SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 10, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14075 Arnon Ltd (IOM), Index 650371/13
Plaintiff-Respondent,

-against-

William Beierwaltes, et al.,
Defendants-Appellants.

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Moses & Singer, LLP, New York (Henry J. Bergman of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom, LLP, New York (Christopher R. Gette of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 29, 2013, which, insofar as appealed from as limited by the briefs, granted plaintiff's CPLR 3211(a)(7) motion to dismiss defendants' counterclaims for fraudulent inducement and tortious interference with prospective economic relations, unanimously affirmed, without costs.

Plaintiff commenced this action against defendants, alleging breach of contract for terminating a sale under which defendants had agreed to sell it an antique Greek sculpture. Defendants

responded that plaintiff was the one who breached the agreement, and asserted counterclaims for, among other things, fraudulent inducement and tortious interference with prospective economic relations. The court issued a temporary restraining order preventing defendants from transferring the sculpture to a new buyer. The parties then stipulated that defendant Phoenix would hold the sculpture at its storage facility pending the outcome of this action.

The court properly dismissed defendants' fraudulent inducement counterclaim as duplicative of their breach of contract counterclaim. The alleged misrepresentation made by plaintiff that it had the capability and intent to immediately pay for the sculpture amounted only to an "insincere promise of future performance" of the contract (*First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 292 [1st Dept 1999]; *see also Forty Cent. Park S., Inc. v Anza*, 117 AD3d 523 [1st Dept 2014]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75 [1st Dept 2004]).

The court also properly dismissed the counterclaim for tortious interference with prospective economic relations. The claim requires a showing that the interference was accomplished by wrongful means or with malicious intent (*see Carvel Corp. v*

Noonan, 3 NY3d 182, 191 [2004]; *Jacobs v Continuum Health Partners*, 7 AD3d 312 [1st Dept 2004]). "'Wrongful means' include[s] physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (*Carvel*, 3 NY3d at 191). Where the interfering conduct is a civil suit, it must be shown that the suit was "frivolous" (*Pagliaccio v Holborn Corp.*, 289 AD2d 85 [1st Dept 2001]).

Accepting defendants' allegations as true and affording them every favorable inference (*see Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013]), defendants have set forth sufficient facts to support their claim that plaintiff's action against them was frivolous. However, "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (*Carvel*, 3 NY3d at 192). Here, the interfering lawsuit was not directed at the defendants' customers so as to induce or cause them to terminate business relations with defendants. Rather, the suit was directed at defendants to prevent them from carrying out their obligations to sell the sculpture to the new buyer (*see Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 79 [1st Dept 2013], *lv denied* 21 NY3d

863 [2013] ["Nor does the complaint allege that any tortious activity was directed at the prospective lessees, rather than directly against plaintiff"]; *Rockwell Global Capital, LLC v Soreide Law Group, PLLC*, 100 AD3d 448, 449 [1st Dept 2012]). Defendants' argument that their business relationships with each other have been damaged by plaintiff's suit is unsupported and unavailing.

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

13025 C. Mahendra (NY), LLC, Index 651259/12
Plaintiff-Appellant,

-against-

National Gold & Diamond Center, Inc.,
Defendant-Respondent.

_____

Sadis & Goldberg, LLC, New York (Paulina Stamatelos of counsel), for appellant.

Louis Fogel & Associates, New York (Louis Fogel of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered May 29, 2013, which granted defendant's motion to dismiss the complaint for lack of personal jurisdiction, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff is a New York wholesale supplier of loose diamonds on consignment to vendors; defendant is a California seller of jewelry, including goods that it accepted on consignment. The parties began doing business with each other in 2002; defendant placed numerous orders, totaling millions of dollars, by telephoning plaintiff in New York and negotiating terms of size, price range, and description of the diamonds. In the course of their dealings, plaintiff shipped diamonds to defendant "on memorandum" so that defendant could examine the diamonds and

decide whether to keep them. Plaintiff then sent defendant invoices for the diamonds it purchased. Both the memoranda and invoices contained conditions regarding jurisdiction, each stating: "[Y]ou consent to the exclusive jurisdiction of the State and Federal courts situate[d] in New York County. This contract shall be construed and governed in accordance with the laws of New York, without giving effect to its choice of law principles."

Several years into the parties' business arrangement, defendant allegedly failed to pay a balance of around $14,000 for a June 2009 consignment. Similarly, defendant allegedly failed to pay more than $50,000 for a March 2011 consignment. Plaintiff commenced this action, seeking to recover more than $64,000. In its complaint, plaintiff interposed causes of action for, among other things, account stated, goods sold and delivered, and breach of contract.

Defendant moved to dismiss the complaint on several grounds, including lack of personal jurisdiction. On the motion, defendant argued that its telephone calls, letters, and faxes to plaintiff – defendant's only connection to New York – did not constitute sufficient "purposeful activity" or sufficient contacts to subject it to personal jurisdiction in this state.

Further, defendant argued, the forum selection clause in the consignment memorandums was not binding because its president never signed the memorandums' terms and conditions. Defendant thus maintained that it had not signed or agreed to the forum selection clause, nor had it otherwise consented to being sued in New York. Likewise, defendant asserted that because it had negotiated for and ordered the diamonds from California and did not sign or agree to the forum selection clause, the consent to jurisdiction contained in the memorandums would materially alter the parties' agreements in contravention of UCC § 2-207(2)(b). Thus, defendant concluded, it was not bound by the unsigned provision on the back of the consignment memorandums.

In opposition, plaintiff argued that the forum selection clause was, in fact, binding on defendant. Indeed, plaintiff asserted, UCC § 207 applies only in instances where additional terms are added to an expression of acceptance or written confirmation of an offer. In this case, plaintiff argued, the forum selection clause appeared on all invoices and memorandums submitted to defendant, including the March 2011 invoice and memorandum, and there was no contract between the parties until defendant accepted the goods. Therefore, plaintiff maintained, defendant's retention of the goods shipped created a cognizable

contract, in accordance with the terms and conditions on the invoices and memorandums, including the forum selection clause. Accordingly, plaintiff concluded that the forum selection clause was actually contained in the original documentation that formed the contracts.

The motion court granted the motion to dismiss. In so doing, it found the forum selection clause invalid, noting that defendant did not sign the invoices. The court further found that under UCC § 2-207(2), forum selection clauses are additional terms that materially alter a contract, and must be construed as mere proposals for additions to the contract. Thus, the court concluded, the forum selection clause was non-binding absent an express agreement. Indeed, the court noted, the complaint did not allege that defendant affirmatively expressed consent, either orally or in writing, to the forum selection clause when it retained the invoices.

Further, the court found, personal jurisdiction was lacking on a "transaction of business" theory because defendant's telephone orders from California to New York were not sufficiently purposeful activity to confer jurisdiction. Indeed, the court noted, defendant's employees did not travel to New York on business, but rather, plaintiff's employees traveled to

California to establish business relations and display merchandise. The court distinguished *Deutsche Bank Sec., Inc. v Montana Bd. of Inves*. (7 NY3d 65 [2006], *cert denied* 549 US 1095 [2006]), upon which plaintiff had relied for its argument that telephone calls provide a sufficient basis for jurisdiction, finding that in *Deutsche Bank*, the defendant was a "sophisticated institutional trader" negotiating and concluding a substantial transaction.

The motion court correctly found that defendant is not bound by the forum selection clause on plaintiff's invoices. UCC § 2-207 contemplates situations like the one here, where parties do business through an exchange of forms such as purchase orders and invoices. As the parties did here, merchants frequently include terms in their forms that were not discussed with the other side. UCC § 2-207[2] addresses that scenario, providing, "[t]he additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: ... [b] they materially alter it."

Here, during telephone discussions, the parties negotiated the essential terms required for contract formation, and the invoices were merely confirmatory (*see Hugo Boss Fashions v Sam's Eur. Tailoring*, 293 AD2d 296, 297 [1st Dept 2002]). Thus, the

forum selection clause is an additional term that materially altered the parties' oral contracts, and defendant did not give its consent to that additional term (*id.*; *see also Orkal Indus., LLC v Array Connector Corp.*, 97 AD3d 555, 556-557 [2d Dept 2012]).

