502, 507-508 [7th Cir 2009];

Caballero v Archer, 2007 WL 628755, *4-5, 2007 US Dist LEXIS 12271, *15-16 [WD Tex 2007]). State Material did not actually transport any goods. It retained DTF, a registered motor carrier for hire, and DTF provided its own truck and driver; nor did State Material instruct DTF in its work (*see Camp v TNT Logistics Corp.*, 553 F3d at 507-508). Accordingly, State Material had no duty here to make the inquiries required of a "motor carrier" (*see* 49 CFR 390.11, 391.1, 392.1), which could have created a duty to investigate (*see T.W. v City of New York*, 286 AD2d 243 [1st Dept 2001]).

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12117 The People of the State of New York, Dkt. 41919C/10
Respondent,

-against-

John Fiumara,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Harold Adler, J.), rendered September 12, 2011, convicting defendant, upon his plea of guilty, of operating a motor vehicle while under the influence of alcohol, and sentencing him to three years' probation and a $1,000 fine, unanimously affirmed.

The accusatory instrument was not jurisdictionally defective. Giving the misdemeanor information "a fair and not overly restrictive or technical reading" (*People v Casey*, 95 NY2d 354, 360 [2000]), we find "as a matter of common sense and reasonable pleading" (*People v Davis*, 13 NY3d 17, 31 [2009]) that it was legally sufficient to charge defendant with violating Vehicle and Traffic Law § 1192(3). The arresting officer alleged that defendant operated a motor vehicle, that he had bloodshot,

watery eyes, slurred speech, and a strong odor of alcohol on his breath, that he was unsteady on his feet, and that he admitted to the officer that he had been drinking, but refused to submit to a breath test (*see e.g. People v Spencer*, 289 AD2d 877, 879 [3rd Dept 2001], *lv denied* 98 NY2d 655 [2002]). There was no requirement that the information also contain an allegation of erratic driving.

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12118 Herminia Isabel Williams, Index 20812/10
Plaintiff-Respondent,

-against-

Akua Z. Hamilton,
Defendant,

Fernando Romero,
Defendant-Appellant.

_____

Rivkin Radler LLP, Uniondale (Henry M. Mascia of counsel), for appellant.

William Pager, Brooklyn, for respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 26, 2012, which denied defendant Fernando Romero's motion for summary judgment dismissing the complaint and all cross claims as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant Romero dismissing the complaint and all cross claims as against him.

Defendant Romero established entitlement to judgment as a matter of law in this action where plaintiff was injured when her car was struck from behind by a vehicle driven by defendant Hamilton, causing her car to strike Romero's car. Romero submitted evidence showing that his car was stationary at the

time of the accident (*see Santana v Tic-Tak Limo Corp.*, 106 AD3d 572 [1st Dept 2013])

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's testimony that Romero stopped abruptly and failed to use his turn signal properly at an intersection prior to the collision fails to raise a triable issue (*see Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 [1st Dept 2013]; *Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]; *compare Tutrani v County of Suffolk*, 10 NY3d 906 [2008]).

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12119 Estate of Harry Rodman, File 947/08
Deceased.

- - - - -

David Gould, as Co-Executor of
the Estate of Harry Rodman,
Petitioner-Appellant,

-against-

Alan Bronstein, et al.,
Respondents-Respondents.

_____

Sweeney, Gallo, Reich & Bolz LLP, Rego Park (Gerard J. Sweeney of counsel), for appellant.

Bleakley Platt & Schmidt, LLP, White Plains (Vincent W. Crowe of counsel), for respondents.

_____

Decree, Surrogate's Court, Bronx County (Lee L. Holzman, S.), entered on or about December 28, 2012, which dismissed the petition brought pursuant to SCPA 2103 to set aside the decedent's transfer of his 50% interest in respondent Aurora Gems, Inc. to respondent Alan Bronstein, unanimously affirmed, without costs.

