SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 5, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Gische, JJ.

13886- 13886A
Theodore Grunewald, et al.,
Plaintiffs-Appellants,

-against-

The Metropolitan Museum of Art, et al.,
Defendants-Respondents.

- - - - -

Filip Saska, et al.,
Plaintiffs-Appellants,

-against-

The Metropolitan Museum of Art,
Defendant-Respondent.

Index 158002/12
650775/13

_____

Emery Celli Brinckerhoff & Abady LLP, New York (Andrew G. Celli, Jr. of counsel), for Filip Saska, Tomáš Nadrchal and Stephen Michelman, appellants.

Weiss & Hiller, PC, New York (Michael S. Hiller of counsel), for Theodore Grunewald and Patricia Nicholson, appellants.

Arnold & Porter LLP, New York (Bruce R. Kelly of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 30, 2013, which, inter alia, granted defendants' motions to dismiss the causes of action

seeking to enjoin defendant museum's admission fee policy as breach of a statute and breach of a lease between the City of New York and defendant museum, unanimously affirmed, without costs.

This appeal arises out of two separate actions in which members of the public seek to challenge a policy by the Metropolitan Museum of Art (MMA), in place since 1970, to have all visitors at all times pay an entrance fee. While the fee is currently "recommended" at $25.00, visitors may pay as little at 1¢, but they must pay something. Prior to 1970, MMA entry was free to all visitors, at least on certain days and times. Plaintiffs in each of these actions claim that they paid for tickets to enter the museum on days and at times that they allege admission was required to be free. In addition to other causes of action, each complaint alleges that MMA's policy of charging an entry fee, in any amount, separately violates both certain legislation and the lease by which MMA occupies its home in Central Park. In each action, plaintiffs seek a permanent injunction to enforce a free admissions requirement.

The narrow issue before this Court is not whether the legislation relied upon and/or the lease mandate free admissions to MMA, but simply whether plaintiffs have standing to raise the issue.

Plaintiffs lack standing to sue under the 1893 statute. The

statute authorizes the Department of Public Parks in the City of New York to apply for up to an additional $70,000 of funds to keep, preserve and exhibit the collections in the MMA. As an express condition of the authorization, the MMA shall be free of charge for five days per week, including Sunday and two evenings per week. Clearly there is no express private right of action. Nor is there an implied right of action consistent with the legislative scheme (*see Sheehy v Big Flats Community Day,* 73 NY2d 629, 633-635 [1989]). Regardless of whether the legislation is designated an appropriations bill or not, the plain language makes the two obligations of the bill interdependent. The Parks Department's authority to apply for the additional appropriations for MMA is expressly conditioned upon free admission. The plaintiffs in this case are not seeking to revoke the Parks Department's authorization to seek additional funds, but only to enforce the condition for that authority. No private remedy to enforce only the conditional portion of the statute is fairly implied. Nor would a private right of action to enforce only the condition be consistent with the mechanism of the statute (e.g. forfeiting the right to seek additional funds) (*see Rhodes v Herz*, 84 AD3d 1, 10 [1st Dept 2011], *lv dismissed* 18 NY3d 838 [2011]). We decline to reach the issue of whether the 1893 statute was impliedly overruled by later legislation.

Plaintiffs also lack standing to sue under the MMA's lease with the City as third party beneficiaries because the benefit to them is incidental and not direct (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 [1983]). Government contracts often confer benefits to the public at large. That is not, however, a sufficient basis in itself to infer the government's intention to make any particular member of the public a third party beneficiary, entitled to sue on such contract (see *Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38 [1985]*; Moch Co. V Rensselaer Water Co*, 247 NY 160 [1928]; Restatement (Second) of Contracts §313). In order for the benefit to be direct, it must be primary and immediate in such a sense and to such a degree as to demonstrate the assumption of a duty to provide a direct remedy to the individual members of the public if the benefit is lost (*Moch Co.* at 164, Cardozo, C. J.). Neither the language of the lease nor any other circumstances indicate that the parties intended to give these plaintiffs individually enforceable rights thereunder (*see*

Oursler v Women's Interact Ctr., 170 AD2d 407 [1ST Dept 1991]; *Alicea v City of New York*, 145 AD2d 315 [1st Dept 1988].