However, the motion court erred in finding that the parties' telephone dealings over several years and in the two transactions at issue were insufficient as a matter of law to confer personal jurisdiction over defendant pursuant to CPLR 302(a)(1). CPLR 302(a)(1) authorizes the assertion of long-arm jurisdiction over a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." CPLR 302(a)(1) is a "single act statute"; accordingly, physical presence is not required and one New York transaction is sufficient for personal jurisdiction. The statute applies where the defendant's New York activities were purposeful and substantially related to the claim (*see D & R Global Selections, S.L. v Bodega Olegario Falcón Pineiro*, 90 AD3d 403, 404 [1st Dept 2011]). "'Purposeful'" activities are defined as "'those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of

its laws'" (*id.*, quoting *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]).

We recognize that courts of this state have generally held telephone communications to be insufficient for finding purposeful activity conferring personal jurisdiction (*see Arouh v Budget Leasing, Inc.*, 63 AD3d 506 [1st Dept 2009]; *Liberatore v Calvino*, 293 AD2d 217, 220 [1st Dept 2002]). However, there are exceptions to this general rule, and in some cases, telephone communications will, in fact, be sufficient to confer jurisdiction (*see e.g. Deutsche Bank*, 7 NY3d at 71 [CPLR 302(a)(1) conferred long-arm jurisdiction over out-of-state institutional investor who called plaintiff, a New York securities firm, to make a trade, and the suit arose from that transaction]; *Fischbarg*, 9 NY3d at 380 [California defendants "transacted business" where they formed an attorney-client relationship with plaintiff attorney in New York through numerous telephone calls, faxes, mail contacts, and emails]).

Here, the court did not assess defendant's conduct or defendant's purposeful availment of the privilege of doing business in this forum (*see Fischbarg*, 9 NY3d at 380-381). Although the motion court distinguished *Deutsche Bank* by pointing to the sophistication of the parties and the magnitude of the

transactions in that case, those two factors do not determine the question of personal jurisdiction. On the contrary, as the Court of Appeals found in *Fischbarg*, the "quality of defendant's contacts" is the primary consideration in deciding the question of long-arm jurisdiction (*id.*). That the circumstances of the defendant's telephone calls in this case were different from those in *Deutsche Bank* does not make defendant's calls any less "purposeful." While the business dealings in this case were not especially complex, they also did not fall on the opposite end of the spectrum – that is, a single consumer transaction (*see Parke-Bernet Galleries v Franklyn,* 26 NY2d 13, 17 [1970]. The quality of the defendant's conduct was sufficient to subject defendant to long-arm jurisdiction.

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

ENTERED: FEBRUARY 10, 2015

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13405 WSC Riverside Drive Owners LLC, Index 571144/12
Petitioner-Respondent,

-against-

Oliver Williams,
Respondent-Appellant.

_____

Grad & Weinraub, LLP, New York (Catharine A. Grad of counsel) for appellant.

Sperber Denenberg & Kahan, P.C., New York (Steven B. Sperber of counsel), , for respondent.

_____

Order of the Appellate Term of the Supreme Court, First Department, entered December 19, 2013, which reversed an order of the Civil Court, New York County (Sabrina B. Kraus, J.), entered on or about May 30, 2012, and, upon reversal, granted landlord's holdover petition seeking denial of respondent's succession to a rent controlled tenancy, unanimously reversed, on the law and the facts, without costs, the petition denied, and the proceeding dismissed. The Clerk is directed to enter judgment accordingly.

The evidence presented to the trial court amply supported its conclusion that respondent's relationship with the now deceased tenant of record, Ms. Singer, was that of a family

member entitled to succeed Singer's rent controlled tenancy pursuant to 9 NYCRR § 2204.6(d)(3). Respondent lived with Singer for 8 years prior to her death. The two relied upon each other for payment of household expenses. They shared holidays and birthday celebrations, traveled together for summer and weekend vacations and traditionally ate their meals together in the subject apartment. The trial court credited the testimony of friends and neighbors who described respondent and Singer as a couple that some believed or assumed were married. Further, respondent and Singer took care of each other. Notably, during the last 2 years of Singer's life, respondent spent substantial time caring for her as she struggled with depression and bouts of colitis. Hospital records listed respondent as Singer's "partner" and he signed consent forms for her as a "personal representative."

While respondent and Singer maintained separate bank accounts and credit cards, they owned an apartment together and relied on each other to pay expenses wherein respondent paid for household expenses such as groceries, supplies and the rent when Singer was unable to pay due to debilitating depression. As

such, the modest intermingling of finances does not negate the conclusion that Singer and respondent had a family-like relationship. It is important to note that in considering whether a person may be considered a "family member" for the purpose of succession, "no single factor shall be solely determinative" (9 NYCRR § 2204.6[d][3]).

Moreover, the factual findings of the trial court should not be disturbed upon appeal unless it is obvious that its conclusions could not be reached under any fair interpretation of the evidence. This is especially true when considering findings of fact that rest largely on the credibility of witnesses (*Claridge Gardens v Menotti*, 160 AD2d 544, 544-545 [1st Dept 1990]; *Nightingale Rest. Corp. v Shak Food Corp.*, 155 AD2d 297 [1st Dept 1989], *lv denied* 76 NY2d 702 [1990]). Here, the record presents facts showing that the couple held themselves out to society as a family unit, and that this impression was

substantiated by a caring, long term emotional, and financial commitment and interdependence (*see Braschi v Stahl Assoc. Co.*, 74 NY2d 201, 212-213 [1989]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

Acosta, J.P., Moskowitz, Richter, Feinman, Clark, JJ.

13868 Martin J. Santiago, Index 300206/11
Plaintiff-Appellant,

-against-

Pablo R. Valentin,
Defendant-Respondent.

_____

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

Keane & Bernheimer, PLLC, Hawthorne (Thomas J. Keane of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered September 10, 2013, which denied plaintiff's motion to vacate an order entered against him on default, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion to vacate granted, and the matter remanded for further proceedings.

In light of the strong public policy in favor of deciding cases on their merits, we find that the motion court improvidently exercised its discretion in denying plaintiff's motion to vacate the default order, since plaintiff established that he had a reasonable excuse for the default and a meritorious cause of action (*see* CPLR 5015[a]). Plaintiff demonstrated that the failure to respond to defendant's summary judgment motion was

not wilful, but was purely the result of a misunderstanding by his counsel that is tantamount to law office failure (*see Chelli v Kelly Group, P.C.*, 63 AD3d 632 [1st Dept 2009]; *Baldini v New York City Employees Retirement Sys.*, 254 AD2d 128 [1st Dept 1998]).

Plaintiff provided an attorney's affirmation describing that the failure to submit opposition was due to a delay in receiving an updated medical report from plaintiff's treating physician.

Further, plaintiff explained that after defendant denied his third request to stipulate to an adjournment, he believed the only recourse was to wait for a decision and order from the court, and thereafter, make a motion to vacate the default judgment. As such, there is no evidence in the record that plaintiff's default was due to any deliberate, willful, or contumacious conduct.

In addition to establishing the excusable nature of the default, plaintiff submitted an affidavit from his treating

physician, which demonstrated that he has a potentially meritorious cause of action. Thus, plaintiff "should not be deprived of his day in court by his attorney's ... inadvertent error" (*Chelli*, 63 AD3d at 634).

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14170 In re Derek Esperon, Index 104221/12
Petitioner,

-against-

Raymond Kelly, etc.,
Respondent.

_____

Law Offices of John S. Chambers, New York (John S. Chambers of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for respondent.

_____

Determination of respondent Police Commissioner, dated March 25, 2013, which revoked petitioner's premises-residence handgun license, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Donna M. Mills, J.], entered August 8, 2013), dismissed, without costs.

Respondent's determination adopting the recommendation of an Administrative Hearing Officer is supported by substantial evidence (*see Matter of Perlov v Kelly*, 21 AD3d 270 [1st Dept 2005]), and there exists no basis upon which to disturb the credibility determinations made by the Hearing Officer (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). To the extent that petitioner frames his arguments as

constitutional claims that his rights under the Second Amendment were violated, they are unpreserved; such arguments were not advanced at the agency level (*see Matter of Health Tea Corp. v New York City Loft Bd.*, 162 AD2d 152, 153 [1st Dept 1990]). In any event, these arguments are unavailing.

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14171 Juan Carlos Pena, also known as Juan Carlos Pena Batista, Plaintiff-Appellant, Index 652848/13

-against-

The Office of the Commissioner of Baseball, et al., Defendants-Respondents.

_____

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

Proskauer Rose LLP, New York (Adam M. Lupion of counsel), for Office of the Commissioner of Baseball, respondent.

