SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 3, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9686 Jandy Coleson, etc., Index 26826/04
Plaintiff-Appellant,

-against-

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

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

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

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Upon remittitur from the Court of Appeals (__ NY3d __, 2014 NY Slip Op 08213 [2014]) for consideration of the issues raised but not determined on appeal to this Court, order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about March 12, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of reinstating the negligence cause of action brought on behalf of plaintiff Jandy Coleson individually, and, as so modified, affirmed, individually, without costs.

After being stabbed and seriously injured by her estranged husband, plaintiff sued the City of New York, alleging a cause of action for negligence on part of the Police Department in failing to provide her with adequate protection to prevent the attack. Two additional causes of action are based on allegations of negligent infliction of emotional distress upon plaintiff's infant son.

On a prior appeal, we affirmed Supreme Court's order granting the City's motion for summary judgment dismissing the entire complaint (106 AD3d 474 [1st Dept 2013]). We dismissed plaintiff's inadequate protection claim on the ground that statements allegedly made to plaintiff by police officers were too vague to constitute promises that would give rise to a special relationship (*id.*). The Court of Appeals reversed that portion of our order, finding that plaintiff raised a triable issue of fact as to whether there was a special relationship and remitted the case to this Court "for consideration of issues raised but not determined . . ." (__ NY3d __, 2014 NY Slip Op 08213, **4).

As an alternative ground for summary judgment, the City invoked the doctrine of governmental function immunity. The defense of governmental function immunity "is not available

unless the municipality establishes that the action taken actually resulted from discretionary decision-making" (*Valdez v City of New York*, 18 NY3d 69, 79-80 [2011]). The City failed to make a prima facie showing of the availability of the defense because its motion was supported by nothing more than a bare assertion that the actions of its police officers were discretionary. "In order to prevail on a governmental function immunity defense, a municipality must do much more than merely allege that its employee was engaged in activities involving the exercise of discretion" (*id.* at 79).

As the Court of Appeals found, plaintiff's son was not in the zone of danger at the time of the attack. Therefore, dismissal of the claims based on his alleged emotional distress was warranted.

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

ENTERED: FEBRUARY 3, 2015

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Gische, JJ.

13081 The People of the State of New York, Ind. 477/12
Respondent,

-against-

Jermel Mangum,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Carol Berkman, J. at suppression hearing; Michael J. Obus, J. at plea and sentencing), rendered September 20, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to an aggregate term of 5 years, unanimously reversed, on the law, defendant's motion to suppress granted, and the indictment dismissed.

On January 26, 2012, police officers Maurad Arslanbeck and David Porras were assigned to patrol a housing complex on the Lower East Side of Manhattan. The officers first observed defendant walking through a courtyard along with two other men,

each holding a styrofoam cup. Defendant was carrying a thin backpack that sagged heavily on its right side. As the trio continued walking, the officers observed defendant discard the styrofoam cup onto the grass.

The officers then approached the men from opposite directions. Officer Arslanbeck reported seeing defendant adjust his backpack to place it higher up on his shoulder and hearing a clinking sound emanating from inside the bag. The officers identified themselves and after some questions, defendant stated that his backpack contained books. Defendant was then instructed to place the backpack on the ground and the officers reported hearing the sound of a clinking metal object as the bag was being moved. Officer Porras picked the bag up from the ground and felt the barrel of a handgun. Defendant was then arrested. At this point, Officer Porras opened the bag and confirmed the presence of a firearm. At the precinct, defendant was searched and a small quantity of marijuana as well as several glassines of heroin were recovered from his person.

Defendant moved to suppress all of the physical evidence against him, arguing that it was obtained through illegal searches in contravention of the Fourth Amendment. The trial court held that the police did not have reasonable suspicion to

stop defendant and frisk his backpack. It nevertheless denied the motion, finding that the evidence was obtained pursuant to a lawful search incident to arrest. The court reasoned that since the police had probable cause to arrest defendant for littering once he discarded the styrofoam cup, the search of the backpack was authorized as incident to the arrest that could have been made, regardless of whether the officers had any actual intent to arrest defendant for littering. Based on the recent Court of Appeals decision in *People v Reid* (__ NY3d __ 2014, 2014 NY Slip Op 08759 [2014]), which holds that there must be either an actual or intended arrest for the offense justifying the search, we now reverse.

It is well recognized that the police may search the person or area within the immediate control of any individual who is lawfully placed under arrest (*see People v Wylie*, 244 AD2d 247, 249 [1st Dept 1997], *lv denied* 91 NY2d 946 [1998], *Chimel v California*, 395 US 752, 762-763 [1969]). The warrantless search incident to arrest advances the twin objectives of ensuring the safety of law enforcement and the prevention of evidence tampering or destruction by a suspect. It is not particularly significant whether a search precedes an arrest or vice versa, so long as the two events occur in a nearly contemporaneous manner.

(*People v Verges*, 120 AD3d 1028, 1029 [1st Dept 2014], *lv denied* __ NY3d __ [2014]; *People v Evans*, 43 NY2d 160, 166 [1977]). Based on *Reid*, however, it is now clear that the police must either make an arrest or intend to make an arrest at the time of the search in order for the search to be considered lawful (*Reid*, __ NY3d __, 2014 Slip Op 08759). The intent to arrest for the offense justifying the search must be present even if a defendant is ultimately arrested for a different offense (*id.*).

In *Reid* (__ NY3d __, 2014 NY Slip 08759 [2014]), the defendant was pulled over by a police officer after he was observed driving erratically. Based on the defendant's disheveled appearance and odd responses to questions, the officer ordered him out of the car, searched his person, and uncovered a knife in his pocket. Although it was undisputed that the officer's observations gave him probable cause to arrest the defendant for driving while intoxicated, the officer testified at the suppression hearing that he had no intention of arresting the defendant at the time he was initially stopped and searched. The officer also explained that it was not until discovery of the knife that he decided to arrest the defendant. In declining to uphold the search as incident to the defendant's arrest, the Court of Appeals observed that "but for the search," the arrest

"would never have taken place (2014 NY Slip Op 08759, *6)," concluding that it was irrelevant that an arrest for DWI could have been made prior to the search. The Court explained that the search must be "incident to an actual arrest, not just probable cause that might have led to an arrest, but did not" (2014 NY Slip Op 08759, *4). This necessarily requires that, at the time the search is undertaken, an arrest has either been made or the officer has already formulated the intent to effectuate an arrest.

While in this case the officers had probable cause to arrest defendant for littering (*see* Administrative Code of the City of New York § 16-118; *Atwater v City of Lago Vista*, 532 U.S. 318, 354 [2001]), defendant was not arrested for that offense. Nor did either of the officers testify at the suppression hearing that they harbored any intent to arrest defendant until they discovered the gun. According to officer Arslanbeck, it was only after they discovered a weapon in defendant's backpack that a decision to arrest him was made. Without an actual arrest or the formulation of an intent to arrest defendant for littering prior to frisking his bag, the search cannot be justified as having been incident to defendant's arrest (*Evans*, 43 NY2d at 166; *Knowles v Iowa*, 525 US 113 [1998]).

The trial court found that the officers otherwise lacked reasonable suspicion to stop defendant, a conclusion that the People do not contest on appeal. Consequently, the evidence obtained from defendant's backpack and from the subsequent search at the precinct should have been suppressed. In light of our decision that the search was unlawful, we need not address defendant's remaining arguments.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

13579 The People of the State of New York, Ind. 1007/12
Respondent,

-against-

Wesley Jones,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and Kaye Scholer LLP, New York (Thomas Szivos of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered May 16, 2013, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously reversed, on the law and as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

Defendant was charged with criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fourth degree, and assault in the second degree. At voir dire, one prospective juror stated that his best friend was a police officer in Suffolk County. The

prosecutor asked, "Do you talk to him about his arrests or anything like that?" The prospective juror responded affirmatively. The prosecutor then asked, "As a result of that experience . . . [w]ould you take a police officer's word over that of a regular citizen?" The prospective juror responded, "I don't know. I really couldn't say."

During defense counsel's questioning of the venire, defense counsel told the prospective jurors that he was going to argue that "the officers are lying about the allegations." Defense counsel asked the venire generally, "Does anyone here hold an officer to a higher standard, meaning that it would take a lot more for you to believe that they would lie?" Defense counsel then turned specifically to the prospective juror at issue, asking, "Being that you're close friends with an officer[,] would that make it more difficult for you?" Defense counsel elaborated, "Because you hear about his duties[,] would you say to yourself[,] why would he do that kind of stuff?" The prospective juror responded, "I may be more inclined to believe him just because of my relationship." Defense counsel then said, "That's solely because he wears a uniform; he's an officer." The record does not reflect that the prospective juror responded to that statement or made any further comments.