Plaintiffs' other contentions address unappealable dicta (*see Edge Mgt. Consulting, v Irmas*, 306 AD2d 69 [1st Dept 2003]).

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

ENTERED: FEBRUARY 5, 2015

CLERK

Mazzarelli, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13889 In re Mashon Baines, Index 402436/11
Petitioner-Respondent,

-against-

Elizabeth Berlin, etc.,
Respondent-Appellant,

Seth Diamond, etc.,
Respondent.

_____

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Joshua Goldfein of counsel) and Shearman & Sterling LLP, New York (Mojoyin Onijala of counsel) for respondent.

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Appeal from order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered on or about January 30, 2012, after a hearing, inter alia, annulling respondent New York State Office of Temporary and Disability Assistance's Decision After Fair Hearing, dated August 31, 2011, which discontinued petitioner's emergency shelter temporary housing assistance, and awarding petitioner attorneys' fees as the prevailing party, unanimously dismissed, without costs, as moot.

Petitioner's move, with her family, into permanent housing rendered this appeal moot insofar as any "justiciable controversy" within the meaning of CPLR 3001 no longer exists

(*see Big Four LLC v Bond St. Lofts Condominium*, 94 AD3d 401, 403 [1st Dept 2012], *lv denied* 19 NY3d 808 [2012]). Further, the exception to the mootness doctrine does not apply, since this case does not involve a controversy or issue that is likely to recur, typically evades review, and raises a substantial and novel question (*see e.g. Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]). Indeed, the central issue, whether the particular allegations recited in the notice to discontinue temporary housing assistance apprised petitioner of the basis for the agency's determination to suspend her temporary housing, is specific to the facts of this case. Accordingly, any decision we rendered would be peculiar to this case and would confer no guidance or certainty in future proceedings between the agency and shelter residents (*see People ex rel. Lassiter v Schriro*, 114 AD3d 593 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]).

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

ENTERED: FEBRUARY 5, 2015

CLERK

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

13954 Rahman Ishmael Jeffers, et al., Index 153386/12
Plaintiffs-Respondents,

-against-

American University of Antigua, et al.,
Defendants-Appellants.

_____

Cowan, Liebowitz & Latman, P.C., New York (J. Christopher Jensen of counsel), for appellants.

Jamie Andrew Schreck, P.C., New York (Matthew Torrie of counsel), for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered March 17, 2014, which, to the extent appealed from, denied as premature defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant so much of the motion as sought summary judgment on the fraud, negligent misrepresentation, unjust enrichment, and conversion causes of action, and otherwise affirmed, without costs.

Plaintiffs are former nursing students seeking to recover their tuition, costs, and damages from defendant the American University of Antigua (AUA), a nursing school which is located in the nation of Antigua and Barbuda, and related entities. Plaintiffs assert causes of action for fraud, breach of contract, negligent misrepresentation, unjust enrichment, and conversion,

based on defendants' alleged misrepresentation that AUA graduates would be qualified to take the National Council License Examination for Registered Nurses (NCLEX), and upon passing that examination, enroll directly into Lehman College's "one-year R.N. to B.S. in Nursing program" and graduate with a Bachelors of Science Degree in Nursing. However, plaintiffs allege AUA was not, at the time of their enrollment, a properly accredited school under § 64.1(a)(3) of the Regulations of the Commissioner of Education of New York State (8 NYCRR 64.1[a][3]). Under that regulation, graduates from a nursing program located in a foreign country may take the NCLEX only if they graduated from a program that "the licensing authority or appropriate governmental agency of said country certifies to the department as being preparation for practice as a registered professional nurse."