As the court found in favor of petitioner, the appellant, to the extent it determined that the decedent's October 2006 sale of his 50% interest in respondent Aurora Gems to respondent Bronstein was not an inter vivos gift, that ruling is not at issue on appeal. In any event, we note that the court's

determination that the sale could not be a gift was based on the fact that, in exchange for the transfer of his interest, decedent received consideration of $10,000, paid by Bronstein, and an interest-bearing promissory note from Aurora Gems for approximately $1.7 million in funds that the decedent had previously loaned the company (*see Matter of Carr*, 99 AD2d 390, 393 [1st Dept 1984], *appeal dismissed* 62 NY2d 802 [1984]). The decedent had bequeathed his interest in the company to Bronstein in his early wills. Both the decedent's lawyer and accountant testified that, by 2006, they had decided to structure the transfer as a sale, rather than a gift, to minimize the potential tax liability from such a bequest.

The court properly concluded that there was no other basis for setting aside the sale. Petitioner argues that the decedent was unduly influenced into selling his 50% interest for a mere $10,000; the underlying assets of Aurora Gems, consisting primarily of two diamond collections, were valued at approximately $2 million on tax returns and were potentially worth much more. Petitioner is correct that Bronstein was in a fiduciary relationship with the decedent, both being shareholders in a close corporation, and, by 2002, Bronstein was president, sole signatory on the checks, and bookkeeper (*see Richbell Info.*

Servs. v Jupiter Partners, 309 AD2d 288, 301 [1st Dept 2003]; *Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]). However, the decedent also had long viewed Bronstein as a son. Indeed, the decedent's 1998, 2000, 2001, and 2002 wills bequeathed his interest in Aurora Gems to Bronstein, long before the October 2006 transaction. When the decedent married Bronstein's mother in 2001, Bronstein became the decedent's stepson. Given this close relationship and family connection, notwithstanding the fiduciary relationship, there is no presumption of undue influence (*Matter of Antoinette*, 238 AD2d 762, 764 [3d Dept 1997]; *Matter of Walther*, 6 NY2d 49, 56 [1959]).

Moreover, there is overwhelming evidence of the decedent's sound mental health and capacity to enter the transaction, and no evidence that Bronstein manipulated the transaction. Petitioner cites a potential conflict of interest because the decedent's attorney was also counsel to Aurora Gems at times. However, the decedent had no complaints about his representation. He retained the same attorney to draft subsequent wills and did not attempt to undo the October 2006 transaction. The record also belies petitioner's claims that Bronstein spoke privately with the decedent's attorney about the transaction, since the decedent received all relevant information and correspondence.

To the extent the final promissory note reflects better repayment terms than those in preceding drafts, or those in earlier promissory notes, the testimony establishes that these changes were made at the decedent's, not Bronstein's, instructions. Nothing in the record suggests that petitioner was in any way unduly influenced or subject to Bronstein's control regarding the transaction (*see Walther*, 6 NY2d at 53-54; *Matter of Ryan*, 34 AD3d 212 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

As there is no evidence that Bronstein engaged in any conduct that influenced the structure of the transaction, petitioner's claims of fraud and overreaching were properly rejected (*see e.g. Ryan*, 34 AD3d at 215; *Stawski v Stawski*, 43 AD3d 776 [1st Dept 2007]).

To the extent petitioner claims that Bronstein breached his fiduciary duty by failing to disclose the true value of Aurora Gems, there is no evidence that Bronstein knew the true value, and no other evidence of any breach of fiduciary duty (*see Rut v Young Adult Inst., Inc.*, 74 AD3d 776 [2d Dept 2010]). In any case, the decedent's attorney advised the decedent to obtain an appraisal, and the decedent declined.

Largely for the above-stated reasons, the court properly

concluded that there was insufficient evidence to support a finding that the sale was unconscionable (*see King v Fox*, 7 NY3d 181, 191 [2006]). When viewed in context, particularly the decedent's and Bronstein's longstanding close familial relationship, the transaction, while perhaps extravagant, reflects the decedent's intent and does not seem grossly unreasonable (*see Mandel v Liebman*, 303 NY 88, 93-94 [1951]).

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12120 The People of the State of New York, Ind. 3452/07
Respondent,

-against-

Shauna King,
Defendant-Appellant.

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Glenn A. Garber, P.C., New York (Glenn A. Garber of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered September 8, 2010, as amended February 9, 2011, convicting defendant, after a jury trial, of assault in the second degree (two counts), reckless endangerment in the first degree, criminal possession of a forged instrument in the second degree, identity theft in the second degree, and assault in the third degree, and sentencing her, as a second felony offender, to an aggregate term of 9 to 12 years, unanimously affirmed.