Defendant's counsel challenged the prospective juror for cause, noting that the prospective juror had "stated that because of his relationship to a best friend who is an officer he automatically puts him [at] a higher standard." The court agreed that the prospective juror had so stated, but observed that counsel had "never followed up to see if that applied to that person or any other person when he clearly indicates he believes his friend because of his personal relationship, not simply because he's a police officer." The court therefore denied the for-cause challenge. Counsel then made a peremptory challenge to the prospective juror, and later exhausted his peremptory challenges.

During summations, the prosecutor addressed the reasonable doubt standard, telling the jury, "Reasonable doubt is the same in this case as it is in every other criminal trial, from a murder case to driving on a suspended driver's license." The prosecutor then stated, "Every person who has been convicted of a crime in this country since the nation's founding has been convicted under that same standard of proof beyond a reasonable doubt. The standard is not special or out of the ordinary. Jurors have applied it for over [200] years." Defense counsel did not object to these remarks.

With respect to the questions during voir dire, the court improperly exercised its discretion in denying defendant's challenge for cause to the prospective juror who noted that he did not know whether he would take a police officer's word over that of a regular citizen. Neither the court nor counsel ever asked the prospective juror to give an unequivocal assurance that he could set aside his bias and render an impartial verdict based on the evidence. Nor did questioning by defense counsel and the prosecutor elicit the requisite assurance.

Criminal Procedure Law § 270.20(1)(b) provides that a party may challenge a prospective juror for cause if the juror "has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at trial." Upon making this type of challenge, "a juror who has revealed doubt, because of prior knowledge or opinion, about [his] ability to serve impartially must be excused unless the juror states unequivocally on the record that [he] can be fair" (*People v Arnold*, 96 NY2d 358, 362 [2001]; *see also People v Blyden*, 55 NY2d 73, 77-78 [1982]). The CPL "does not require any particular expurgatory oath or talismanic words" (96 NY2d at 362 [internal quotation marks omitted]), but challenged jurors "must in some form give unequivocal assurance that they can set aside any bias

and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614 [2000]). Those who have given "less-than-unequivocal assurances of impartiality . . . must be excused" and "[i]f there is any doubt about a prospective juror's impartiality, trial courts should err on the side of excusing the juror, since at worst the court will have replaced one impartial juror with another" (*Arnold*, 96 NY2d at 362-363 [internal quotation marks omitted]).

In this case, the prospective juror gave a response that was uncertain at best, stating that he did not know and "couldn't say" whether he would be able to judge an officer's credibility as opposed to a civilian witness. As the People note, the prospective juror's later response (i.e., "I may be more inclined to believe him just because of my relationship") was unclear as to whether he meant that he would credit the word of his friend specifically because of the personal relationship, or whether he would credit the word of any police officer simply for being an officer. On the record, both interpretations of this later response are equally plausible. Given this ambiguity, and given the prospective juror's prior statement that he "couldn't say" whether he would be free of bias in favor of an officer's testimony, it was incumbent upon the trial court to take

corrective action to elicit unequivocal assurance from the prospective juror that he would be able to reach a verdict based solely upon the court's instructions on the law (*People v Bludson*, 97 NY2d 644, 646 [2001]). Neither the trial court nor counsel, however, asked the challenged prospective juror to give an unequivocal assurance that he could put aside any bias and render an impartial verdict on the evidence. This omission constitutes reversible error (*see Johnson*, 94 NY2d at 614; *see also* CPL 270.20[2]).

Further, the prosecutor's summation remarks regarding reasonable doubt also constituted reversible error, as these remarks suggested that the jury should convict based on facts extraneous to the trial. Specifically, the comments "linked [the defendant] to every defendant who turned out to be guilty and was sentenced to imprisonment," thus inviting the jury to consider his status as a defendant as "evidence tending to prove his guilt" (*Taylor v Kentucky*, 436 US 478, 486-487 [1978]). Moreover, the prosecutor's comments tended to minimize the jury's sense of responsibility for the verdict. These remarks exceed the bounds of permissible advocacy.

Contrary to the People's argument on appeal, the prosecutor at trial did not simply observe that juries had consistently

applied the reasonable doubt standard and that the jury in this case could apply that same standard. Rather, the prosecutor expressly pointed out that "every person *who ha[d] been convicted of a crime in this country*" had been "convicted under" the reasonable doubt standard (emphasis added). This remark goes far beyond simply noting that juries had consistently applied the same legal standard when considering trial evidence.

Although defendant failed to preserve his contention for appellate review, we reach the matter in the interests of justice; this error, compounded by the one regarding the prospective juror, necessitates a new trial.

In light of our determination, we need not reach defendant's remaining contentions.

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

ENTERED: FEBRUARY 3, 2015

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13737 The People of the State of New York, Respondent, Ind. 1830/08 5282/08

-against-

Wilfredo Rosario, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered August 4, 2010, convicting defendant, after two jury trials, of sexual abuse in the first degree, sexual abuse in the third degree (two counts), official misconduct (two counts), attempted coercion in the second degree, and unlawful imprisonment in the second degree, and sentencing him to an aggregate term of 5 years, unanimously affirmed.

With regard to each conviction at each of defendant's two trials, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the credibility determinations made by the jury at either trial. As to each conviction, the evidence satisfied the

elements of the crime. In particular, there was ample evidence to support the forcible compulsion (*see* Penal Law § 130.00[8]) element of first-degree sexual abuse.

Defendant's challenges to the prosecutor's conduct at both trials are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. The prosecutor's questioning of witnesses and summations, which were responsive to issues raised by the defense, did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, JJ.

14034- Index 350044/12
14035-
14036-
14037 & Manuel John M.,
M-6144 Petitioner-Respondent,

-against-

Lisa Rossi M.,
Respondent-Appellant.

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Thomas D. Shanahan, P.C., New York (Thomas D. Shanahan of counsel), for appellant.

Kasowitz Benson Torres & Friedman LLP, New York (Eleanor B. Alter and Jenifer J. Foley of counsel), for respondent.

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

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Order and judgment (one paper), Supreme Court, New York County (Lori S. Sattler, J.), entered April 9, 2014, which granted the petition to modify the custody and access provisions of the parties' Texas divorce decree, awarded sole legal and physical custody of the children to petitioner father with visitation by respondent mother subject to supervision by a trained child-care provider at the father's expense and permitted petitioner to relocate the children to Houston, Texas, and denied respondent's cross petition for custody, unanimously affirmed, without costs. Appeal from order, same court and Justice,

entered July 7, 2014, which, inter alia, denied the application to modify the aforesaid order and judgment to permit unsupervised visitation, unanimously dismissed, without costs, as abandoned for failure to make any argument in respondent's main brief. Appeal from order, same court and Justice, entered July 10, 2014, which, inter alia, denied respondent's applications for an interim award of attorneys' fees and appellate fees and costs, unanimously dismissed, without costs, as abandoned, without prejudice to further proceedings in the trial court.

The trial court's thoughtful and detailed determination, concluding that there was a change of circumstances following the parties' divorce warranting modification of the existing custody arrangement to ensure the best interests of the subject children, has a sound and substantial basis in the record (*see Sequeira v Sequeira*, 121 AD3d 406 [1st Dept 2014]). In particular, respondent interfered with petitioner's visitation with the children and undermined his relationship with them. Among other things, respondent repeatedly made allegations against petitioner of physical violence toward her and sexually inappropriate conduct with the parties' daughter, all of which were unsupported by any evidence and were found to be false (*see William S. v Tynia C.*, 283 AD2d 327 [1st Dept 2001]; *Matter of Youngok Lim v*

Sangbom Lyi, 299 AD2d 763 [3d Dept 2002]). In addition, the record demonstrates that respondent's ability to care for the children was negatively impacted by her misuse of prescription medications and alcohol (*see Matter of Susan B. v Charles M.*, 67 AD3d 488 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). Upon review of the record before the trial court, we see no basis for disturbing the court's findings that petitioner was direct, credible and even-tempered throughout the proceedings, while respondent's testimony was incredible and showed a lack of insight into her issues.

Although the court acknowledged the positive steps taken by respondent to establish a warm home for the children in New York, the determination that the change in custody is in the children's best interests is supported by the totality of the circumstances. In weighing all relevant factors, the record demonstrates that petitioner is able to provide a more stable and appropriate environment for the children (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]).