LeClair Ryan, New York (Madeleine Moise Cassetta of counsel), and Lorenger & Carnell PLC, Alexandria, VA (Michael J. Lorenger of the bars of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), for The Washington Nationals Baseball Club, respondent.

_____

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered March 27, 2014, which granted defendants the Office of the Commissioner of Major League Baseball and the Washington Nationals Baseball Club's motions to dismiss the complaint, unanimously affirmed, without costs.

In this putative class action suit, the motion court properly concluded that plaintiff's commencement of this action was an improper collateral attack on a prior arbitration decision that plaintiff failed to challenge in accordance with CPLR 7511.

Plaintiff was required to file a petition challenging the determination within 90 days of receipt of the arbitrator's decision in order to challenge the arbitration clause in the Minor League Uniform Players' Contract (*see Matter of Mavica v New York City Tr. Auth.*, 289 AD2d 86 [1st Dept. 2001]).

Similarly, in order to challenge the arbitration clause on the ground that he was coerced into signing the contract and agreeing to arbitration, he would have had to file a motion to stay the arbitration (*see* CPLR 7503[b]). Having failed to follow the proper procedure, plaintiff cannot now be heard by bringing these claims in a putative plenary class action.

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 10, 2015

CLERK

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

14172 Bausch & Lomb Contact Lens Solution Product Liability Litigation: Index 766000/07

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Plaintiffs' Steering Committee for all Plaintiffs in the New York Coordinated Proceeding,
Plaintiffs-Appellants,

-against-

Bausch & Lomb Contact Lens Solution Product,
Defendant-Respondent.

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 31, 2013, which, among other things, denied plaintiffs' motion to renew defendant's pretrial motion to exclude certain expert opinions, unanimously affirmed, without costs.

Even if the motion were timely, plaintiffs failed to show that the alleged new facts would change the court's prior determination to exclude the general causation opinions of plaintiffs' experts regarding non-Fusarium corneal infections (*see* CPLR 2221[e][2]). In particular, plaintiffs failed to show

that the experts' causation theory was generally accepted by the relevant medical or scientific community (*see Cornell v 360 W. 51st Street Realty, LLC*, 22 NY3d 762 [2014]; *Matter of Bausch & Lomb Contact Lens Solution Prod. Liab. Litig.*, 87 AD3d 913, 913 [1st Dept 2011], *appeal dismissed* 19 NY3d 845 [2012]). The new studies submitted by plaintiffs do not support the experts' causation theory.

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

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14173 The People of the State of New York, Ind. 701/09
Respondent,

-against-

Ernesto Martinez,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered on or about May 21, 2010, 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 10, 2015

CLERK

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

14174 Salvador Pion, Index 301849/10
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant.

Lisa M. Comeau, Garden City, for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered March 24, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion to strike the complaint on the ground that the notice of claim was materially defective or, in the alternative, for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant waived its objection under CPLR 2101(b) by failing to reject the notice of claim within 15 days of its receipt (*see* CPLR 2101[f]). Moreover, defendant does not argue that the alleged defect in the notice of claim prejudiced a substantial right (*id.*).

Contrary to defendant's contention that plaintiff does not know what caused him to trip and fall down its staircase, plaintiff testified at his examination before trial that the circle he drew on a photograph during his General Municipal Law § 50-h hearing showed the location on the upper platform where his shoe got caught before he tripped and fell, and that the upper platform was broken and uneven. This testimony, coupled with plaintiff's expert affidavit identifying a toe-trap and a dangerous tripping hazard at the identified location as well as a gap between expansion joints is sufficient to raise an issue of fact whether plaintiff's fall was caused by the allegedly defective condition in the platform (*see Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555 [1st Dept 2012]).

Defendant submitted no measurements of the alleged defect in support of its contention that the defect was trivial as a matter of law, and in any event plaintiff's expert's opinion that the gap and the height differential constituted a trap, particularly in light of its location at the top of a staircase, raises an

issue of fact whether the defect, trivial or not, had the characteristics of a trap (*see Valentin v Columbia Univ.*, 89 AD3d 502 [1st Dept 2011]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14175 The People of the State of New York, Ind. 3279/07
Respondent,

-against-

Anthony Rivera,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Leila N. Tabbaa of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J. at suppression hearing; Darcel D. Clark, J. at plea and sentencing), rendered April 12, 2011, convicting defendant of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 11 years, unanimously affirmed.

Defendant made a valid and enforceable waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 257 [2006]). The court discussed the waiver of the right to appeal in detail, separately from its explanation of the rights that are automatically forfeited by a guilty plea. The court accurately explained that, in addition to the previously enumerated rights, defendant had agreed to give up the right to appeal "in exchange" for the disposition. Thus, the court ensured that defendant

understood that the right to appeal was separate and distinct from the trial rights automatically forfeited upon pleading guilty. The court also confirmed that defendant had discussed the waiver with defense counsel, and defendant signed a written waiver confirming that fact.

This waiver forecloses review of defendant's suppression and excessive sentence claims. As an alternative holding, we also reject them on the merits.

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14176 The People of the State of New York, Ind. 8230/99
Respondent,

-against-

Lerone Grant,
Defendant-Appellant.

_____

Leonard J. Levenson, New York, for appellant.

Lerone Grant, appellant pro se.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about September 11, 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.

We have considered the contentions raised in defendant's pro se supplemental brief and find them to be without merit.

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14177 Jozef Acar, Index 116515/10
Plaintiff-Appellant,

-against-

Ecclesiastical Assistance Corporation,
Defendant-Respondent,

Montessori School of New York,
Defendant.

_____

Morelli Alters Ratner, LLP, New York (Adam Deutsch of counsel), for appellant.

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr. of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered September 24, 2013, which granted defendant Ecclesiastical Assistance Corporation's (defendant) motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The affidavit of plaintiff's expert meteorologist was not sufficient to raise a triable issue of fact as to whether the ice upon which plaintiff allegedly slipped and fell was a result of melting and refreezing of runoff created by defendant's snow-clearing activities. As Supreme Court found, the meteorologist's opinion offered by plaintiff was speculative. Plaintiff's expert

did not refute the testimony of defendant's maintenance supervisor that, shortly before plaintiff's fall, he had inspected the subject area and observed that it was free of ice. In any event, even if the snow removal efforts were incomplete, they did not exacerbate any hazardous condition (*see Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462 [1st Dept 2007).

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14178 The People of the State of New York, Case No. 20232/13
Respondent,

-against-

Peter Kaplan,
Defendant-Appellant.

_____

Michael A. Scotto, Garden City, for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about June 23, 2014, convicting defendant, after a nonjury trial, of attempted criminal contempt in the second degree, and sentencing him to a term of 20 days, concurrent with 1 year of probation, and imposing a final order of protection, unanimously modified, on the law, to the extent of remanding for resentencing proceedings consistent with this decision, and otherwise affirmed.

The misdemeanor accusatory instrument in this Integrated Domestic Violence Part case was facially sufficient. In pertinent part, it alleged that, in a recorded phone call, defendant attempted to contact his wife through a third party in violation of an order of protection. These allegations gave

defendant sufficient notice to prepare a defense and had detail adequate to prevent him from being tried twice for the same offense (*see People v Kalin*, 12 NY3d 225 [2009]). The instrument alleged conduct that came dangerously close to completion of a crime, and thus sufficiently alleged an attempted crime. Defendant's remaining claims regarding the instrument are without merit.

The court's 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]). The evidence supported an inference that defendant knowingly and intentionally violated the provision of an order of protection barring any third-party contact with his wife. The evidence established attempted contempt, because the crime would have been complete had the third party complied with defendant's request. Defendant's claim that the attempted contact was justified as an emergency measure under Penal Law § 35.05(2) is meritless.

Because defendant was convicted after trial of a misdemeanor, probation was not an agreed-upon sentence (*see* CPL 390.20[4][a][ii]). Accordingly, a sentence of probation was not authorized without a presentence report, and a remand is required for resentencing in compliance with CPL 390.20(2)(a). In

addition, as the People concede, the final order of protection should be reduced from five years to two years (*see* CPL 530.12[5][c]). Upon resentencing, that error should be corrected as well.

We have considered and rejected defendant's remaining claims, including his challenges to the admissibility of a recorded phone call he made while in custody awaiting arraignment on other charges.