Defendant challenges the sufficiency and weight of the evidence supporting her reckless endangerment and possession of a forged instrument convictions. Defendant's legal sufficiency claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them

on the merits. We also reject defendant's argument that these verdicts were against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find no basis for disturbing any of the jury's credibility determinations.

With respect to reckless endangerment, defendant's depraved indifference to human life was established by evidence that while fleeing from the police by car after committing other crimes, defendant violated various traffic laws, struck multiple cars and two people, including a police officer in her path, and nearly struck additional pedestrians and cars before being forced by traffic to stop (*see e.g. People v Tart*, 305 AD2d 137 [1st Dept 2003], *lv denied* 100 NY2d 624 [2003]). Unlike the defendant in *People v Prindle* (16 NY3d 768 [2011]), which also involved a high speed chase, this defendant made no effort to avoid hitting persons and vehicles; instead, she continued her grossly reckless driving even after she knocked a pedestrian into the air and was well aware that she was endangering people's lives (*see People v Heidgen*, 22 NY3d 259, 276 [2013]; *People v Gomez*, 65 NY2d 9, 12 [1985]).

With respect to possession of a forged instrument, the evidence established defendant's accessorial liability for

possession of a forged driver's license recovered from the codefendant (*see* Penal Law § 20.00). The evidence supports the conclusion that the forged license, used in an effort to steal merchandise, was an instrumentality of a joint criminal enterprise involving both defendants and was thus jointly possessed by both of them (*see e.g. Matter of Kadeem W.*, 5 NY3d 864 [2005]; *People v Ramos*, 59 AD3d 269 [1st Dept 2009], *lv denied* 12 NY3d 858 [2009].

The court properly exercised its discretion in imposing reasonable limits on defendant's cross-examination of the People's witnesses (*see People v Corby*, 6 NY3d 231, 234-235 [2005]). Defendant received sufficient latitude in which to impeach the credibility of police and medical witnesses. Since defendant never asserted a constitutional right to pursue any precluded lines of inquiry, her 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 find no basis for reversal (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

Although, in explaining the elements of second-degree identity theft, the court incorrectly described attempted fourth-degree grand larceny as a felony, when in fact it is a

misdemeanor, this could not have prejudiced defendant. Under the circumstances of the case, an attempt to commit fourth-degree grand larceny would satisfy the requirements of Penal Law § 190.79(3), and there is no reasonable possibility that the jury convicted defendant of identity theft on an improper theory (*see People v Whitecloud*, 110 AD3d 626 [1st Dept 2013]).

Defendant did not preserve her remaining arguments concerning the court's charge, including those relating to its instruction on depraved indifference, or any of her challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12121 Wagner Davis P.C., Index 100044/09
Plaintiff-Respondent,

-against-

Rosa Gargano, et al.,
Defendants-Appellants.

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Gunilla Perez-Faringer, White Plains, for appellants.

Porzio, Bromberg & Newman, P.C., New York (Bonnie Reid Berkow of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered August 20, 2013, which granted plaintiff's motion for summary judgment and ordered a hearing to determine the amount of attorney's fees to which plaintiff is entitled, unanimously affirmed, without costs.

In this action for unpaid legal fees, defendants asserted a counterclaim for legal malpractice alleging that they would have prevailed on a motion for a preliminary injunction in the underlying action commenced by defendants against their neighbors over a retaining wall between their properties, if it had been made earlier by plaintiff. However, defendants failed to establish that they would have been successful on the motion absent counsel's delay (*see Warshaw Burstein Cohen Schlesinger &*

Kuh, LLP v Longmire, 106 AD3d 536, 536 [1st Dept 2013], *lv dismissed* 21 NY3d 1059 [2013]). In any event, plaintiff's delay while a new expert prepared a report on the challenged retaining wall, was a reasonable strategic decision that cannot form the basis of a malpractice claim (*Morrison Cohen Singer & Weinstein v Zuker*, 203 AD2d 119, 119 [1st Dept 1994]).

Defendants' contention that the claims for fees should not have been granted due to plaintiff's failure to comply with the rules on fee arbitration is unavailing. The complaint expressly states that the amount of damages sought is $56,943.25, which is beyond the maximum amount covered by the Fee Dispute Resolution Program (*see* 22 NYCRR 137.1[b][2]; *Kerner & Kerner v Dunham*, 46 AD3d 372 [1st Dept 2007]). Although defendants' arguments regarding the amount of the fees were deferred to an evidentiary hearing, the motion court properly declined to consider the un-notarized, out of state report of defendants' expert (*see* CPLR 2309; CPLR 2106).