AUA's first class of nursing students graduated in late 2009.[1] However, AUA graduates were not permitted to take the NCLEX in New York until December 2011 because, in 2010, the New York State Education Department (NYSED) found that AUA was not approved by the General Nursing Council of Antigua and Barbuda, and thus was not a certified nursing program in that country. Without passing the NCLEX, AUA graduates were not qualified to

[1] The 17 plaintiffs either graduated from AUA in 2009 or 2010, or withdrew from the program in 2010 or 2011.

enroll in Lehman College's one-year BSN program. In January 2011, Lehman College allowed AUA graduates to enroll in its Generic Nursing Program, which did not require completion of the NCLEX. In December 2011 (approximately two years after the first AUA class graduated), NYSED altered its earlier decision and determined, based on "the representations set forth in letters submitted by the Prime Minister, Minister of Health, the Attorney General, and other government officials of Antigua and Barbuda," that the school was properly accredited in Antigua and Barbuda. Graduates were then qualified to take the NCLEX in New York and enroll in Lehman College's one-year BSN program, as promised by AUA at the time of their enrollment several years earlier.

Summary judgment is inappropriate as to plaintiffs' breach of contract claims. "'[P]romises set forth in a school's bulletins, circulars, and handbooks, which are material to the student's relationship with the school, can establish the existence of an implied contract'" (*Cheves v Trustees of Columbia Univ.*, 89 AD3d 463, 464 [1st Dept 2011], *lv denied* 18 NY3d 807 [2012], quoting *Keefe v New York Law School*, 71 AD3d 569, 570 [2010]]). AUA's "fact book" aimed at prospective students promised, inter alia, that AUA graduates would be eligible to take the NCLEX, and, upon passing that exam, "automatically matriculate" into Lehman College's "one-year RN to BSN program."

While generally denying plaintiffs' allegation that they breached the contract, defendants also argue that plaintiffs failed to establish damages. Defendants note that, during the two-year period in which graduates were not qualified to take the NCLEX in New York, some plaintiffs entered Lehman College's Generic Nursing Program, and some withdrew from AUA and/or transferred to another nursing school. Defendants further note that AUA offered refunds to any graduates unable to take the NCLEX examination because of the NYSED accreditation issue. Defendants' arguments raise issues of fact, but do not entitle them to judgment in their favor as a matter of law.

At the time of defendants' summary judgment motion, no discovery had occurred, and the motion court properly found that summary judgment on this claim was premature. Defendants contend that plaintiffs have not shown that facts essential to oppose the motion were in defendants' exclusive knowledge, or that discovery might lead to facts relevant to the material issues (*see Woods v 126 Riverside Dr. Corp.*, 64 AD3d 422, 424 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). Plaintiffs have not yet deposed defendants, and the record is not fully developed on damages, though plaintiffs do contend that they suffered financial harm. Defendants' motion for summary judgment stayed discovery (CPLR 3214 [b]; *see McGlynn v Palace Co.*, 262 AD2d 116, 117 [1st Dept

1999]), and there is no indication in the record that the court lifted the automatic stay.

Plaintiffs' remaining claims fail, and further discovery would not alter this determination. In support of their fraud claims, plaintiffs allege that defendants falsely represented that they would be qualified to take the NCLEX upon graduation from AUA. "A cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract. A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud" (*J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2009] [internal quotation marks omitted]; *see also Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [1st Dept 2010]).[2] Plaintiffs' fraud claims fail because they merely allege that, at the time they enrolled in AUA, defendants misrepresented their intention to perform under the contract - that is, to provide them with degrees qualifying them to take the NCLEX.

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[2] Plaintiffs' fraud claims also fail because they are duplicative of their breach of contract claims (*Mañas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008] ["A fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract"] [internal quotation marks omitted]).