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14179 The People of the State of New York, Ind. 1208/12
Respondent,

-against-

Oscar Nieves,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Alan S. Axelrod 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 (Charles H. Solomon, J.), rendered on or about October 2, 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 10, 2015

CLERK

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

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

14180-
14181-
14182-
14183 In re Lucy T., and Others,

Children Under the Age of
Eighteen Years, etc.,

Commissioner of Social Services
of the City of New York,
Petitioner-Appellant-Respondent,

Luz M.,
Respondent-Respondent-Appellant,

Rafael A.,
Respondent-Respondent.

- - - - -

In re Lucy T., and Others,

Children Under the Age of
Eighteen Years, etc.,

Commissioner of Social Services
of the City of New York,
Petitioner-Appellant-Respondent,

Rafael A.,
Respondent,

Luz M.,
Respondent-Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for appellant-respondent.

Patricia W. Jellen, Eastchester, for respondent-appellant.

Bruce A. Young, New York, for respondent.

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

George E. Reed, Jr., White Plains, attorney for the children Felicity M., Yolicia M., Diajenice P., and Mahoganie A.

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about May 24, 2013, insofar as it brings up for review a fact-finding determination, same court and Judge, entered on or about May 23, 2013, which, inter alia, found that respondent Rafael A. abused and neglected Lucy T. and that respondent mother Luz M. neglected Lucy T., and denied petitioner's application for additional findings of child abuse of Lucy T., against the mother, unanimously affirmed, without costs. Order of disposition, same court and Judge, entered on or about June 4, 2013, insofar as it brings up for review the aforementioned fact-finding determination, which, inter alia, found that respondent mother Luz M. derivatively neglected Yolicia M., Diagenice P., Felicity M. and Mahoganie A., and denied petitioner's applications for additional findings of derivative child abuse of those children against respondent Luz M. and respondent Rafael A., unanimously modified, on the law and the facts, to find that respondent Rafael A. derivatively abused the four children, and otherwise affirmed, without costs.

Family Court properly found that respondent Rafael A., the mother's boyfriend, was a legally responsible person who abused Lucy T., and, respectively, neglected and derivatively neglected her and the other four children (*see Matter of Yolanda D.*, 88 NY2d 790, 796 [1996]). However, it should have further found that Rafael also derivatively abused the other four children (*see Matter of Christina G. [Vladimir G.]*, 100 AD3d 454 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]).

The findings of neglect and derivative neglect against both respondents with respect to Lucy T. and the other four children were also proper. Rafael A.'s abuse of Lucy T. while the other four children were in the room, and the mother's permitting Rafael back into the home after learning of his abuse of Lucy T., placed all five children at risk (*see Matter of Roy R.*, 6 AD3d 213, 213-214 [1st Dept 2004]; *Matter of Taliya G. [Jeannie M.]*, 67 AD3d 546, 547 [1st Dept 2009]).

However, there is no evidence that the mother abused or

derivatively abused any of her children (*see Matter of Dayanara V. [Carlos V.]*, 101 AD3d 411 [1st Dept 2012]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14184 Marianne Nestor Cassini, Index 108971/11
Plaintiff-Appellant,

-against-

Advance Publications, Inc., et al.,
Defendants-Respondents,

Maureen Orth, et al.,
Defendants.

_____

Reppert Kelly, LLC, New York (Christopher P. Kelly of counsel), for appellant.

Davis Wright Tremaine, LLP, New York (Elizabeth A. McNamara of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered April 19, 2013, which granted defendants' motion to dismiss the complaint, and denied plaintiff's cross motion pursuant to CPLR 306-b for an extension of time to serve the summons and complaint, unanimously affirmed, without costs.

Plaintiff failed to state a cause of action for defamation based on allegedly false and disparaging statements in an article published in the September 2010 issue of Vanity Fair ("Cassini Royale") that reports on plaintiff's secret marriage to the late designer, Oleg Cassini, and her conduct in litigation concerning

his estate. Contrary to plaintiff's contention, the allegedly defamatory statements, including a quoted statement that plaintiff and her sisters used to throw parties in the 1960s that were attended by many wealthy "older guys looking for action," do not imply that plaintiff was a prostitute and lacked sexual morals. Given the overall context in which the statements were made, a reasonable reader would not conclude that plaintiff was a prostitute or otherwise unchaste (*see James v Gannett Co.*, 40 NY2d 415, 419 [1976]; *Morrow v Wiley*, 73 AD2d 859 [1st Dept 1980]). Nor were the statements so "extreme and outrageous" that they would support an action for infliction of emotional distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]).

Given the complaint's lack of substantive merit and plaintiff's failure to demonstrate diligence in attempting to effect service, plaintiff failed to meet her burden of

demonstrating that either good cause or the interests of justice support an extension of her time to serve defendants (CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14185 The People of the State of New York, Ind. 1376/08
Respondent,

-against-

Michael Molinero,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John W. Carter, J.), rendered on or about January 31, 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 10, 2015

CLERK

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

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

14186- Index 601159/08
14186A Financial Structures Limited, et al.,
Plaintiffs-Appellants,

-against-

UBS AG, et al.,
Defendants-Respondents.

_____

Denton US LLP, New York (Michael H. Barr of counsel), for appellants.

Paul Hastings LLP, New York (James R. Bliss of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 11, 2014, dismissing plaintiffs' complaint pursuant to an order, same court and Justice, entered April 9, 2014, which, insofar as appealed from as limited by the briefs, had granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The alleged oral representation made by one of defendants' representatives to one of plaintiffs' representatives regarding defendants' management of the reference pools at issue is insufficient to raise a triable issue of fact as to the existence

of a legally binding oral side agreement between the parties. The evidence, as a whole, including several written agreements between the sophisticated commercial parties documenting the terms of defendants' management obligations with no mention made of the alleged oral representation, demonstrates the lack of an oral agreement (*see Zheng v City of New York*, 19 NY3d 556, 575 [2012]).

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

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

ENTERED: FEBRUARY 10, 2015

CLERK

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

14187N The New School, Index 108307/11
Plaintiff-Respondent,

-against-

Farm Family Casualty Insurance Company,
Defendant-Appellant.

_____

Gorton & Gorton LLP, Mineola (John T. Gorton of counsel), for appellant.

Ahmuty, Demers & McManus, Albertson (William J. Mitchell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenny, J.), entered July 16, 2014, which granted plaintiff's motion for post-note of issue discovery and extended its time to move for summary judgment, unanimously affirmed, without costs.

We find no abuse of discretion in the trial court's ordering of additional discovery and restriction of future motion practice.

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14188 The People of the State of New York, Ind. 668/97
Respondent,

-against-

Sterling Jones,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (William Leibovitz, J.), rendered October 26, 1998, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly exercised its discretion in denying defendant's mistrial motions based on an improper question asked by the prosecutor of a rebuttal witness (*see People v Ortiz*, 54 NY2d 288 [1981]). A mistrial was unwarranted because the question went unanswered and the court minimized any prejudice by

way of a thorough curative instruction that the jury is presumed to have followed (*see e.g. People v Otero*, 56 AD3d 350 [1st Dept 2008], *lv denied* 14 NY3d 804 [2010]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14189 Aridia Bonilla, Index 112895/11
Plaintiff-Respondent,

-against-

191 Realty Associates, L.P.,
Defendant-Appellant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (David Bloom of counsel), for appellant.

Trolman, Glaser & Lichtman, P.C., New York (Michael T. Altman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 13, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish entitlement to judgment as a matter of law in this action where plaintiff alleges that defendant negligently allowed a broken window on the premises to remain propped open by a tin can for several months, which permitted rain water to enter and spill onto a landing of an interior staircase, where plaintiff fell. Defendant did not demonstrate that it lacked notice of the hazardous condition, as it offered no specific evidence showing that its cleaning routines were followed on the date of the accident, or when the

area where plaintiff fell was last cleaned and inspected (*see Guerrero v Duane Reade, Inc.*, 112 AD3d 496 [1st Dept 2013]). Furthermore, defendant did not refute the evidence that it had knowledge of the broken, propped-up window but failed to remedy the condition for months, thereby allowing a recurring dangerous condition of water on the staircase landing whenever it rained (*see Scafe v Schindler El. Corp.*, 111 AD3d 556 [1st Dept 2013]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14190 American Express Bank FSB, Index 106634/10
Plaintiff-Respondent,

-against-

Laila Najieb, etc.,
Defendant-Appellant,

Byte Analysis, etc.,
Defendant.

_____

Laila Najieb, appellant pro se.