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12124 Angelo Megaro, Index 306986/08
Plaintiff-Respondent, 84084/11

-against-

Pfizer, Inc., et al.,
Defendants-Respondents,

American Building Maintenance Company
of New York, etc.,
Defendant.

Jones Lang Lasalle Americas Inc.,
Defendant-Appellant.

- - - - -

[And Third-Party Actions]

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McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellant.

Jasper & Jasper, New York (Steven M. Pivovar of counsel), for Angelo Megaro, respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for Pfizer, Inc. and Morgan Construction Enterprises, respondents.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered on or about December 27, 2012, which, to the extent appealed from, denied the motion of Jones Lang LaSalle Americas, Inc. (JLL) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, summary judgment granted and the complaint dismissed as to

defendant JLL. The Clerk is directed to enter judgment accordingly.

A contractual obligation does not generally "give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, a contractor is potentially liable in tort to third persons, where the contracting party "launches a force or instrument of harm," where the plaintiff suffers injury as a result of reasonable reliance on the defendant's continued performance of a contractual obligation, or "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140).

The facts presented here fail to fall within any of the recognized exceptions to the general rule. JLL, as property manager, met its initial burden as movant through its submissions of the contract and witnesses' testimony, evidencing that it was an independent contractor that owed no duty to plaintiff (*see id.* at 141). Although plaintiff, a construction worker who slipped and fell on water in a stairwell at the premises, argues that he detrimentally relied upon JLL, he did not plead such a claim, nor do the facts of this case support one (*see Fairclough v All Serv. Equip. Corp.*, 50 AD3d 576, 578 [1st Dept 2008]). Neither do the

facts of this case support a claim that JLL, which had subcontracted janitorial services, launched an instrument of harm, or that the contract was a comprehensive and exclusive management agreement such as to displace the owner's duty to safely maintain the premises (*see Ortiz v Gun Hill Mgt., Inc.*, 81 AD3d 512 [1st Dept 2011]).

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

ENTERED: APRIL 1, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12125- Ind. 1972/10
12125A The People of the State of New York, SCI. 4617/10
Respondent,

-against-

George Olson,
Defendant-Appellant.

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Richard M. Greenberg, Office of The Appellate Defender, New York (Samantha L. Stern of counsel), for appellant.

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

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Judgments, Supreme Court, New York County (Carol Berkman, J.), rendered October 27, 2010, convicting defendant, upon his pleas of guilty, of two counts of burglary in the third degree, and sentencing him, as a second felony offender, to consecutive terms of 3½ to 7 years, unanimously affirmed.

Defendant's contention that he was convicted of two burglary counts for the same unlawful entry, thereby violating the rule against multiplicitous counts and the corresponding double jeopardy principle, is unpreserved and waived (*see People v Gonzalez*, 99 NY2d 76, 82 [2002]), and we decline to review it in the interest of justice. As an alternative holding, we reject defendant's claim on the merits. The record establishes that

defendant made successive unlawful entries into two places, each constituting a separate and distinct "building" under the definition contained in Penal Law § 140.00(2), and thus committed two separate crimes (*see People v Felder*, 2 AD3d 365 [1st Dept 2003], *lv denied* 2 NY3d 799 [2004]). *see also People v Frazier*, 16 NY3d 36, 41 [2010]). For similar reasons, we reject defendant's challenges to his waiver of indictment, and to the imposition of consecutive terms.

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

ENTERED: APRIL 1, 2014

CLERK

Gonzalez, P.J., Tom, Renwick, Freedman, Clark, JJ.

11144 Harvardsky Prumyslovy Holding, A.S.,-V Likvidaci,
Plaintiff-Appellant,

-against-

Viktor Kozeny,
Defendant,

Landlocked Shipping Company,
Defendant-Respondent.

Index 651826/12

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Milbank, Tweed, Hadley & McCloy LLP, New York (Edward G. Baldwin of counsel), for appellant.