Plaintiffs also brought negligent misrepresentation claims based on defendants' representations that AUA graduates would be able to sit for the NCLEX. However, plaintiffs do not have a claim for negligent misrepresentation because there is no special or privity-like relationship between defendants and plaintiffs so as to support a negligent misrepresentation claim (*see Kickertz v New York Univ.*, 110 AD3d 268, 276 [1st Dept 2013]; *Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13, 18-19 [1st Dept 2012], *lv denied* 20 NY3d 1093 [2013] [finding no "special relationship or fiduciary obligation requiring a duty of full and complete disclosure from defendant [school] to its prospective students"]). Plaintiffs' unjust enrichment claims are "indistinguishable from [their] claim[s] for breach of contract, and must be dismissed as duplicative of the contract claim[s]" (*Benham v eCommission Solutions, LLC*, 118 AD3d 605, 607 [1st Dept 2014] [internal quotation marks and citations omitted]).

Defendants are entitled to summary judgment on plaintiffs' conversion claims. Plaintiffs allege that defendants converted their money by inducing them to pay tuition and other expenses despite knowing that AUA graduates would be ineligible to take the NCLEX and attend Lehman College as promised. "A cause of action for conversion cannot be predicated on a mere breach of contract" (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269

[1st Dept 2003]). Here, plaintiffs' conversion claims allege no facts independent of the facts supporting their breach of contract claims.

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14147 The People of the State of New York, Respondent, Ind. 1792/11

-against-

Jackie Hodge, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered May 31, 2012, convicting defendant, after a jury trial, of bail jumping in the second degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Contrary to defendant's argument, the People were not required to establish any culpable mental state (*see People v Thomas*, 287 AD2d 324 [1st Dept 2001], *lv denied* 97 NY2d 709 [2002]; *see also People v Eiffel*, 81 NY2d 480, 483 [1993]). Accordingly, the court properly charged the jury on the elements of bail jumping in the second degree without specifying any required mental state, tracking the applicable section of the

Criminal Jury Instructions (*see* Penal Law § 215.56; *see also People v Diaz*, 105 AD3d 652 [1st Dept 2013], *lv denied* 21 NY3d 1015 [2013]). Insofar as *People v Simpkins* (174 AD2d 341 [1st Dept 1991], *lv denied* 78 NY2d 1015) is to the contrary, it should not be followed.

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14148-
14148A-
14148B Edward Thornton, et al., Index 100743/13
Petitioners-Appellants,

-against-

The New York City Board/Department of Education, et al.,
Respondents-Respondents.

_____

Law Offices Of Jeffrey Goldman, New York (Jeffrey E. Goldman of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jenna Krueger of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered January 16, 2014, denying the petition and dismissing this hybrid proceeding brought pursuant to CPLR article 78 and 42 USC § 1983, unanimously reversed, on the law, without costs, the article 78 claims are remanded to respondent New York City Board/Department of Education (DOE) for the issuance of a determination whether petitioner Thornton's Classic Studios, Inc. is a responsible vendor, the proceeding with respect to the 42 USC § 1983 claims is converted into a plenary action, and those claims are reinstated without prejudice to a motion to dismiss. Order, same court and Justice, entered November 12, 2013, which denied petitioners' motion for

injunctive relief, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 13, 2014, which denied petitioners' motion for discovery, unanimously dismissed, without costs, as moot.

This hybrid action arises out of respondent DOE's decision to place petitioner Thornton's Classic Studios, Inc. (TCS), a photography studio, on de-active status in the Financial Accounting and Management System (FAMIS), the online procurement portal through which the DOE orders goods and services, and subsequent actions taken by respondents. To do business with the DOE, a vendor must have an active status on FAMIS and must have been determined to be a responsible vendor pursuant to the DOE's Procurement Policy and Procedures. The DOE's determination placing TCS on de-active status in FAMIS was rationally based upon the 2012 admission of TCS's president, petitioner Edward Thornton, that he had continued to send a certain photographer to work in DOE schools after becoming aware that the photographer had been accused of touching a student's breast five years earlier and had pleaded guilty to the charge of endangering the welfare of a child (Penal Law § 260.10[1]) (*see Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

However, the DOE acted arbitrarily and capriciously in failing to provide TCS with notice of its apparent determination

of non-responsibility and of TCS's right to protest the determination, as required by its own Procurement Policy and Procedures (Sections 2-05(g)(1) and 2-06) (*see St. Joseph's Hosp. Health Ctr. v Department of Health of State of N.Y.*, 247 AD2d 136, 155 [4th Dept 1998], *lv denied* 93 NY2d 803 [1999]; *Matter of Era Steel Constr. Corp. v Egan*, 145 AD2d 795, 798 [3d Dept 1988]; *see also Matter of Mitchell v New York City Dept. of Correction*, 94 AD3d 583 [1st Dept 2012]).