Jaffe & Asher LLP, New York (David Joyandeh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about October 8, 2013, which denied defendant Laila Najieb's (defendant) motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for summary judgment and to strike the answer, unanimously modified, on the law, to the extent of denying the motion to strike the answer, vacating the direction to enter judgment on default, and directing the Clerk to enter judgment for $24,797.86, the amount of the account stated, as set forth in the affirmation in support of plaintiff's cross motion, and otherwise affirmed, without costs.

The securitization of plaintiff credit card issuer's

receivables did not divest it of its ownership interest in the account, and therefore did not deprive it of standing to sue to recover defendant's overdue credit card payments (*see Citibank [South Dakota], N.A. v Carroll*, 220 P3d 1073, 1076-1078 [Idaho 2009]; *Tostado v Citibank [South Dakota], N.A.*, 2010 WL 55976, *2-*3, 2010 US Dist LEXIS 228, *5-*8 [WD Tex 2010]; *Scott v Bank of America*, 580 Fed Appx 56 [3d Cir 2014]; *Shade v Bank of America*, 2009 WL 5198176, *4, 2009 US Dist LEXIS 119320, *10 [ED Cal 2009], *affd* __Fed Appx__, 2011 WL 794605, 2011 US App LEXIS 4535 [9th Cir 2011]).

Plaintiff's submission of statements that were retained by defendants for several months without protest was sufficient to entitle plaintiff to judgment on its cause of action for an account stated.

However, we find that the motion court improvidently exercised its discretion in striking the answer for failure of the individual defendant to appear at a deposition directed by a compliance conference order for a date just over one week before

the motion seeking such relief was brought. Plaintiff failed to show that the noncompliance was willful, contumacious or in bad faith (*see Amini v Arena Constr. Co., Inc.*, 110 AD3d 414 [1st Dept 2013]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14191-
14192 Index 350325/08

Roy L. N., Jr., etc., et al.,
Plaintiffs-Respondents,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Miriam Skolnik of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 15, 2013, upon a jury verdict awarding infant plaintiff $250,000 for past pain and suffering, and bringing up for review an order, same court and Justice, entered May 30, 2013, which, inter alia, denied defendant's posttrial motion for a new trial on said damages, unanimously affirmed, without costs. Order, same court and Justice, entered April 8, 2014, which denied defendant's motion to amend the judgment to reduce the interest rate on the judgment amount from 9% per annum to 3% per annum, unanimously affirmed, without costs.

Infant plaintiff sustained a gash with an exposed bone, a

spiral fracture in the left tibia, and damage to the surrounding soft tissue (including the tendons, ligaments, muscles, and nerves) when a rock ejected from a lawnmower operated by an employee of defendant New York City Housing Authority (NYCHA) struck plaintiff in the left shin area. He was hospitalized for three days, underwent debridement of dead tissue, wore a hard cast for 6½ weeks, and recovered with an "unsightly" keloid scar that is permanent. Plaintiff's ability to engage in sports was significantly impeded because of the muscle and tendon damage.

The award for past pain and suffering does not deviate materially from what would be reasonable compensation under the circumstances (CPLR 5501[c].

The court did not abuse its discretion in setting the rate of interest at 9% per annum (CPLR 5004; Public Housing Law § 157 [5]). That rate is "presumptively fair and reasonable" (*Rodriguez v New York City Hous. Auth.*, 91 NY2d 76, 81 [1997]), and NYCHA failed to rebut the presumption here (*see Denio v State of New York*, 7 NY3d 159, 168-169 [2006]).

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

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14193 The People of the State of New York, Ind. 2604/11
Respondent,

-against-

Rafael Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered on or about September 28, 2011, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]. There is no basis for disturbing the jury's credibility determinations. The evidence established that defendant took the victim's property by reaching into her pocket, and the alternative scenario posited by defendant is speculative and unsupported by any evidence.

Defendant's belated mistrial motion did not preserve his claim regarding the court's failure to instruct the deliberating jurors pursuant to CPL 270.40 and 310.10 before releasing them for lunch. The record does not support defendant's assertion that he was prevented from raising the issue at a time when the error could have been avoided. We decline to review this unpreserved issue in the interest of justice. As an alternative holding, we find no basis for reversal (*see* CPL 470.05[1]). The court properly exercised its discretion in denying defendant's mistrial motion, particularly because it had already given the jury instructions, throughout the trial, that adequately conveyed the necessary admonitions (*see People v Williams*, 46 AD3d 585 [2d Dept 2007], *lv denied* 10 NY3d 772 [2008]). Furthermore, defendant would not accept any remedy other than a mistrial.

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14194 The People of the State of New York, Ind. 3116/12
Respondent,

-against-

Eric Harper,
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 (Lewis Bart Stone, J.), rendered on or about December 20, 2012, as amended December 28, 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 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14195 In re Darren Gittens, Index 100890/13
Petitioner-Appellant,

-against-

State University of New York, et al.,
Respondents-Respondents.

_____

Civil Service Employees Association, Albany (Constance R. Brown of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered April 14, 2014, denying an article 78 petition seeking to annul respondents' determination, dated February 22, 2013, to terminate petitioner's employment, and granting respondents' cross motion to deny the petition and dismiss the proceeding, unanimously reversed, on the law, without costs, the judgment vacated, the cross motion denied, the petition reinstated and the matter remanded for further proceedings.

The Supreme Court erred in holding that the parties' disciplinary settlement agreement executed in 2012 waived petitioner's right to appeal or seek judicial review of his termination of employment in all scenarios. The agreement's introductory paragraph states that the parties agreed to settle

petitioner's violation of a prior agreement where petitioner, who had worked as a cleaner for respondents' hospital since 2003, sold a DVD movie to the visitor of a patient in violation of SUNY DMC policy HR-03 entitled "Sales of Goods and Services in Hospital," and which also violated departmental policies and procedures. Paragraph one of the 2012 settlement agreement provided that should petitioner engage in misconduct that was the "same or similar to" that constituting the violation of the prior agreement, to be determined solely by the Director of Labor Relations or her designee, he would be terminated and could not appeal the penalty in any administrative or legal forum. However, paragraph three of the agreement separately provided that petitioner agreed to adhere to departmental policies and procedures and would be terminated for his failure to do so, but provided no limitation on who would determine his guilt, nor did it waive any judicial review.

It is a cardinal rule of construction that courts should "adopt an interpretation that renders no portion of the contract meaningless" (*Matter of Wallace v 600 Partners Co.*, 205 AD2d 202, 206 [1st Dept 1994], *affd* 86 NY2d 543 [1995]). In the instant matter, respondents terminated petitioner for allegedly taking leave under the Family Medical Leave Act (*see* 29 USC §§ 2611 *et*

seq.) to care for his ill mother overseas without obtaining prior approval from his department or the Office of Labor Relations. This is not conduct that is the "same or similar to" the sale of goods to a visitor on hospital premises, and hence the strictures of paragraph one of the 2012 settlement agreement, including the waiver of judicial review, are inapplicable. To hold otherwise would be to render superfluous paragraph three, which speaks to the penalty for failing to adhere to policies and procedures generally, but does not include such additional restrictions (*see Glass v Glass*, 16 AD3d 120, 121 [1st Dept 2005]; *Wallace* at 206).

Moreover, respondents failed to follow their own procedures and the terms of the settlement agreement by effectively precluding petitioner from having an opportunity to explain why he should not be terminated.

As the Supreme Court never reached the merits of the petition, we remand for further proceedings.

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14197 The People of the State of New York, SCI 1219/12
Respondent,

-against-

Roilin Reynoso,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about October 4, 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 10, 2015

CLERK

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

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14198 In re Detectives' Endowment Association, Inc. of the Police Department of the City of New York, Petitioner-Respondent, Index 100946/12

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for The City of New York and The City of New York Office of Labor Relations, appellants.

Philip L. Maier, Office of Collective Bargaining, New York (Michael Thomas Fois and Karine Spencer of counsel), for The New York City Board of Collective Bargaining and Marlene Gold, appellants.

Pitta & Giblin, LLP, New York (Michael G. Dzialo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 17, 2013, inter alia, granting the petition to annul a determination of respondent New York City Board of Collective Bargaining (Board), dated December 20, 2011, which denied a request for arbitration of a grievance filed by petitioner, annulling the determination, and directing the parties to proceed to arbitration of the grievance forthwith, unanimously reversed, on the law, without costs, the judgment

vacated, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The Board's determination finding the grievance not arbitrable due to the lack of a reasonable relationship between the collective bargaining agreements and the claim that the New York City Police Department improperly departed from its past practice by paying salaries to detectives that were lower than those paid to officers (*see Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 140 [1999]), had a rational basis and was not arbitrary and capricious (*Matter of New York City Dept. of Sanitation v MacDonald*, 87 NY2d 650, 656 [1996]).