On the record before it, the trial court properly determined that, pending respondent's completion of one year of negative drug testing, her visits with the children should be supervised by an appropriate care-giver or nanny to ensure the children's

safety (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 727 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

In addition, the court, having had an opportunity to hear the parents testify and to conduct an in camera meeting with the children, properly determined that, on balance, relocation to Texas, where the children lived prior to the divorce and where petitioner's business is located, is in the children's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]; *Matter of David J.B. v Monique H.*, 52 AD3d 414 [1st Dept 2008]). The parties' custody agreement, which was incorporated into the divorce decree in Texas, gave respondent the choice of residing with the children in the New York City area or the Houston area. However, she almost immediately failed to comply with the detailed parenting and visitation plan. Petitioner established that commuting back and forth to Houston is not practical and would be detrimental to his business, the sole income source for the children. By contrast, although respondent's family resides in New York State, she does not have significant ties to New York City. The record further demonstrates that petitioner is committed to fostering a relationship between the children and respondent (*see Sonbuchner v Sonbuchner*, 96 AD3d 566 [1st Dept 2012]; *James Joseph M.*, 32

AD3d at 726). We note that while petitioner sought supervised visitation, he did not seek to curtail respondent's visitation with the children and the liberal visitation schedule will allow for the continuation of a meaningful relationship between respondent and the children.

While the trial court erred in permitting respondent to be cross-examined about having had an abortion, that evidence being irrelevant and embarrassing, the error did not impact the court's ultimate decision.

Finally, upon granting respondent's motion to supplement the record, and upon our review of the additional information there provided, we observe that there are indications that respondent has made good progress in her treatment. We therefore recommend that the trial judge convene an early hearing to reexamine the continued necessity of the supervision requirement.

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

M-6144 - *Manuel John M. v Lisa Rossi M.*

Motion to supplement the record is granted.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14096 The People of the State of New York, Ind. 1938/10
Respondent,

-against-

Jose Mercado,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered May 24, 2011, as amended June 3, 2011, convicting defendant, upon his plea of guilty, of robbery in the first degree as a sexually motivated felony (three counts), robbery in the first degree (two counts), robbery in the second degree as a sexually motivated felony, and sexual abuse in the first degree (four counts), and sentencing him to an aggregate term of 12 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing

pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful offender determination. Since we are ordering a new sentencing proceeding, we find it unnecessary to address defendant's other arguments (*see e.g. People v Smith*, 113 AD3d 453 [1st Dept 2014]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14098-
14099 In re Jonathan W.,

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

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Bruce A. Young, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J. and Monica Drinane, J. at fact-finding proceedings; Monica Drinane, J. at disposition), entered on or about December 20, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree and criminal possession of a stolen property in the fifth degree, and upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, sexual abuse in the first and third degrees, grand larceny in the fourth degree, and criminal possession of stolen property in the fifth degree, and placed him on enhanced supervision probation for a period of 18

months, unanimously affirmed, without costs.

Appellant, who was adjudicated a juvenile delinquent based on separate hearings involving separate incidents, challenges the suppression and fact-finding rulings (Roberts, J.) relating to one of the incidents. We find these challenges unavailing.

The court properly denied appellant's suppression motion. The lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]; *see also People v Jackson*, 98 NY2d 555, 559 [2002]). Based on our review of a photograph of the lineup, we conclude that the differences in age and facial hair between appellant and the fillers were not so noticeable as to single appellant out. The victim's awareness that the police had a suspect in custody did not render the lineup unduly suggestive (*see e.g. People v Ramos,* 170 AD2d 186, 186 [1st Dept 1991], *lv denied* 78 NY2d 1014 [1991]).

The fact-finding determination challenged on appeal was supported by legally sufficient evidence. Appellant's sexual conduct toward the victim was clearly intended to obtain sexual gratification (*see e.g. Matter of Stephen F.*, 300 AD2d 52 [1st Dept 2002]), and his guilt of criminal possession of stolen property was established under the theory of accessorial liability (*see* Penal Law § 20.00) even though only appellant's

accomplice actually possessed the stolen phone. The court properly rejected appellant's defense of duress (*see* Penal Law § 40.00), involving an alleged threat of harm that was clearly not imminent (*see e.g. People v Moreno*, 58 AD3d 516, 518 [1st Dept 2009], *lv denied* 12 NY3d 819 [2009]).

Given the seriousness of the appellant's conduct in two separate incidents, the joint disposition was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14100 Esley Porteous, Index 112579/11
Plaintiff-Appellant-Respondent,

-against-

J-Tek Group, Inc., et al.,
Defendants-Respondents,

Six Sigma USA, Inc.,
Defendant-Appellant.

_____

De Caro & Kaplen, LLP, Pleasantville (Michael V. Kaplen of counsel), for appellant-respondent.

Law Offices of E. Michael Rosenstock, P.C., Rockville Centre (E. Michael Rosenstock of counsel), for appellant and respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered February 26, 2014, which granted so much of defendants' motion for summary judgment as sought to dismiss the complaint as against defendants J-Tek Group, Inc. and 449 Washington LLC, and denied so much of the motion as sought to dismiss the complaint as against defendant Six Sigma USA, Inc., unanimously modified, on the law, to deny the motion as to 449 Washington, LLC, and J-Tek Group, Inc., and otherwise affirmed, without costs.

Plaintiff seeks damages for injuries he sustained when a falling piece of wood struck him in the head as he was walking on

the sidewalk in front of a building owned by defendant 449 Washington LLC that was undergoing construction by defendant Six Sigma USA, Inc., an independent contractor hired by 449 Washington. There is conflicting evidence in the record as to the source of the falling wood, whether Six Sigma was performing, or was scheduled to perform, exterior work at the time of the accident, and whether this work posed an inherent danger to pedestrians on the public sidewalk abutting the building. Thus, issues of fact exist whether 449 Washington can be held liable for plaintiff's injuries as a building owner with a non-delegable duty not to cause harm to those traveling on the nearby public sidewalk or as an owner who knew or had reason to know that its independent contractor's work involved special dangers inherent in the work or dangers that should have been anticipated (*see Emmons v City of New York*, 283 AD2d 244 [1st Dept 2001]).

The project architect's disagreement with plaintiff's architect's reading of the plans and qualifications in rendering an opinion as to the source of the piece of wood that struck plaintiff, and defendants' challenge to the credibility of a witness who was walking with plaintiff at the time of the accident, are matters for resolution by the trier of fact (*Alvarez v New York City Hous. Auth.*, 295 AD2d 225 [1st Dept

2002]).

Defendant Six Sigma admitted that it performed all the construction work on the building, and, in moving for summary judgment, offered only speculation as to the cause of plaintiff's injury.

Defendant J-Tek Group, Inc. did not establish prima facie that it was not involved in the project. Moreover the work permit was issued in its name therefore raising an issue of fact.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14101 The People of the State of New York, Ind. 196N/09
Respondent,

-against-

Dashawn Cassidy,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered March 9, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and criminal sale of a controlled substance in or near school grounds, and sentencing him to an aggregate term of 30 days, concurrent with 5 years' probation, unanimously affirmed.

The court properly exercised its discretion in receiving carefully limited evidence that, before the drug transaction, the undercover officer was shown photographs of defendant and other persons he might see on the street. On its face, this evidence did not constitute evidence of uncharged crimes (*see People v Correa*, 16 AD3d 355 [1st Dept 2005], *lv denied* 5 NY3d 787 [2005]). In any event, even if this testimony may have contained

an implication of uncharged drug activity, it was more probative than prejudicial under the circumstances of the case. Evidence that defendant was already known to the police was necessary to enable the jury to understand how defendant came to be arrested two days later at his home, by an officer who did not witness the sale (*see People v Stevenson*, 67 AD3d 605 [1st Dept 2009], *lv denied* [2010]). This evidence was also probative of the undercover officer's ability to identify defendant (*see People v Williams*, 12 AD3d 183, 184 [1st Dept 2004], *lv denied* 4 NY3d 769 [2005]).

Defendant did not preserve his claims regarding the court's failure to deliver a limiting instruction as promised (*see People v Whalen*, 59 NY2d 273, 280 [1983]), testimony on the roles of participants in narcotics sales, and the People'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: FEBRUARY 3, 2015

CLERK

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

14102-
14103 James Zimmerman, et al.,
Plaintiffs-Appellants,

-against-

Jeffrey I. Kohn, Esq., et al.,
Defendants-Respondents.

Index 652826/13

Kevin T. Mulhearn, P.C., Orangeburg (Kevin T. Mulhearn of counsel), for appellants.

Debevoise & Plimpton LLP, New York (Matthew E. Fishbein of counsel), for respondents.

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 17, 2014, dismissing the complaint, unanimously affirmed, without costs. Appeal from underlying order, same court and Justice, entered April 11, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs alleged that defendant attorneys (OM&M), who represented their preparatory school in an earlier federal action alleging the school's negligent supervision and retention of a football coach, made intentional misrepresentations in the federal action that proximately caused plaintiffs' attorneys to spend unnecessary attorney hours to establish an equitable estoppel argument opposing the school's motion to dismiss on

statute of limitations grounds. The parties to the federal action ultimately entered into a confidential settlement, and plaintiffs voluntarily discontinued their claims, with prejudice, as against all the named defendants therein. Plaintiffs' counsel in the federal action had a contingency fee arrangement with the plaintiffs, and was evidently compensated accordingly.