The record presents no extraordinary circumstances that would support the court's sua sponte dismissal of this proceeding (*see Grant v Rattoballi*, 57 AD3d 272 [1st Dept 2008]). Respondents did not move to dismiss the 42 USC § 1983 claims (*see Nichols v Curtis*, 104 AD3d 526, 527 [1st Dept 2013]; *Purvi Enters., LLC v City of New York*, 62 AD3d 508, 509 [1st Dept 2009]; *see also Matter of Alltow, Inc. v Village of Wappingers Falls*, 94 AD3d 879, 882 [2d Dept 2012] [summary procedure applicable to CPLR article 78 case may not be used to dispose of causes of action for damages]). As to those claims, conversion of this proceeding into a plenary action is warranted (*see* CPLR 103[c]; *Raykowski v New York City Dept. of Transp.*, 259 AD2d 367 [1st Dept 1999]).

In moving for injunctive relief, petitioners failed to demonstrate a likelihood of success on the merits, irreparable injury, and that the balance of equities were in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]).

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14149 NYCTL 2008-A Trust, et al., Index 381161/09
Plaintiffs-Appellants,

-against-

Estate of Vincent Roberts, et al.
Defendants-Respondents,

New York City Environmental Control Board, et al.,
Defendants.

_____

Windels Marx Lane & Mittendorf, LLP, New York (Bruce F. Bronster of counsel), for appellants.

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Judgment, Supreme Court, Bronx County (John Barone, J.), entered July 25, 2013, awarding plaintiffs a portion of their publication expenses as part of their costs, unanimously modified, on the law, to award the full amount of publication expenses, and otherwise affirmed, without costs.

As purchasers of a City tax lien, plaintiffs stand in the City's shoes (Administrative Code of City of NY § 11-332). As such, having prevailed on the foreclosure of real property to collect on the lien, they are entitled to the costs of the action (Administrative Code § 11-338). Given that they are entitled to an award of costs, plaintiffs are entitled to the costs set forth

in CPLR 8301. CPLR 8301(3) expressly provides for the award of publication costs. As such, the court should have awarded the full amount of the publication costs, since the publications were pursuant to court orders.

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick JJ.

14150 The People of the State of New York, Ind. 3701N/10
Respondent,

-against-

Arthur Luke also known as Luke Arthur,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael R. Sonberg, J.), rendered on or about March 15 2011,

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

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

ENTERED: FEBRUARY 5, 2015

CLERK

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

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14151 Dhanraj Rajkumar, Index 25619/03
Plaintiff-Appellant, 85126/06

-against-

Budd Contracting Corporation,
Defendant-Respondent,

Sheraton Hotel, et al.,
Defendants.

[And A Third-Party Action]

_____

Kravet, Hoefer & Maher, P.C., Bronx (John A. Maher of counsel), for appellant.

Nicoletti Gonson Spinner LLP, New York (Benjamin Gonson of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 29, 2013, which granted defendant Budd Contracting Corporation's motion for summary judgment dismissing plaintiff's common law negligence and Labor Law § 200 claims against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff, an employee of a framing contractor, commenced this action alleging that he slipped and was injured while carrying a framed mirror when his foot became caught in a seam between pieces of construction paper laid by general contractor Budd to protect a newly installed floor during a hotel lobby

renovation project. Plaintiff alleges that Budd created the defective condition that caused his accident. Thus Budd's arguments regarding actual and constructive notice are irrelevant. While Budd asserts that there was no evidence that the construction paper was untaped, on its motion for summary judgment, it had the burden of demonstrating that the paper was secured to the floor (*see Kamin v James G. Kennedy & Co., Inc.*, 52 AD3d 263, 264 [1st Dept 2008]). However, it points to no evidence that the tape covered the entire length of the edges of the construction paper, as its project manager testified was necessary or else the paper would not stay down and could be a tripping hazard. Accordingly, Budd failed to meet its burden of establishing prima facie that it properly secured the paper in which plaintiff allegedly caught his foot (*id.*).