Shoemaker Ghiselli + Schwartz LLC, Boulder, CO (Paul H. Schwartz of the bar of the State of Colorado, admitted pro hac vice, of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about June 10, 2013, reversed, on the law, without costs, defendant Landlocked Shipping Company's motion to dismiss the complaint denied, the complaint reinstated as against Landlocked, and the motion for attachment granted.

Opinion by Tom, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
Dianne T. Renwick
Helen E. Freedman
Darcel D. Clark, JJ.

11144
Index 651826/12

_____x

Harvardsky Prumyslovy Holding,
A.S.,-V Likvidaci,
Plaintiff-Appellant,

-against-

Viktor Kozeny,
Defendant,

Landlocked Shipping Company,
Defendant-Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Ellen M. Coin, J.), entered on or about June 10, 2013, which granted defendant Landlocked's motion to dismiss the complaint insofar as asserted against it, and denied plaintiff Harvardsky's motion for an order of attachment against Landlocked's bank account funds under CPLR article 62.

Milbank, Tweed, Hadley & McCloy LLP, New York (Edward G. Baldwin, Michael D. Nolan and Sander Bak of counsel), for appellant.

Shoemaker Ghiselli + Schwartz LLC, Boulder, CO (Paul Schwartz of the bar of the State of Colorado, admitted pro hac vice, of counsel), Carter Ledyard & Milburn LLP, New York (Judith A Lockhart of counsel), and James Nesland, New York, for respondent.

TOM, J.

We are called upon to decide whether the courts of this state must recognize a foreign country judgment issued by a criminal court awarding a sum of money as compensation for damages sustained by the victim of a fraudulent scheme (*see* CPLR 5303). Defendant Landlocked Shipping Company argues, inter alia, that because the judgment was rendered by a Czech criminal court, it is not civil in nature and, thus, unenforceable as "a fine or other penalty" (CPLR 5301[b]). No support for this interpretation is to be found, either in the statutory language or case law, and the issue appears to be one of first impression.

This controversy has its origins in the privatization of formerly state-owned companies in the Czech Republic. In the early 1990s, Czech citizens were issued voucher points that could be used to purchase shares in designated firms or assigned to one of many investment privatization funds (IPFs) that would purchase and manage a portfolio of shares on their behalf. The judgment of the Municipal Court in Prague, rendered July 9, 2010, states that defendant Viktor Kozeny utilized Harvard Capital and Consulting to solicit investors through its six Harvard investment funds, one of which ultimately became plaintiff Harvardsky Prumyslovy Holding, A.S ,-V Likvidaci (Harvardsky). As the authorized representative of Harvard Capital, Kozeny then

looted the IPFs, diverting the funds of many Czech investors to a series of shell companies in Cyprus. Kozeny, who had relocated to the Bahamas, was prosecuted in absentia after the Bahamian government refused extradition. He was found guilty of gross fraud and sentenced to a term of 10 years. Harvardsky, with approximately 250,000 shareholders, joined in the action as the injured party, and Kozeny was directed to pay compensation in the sum of CZK 8,289,933,074.05 (approximately USD $410 million) to the company as "compensation for damage to the victim" under section 228(1) of the Czech Code of Criminal Procedure in accordance with the relief sought.

Harvardsky subsequently commenced this action under CPLR article 53 seeking recognition of the Czech judgment to render it enforceable in New York. Harvardsky also seeks the attachment of funds held in a Wells Fargo bank account in the name of Landlocked Shipping Company. The complaint alleges that Landlocked is a shell corporation organized under the laws of the Turks and Caicos Islands and is Kozeny's alter ego. In 1997, at Kozeny's direction and to prevent the seizure of assets by creditors, Landlocked acquired a house in Aspen, Colorado. Landlocked paid the purchase price of $19.75 million in cash and expended "millions of dollars" for renovation and furnishings, using funds that Kozeny had embezzled from plaintiff's

shareholders, among others. Landlocked sold the house for $22 million in November 2001 and deposited the proceeds into its account at Wells Fargo Bank. It is asserted that Kozeny is the sole beneficial owner of the funds.

Landlocked subsequently moved to dismiss the complaint as asserted against it on grounds, inter alia, that New York courts may not recognize judgments that are penal in nature. Supreme Court granted Landlocked's motion to dismiss insofar as dismissing the complaint asserted against it, and otherwise denied the motion. It also vacated a temporary restraining order, and denied Harvardsky's motion to attach the bank funds.