Even assuming any unwarranted attorney hours were, in fact, expended by plaintiffs' counsel on account of OM&M's challenged representations made to the court, any burden in rendering such additional attorney hours, and corresponding injury, was shouldered by plaintiffs' counsel, who worked pursuant to a contingency fee. Plaintiffs, upon settlement of their federal action, paid the same attorney fees to their counsel regardless of the hours their counsel had expended on the matter. Thus, plaintiffs have not alleged facts as would show OM&M's alleged misrepresentations proximately caused them any injury (*see Strumwasser v Zeiderman*, 102 AD3d 630 [1st Dept 2013]). Indeed, regardless of the alleged deceit by OM&M in federal court, the burden always remained with plaintiffs in such court to establish, in the first instance, a basis for their equitable estoppel argument, which warranted the pre-dismissal motion early discovery they conducted. To the extent plaintiffs' discovery

was inhibited at all due to alleged lost notes prepared by one of the school's initial investigators, the attorney hours expended on such issue were not attributable to the alleged OM&M misrepresentations. Moreover, plaintiffs' spoliation motion was pending in the federal court, and a final determination of such motion was interrupted by plaintiffs' settlement of the action.

Plaintiffs' second cause of action, alleging OM&M was unjustly enriched by its receipt of attorney fees from its client, and that such fees should be disgorged in light of the alleged unwarranted attorney hours OM&M caused plaintiffs' counsel to expend in the federal action, fails to state a claim, as plaintiffs have not shown how OM&M's alleged fraud enriched OM&M at plaintiffs' expense (*see Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 250-251 [1st Dept 2009], *lv denied* 14 NY3d 706 [2010]).

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14104 The People of the State of New York, Ind. 4820/10
Respondent,

-against-

Ron Allen,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered on or about May 9, 2012,

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

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

14105 Nicholas Romanoff, etc., Index 151160/14
Plaintiff-Appellant,

-against-

Gerald Romanoff, et al.,
Defendants,

55 Gans Judgment LLC, etc., et al.,
Defendants-Respondents.

_____

Law Office of James M. Haddad, New York (James M. Haddad of counsel), for appellant.

Loeb & Loeb LLP, New York (Wook Hwang of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 25, 2014, which granted defendant Griffon Gansevoort Holdings LLC's motion to cancel the notice of pendency, unanimously affirmed, with costs.

The notice of pendency filed in this action was correctly cancelled as a prohibited successive notice affecting the same property (CPLR 6516[c]). "[A]n expired or cancelled notice of pendency may not be refiled on the same cause of action or claim" (*Gutman v Gutman*, 78 AD3d 779, 781 [2d Dept 2010] [citation omitted] [distinguishing *Deutsch v Grunwald*, 63 AD3d 872 [2d Dept 2009]; *see also Bonded Concrete Inc. v Johnson*, 280 AD2d 758, 759

[3d Dept 2001]). This case presents a more than apt occasion for the application of this "no second chance" rule, in light of Robert Romanoff's attempts to place a cloud on title of the property so as to leverage a buyout of his purported interest as beneficiary of the trust, which he has sought to accomplish through this action and another between essentially the same parties, under the same theories, and seeking identical relief from the same defendant.

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14106 The People of the State of New York, Ind. 4454/07
Respondent,

-against-

Jonathan Narvaez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered July 30, 2009, convicting defendant, after a jury trial, of attempted rape in the first degree and sexual abuse in the first degree, and sentencing him to an aggregate term of 13 years, unanimously affirmed.

The court properly denied for-cause challenges to two prospective jurors. While both made statements raising initial doubt about their ability to be impartial, both subsequently gave unequivocal assurances of their impartiality (*see People v Chambers*, 97 NY2d 417 [2002]). Furthermore, a trial court is in the best position to evaluate a panelist's responses, including by way of observation of the panelist's demeanor (*see People v Shulman*, 6 NY3d 1, 27 [2005], *cert denied* 547 US 1043 [2006]).

The court properly exercised its discretion in denying defendant's motions for a mistrial based on alleged improprieties in the prosecutor's cross-examination of defendant and in his summation. To the extent that the prosecutor strayed, on isolated occasions, beyond the proper bounds of inquiry or argument, the court's prompt curative actions minimized any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]), and defendant was not deprived of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14108 The People of the State of New York, Ind. 3612/12
Respondent,

-against-

Darren Crosker,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross 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 (Thomas A. Farber, J.), rendered on or about February 5, 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: FEBRUARY 3, 2015

CLERK

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

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

14109 The People of the State of New York, Ind. 534/08
Respondent,

-against-

Hellime Nasher,
Defendant-Appellant.

_____

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

Helime Nasher, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered December 21, 2010, convicting defendant, after a nonjury trial, of robbery in the second degree, burglary in the third degree and criminal impersonation in the first degree, and sentencing him to an aggregate term of 10 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the robbery conviction to a term of 8 years, resulting in a new an aggregate term of 8 years, and otherwise affirmed.

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

court's credibility determinations. The evidence established the element of force required for the robbery conviction. The unlawful entry element of burglary was established by evidence that defendant entered the nonpublic portion of a store. Defendant's argument that this theory was unsupported by the indictment or otherwise invalid is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Defendant's ineffective assistance of counsel claims, including those raised in his pro se brief, are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's conduct of the case fell below an objective standard of reasonableness,

particularly given counsel's inability to consult with his client, who had absconded and was tried in absentia. Defendant has also failed to establish that counsel's conduct deprived defendant of a fair trial or affected the outcome of the case.

We find the sentence excessive to the extent indicated.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14110- Index 102633/11
14111- 102634/11
14112- 117752/09
14113 Greater New York Mutual Insurance 590041/11
Company, as subrogee of 432 Park 590343/11
Avenue South Realty Co., LLC, etc.,
Plaintiff-Respondent,

-against-

ERE LLP,
Defendant-Appellant,

Hi-Re-Li Conditioning Corp.,
Defendant-Respondent.

- - - - -

Greater New York Mutual Insurance
Company, as subrogee of 432 Park
Avenue South Realty Co., LLC, etc.,
Plaintiff-Respondent,

-against-

ERE LLP,
Defendant-Respondent,

Hi-Re-Li Conditioning Corp.,
Defendant-Appellant.

- - - - -

Greater New York Mutual Insurance
Company, as subrogee of 440 Realty
Associates, LLC, etc.,
Plaintiff-Respondent,

-against-

ERE LLP,
Defendant,

Hi-Re-Li Conditioning Corp.,
Defendant-Appellant.

- - - - -

Travelers Indemnity Company
of Connecticut, as subrogee of
ERE LLC,
Plaintiff-Respondent,

-against-

Hi-Re-Li Conditioning Corp.,
Defendant-Appellant.

- - - - -

Hi-Re-Li Conditioning Corp.,
Third-Party Plaintiff-Appellant,

-against-

440 Realty Associates LLC, et al.,
Third-Party Defendants.

- - - - -

440 Realty Associates LLC, et al.,
Fourth-Party Plaintiffs,

-against-

ERE LLP,
Fourth-Party Defendant-Respondent.

_____

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for Ere LLP, appellant/respondent.

Farber Brocks & Zane LLP, Garden City (Tracy L. Frankel of counsel), for Hi-Re-Li Conditioning Corp., respondent/appellant.

Gwertzman Lefkowitz Burman Smith & Marcus, New York (David S. Smith of counsel), for Greater New York Mutual Insurance Company, respondent.

Law Office of Andrea G. Sawyers, Melville (Scott W. Driver of counsel), for Travelers Indemnity Company of Connecticut, respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about April 28, 2014, which denied defendant ERE LLP's motion for summary judgment dismissing plaintiff Greater New York Mutual Insurance Company's complaint against it, unanimously affirmed, without costs. Orders, same court and Justice, entered April 28, 2014, which denied defendant Hi-Re-Li Conditioning Corp.'s motions for summary judgment dismissing plaintiff Greater New York Mutual Insurance Company's complaints and defendant ERE LLP's cross claims for contribution and common-law indemnification against it, unanimously affirmed, without costs. Order, same court and Justice, entered April 28, 2014, which, to the extent appealed from, denied defendant/third-party plaintiff Hi-Re-Li's motion for summary judgment dismissing plaintiff Travelers Indemnity Company of Connecticut's complaint and all common-law indemnification and contribution claims against it, unanimously affirmed, without costs.