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14152 The People of the State of New York, Ind. 1454/12
Respondent,

-against-

Welch Fitzgerald,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about November 19, 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 5, 2015

CLERK

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

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14153 James Augustus Proctor, et al., Index 190040/13
Plaintiffs-Respondents

-against-

Alcoa, Inc., et al.,
Defendants,

Andal Corp, etc.,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Armand Kalfayan of counsel), for appellant.

Early Lucarelli Sweeney Meisenkothen, New York (Kyle A. Shamberg, of counsel), for respondents.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered July 1, 2014, which denied the motion of defendant Andal Corp. (Andal) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The record presents triable issues of fact as to whether Andal's alleged predecessors-in-interest performed certain construction work at the former World Trade Center site, and were responsible for plaintiff's exposure to asbestos at the site (*see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). Although plaintiff failed to identify any entity that used asbestos during the period that he worked at the site in 1970, he submitted sufficient evidence to raise a triable issue of fact as

to whether Andal's alleged predecessors-in-interest were present during that period and used an asbestos product in the area in which plaintiff worked. We have considered Andal's remaining arguments, and find them unavailing.

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14155 Hartsko Financial Services, LLC, Index 653251/12
Plaintiff-Appellant,

-against-

JPMorgan Chase Bank, N.A.,
Defendant-Respondent.

_____

The Law Offices of Edward T. Joyce & Associates, P.C., Chicago, IL (Edward T. Joyce of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Levi Lubarsky & Feigenbaum LLP, New York (Andrea Likwornik Weiss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered August 5, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the first cause of action pursuant to CPLR 3211(a)(1) and (7), and denied plaintiff's motion for leave to amend, unanimously affirmed, without costs.

Whether the first cause of action is denominated negligence or gross negligence, it was correctly dismissed because defendant had no duty to plaintiff independent of the contract formed when the account was opened (*Stella Flour & Feed Corp. v National City Bank of N.Y.*, 285 App Div 182 [1st Dept 1954], *affd* 308 NY 1023 [1955]).

Plaintiff is correct that the motion court should not have

denied its request for leave to amend on the ground that the request was belated (*see e.g. Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). However, denial was proper because plaintiff failed to demonstrate that it has a tort claim independent of a contract claim (*see e.g. Sabo v Alan B. Brill, P.C.*, 25 AD3d 420 [1st Dept 2006]).

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

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14156 The People of the State of New York, Respondent, Ind. 4600/11

-against-

Shenee Gause, 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 (Larry Stephen, J.), rendered on or about November 14, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [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 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14157-
14158 The People of the State of New York, Ind. 267/11
Respondent,

-against-

Rakeem Frazier,
Defendant-Appellant.
- - - - -
The People of the State of New York
Respondent,

-against-

Joshua Moody,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Jones Day, New York (Joshua A. Weiner of counsel), for Rakeem Frazier, appellant.

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

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

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Appeals from judgments, Supreme Court, New York County (Ruth Pickholz, J.), rendered September 13, 2011 and September 15, 2011, convicting defendants, after a jury trial, of robbery in the first and second degrees and two counts of criminal possession of stolen property in the fourth degree, and sentencing each defendant to an aggregate term of 10 years, held in abeyance, and the matters remanded for further proceedings

pursuant to *Batson v Kentucky* (476 US 79 [1986]).