Petitioner contends that its grievance alleged an "inequitable application" of the parties' contracts, thereby satisfying the contractual definition of an arbitrable grievance, which includes such an "inequitable application." On the contrary, petitioner's claim that the contractually provided salary schedule improperly departed from the alleged past practice is not "relevant to the parties' contractual rights and responsibilities," in the absence of any contractual provision requiring the continuation of past practices as to salaries (*Matter of Chenango Forks Cent. Sch. Dist. v New York State Pub.*

Empl. Relations Bd., 21 NY3d 255, 266 [2013]; *see also Matter of Good Samaritan Hosp. v 1199 Natl. Health & Human Servs. Empls. Union*, 69 AD3d 721, 722 [2d Dept 2010]). There is no claim that the alleged past practice would have been relevant to any contractual issue, such as the interpretation of an ambiguous provision (*see Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 332 [1998]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14200 The People of the State of New York, Ind. 269/87
Respondent,

-against-

Carlos Rodriguez,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about December 10, 2012, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's motion for resentencing. Resentencing is discretionary (*People v Sosa*, 18 NY3d 436, 442-443 [2012]), and courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]). The mitigating factors cited by defendant are outweighed by his extremely serious criminal history and prison disciplinary record. Defendant has been

convicted of two homicides, the second of which was committed against a fellow prison inmate.

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14201-
14202 In re Milton A.,
Petitioner-Respondent,

-against-

Tracy H. A.,
Respondent-Appellant.

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

Andrew J. Baer, New York, for respondent.

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Order, Family Court, Bronx County (Paul A. Goetz, J.), entered on or about November 13, 2013, which denied respondent-mother's motion to dismiss the father's petition for modification of an order of visitation, unanimously affirmed, without costs. Appeal from order, entered on or about January 6, 2014, which, to the extent appealable, denied the mother's motion to renew, unanimously dismissed, without costs, as abandoned.

Family Court properly denied the mother's motion to dismiss the father's modification petition for lack of subject matter jurisdiction, since pursuant to Domestic Relations Law § 76-a(1), New York State maintained exclusive, continuing jurisdiction over the prior child custody determination it made pursuant to

Domestic Relations Law § 76 (*see Matter of Greenidge v Greenidge*, 16 AD3d 583 [2d Dept 2005]).

We reject the mother's argument that the July 2011 order did not expressly designate that New York retained exclusive home state jurisdiction. Even in the absence of a provision expressly retaining jurisdiction, the majority of courts have held that "the state in which the initial decree was entered has exclusive continuing jurisdiction to modify the initial decree if: (1) one of the parents continues to reside in the decree state; and (2) the child continues to have some connection with the decree state, such as visitation" (*Stocker v Sheehan*, 13 AD3d 1, 7 [1st Dept 2004], internal quotation marks and citation omitted). The court did not make any determination as to whether New York is an inconvenient forum. Rather, it referred the matter to a referee to determine whether the allegations in the mother's affidavit are sufficient to make a determination on whether the court should decline to exercise exclusive continuing jurisdiction over the initial custody determination or whether a hearing is required to make such a determination (*see Matter of Blerim M. v Racquel M.*, 41 AD3d 306 [1st Dept 2007]).

In disputed custody/visitation litigation, the interests of children should be independently represented, and therefore, "the

appointment of [an attorney for the child] has been recognized as appropriate and helpful to the court" (*Anonymous 2011-1 v Anonymous 2011-2*, 102 AD3d 640, 642 [2d Dept 2013]; *Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 117 [2d Dept 1990]). However, the court did not err in declining to appoint an attorney for the child, since the record established that the court only addressed the jurisdictional issue before it and did not make any determination as to the merits of the father's petition for modification of the July 2011 order.

No appeal lies from the denial of a motion to reargue (*Espinal v City of New York*, 107 AD3d 411, 412 [1st Dept 2013]). We dismiss as abandoned the mother's appeal from that portion of the court's order denying renewal, since she failed to raise any arguments regarding that aspect of the order on her appeal (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438 [1st Dept 2009]).

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

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14203-
14204 In re Malachi H.,

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

Dequisa H.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about February 20, 2014, to the extent it brings up for review a fact-finding order (same court and Judge), entered on or about December 5, 2013, which, after a hearing, determined that respondent neglected the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence, which demonstrates that respondent left her then

two-year-old son alone in her apartment for an hour and that he was discovered in the hallway outside the apartment while she was out (*see* Family Court Act § 1046[b][i]). Respondent's conduct placed her son in imminent danger of physical or emotional harm, and constitutes neglect, notwithstanding that the child was unharmed (*see* Family Court Act § 1012[f][i][B]; *Matter of Rosemary V. [Jorge V.]*, 103 AD3d 484 [1st Dept 2013]).

Since respondent made no application for dismissal pursuant to Family Court Act § 1051(c), her contention that the court should have dismissed the petition because the aid of the court was no longer required is unpreserved, and we decline to consider it (*see Matter of Cherish C. [Shanikwa C.]*, 102 AD3d 597 [1st Dept 2013]). Were we to consider it, we would reject it.

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14205 Noel Christie, Index 20071/13E
Plaintiff-Respondent,

-against-

Mark Scheiner, et al.,
Defendants-Appellants.

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Law Offices of Jay S. Markowitz, P.C., Fresh Meadows (Jay S. Markowitz of counsel), for appellants.

Winograd & Winograd, P.C., New York (Igor Kotlyar of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered May 31, 2013, which, to the extent appealed from, denied the part of defendants' motion to dismiss that sought dismissal of the complaint as against defendant Mark Scheiner, unanimously affirmed, with costs.

In this action, plaintiff alleges, among other things, that defendant Scheiner acted both individually and on behalf of defendant estate to harass plaintiff in order to force him to move from the building owned by the estate. In a prior action between plaintiff and subsequent owners of the building, plaintiff signed an affidavit stating that he had never been harassed by any owner of the building. Scheiner contends that this affidavit bars plaintiff's current claims against him

because he acted as the estate's agent. The court correctly rejected Scheiner's contention, since the affidavit bars harassment claims against owners only, not agents. Moreover, even if Scheiner was acting as the estate's agent, he may still be liable for affirmative wrongful acts (*see Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 11 [1st Dept 2006], *overruled on other grounds by Fletcher v Dakota, Inc.*, 99 AD3d 43, 49-50 [1st Dept 2012]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14206 The People of the State of New York, Ind. 2647N/12
Respondent,

-against-

Richee Ortega,
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J. at plea; Michael R. Sonberg, J. at sentencing), rendered September 6, 2012, convicting defendant of criminal possession of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the fifth degree, and sentencing him to concurrent terms of six months, unanimously affirmed.

Defendant's challenge to the sufficiency of his plea is unpreserved (see *People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review it in the interest of justice. We reject defendant's assertion that he had no actual or practical ability to make a motion to withdraw his plea. As an alternative holding, we reject the claim on the merits.

Under the circumstances of this case, we find that the court adequately informed defendant of the rights he would be waiving in exchange for his plea, and that the plea was knowingly, intelligently and voluntarily made. There is no mandatory catechism for a guilty plea, and a plea is not rendered invalid where "the record as a whole ... contain[s] an affirmative demonstration of the defendant's waiver of his fundamental constitutional rights" (*People v Tyrell*, 22 NY3d 359 [2013]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

Sweeny, J.P., Renwick, Moskowitz, Feinman, Kapnick, JJ.

14209N In re H. Brian Walker, et al., Index 114718/10
Petitioners-Appellants,

-against-

Sandberg & Sikorski Corporation, et al.,
Respondents-Respondents.

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H. Brian Walker, appellant pro se.

Leonard A. Walker, appellant pro se.

Hamburger Law Firm LLC, New York (Sharon E. Ash of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 12, 2013, which denied petitioners' motion to compel respondents to more fully comply with an order, same court and Justice, entered May 27, 2011, granting petitioners' motion for pre-action discovery, unanimously affirmed, without costs.

Because petitioners already possess sufficient information

to file a complaint asserting defamation, they are not entitled to further pre-action discovery under CPLR 3102(c) (*see Matter of Verdon v New York City Tr. Auth.*, 92 AD2d 465 [1st Dept 1983]).

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

ENTERED: FEBRUARY 10, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Clark, JJ.