In these three cases brought by plaintiff insurance companies as subrogees of their insureds, plaintiffs allege, among other things, that defendant Hi-Re-Li failed to properly install and insulate an HVAC system in defendant/fourth-party defendant ERE's computer server room, which was located in a building owned by 440 Realty Associates, LLC. The motion court

correctly denied Hi-Re-Li's motions for summary judgment. The submissions made by the parties, including their expert reports, demonstrate that issues of fact exist concerning whether Hi-Re-Li, in its alleged negligent installation and maintenance of the HVAC system, launched a force or instrument of harm that impacted the buildings owned by 440 Realty and 432 Park Avenue South Realty Co., LLC (the insureds of plaintiff Greater New York Mutual Insurance Company) (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140, 141-142 [2002]). Similarly, the motion court correctly determined that there are issues of fact concerning whether Hi-Re-Li breached its contracts with ERE (the insured of plaintiff Travelers Indemnity Company of Connecticut) for the installation and maintenance of the HVAC system. Further, because questions of fact exist concerning the cause of the accident, the motion court correctly denied Hi-Re-Li's motion for summary judgment dismissing the cross claims and counterclaims for contribution and indemnification.

The motion court correctly denied ERE's motion for summary judgment dismissing the action brought against it by Greater Mutual as subrogee of 432 Park Avenue South Realty. Issues of fact exist as to whether the action against ERE is barred by a waiver of subrogation clause in a lease between ERE and 432 Park

Avenue South Realty. Where, as here, ERE argues that reference to extrinsic facts is necessary to determine the intent of the parties with regard to the waiver of subrogation provisions in ERE's leases with 440 Realty and 432 Park Avenue South, summary judgment must be denied (*see American Express Bank v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *lv denied* 77 NY2d 807 [1991]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14114 The People of the State of New York, Ind. 3313/12
Respondent,

-against-

Giovanni Ortiz,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered on or about February 11, 2013, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

service of a copy of this order.

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14115 In re Dedon G.,
Petitioner-Respondent,

-against-

Zenhia G.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Law Office of Lewis S. Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Paul A. Goetz, J.), entered on or about January 8, 2014, which, after a hearing, to the extent appealed from as limited by the briefs, granted the father's petition for sole legal and physical custody of the parties' daughter, unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's determination that the child's best interests would be served by awarding custody to the father (*see Eschbach v Eschbach*, 56 NY2d 167, 171, 174 [1982]). The Family Court considered the totality of the circumstances and properly concluded that the father was more able to identify and address the child's educational and emotional needs, and to provide a stable and healthy home

environment for the child (*id.* at 172). Although the mother had been the primary caregiver and had temporary custody of the child during the pendency of the custody hearing, that factor alone is not determinative (*see e.g. Matter of Khaykin v Kanayeva*, 47 AD3d 817, 817 [2d Dept 2008]), especially since the child, now eight years old, had lived with the father for significant periods of time prior to the temporary custody order, and since the father has always been actively involved in the child's daily life.

The mother failed to preserve her arguments that a forensic evaluation or expert testimony was required to support the Family Court's conclusion that the mother's home environment caused the child's behavioral problems at school (*see Matter of Hezekiah L. v Pamela A.L.*, 92 AD3d 506, 506 [1st Dept 2012]). In any event, expert testimony was not required or needed (*see Matter of Major v Gamble-Major*, 235 AD2d 356 [1st Dept 1997], *lv denied* 91 NY2d 804 [1997]), and the record shows that the child was bothered by the mother's frequent arguments with her boyfriend, that the child's behavioral problems manifested after she began living with the mother, and that the father had a less stressful home environment (*see Eschbach*, 56 NY2d at 172).

The mother also failed to preserve her argument that the Family Court failed to adequately consider the child's separation

from her half sister. In any event, the argument is unavailing. Although keeping children together is an important factor for the court to consider, it is not "an absolute" requirement (*Eschbach*, 56 NY2d at 173), especially where, as here, the two half siblings had not grown up together (*Matter of Olimpia M. v Steven M.*, 228 AD2d 270, 270 [1st Dept 1996]). Moreover, the child recently advised the attorney for the child that she has adequate contact with her half sister through the current custodial and visitation arrangements.

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

ENTERED: FEBRUARY 3, 2015

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Degrasse, Manzanet-Daniels, JJ.

14116 In re Adama Wellington, Index 654117/12
Petitioner-Appellant,

-against-

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

_____

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 8, 2013, which denied the petition to annul respondent's determination, dated July 31, 2012, terminating petitioner's probationary employment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to demonstrate that respondent's termination of her probationary employment was in bad faith (*see Matter of Cortijo v Ward,* 158 AD2d 345 [1st Dept 1990]). Although criminal charges filed against petitioner were dismissed, termination of a probationary employee based on an arrest for criminal charges that were subsequently dismissed

does not constitute bad faith (*see Matter of Holmes v Sielaff*, 182 AD2d 557 [1st Dept 1992]; *Oberson v City of New York*, 232 AD2d 172 [1st Dept 1996]). Moreover, the record reflects that petitioner's job performance was considered sub-standard (*see Oberson*, 232 AD2d at 173).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14117 The People of the State of New York, Ind. 3272/12
Respondent,

-against-

Beatty Vaughn,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered on or about January 18, 2013, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14118N Tancia Brown, Index 304789/08
Plaintiff-Respondent,

-against-

Brink Elevator Corporation, doing business as Herk Elevator Co., Inc.,
Defendant-Appellant.

_____

Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of counsel), for appellant.

Hausman & Pendzick, Harrison (Elizabeth M. Pendzick of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered April 21, 2014, which, in this personal injury action, to the extent appealed from as limited by the briefs, denied defendant's motion to compel plaintiff to submit to a further deposition, and denied defendant's motion to compel plaintiff to undergo a physical examination by Dr. Douglas Cohen, and instead directed plaintiff to appear for examination by Dr. Daniel Feuer, unanimously reversed, on the law and the facts, without costs, and defendant's motion granted.

After plaintiff exercised her right to serve a second supplemental bill of particulars concerning continuing disabilities in her cervical spine, defendant was "entitled to

newly exercise any and all rights of discovery" with respect to such newly alleged continuing disabilities (CPLR 3043[b]; *see DeLuca v Federated Dept. Stores*, 259 AD2d 421, 422 [1st Dept 1999]). Defendant's discovery rights include the right to take a further deposition (CPLR 3106), and to notice a physical examination by a "designated physician" (CPLR 3121[a]). Given the lack of any contention that the physician designated by defendant for a further physical examination was biased or would otherwise cause prejudice to plaintiff, the court improvidently exercised its discretion in requiring the further physical examination to be conducted by the same physician that conducted the initial examination (*Lewis v John*, 87 AD3d 564 [2d Dept 2011]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14119 In re Mackey Reed Electric,
[M-3688] Inc., et al.,
Petitioners,

-against-

The Comptroller of the City
of New York
Respondent.

_____

Silverberg P.C., Central Islip (Karl Silverberg of counsel), for petitioners.

Zachary W. Carter, Corporation Counsel, New York (Jay Y. Kim of counsel), for respondent.

_____

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

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14120 The People of the State of New York, Ind. 3016/06
Respondent,

-against-

Marcos Llibre,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about June 27, 2013, which denied defendant's CPL 440.10 motion to vacate a 2007 judgment of conviction, unanimously affirmed.

Defendant's ineffectiveness of counsel claims are primarily based on his attorney's alleged failure to advise him about the risk of deportation arising from his guilty plea (*see Padilla v Kentucky*, 559 US 356 [2010]). However, *Padilla* has no retroactive application to this appeal (*see Chaidez v United States*, 568 US __, 133 S Ct 1103 [2013]; *People v Baret*, 23 NY3d 777 [2014]). Since the *Padilla* rule does not apply here, defendant has no basis under either the United States or New York Constitutions for claiming that the alleged lack of immigration

advice constituted ineffective assistance of counsel (*see People v Chacko*, 119 AD3d 955 [2d Dept 2014], *lv denied* 24 NY3d 1001 [2014]).

In addition to his *Padilla* claim, defendant argues that his counsel affirmatively misadvised him about the immigration consequences of his guilty plea (*see People v McDonald*, 1 NY3d 109, 111 [2003]). However, defendant's factual allegations failed to support such a claim (*see* CPL 440.30[4]). In his affidavit, defendant only claimed his attorney told him that, after taking the plea, he "would just get probation and the case would be over." This does not constitute erroneous advice on the subject of deportation (*see People v Melo-Cordero*, __ AD3d __, 2014 NY Slip Op 08775 [1st Dept 2014]; *see also People v Simpson*, 120 AD3d 412 [1st Dept 2014]).