In determining defendants' *Batson* application, the court did not follow the standard protocols, and it prematurely terminated the proceeding. Although the court did not make a specific ruling that defendants satisfied step one of *Batson* (prima facie case of discrimination), once it ordered the prosecutor to provide the reasons for his peremptory challenges to two of the six panelists who were the subject of defendants' application, it should have required the prosecutor to articulate his reasons for striking the remaining four panelists, as defendants specifically requested. The court also improperly denied the defense an opportunity to show that the prosecutor's proffered race-neutral reasons for striking the panelists were pretextual (*see People v Smocum*, 99 NY2d 418, 423 [2003]). Contrary to the People's assertion, these errors were preserved for our review.

Accordingly, we remand for further *Batson* proceedings. This is the appropriate remedy under the circumstances presented (*see*

e.g. People v Payne, 88 NY2d 172, 186-187 [1996]; *People v Hawthorne*, 80 NY2d 873, 874 [1992]), and we reject defendants' arguments that they have already established their entitlement to new trials.

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14159-
14160-
14161-
14161A In re Jamie S., and Others,

Dependent Children Under Eighteen
Years of Age, etc.,

Ariel S., et al.,
Respondents-Appellants,

St. Dominic's Home, et al.,
Petitioners-Respondents.

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

Carol L Kahn, New York, for Yesinia L., appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for Saint Dominic's Home, respondent.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for the Children's Aid Society, respondent.

Tennille M. Tatum-Evans, New York, attorney for the child Jamie Lee S.

Karen D. Steinberg, New York, attorney for the child Richard S.

Andrew J. Baer, New York, attorney for the child Ariel S.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the child Xavier V.

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Orders of fact-finding and disposition, Family Court, Bronx County (Karen Lupuloff, J.), entered on or about May 13, 2013, and June 18, 2013, which, to the extent appealed from as limited

by the briefs, determined, after a hearing, that respondent mother permanently neglected the subject children, unanimously affirmed, without costs. Orders of fact-finding and disposition, same court and Justice, entered on or about May 13, 2013, and June 18, 2013, which to the extent appealed from as limited by the briefs, determined, after a hearing, that respondent father was a notice father only as to Ariel and Richard, and in the alternative, that he permanently neglected them, and that he abandoned Jamie, unanimously affirmed, without costs.

The finding of permanent neglect against respondent mother is supported by clear and convincing evidence of her failure to plan for the children's future, notwithstanding the petitioning agencies' diligent efforts (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 380-381 [1984]). Although respondent mother was given referrals for a comprehensive mental health evaluation, she refused to comply for several years, despite the fact that the court suspended visitation until she complied and failed to provide an appropriate evaluation (*see Matter of Toyie Fannie J.*, 77 AD3d 449 [1st Dept 2010]). In addition, after completion of a domestic violence program, she admitted to continuing to engage in relationships involving domestic violence, and continued to have angry outbursts and exhibit inappropriate behavior in front

of the children. The record demonstrates that respondent mother's outbursts, which harmed and embarrassed the children, had not abated, and that she failed to recognize her role in the children's removal from her care (*see Matter of Emily Rosio G. [Milagros G.]*, 90 AD3d 511 [1st Dept 2011]).

Respondent father admitted that he failed to support Ariel and Richard according to his means prior to his incarceration, and that he provided no support after incarceration. The record also demonstrates that he had limited contact with Ariel and Richard after his incarceration (*see* Domestic Relations Law §111[d]). Incarceration did not absolve him of his obligation to support and maintain contact with his children *(see Matter of Jaden Christopher W.-McC [Michael L. McC.]*), 100 AD3d 486 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]).

The court properly found that respondent father abandoned Jamie since he admitted that he had no contact with the child in

the six months prior to the filing of the petition *(see Social Services Law § 384-b[5][a]; Matter of Ishmael A.*, 264 AD2d 647 [1999]).