13693 The People of the State of New York, Ind. 918/09
Respondent,

-against-

Miguel Morales,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Kirkland & Ellis LLP, New York (Geoffrey A. David 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 (Robert M. Stolz, J. at hearing; Bruce Allen, J. at jury trial and sentencing), rendered September 15, 2010, reversed, on the law and the facts, the motion to suppress granted, and the indictment dismissed.

Opinion by Richter, J. All concur except Friedman, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Karla Moskowitz
Rosalyn H. Richter
Darcel D. Clark, JJ.

13693
Ind. 918/09

_____x

The People of the State of New York
Respondent,

-against-

Miguel Morales,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Robert M. Stolz, J. at hearing; Bruce Allen, J. at jury trial and sentencing), rendered September 15, 2010, convicting him of criminal possession of a controlled substance in the fifth degree, and imposing sentence.

Steven Banks, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Kirkland & Ellis LLP, New York (Geoffrey A. David of counsel), for appellant.

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

RICHTER, J.

In this appeal, we are asked to determine whether the police lawfully searched defendant's jacket, which was lying on the trunk of a police car, while defendant was sitting handcuffed in the vehicle and numerous police officers were present at the scene. We conclude that, at the time of the search, the jacket was not within defendant's grabbable area, and there were no exigent circumstances justifying a warrantless search of the jacket incident to arrest (*see People v Jimenez*, 22 NY3d 717 [2014]; *People v Gokey*, 60 NY2d 309 [1983]). The dissent's contention that our decision will endanger the police and public is unsupported by the record, and cannot be reconciled with controlling precedent. We recognize the difficult job that police officers face when arresting suspects, but no one was in danger here once the suspect was subdued, and the officers had other legal means available to them to secure the jacket safely. Under these circumstances, the evidence recovered from the jacket should have been suppressed.

The relevant facts at the suppression hearing established the following. On February 29, 2008, at around 9:00 p.m., Officer William Svenstrup and his partner responded to a 911 call reporting that a suspicious man was inside Frank's Restaurant, located at 88 Second Avenue in Manhattan. The manager greeted

the officers outside the restaurant and informed them that defendant, who was in the bar area of the restaurant, appeared to be trying to steal from women's purses. The officers entered the restaurant and asked defendant to step outside with them.

As they exited the restaurant with defendant, he turned around and placed both his hands inside his jacket pockets. The officers grabbed defendant's arms and a struggle ensued as defendant ignored the officers' request to remove his hands from his pockets. By this time, five or six additional officers had arrived on the scene. The officers subdued defendant, and he was handcuffed and placed in the back of a police car. Defendant's jacket, which had fallen off during the struggle, was resting on the trunk of the police car. While defendant was sitting in the car with handcuffs on, the officers searched the jacket pockets and found seven envelopes containing drugs, and a box cutter. The police subsequently returned the jacket to defendant.[1]

"[A]ll warrantless searches presumptively are unreasonable

[1] There is no record support for the prosecutor's contention at the suppression hearing that the police gave the jacket back to defendant because it was cold outside. No testimony at the hearing established that defendant asked for his jacket to be returned. Nor was there any evidence that the officers asked defendant if he wanted the jacket back. Indeed, there was no testimony as to why, or even when, the jacket was returned to defendant. Thus, the dehors-the-record weather data gathered by the dissent from an Internet search is simply irrelevant here.

per se," and, "[w]here a warrant has not been obtained, it is the People who have the burden of overcoming" this presumption of unreasonableness (*People v Hodge*, 44 NY2d 553, 557 [1978]). As the Court of Appeals recently reiterated in *Jimenez* (22 NY3d at 717), the People must satisfy two separate requirements to justify a warrantless search of a container incident to arrest. "The first imposes spatial and temporal limitations to ensure that the search is not significantly divorced in time or place from the arrest" (*Jimenez*, 22 NY3d at 721 [internal quotation marks omitted]; *see Gokey*, 60 NY2d at 312 [item searched must be within the immediate control or grabbable area of the suspect]). The second requires the People to demonstrate the presence of exigent circumstances (*Jimenez*, 22 NY3d at 722). The Court of Appeals has recognized two interests underlying the exigency requirement: the safety of the public and the arresting officer, and the protection of evidence from destruction or concealment (*id.* at 722).

Although *Jimenez* had not been decided at the time the motion court denied defendant's suppression motion, the principles set forth in that case are instructive.[2] In *Jimenez*, police officers

[2] Although defendant's main brief on appeal does not rely on *Jimenez*, which was decided after the brief was filed, he properly supports his arguments with cases preceding *Jimenez* (*see Gokey*, 60 NY2d at 309; *Arizona v Gant*, 556 US 332 [2009]).

responding to a reported burglary in an apartment building encountered the defendant in the building's lobby. After the building's superintendent made gestures indicating to the officers that they should stop the defendant, the officers asked the defendant why she was in the building. They arrested her for trespassing after she provided contradictory answers. During the arrest, an officer removed the defendant's purse from her shoulder. The officer perceived the purse to be heavy and opened it, revealing a gun. The Court held that the gun should have been suppressed because the People failed to establish exigent circumstances justifying a warrantless search of the purse incident to arrest. The Court noted that neither of the police officers who testified at the suppression hearing stated that he feared for his safety or for the integrity of any destructible evidence, and, while affirmative testimony is not necessary, such a belief would not have been objectively reasonable under the circumstances. *Jimenez* reinforces the principle that containers cannot be searched incident to arrest unless the People affirmatively demonstrate exigency.

Here, the jacket was unquestionably outside defendant's grabbable area at the time of the search, which even the dissent acknowledges. Defendant was sitting handcuffed inside a police car, the jacket was outside lying on the vehicle's trunk, and

numerous officers were on the scene. Thus, the jacket had been reduced to the exclusive control of the police and there was no reasonable possibility that defendant could have reached it (*see People v Thompson*, 118 AD3d 922, 923 [2d Dept 2014] [search of backpack not justified where the defendant was secured and the backpack was not within his immediate control]; *People v Diaz*, 107 AD3d 401 [1st Dept 2013], *lv dismissed* 22 NY3d 996 [2013] [search of backpack unlawful because the defendant was handcuffed at the time of the search and it was no longer in his control]; *People v Julio*, 245 AD2d 158 [1st Dept 1997], *lv denied* 91 NY2d 942 [1998] [search of bag unlawful where it was in the exclusive control of the police and the defendant was unable to reach it because he was handcuffed and surrounded by police officers).[3]

Further, the People failed to establish the requisite exigent circumstances justifying a warrantless search of the jacket. Although defendant had previously struggled with police, five to six additional officers had arrived on the scene and defendant was subdued and placed in the police car. Thus, the scene at the time of the search was police-controlled (*see Gokey*, 60 NY2d at 313-314). Officer Svenstrup, one of the responding

[3] The motion court's finding that the jacket was not in the exclusive control of the police cannot be reconciled with the testimony that defendant was handcuffed in the car and numerous police officers were present.

officers, did not testify that the jacket was searched out of fear for the officers' safety or for the integrity of any destructible evidence (*see Jimenez*, 22 NY3d at 722-723). In any event, such a conclusion would not have been objectively reasonable under the circumstances because at the time of the search, defendant could not have reached the jacket (*see Arizona v Gant*, 556 US at 332 [warrantless search of jacket in the defendant's car unreasonable where the defendant, at the time of the search, was handcuffed and locked in the back of a police car]; *People v Boler*, 106 AD3d 1119, 1123 [3d Dept 2013] [warrantless search of the defendant's purse on the hood of her car unreasonable where, at the time of the search, she was handcuffed in the back of a police car]).

The cases relied on by the People are distinguishable. In *People v Mack* (82 AD3d 663 [1st Dept 2011], *lv denied* 17 NY3d 798 [2011]), the search was upheld because a police officer saw the defendant pick up a gun and put it in his jacket pocket. Although there were conflicting versions of the facts in *Mack*, there is no indication that the defendant was handcuffed at the time of the search. In *People v Capers* (298 AD2d 184, 184 [1st Dept 2002], *lv denied* 99 AD3d 580 [2003]), the defendant "chose to wear [the jacket] to the police station." In *People v McPherson* (300 AD2d 194, 194 [1st Dept 2002], *lv denied* 99 AD3d

630 [2003]), the jacket had "not yet been reduced to the exclusive control of the police."