Defendant's claim relating to the court's inadequate or erroneous advice concerning the immigration consequences of the plea (*see People v Peque*, 22 NY3d 168 [2013], *cert denied* __ US __, 135 S Ct 90 [2014]) "[would be] clear from the face of the record and therefore not properly raised in a CPL article 440 motion" (*People v Louree*, 8 NY3d 541, 546 [2007]; *see also People v Simpson*, 120 AD3d at 412). Defendant has not established any

cognizable justification for his failure to appeal (*see* CPL 440.10[2][c]; *People v Stewart*, 16 NY3d 839, 841 [2011]; *People v Ceni*, __ AD3d __ 2014 NY Slip Op 08731 [1st Dept 2014]), and nothing in *People v Grubstein* (__ NY3d __, 2014 NY Slip Op 07924 [2014]), which involves a complete deprivation of counsel, is to the contrary. Moreover, defendant's argument that his failure to appeal was the product of ineffective assistance of counsel has been rejected by this Court on defendant's coram nobis motion (M-6609, 2014 NY Slip Op 73663[U] [1st Dept 2014]). In addition, while the remedy for a *Peque* error may involve a remand for fact-finding proceedings (22 NY3d at 200-201), we reject defendant's argument that this circumstance permits a record-based *Peque* claim to be raised on a CPL 440.10 motion.

In any event, even if the statute permitted a record-based *Peque* claim to be raised by way of CPL article 440, defendant's claim would still be unavailing. Although *Peque* is retroactive to cases pending on direct appeal (*People v Brazil*, __ AD3d __, 2014 NY Slip Op 08555 [1st Dept 2014]), there is no basis under

the principles set forth in *People v Pepper* (53 NY2d 213 [1981], *cert denied* 454 US 967 [1981]) to extend retroactivity to convictions that have become final.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14121 The People of the State of New York, Ind. 2914/08
Respondent,

-against-

James Frey,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about June 3, 2013, which adjudicated defendant a level three sexually violent predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 10 points under the risk factor for defendant's age of 20 years or less when he committed his first act of sexual misconduct, notwithstanding that this was based on a youthful offender adjudication (*see People v Wilkins*, 77 AD3d 588 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]; *see also People v Torres*, 103 AD3d 868 [2d Dept], *lv denied* 21 NY3d 856 [2013]). Contrary to defendant's assertions, CPL 720.35 does not prohibit the use of youthful offender adjudications by

courts.

The court also properly assessed 15 points under the risk factor for alcohol abuse, based on clear and convincing evidence including defendant's past conviction and pending charges of driving while impaired, and his conceded history of ethanol abuse. The only evidence to suggest that he did not have any history of alcohol abuse were documents based on his self-reported answers, which the court properly deemed unreliable in light of the other evidence in the record.

In any event, resolution of defendant's challenges to point assessments is not necessary to the disposition of this appeal. Even deducting the challenged 25 points, defendant would remain a presumptive level three offender, and even with the reduced point score, there is no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]), particularly in light of the seriousness of the underlying sex crime, and defendant's extensive criminal history, which includes the commission of other sex offenses against both children and adults. We note

that defendant committed the instant offense after twice being adjudicated a level three sex offender, and that he was sentenced as a second child sexual assault felony offender (*see* Penal Law § 70.07).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14124 The City of New York, Index 450610/13
Plaintiff-Appellant,

-against-

VJHC Development Corp., et al.,
Defendants-Respondents,

Emigrant Funding Corp., et al.,
Defendants.

_____

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for appellant.

Sperber Denenberg & Kahan, New York (Jacqueline Handel-Harbour of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 18, 2013, which, to the extent appealed from as limited by the briefs, granted the part of defendants Thomas Sung (Thomas), Vera Sung (Vera), VJHC Development Corp., and Mott & Prince Management Inc.'s motion that sought to dismiss the complaint as against Thomas pursuant to CPLR 3211(a)(8) and granted the part that sought to dismiss the complaint as against Vera, VJHC, and Mott & Prince pursuant to CPLR 3211(a)(1) and (7) to the extent of ordering a hearing, unanimously reversed, on the law and the facts, without costs, and the motion denied.

The motion court erred by granting the motion to dismiss as

against Thomas pursuant to CPLR 3211(a)(8) as unopposed; plaintiff opposed it.

Plaintiff properly served Thomas with the amended complaint pursuant to CPLR 308(2) by delivering it to his 47-year-old daughter Vera at his actual place of business and mailing it to his actual place of business in an envelope marked "personal and confidential." Thomas contends that Vera was not authorized to accept service on his behalf. However, authority is not a relevant criterion with respect to service on individuals (*see Charnin v Cogan*, 250 AD2d 513, 517-518 [1st Dept 1998]; *Public Adm'r of County of N.Y. v Markowitz*, 163 AD2d 100 [1st Dept 1990]). Upon Vera's refusal to accept service, it was proper for the process server to leave the amended complaint in her "general vicinity" (*Duffy v St. Vincent's Hosp.*, 198 AD2d 31 [1st Dept 1993] [internal quotation marks omitted]).

Thomas's complaint that the process server did not determine if the 47-year-old Vera was a suitable person to serve is unavailing. We reject his claim that 6 Bowery, sixth floor, was not his actual place of business; the process server submitted an affidavit saying that, once he exited the elevator on the sixth floor of 6 Bowery, he saw the sign, "Thomas Sung, attorney at law." Nor is Thomas's affidavit conclusorily denying that he

received any pleadings sufficient to overcome the presumption of delivery that attaches to a properly mailed letter (*Public Adm'r*, 163 AD2d at 101). We also reject Thomas's contention that he was entitled to be served by a licensed process server. He did not submit any proof that plaintiff's process server was not licensed. In any event, the process server's not being licensed would not invalidate service (*see Wellington Assoc. v Vandee Enters. Corp.*, 75 Misc 2d 330, 333 [Civ Ct, NY County 1973]). Since plaintiff properly served Thomas with the amended complaint, it is not necessary to consider whether it properly served him with the original complaint (*see Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012]).

Contrary to defendants' claim, an order directing a hearing is appealable (*see Grand Cent. Art Galleries v Milstein*, 89 AD2d 178, 180-181 [1st Dept 1982]).

The motion court erred by ordering a hearing on the parts of defendants' motion seeking dismissal for failure to state a cause of action and upon documentary evidence. Whether plaintiff has a cause of action and whether documentary evidence conclusively refutes plaintiff's allegations are questions of law.

The amended complaint states a cause of action under Administrative Code of City of NY § 7-706(a). By the plain

language of the statute, plaintiff is not limited to suing owners; rather, it may sue "the person or persons conducting, maintaining or permitting the public nuisance." Similarly, the statute does not require that the person or persons *knowingly* conduct, maintain, or permit the public nuisance. Even if, arguendo, knowledge were required, defendants' submissions would not warrant dismissal. For example, Thomas's and Vera's affidavits, which say they had no knowledge that VJHC's tenants were engaged in counterfeiting activity, do not qualify as documentary evidence for purposes of CPLR 3211(a)(1) (*United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 409 [1st Dept 2014]).

The court, sub silentio, denied so much of defendants' motion as sought to dismiss the fourth through fourteenth causes of action on the ground that plaintiff was improperly splitting

those claims. Defendants did not cross appeal. Hence, they may not argue on plaintiff's appeal that plaintiff may not litigate those causes of action (*see Hecht v City of New York*, 60 NY2d 57 [1983]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14125 The People of the State of New York, Ind. 3910/10
Respondent,

-against-

Harvys Gomez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Edgar G. Walker, J.), rendered March 16, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of six months, concurrent with five years' probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no

basis for disturbing the jury's credibility determinations, including its evaluation of police paperwork errors and minor inconsistencies in testimony.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14126 The People of the State of New York, Ind. 4356N/12
Respondent,

-against-

Charles Dunbar,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about January 16, 2013, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14127 Patricia Leighton, Index 115379/08
Plaintiff-Appellant,

-against-

Marc Lowenberg, D.D.S., et al.,
Defendants-Respondents.

_____

Andrew Molbert, New York, for appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered October 22, 2013, which denied renewal of plaintiff's motion for leave to amend the complaint to the extent it sought to add claims for lack of informed consent, unanimously affirmed, without costs.

The court providently exercised its discretion in denying plaintiff's motion to renew. Plaintiff did not provide a reasonable justification for failing to submit the required expert affirmation in support of her original motion to amend (*see Onglingswan v Chase Home Fin., LLC*, 104 AD3d 543 [1st Dept 2013], *lv dismissed* 22 NY3d 1113 [2014]). Even if we were to accept plaintiff's excuse for failing to submit her expert's affirmation on the earlier motion (*see Garner v Latimer*, 306 AD2d

209 [1st Dept 2003]), the belatedly proffered expert affirmation is insufficient to support the proposed claims. The expert opined that defendants deviated from accepted dental practice in specified ways, proximately resulting in harm, but did not state, "with certainty that the information defendants allegedly provided to plaintiff before the dental procedures at issue departed from what a reasonable practitioner would have disclosed" (103 AD3d 530, 530 [1st Dept 2013]), so as to support a cause of action for lack of informed consent (*see* Public Health Law § 2805-d [1], [3]; CPLR 4401-a; *Orphan v Pilnik*, 15 NY3d 907, 908 [2010]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14131 The People of the State of New York, Ind. 1822/09
Respondent,

-against-

Jimmie Lee Davis,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George R. Villegas, J. at plea; Robert Torres, J. at sentencing), rendered January 31, 2013, convicting defendant of criminal sale of a controlled substance in the third degree and sentencing him, as a second felony offender, to a term of 2½ years, unanimously affirmed.