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14162 Vincenta Quezada, Index 303010/11
Plaintiff-Respondent,

-against-

2700 GC LLC, et al.,
Defendants-Appellants.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 15, 2014,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 15, 2015,

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14163 The People of the State of New York, Respondent, Ind. 6115/99

-against-

Dominick Florio, Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered March 2, 2012, resentencing defendant to a term of 15 years, with 2½ years' postrelease supervision, unanimously affirmed.

There was no unreasonable delay in resentencing defendant for the purpose of adding a term of postrelease supervision (*see People v Williams*, 14 NY3d 198, 213 [2010]). "[E]ven assuming that CPL 380.30 applies, there was no violation of the statute because defendant[was] resentenced within a reasonable time after DOCS notified the courts that [he was a] 'designated

person[]' under Correction Law § 601-d" (*id.*). There is nothing in *Williams*, nor in any other authority, to suggest that the delay should be measured from the date that the Court of Appeals decided *People v Sparber* (10 NY3d 358 [2008]), which rendered resentencing necessary.

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14166N Ashley Vilches, Index 153368/13
Plaintiff-Appellant,

-against-

Charles Thomas Guadagno,
Defendant-Respondent.

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

Steven P. Schultz, Gansevoort (J. David Burke of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 6, 2014, which granted defendant's motion to change venue from New York County to Albany County, unanimously reversed, on the law, without costs, and the motion denied, without prejudice to renewal after plaintiff's compliance with defendant's discovery demands.

Defendant failed to contact purported material witnesses to determine if they were willing to testify, the substance of their testimony, or the manner in which they will be inconvenienced if they must testify in New York County. Defendant's entire motion is based solely on his counsel's conclusory affirmation. Thus, defendant has failed to fully establish entitlement to a change of venue pursuant to CPLR 510(3) (*see Gissen v Boy Scouts of Am.*, 26 AD3d 289, 290-291 [1st Dept 2006]; *Hernandez v Rodriguez*, 5

AD3d 269, 269-270 [1st Dept 2004]). Defendant's assertion that his insufficient showing resulted from plaintiff's failure to provide defendant with HIPAA and school authorizations permitting him to contact these witnesses is not supported by any documentation, and defendant has not explained why he did not seek to compel such discovery prior to making the motion.

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

ENTERED: FEBRUARY 5, 2015

CLERK

Acosta, J.P., Renwick, Feinman, Clark, Kapnick, JJ.

14167N Julio Rebollo, Index 115289/08
Plaintiff-Appellant,

-against-

Nicholas Cab Corp., et al.,
Defendants-Respondents,

Soliris Columbus, et al.,
Defendants.

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Law Offices of Michael S. Lamonsoff, PLLC, New York (Stacy Haskel of counsel), for appellant.

Russo & Toner, LLP, New York (Mitchell A. Greene of counsel), for respondents.

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Order, Supreme Court, New York County (Carol E. Huff, J.), entered December 17, 2013, which granted defendants' motion to direct plaintiff to appear for a further independent medical examination (IME) by a physician designated by defendants, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was not required to appear for an additional IME. Although there is no restriction in CPLR 3121 limiting the number of examinations to which a plaintiff may be subjected, a defendant seeking a further examination must demonstrate the necessity for it (*see Chaudhary v Gold*, 83 AD3d 477, 478 [1st Dept 2011]). Moreover, after a note of issue has been filed, as

here, "a defendant must demonstrate that unusual and unanticipated circumstances developed subsequent to the filing of the note of issue to justify an additional examination" (*Futersak v Brinen*, 265 AD2d 452, 452 [2d Dept 1999]]).

Here, the fact that defendants' examining physician was placed on a three-year suspension subsequent to his examination of plaintiff and the filing of the note of issue does not justify an additional examination by another physician (*see Giordano v Wei Xian Zhen*, 103 AD3d 774 [2d Dept 2013]). Defendants have failed to demonstrate the existence of "unusual and unanticipated circumstances," since the bill of particulars was served before the IME, and there were no allegations of new or additional injuries (*see Frangella v Sussman*, 254 AD2d 391 [2d Dept 1998]).

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

ENTERED: FEBRUARY 5, 2015

CLERK