This Court granted Harvardsky's motion for a stay pending the appeal to the extent of reinstating the TRO until the determination of this appeal.

CPLR 5301(b) defines a "foreign country judgment" as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." The judgment sought to be enforced in this case provides restitution to Harvardsky, directing Victor Koveny, the criminal defendant, to pay a specific sum as "compensation for damages to the victim" of his scheme to defraud. Clearly, the judgment is not one for taxes or support obligations; nor is it a

fine. Thus, the question is whether a judgment providing compensation to a crime victim (here, a victim of criminal fraud) should be regarded as a "penalty" and denied enforcement.

Landlocked adopts the view that a judgment awarding damages for fraud, otherwise construed as compensatory when rendered by a civil court, must be regarded as an unenforceable penalty when issued by a criminal tribunal. The immediate problem with such a distinction is that there are any number of civil proceedings in which the compensation recoverable by the victim may constitute a penalty (*see e.g. State of N.Y. ex rel. Grupp v DHL Express (USA), Inc.*, 19 NY3d 278, 286-287 [2012] [fraud claims brought pursuant to the FCA alleging violations of the State Finance Law]; *Mohassel v Fenwick*, 5 NY3d 44, 50 [2005] [rent overcharge in violation of Rent Stabilization Law]; *Cox v Microsoft Corp.*, 290 AD2d 206 [2002], *lv dismissed* 98 NY2d 728 [2002] [monopoly in violation of General Business Law § 340]). Moreover, the statutory basis for denying enforcement is predicated on the classification and purpose of the judgment, not the court that issued it, making no differentiation between foreign *civil* and foreign *criminal* judgments. Upon even a superficial examination, such a distinction is artificial.

Because the Civil Practice Law and Rules governs civil matters, it is appropriate to examine the question of whether a

monetary award constitutes a penalty by reference to a civil standard, that is, whether the award at issue has been held to impose a civil penalty rather than providing compensatory damages for the actual harm inflicted. As noted by the Supreme Court in *Huntington v Attrill* (146 US 657, 667 [1892] [internal quotation marks omitted]), the words "penal and penalty" are "commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered." So, for example, in *State of N.Y. ex rel. Grupp* (19 NY3d at 282), the Court of Appeals stated that, "rather than redressing the harm actually suffered, the statute's imposition of civil penalties and treble damages evinces a broader punitive goal of deterring fraudulent conduct against the state." As this Court has noted, "[t]he idea that multiple damage awards are punitive finds support in the ancestry of numerous treble damages provisions having their origins in equivalent provisions of former criminal statutes" (*Cox v Microsoft Corp.*, 290 AD2d 206, 207 [1st Dept 2002], *lv dismissed* 98 NY2d 728 [2002]; *but see Mohassel*, 5 NY3d at 50 [treble damages awarded for a rent overcharge are designed "to compensate the tenant, particularly when the violation is willful"]). Indeed, this Court has applied this test in an action that likewise sought to recover monies obtained by fraud. We observed

that even though the plaintiff was "a sovereign, its aim is merely the restoration of an outlay wrongfully obtained from it. The object of the action is not vindication of the public justice but reparation to one aggrieved" (*Regierungspraesident Land Nordrhein-Westfalen v Rosenthal*, 17 AD2d 145, 148 [1st Dept 1962], *lv denied* 12 NY2d 648 [1963] [internal quotation marks omitted]). Where, as here, the purpose of a monetary judgment is to compensate the victim for actual damages, it represents "reparation to one aggrieved" (*id.* [internal quotation marks omitted]) regardless of whether or not a particular treble-damages award may be said to constitute a penalty. Section 228(1) of the Czech Code of Criminal Procedure provides for victims of crimes to file a petition in a criminal proceeding for compensation of damages. Harvardsky's Czech counsel states that "the nature of such claim is civil and its qualification and calculation is done according to the civil law."