Defendant did not preserve his claims that the plea court failed to properly advise him of his rights under *Boykin v Alabama* (395 US 238 [1969]) and obtain a factual allocution (*see People v Jackson*, __ AD3d __, 2014 NY Slip Op 09048 [1st Dept 2014], and we decline to review them in the interest of justice. Unlike the situation in *People v Tyrell* (22 NY3d 359, 364 [2013]), defendant had the opportunity to move to withdraw his plea or otherwise raise these issues, and the deficiencies in the

plea proceeding were not so egregious as to constitute mode of proceedings errors (*id.*).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14132 In re Alexis F.,
Petitioner-Respondent,

-against-

Noëlle P.,
Respondent-Appellant.

_____

Noëlle P., appellant pro se.

Alexis D. F., respondent pro se.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about March 15, 2013, which denied respondent's objections to the order, same court (Support Magistrate Cheryl Weir-Reeves), entered on or about December 7, 2012, denying her objection to a cost-of-living adjustment and modifying an order of support to set her monthly child support obligation at $2,106.66, plus one-half of the children's college costs, unanimously affirmed, without costs.

The court properly determined respondent's child support obligation based on the greater of the children's needs or standard of living, pursuant to Family Court Act § 413(1)(k), since there was insufficient evidence to determine her gross income for child support purposes (*see Matter of Salvatore D. v Shyou H.*, 88 AD3d 548 [1st Dept 2011]; *Merchant v Hicks*, 15 AD3d

266 [1st Dept 2005]).

Respondent's argument that the court erred in declining to use income tax return evidence when determining her base income for child support purposes is unavailing. The magistrate was "not bound to determine respondent's income based solely on the figure reported on [her] income tax return[s]" (*Childress v Samuel*, 27 AD3d 295, 296 [1st Dept 2006]), since "[c]hild support is based on a parent's ability to provide for his or her children, not necessarily the parent's current economic situation" (*K. v B.*, 13 AD3d 12, 20 [1st Dept 2004]; *see* Family Court Act § 413[1][a]).

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14133 Bi Fang Zhou, Index 107390/10
Plaintiff-Appellant,

-against-

131 Chrystie Street Realty Corp., et al.,
Defendants-Respondents.

_____

Leslie Elliot Krause, LLP, New York (Joseph Medic of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for 131 Chrystie Street Realty Corp., Henry Madison Management Corp. and Home Sweet Home, respondents.

Tobias & Kuhn, New York (Michael V. DiMartini of counsel), for Envoy Enterprises, LLC, respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about October 16, 2013, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that on February 11, 2010, at approximately 7:30 a.m., she slipped and fell on a layer of ice covered with snow on the sidewalk. The sidewalk was located in front of premises owned by defendant 131 Chrystie Realty Street Corp. and managed by defendant Henry Madison Management Corp.; defendant TLS Chrystie LLC d/b/a Home Sweet Home operated a bar

in the basement of the premises, and defendant Envoy Enterprises, LLC operated an art gallery on the ground floor.

Defendants submitted, inter alia, meteorological records showing that snow fell throughout the day prior to plaintiff's accident, ending after 11 p.m. Thus, "[p]ursuant to Administrative Code of the City of NY § 16-123(a), defendants had until 11:00 a.m. to clear the snow and ice from the sidewalk. Since that period had not yet expired at the time that plaintiff fell, defendants established their entitlement to judgment as a matter of law" (*Colon v 36 Rivington St., Inc.*, 107 AD3d 508, 508 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. She offered only speculation that defendants may nonetheless be held liable for making the natural accumulation of snow and ice worse by negligently attempting to remove it. "Mere evidence of the property owner's general habits regarding snow removal are insufficient to raise an issue of fact as to whether the defendant may have engaged in snow removal that led to the accident" (*Nadel v Cucinella*, 299 AD2d 250, 252 [1st Dept 2002]). Moreover, the presence of ice under a layer of snow, cited by plaintiff as evidence that snow removal had been negligently attempted, is insufficient to establish liability on the part of

the entity responsible for maintaining the property (*see Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288, 289 [1st Dept 2008]).

Furthermore, any lease or sublease provision requiring TLS Chrystie or Envoy to keep the sidewalks clear of snow and ice does not create a duty to plaintiff (*see Tucciarone v Windsor Owners Corp.*, 306 AD2d 162 [1st Dept 2003]). Similarly, their failure to follow their asserted custom of clearing the sidewalk of snow and ice without waiting for the snowfall to end cannot give rise to liability here. Such liability "cannot be based on the violation of an internal rule imposing a higher standard of care than the law, at least where there is no showing of detrimental reliance by the plaintiff" (*Prince v New York City Hous. Auth.*, 302 AD2d 285, 286 [1st Dept 2003]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14134 Claire Urich, Index 155157/12E
Plaintiff-Respondent, 590681/13

-against-

765 Riverside LLC, et al.,
Defendants-Appellants.

[And a Third-Party Action]

_____

Carol R. Finocchio, New York, for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 25, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In opposition to defendants' prima facie showing that the locks on the entrances to the building were working on the date of the criminal attack on plaintiff, plaintiff raised an issue of fact as to whether her assailant gained entry through a side entrance (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544 [1998]). She submitted tenants' affidavits saying that there was a recurring problem with the side door to the building, i.e., that it did not close completely, and that, on or about the date

of the assault, the lock on that door "would spin so that any key could open [it]." Moreover, plaintiff presented evidence raising an issue of fact as to the foreseeability of the attack (*see Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]). She submitted a letter sent to defendant building manager by a group of tenants 18 months before the assault on her complaining of a break-in that resulted in destruction of property, intruders smoking marijuana on the roof, the service elevator being used for "drug drops," and the building becoming a target for people "to easily enter . . ., conduct illegal activities and escape without apprehension," and requesting, inter alia, that the building's locks be replaced rather than waiting "for tragedy to strike."

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

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14135 In re Richard Pazian, Index 112500/11
Petitioner-Respondent,

-against-

The Department of Citywide
Administrative Services, et al.,
Respondents-Appellants.

_____

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for appellants.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 10, 2013, which granted the petition, brought pursuant to CPLR article 78, to the extent of vacating respondent New York City Department of Buildings' (DOB) determination, dated July 20, 2011, denying petitioner's application for a master plumber's license, and remanded for a new hearing and determination, unanimously reversed, on the law, without costs, and the petition dismissed.

Petitioner submitted his application in October 2006, stating that he had amassed five years of practical experience in the design and installation of plumbing systems working at All County Plumbing and Heating Corp. from December 1984 to December 1989; and two years and ten months of experience working at Scarponi & Son Plumbing and Heating from December 1989 to

September 1992. As to the position at Scarponi, petitioner claimed that, pursuant to an unwritten agreement, he held an unpaid position after March 1991 in exchange for the opportunity to later buy into the business, which never materialized. After initially denying petitioner's application, DOB, in its final determination, reaffirmed its denial due to insufficient experience. In doing so, DOB rescinded its original accreditation of five years' experience at All County. In deciding to revoke acceptance of petitioner's All County experience, DOB failed to provide an adequate explanation for why it first credited petitioner with this experience, only to reverse course nearly two years later.

On this record, DOB's determination to disallow the five years experience at All County was arbitrary and capricious. However, we reverse solely because DOB did not credit petitioner's and Scarponi's testimony about an unwritten agreement to buy into the business in return for uncompensated

work. We have no basis on which to upset DOB's credibility determination on this issue and, without the time that petitioner claimed to have held the unpaid position, he did not satisfy the experience requirement for a master plumber's license.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14136- Ind. 1381/10
14137- 3403/11
14138 The People of the State of New York, 2774/08
Respondent,

-against-

Jose Figueroa,
Defendant-Appellant.

_____

Danielle Neroni Reilly, Albany, for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 10, 2012, convicting defendant, upon his plea of guilty, of six counts of criminal sale of a controlled substance in the third degree, and also convicting him of violation of probation, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

Defendant's plea was knowing, intelligent, and voluntary. The court satisfactorily explained the rights defendant was waiving by pleading guilty (*see People v Harris*, 61 NY2d 9, 16 [1983]), and it elicited an appropriate factual allocution that cast no doubt on defendant's guilt. The record fails to support defendant's claim that the court coerced the plea. Furthermore,

the court's participation in plea bargaining resulted in a lower sentence than the People were offering.

The court properly denied defendant's motion to withdraw his plea, and also properly declined to appoint new counsel. During the plea proceeding, the court specifically advised defendant that he would be receiving an aggregate determinate prison term of 10 years, followed by 2 years' postrelease supervision. Nevertheless, in moving to withdraw his plea, defendant asserted that his attorney had told him that under such a sentence he would actually serve three years and then be paroled. The court correctly concluded that this allegation was so patently incredible that it did not require any fact-finding proceedings or substitution of counsel (*see e.g. People v Lopez*, 15 AD3d 285 [1st Dept 2005], *lv denied* 4 NY3d 855 [2005]). Accordingly, there was no violation of defendant's right to conflict-free representation (*see Hines v Miller*, 318 F3d 157, 162-164 [2d Cir 2003], *cert denied* 538 US 1040 [2003]). None of the other claims raised in defendant's oral and written plea withdrawal applications warranted substitution of counsel or further inquiry.

We perceive no basis for reducing the sentence. The record does not establish that the length of the sentence was influenced by any impermissible factors.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14141 The People of the State of New York, Ind. 5014/10
Respondent,

-against-

Mohammed Khan,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case LLP, New York (C. Kelly Newman of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about May 22, 2014, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly designated defendant a sexually violent offender, since he was convicted of sexual abuse in the first degree, an enumerated sexually violent offense (*see* Correction Law § 168-a[3][a]; [7][b]). The court properly determined that it lacked discretion to do otherwise (*see People v Bullock*, __ AD3d __, 2014 NY Slip Op 08265 [1st Dept 2014]). Defendant asserts that although an element of the crime of which he was

convicted (Penal Law § 130.65[1]) is forcible compulsion, he committed the underlying crime in a manner that was not actually violent, within the general sense of that term. He then argues that the court should have considered his underlying conduct in determining whether to adjudicate him a sexually violent offender. We reject that argument for reasons similar to those set forth in *Bullock*. Regardless of the underlying facts, defendant is a sexually violent offender simply because he has been convicted of one of the enumerated crimes, and thus meets the statutory definition. In any event, the record establishes that defendant's conduct can be fairly described as violent.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14142-
14143-
14144 Index 603250/05

Wathne Imports, Ltd.,
Plaintiff-Appellant,

-against-

PLR USA, INC., et al.,
Defendants-Respondents.

_____

Manatt, Phelps & Phillips, LLP, New York (Thomas C. Morrison of counsel), for appellant.

Kelley Drye & Warren LLP, New York (Robert I. Steiner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 13, 2014, which, to the extent appealed from, granted defendants' motion in limine to preclude plaintiff's CEO from offering any testimony on damages, unanimously reversed, on the facts, without costs, and the motion denied. Appeal from order, same court and Justice, entered April 4, 2014, which denied plaintiff's motion to renew defendants' motion to preclude, unanimously dismissed, without costs, as moot. Order, same court and Justice, entered July 23, 2014, which denied plaintiff's motion pursuant to CPLR 3101(h) to supplement its discovery responses on the issue of damages, unanimously reversed, on the facts, without costs, and the motion granted.

Under the circumstances of this case, the in limine order granting defendants' motion to prelude that witness's testimony on damages is appealable.

Plaintiff's CEO has the requisite personal knowledge of the relevant business areas and information to render her competent to testify as to plaintiff's lost profits, including offering estimates or projections of lost sales and profits (*see Ashland Mgt. v Janien*, 82 NY2d 395, 406 [1993]; *Greasy Spoon v Jefferson Towers*, 75 NY2d 792, 795-796 [1990]). The witness had been CEO of plaintiff throughout plaintiff's 25-year relationship with defendants, and had participated in all relevant aspects of plaintiff's business. The weaknesses identified by defendants in the witness's analysis bear on the credibility, not the admissibility, of her testimony (*see e.g. Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 89 [1st Dept 2012]).

As plaintiff's motion to supplement its discovery responses on damages was denied on the sole ground that the CEO's testimony was inadmissible, the denial of that motion was also error.

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14145 In re Lillie Ross, Index 400033/13
Petitioner-Appellant,

-against-

DHCR,
Respondent-Respondent,

Stanley Wasserman,
Respondent.

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Lillie Ross, appellant pro se.

Gary R. Connor, New York (Jeffrey G. Kelly of counsel), for DHCR, respondent.

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Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered May 15, 2013, granting the cross motion of respondent New York State Division of Housing and Community Renewal (DHCR) to dismiss this CPLR article 78 proceeding by petitioner to annul DHCR's order, which dismissed as untimely petitioner's petition for administrative review (PAR) of the denial of her rent overcharge complaint, unanimously affirmed, without costs.

The record supports DHCR's finding that petitioner did not file the PAR until after the 35-day time limit imposed by section 2529.2 of the Rent Stabilization Code had expired (*see Matter of Windsor Place Corp. v State Div. of Hous. & Community Renewal,*

Off. of Rent Admin., 161 AD2d 279, 280 [1st Dept 1990]). Contrary to petitioner's contention, the Labor Day holiday is not excluded in counting the 35-day period because it was not the day on which the time limitation expired (*see* General Construction Law § 25-a; *Matter of Pantaleoni v City of Rome*, 126 Misc 2d 809, 809-810 [Sup Ct, Oneida County 1984]). Accordingly, petitioner's failure to timely file a PAR within 35 days after "the issuance of the overcharge order constituted a failure to exhaust administrative remedies justifying dismissal of petitioner's subsequent article 78 proceeding" (*Matter of Nelson Mgt. Group v New York State Div. of Hous. & Community Renewal*, 259 AD2d 411, 412 [1st Dept 1999], *lv denied* 93 NY2d 814 [1999]).

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

ENTERED: FEBRUARY 3, 2015

CLERK

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

14146N In re Prospect Park East Network, et al., Petitioners-Appellants, Index 101695/13

-against-

New York State Homes & Community Renewal, et al., Respondents-Respondents,

Lettire Construction Services, Inc., Respondent.

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Wilmer Cutler Pickering Hale and Dorr LLP, New York (David B. Bassett of counsel), for appellants.

South Brooklyn Legal Services, Brooklyn (Rachel Hannaford of counsel), for Flatbush Development Corporation, Flatbush Tenant Coalition and Leo Crooks, appellants.

Venable LLP, New York (Michael J. Volpe of counsel), for New York State Homes & Community Renewal, Darryl C. Towns and New York State Housing Finance Agency, respondents.

Sive, Paget & Riesel, P.C., New York (David Paget of counsel), for The Hudson Companies Inc., Hudson CBD Flatbush LLC, Hudson PLG LLC, Hudson Company Ventures LLC and Hudson Catamount Flatbush LLC, respondents.

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Order, Supreme Court, New York County (Peter H. Moulton, J.), entered June 23, 2014, which vacated a temporary restraining order and denied petitioners' motion for a preliminary injunction staying any work on the subject project, and any further public financing for the project, until a further environmental review

is conducted, unanimously affirmed, without costs.

In this proceeding brought pursuant to CPLR article 78 seeking to, among other things, annul a negative declaration of environmental impact issued by respondent New York State Housing Finance Agency (HFA), Supreme Court providently exercised its discretion in denying petitioners' motion for a preliminary injunction (*see Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24-25 [1st Dept 2011]). Petitioners did not demonstrate a likelihood of success on the merits (*id.*), since HFA identified the relevant areas of environmental concern, took a "hard look" at them, and made a "reasoned elaboration" of the basis for its determination (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007] [internal quotation marks omitted]). The environmental assessment form (EAF) specifically analyzed the issues of secondary displacement and of the project's impact on the view from Prospect Park, and found no significant adverse environmental impacts. Even if the project should have been designated as a Type I action, any misclassification was harmless error, because the procedures applicable to Type I actions were used — namely, the Full EAF (*see Matter of Rusciano & Son Corp. v Kiernan*, 300 AD2d 590, 590-591 [2d Dept 2002], *lv denied* 99 NY2d 510 [2003]; *Matter of*

Jaffe v RCI Corp., 119 AD2d 854, 855 [3d Dept 1986], *lv denied* 68 NY2d 607 [1986]). HFA properly submitted a supplemental affidavit to explain the analysis set forth in the EAF in response to the challenges raised by petitioners in this proceeding (*see Matter of Chinese Staff & Workers' Assn. v Burden*, 88 AD3d 425, 433 [1st Dept 2011], *affd* 19 NY3d 922 [2012]).

Supreme Court properly determined that the impact of HFA's financing of the project is slight, since the project can be built "as of right" without HFA's financing (*see Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Council of City of N.Y.*, 214 AD2d 335, 337 [1st Dept 1995], *lv denied* 87 NY2d 802 [1995]).

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

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 3, 2015

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