The purpose of CPLR article 53 (L 1970, ch 981, eff Sept. 1, 1970), adopting the Uniform Foreign Country Money-Judgments Recognition Act (CPLR 5309), is to promote reciprocal treatment for New York judgments in foreign courts by providing a statutory basis to reflect New York's liberal treatment of foreign judgments (8th Ann Report of Jud Conf on CPLR, reprinted in 1970 McKinney's Session Laws of NY at 2784), which is generally

acknowledged (*see Ackerman v Ackerman*, 517 F Supp 614, 624 [SD NY 1981], *affd* 676 F2d 898 [2d Cir 1982]). The salutary purpose of the statute is not promoted by the refusal to recognize a foreign judgment based on some contrived criterion, which may then prompt foreign courts to deny enforcement to similar New York judgments. Landlocked would distinguish between restitution awarded to a fraud victim in a criminal proceeding (Penal Law § 60.27[1]) and restitution awarded in a proceeding initiated by the crime victim (*see City of New York v College Point Sports Assn., Inc.*, 61 AD3d 33 [2d Dept 2009]) or by the Office of Victim Services (Executive Law § 634[1]; *see generally New York State Crime Victims Bd. v T.J.M. Prods.*, 265 AD2d 38 [1st Dept 2000]). The distinction is particularly tenuous in view of the collateral estoppel effect accorded to the criminal conviction in a separate civil restitution action (*see id.* at 44) and recognition of the necessity to offset any sum awarded by the criminal court to avoid duplicative recovery (*see id.* at 46).

Landlocked identifies no New York case denying enforcement of a judgment awarding restitution merely because it was rendered by a criminal court. The cases it cites are concerned with the extent of a court's power to award restitution (*People v Horne*, 97 NY2d 404 [2002]; *People v Fuller*, 57 NY2d 152 [1982]) and to designate a particular recipient (*People v Hall-Wilson*, 69 NY2d

154 [1987]). That a judgment of restitution may serve a penological purpose by offering "an effective rehabilitative penalty" and "a greater potential for deterrence" (*Hall-Wilson*, 69 NY2d at 157) does not detract from the court's power "to order offenders to compensate the victims of their crimes" for actual damages sustained (*Fuller*, 57 NY2d at 157). As noted in *Horne* (97 NY2d at 410 [internal quotation marks omitted]), Penal Law § 60.27(1) expressly limits the amount that may be awarded to "the actual out-of-pocket loss" incurred by the victim. The federal case cited is altogether consistent, holding that a judgment issued in a Belgian criminal proceeding for the precise amount of the victim's loss was "remedial" (*Chase Manhattan Bank v Hoffman*, 665 F Supp 73, 76 [D Mass 1987]). The court went on to state that the award "afforded a private remedy rather than punished an offense against the public justice of Belgium. Moreover, the benefit of the judgment accrued in in its particulars to the private party plaintiff, not the state. Consequently ... the judgment Chase now seeks to enforce is clearly not 'a fine or other penalty'" (*id.*).

There is no merit to Landlocked's position that this matter is governed by the doctrine of "reverse piercing" (where a plaintiff seeks to hold a company liable for the debts of its shareowner), rather than "traditional" piercing (where a

plaintiff seeks to hold a shareowner liable for the debts of the company). Landlocked further contends that under New York's choice of law rules, veil-piercing claims are governed by the law of the company's state of incorporation, and that Harvardsky has failed to establish that reverse-piercing is a doctrine available under the law of the Turks and Caicos Islands. In so arguing, Landlocked again draws a distinction without a difference. Under either theory, "there is a disregard of the corporate form, and the controlling shareholders are treated as alter egos of the corporation and vice versa" (*Sweeney, Cohn, Stahl & Vaccaro v Kane*, 6 AD3d 72 [2d Dept 2004]). Plaintiff has amassed sufficient evidence to demonstrate that Kozeny and Landlocked are alter egos of each other; thus, they may be treated as one and the same for the purpose of enforcing the judgment (see *Motorola Credit Corp. v Uzan*, 739 F Supp 2d 636, 638-640 [SD NY 2010]).

Accordingly, the order of the Supreme Court, New York County (Ellen M. Coin, J.), entered on or about June 10, 2013, which granted defendant Landlocked's motion to dismiss the complaint insofar as asserted against it, and denied plaintiff Harvardsky's motion for an order of attachment against Landlocked's bank account funds under CPLR article 62, should be reversed, on the

law, without costs, the motion to dismiss the complaint denied, the complaint reinstated as against Landlocked, and the motion for attachment granted.

All concur.

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

ENTERED: APRIL 1, 2014

CLERK