The dissent concludes that the search here was justified because the jacket may have contained a loaded gun that would endanger the police and the public. Officer Svenstrup, however, did not testify that, once defendant was subdued, he searched the jacket due to any concern that it might contain a gun or other weapon. Nor did he state that any other exigent circumstances existed. In fact, there was no testimony whatsoever as to why the search was conducted. In any event, even if there had been a legitimate concern, at some earlier time during the encounter between defendant and the police, that defendant might retrieve a weapon from the jacket, that possibility no longer existed at the time the police conducted the search.

The fact that defendant was handcuffed in the police car and multiple officers were at the scene is minimized by the dissenting Justice who would uphold the search even though defendant had been subdued and no longer had access to the jacket. This view cannot be reconciled with the Court of Appeals' requirement that there be "'a reasonable belief that the suspect may *gain possession* of a weapon'" (*Jimenez*, 22 NY3d at 722, quoting *Gokey*, 60 NY2d at 311 [emphasis added]). Taken to its logical conclusion, the dissent is arguing that an exigency

that may have existed earlier in the encounter allowed the police to search the jacket, even where the jacket was in the exclusive control of the police. That view, if accepted, would run afoul of Court of Appeals jurisprudence and would eviscerate the grabbable area doctrine.

As the dissent concedes, the existence of exigent circumstances must be measured at the time the search is conducted. This point was recently underscored in *People v Jenkins* (24 NY3d 62 [2014]). In addressing the exigent circumstances exception to the warrant requirement, the Court in *Jenkins* found a search unreasonable because at the time of the search, any urgency had abated and there was no longer any danger to the public or the police (*id.* at 65). Likewise here, when the police searched the jacket, no danger to the police or public existed.

We fail to grasp the logic of the dissent's position that any such danger did not disappear simply because defendant had been subdued. In fact, it *did* disappear — defendant was locked in the police car, and the jacket was on the trunk. Once defendant was safely separated from the jacket, the record does not show that any harm could have resulted from the possible presence of a weapon. In any event, Officer Svenstrup or any of the other half dozen police officers at the scene could have used

other legal means to secure the jacket since it was in their exclusive control. Our decision does not, as the dissent charges, break any new ground, but simply adheres to well-settled principles governing the parameters of a search incident to arrest. The dissent would extend this doctrine and hold that whenever there is the possible presence of a weapon, the police can search a container to protect themselves, even if it is nowhere near the suspect's grabbable reach. Such a conclusion finds no support in this state's jurisprudence on searches incident to arrest.

The dissent raises a host of matters neither developed in the record below nor advanced by the People. Thus, despite the fact that this case does not involve any firearm, the dissent speculates about danger to the public arising from the possible accidental discharge of a loaded gun. In doing so, the dissent appears to be justifying the search based on the emergency doctrine, an entirely separate exception to the warrant requirement. That exception, however, was never argued by the People, either below or on appeal, and there is no record evidence supporting any of the post-arrest scenarios posited by the dissent. Nor was the emergency doctrine the basis of the motion court's decision, which limited itself to the search

incident to arrest exception to the warrant requirement.[4] It bears emphasis that the only issue on appeal is whether the police conduct was lawful under that exception. On that point, the dissent agrees with the majority that when the police searched the jacket, it was not within defendant's grabbable reach. That undeniable fact ends the inquiry and requires, under clear Court of Appeals precedent, the suppression of the items found in the jacket.

Accordingly, the judgment of the Supreme Court, New York County (Robert M. Stolz, J. at hearing; Bruce Allen, J. at jury trial and sentencing), rendered September 15, 2010, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 2½ years, should be reversed, on the law and the facts, the motion to suppress granted, and the indictment dismissed.

All concur except Friedman, J.P. who dissents in an Opinion:

[4] Even if the People had raised the emergency doctrine on appeal, it would be both unpreserved and beyond this Court's power of review (*see People v Concepcion*, 17 NY3d 192, 194-195 [2011]; *People v Gerard*, 94 AD3d 592 [1st Dept 2012]).

FRIEDMAN, J.P. (dissenting)

I respectfully dissent. Defendant's suspicious conduct immediately before his arrest "gave rise to a reasonable belief that [his jacket might have] contained . . . a weapon" (*People v Jimenez*, 22 NY3d 717, 724 [2014]). Specifically, as the police escorted defendant out of a restaurant, he suddenly stopped, turned around and jammed his hands into his jacket pockets; he resisted the attempts of the police to remove his hands from his pockets, and it ultimately required five or six officers to subdue him. The possible presence of a dangerous instrumentality within the jacket, which would need to be secured to prevent accidental harm to the police or others regardless of defendant's inability to retrieve it, constituted the "requisite exigency" (*id.*) that justified the search of defendant's jacket after he was subdued. While the jacket somehow fell off defendant during his struggle with the police, and he was sitting in a police car in handcuffs at the time the police searched the jacket outside the vehicle, the police were entitled to search the jacket for a weapon for their own protection and that of the public. Even if defendant no longer had access to any weapon secreted in the jacket, such a weapon, whether a loaded gun or a cutting instrument (such as the box-cutter the police found), could cause harm accidentally if the police did not immediately secure it.

In refraining from criticism of the initial seizure of defendant triggered by his jamming his hands into his jacket pockets during a confrontation with the police (although defendant makes this issue point I of his appellate brief), the majority itself implicitly recognizes that this action by defendant gave the police reasonable cause to suspect that the pockets contained a dangerous instrumentality. Any such instrumentality, so far as the police knew at the time, might well have remained a potential source of accidental danger after defendant and the jacket became separated. Hence, the need for an immediate search of the pockets, in the interests of public safety.

Contrary to the majority's focus on whether the jacket was within defendant's "grabbable area" when it was searched (and I agree with the majority that it was not, so there is no debate on that point), nothing in *Jimenez* requires the police to disregard common sense and to court the needless risk of accidental harm from a loose weapon that is reasonably suspected — based on an arrested person's own conduct immediately prior to the arrest — of being present in a garment or other container that has been removed from that person's reach. *Jimenez* does not require the majority's result because, unlike this case — where not even the majority can deny that defendant's suddenly jamming his hands in

his jacket pockets was, in context, a threatening act suggestive of a dangerous instrumentality within, which, if present, would not cease to be dangerous once defendant was subdued — the police in *Jimenez* had no such grounds for reasonably suspecting that the container there in question (a woman's handbag) contained a weapon. The majority's assertion that any danger from a weapon in the jacket "*did* disappear" (emphasis the majority's) once defendant was handcuffed ignores the danger that a loose weapon in the jacket could cause harm accidentally, whether it was a loaded gun (which could discharge upon impact) or a knife (which could fall or poke out of the pocket and cut someone). These are not imaginary dangers, and the majority offers no example of what the police could have done to eliminate such hazards without first finding and securing any weapon secreted within the jacket (as opposed to the jacket itself).[1] In sum, the majority has broken new ground in defining permissible police conduct in protecting themselves and the public from reasonably suspected dangers.

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[1]For example, one possible meaning the majority may have in mind when it says that the police is that the officers should have locked the jacket in the trunk of the police car and then driven to the police station and obtained a warrant before searching the pockets. If the police had done this, an impact during the drive to the station might have caused a loaded gun in the jacket to discharge.

At the suppression hearing, the People pointed out that the police were rightly apprehensive at defendant's jamming his hands into his pockets because of "the unknown element" of what the pockets contained, and argued that, before returning the jacket to defendant, it was important "to make sure there's no criminality, nothing that can hurt somebody, nothing of a criminal nature before it's released from police custody." The court agreed, finding that the search of the jacket was justified "under the same rationale from their point of view that seems to me justified pulling the defendant's hands out of the pockets in the first place, namely they have to protect his own safety."[2] In other words, just as defendant's jamming his hands in his pockets as he was being escorted out of the restaurant gave the

[2]While the prosecutor and the hearing court seem to have focused on the need to search the jacket before returning it to defendant, the jacket was a potential source of danger whether or not it was returned to defendant, given the grounds the police had to suspect that there might be a weapon in the jacket's pockets (as turned out to be the case). Thus, even if the record does not establish that there was a necessity to return the jacket to defendant (as the majority contends), the presence or absence of a need to return the jacket to defendant is of no moment. Certainly, the police cannot be criticized for desiring to return defendant's jacket to him on a February night. While the majority correctly notes that the record is not well developed on this issue, and Officer Svenstrup testified that "[i]t was cold, but not too cold" when defendant was arrested, I observe that an Internet search reveals that, at the time of the arrest (about 9:00 p.m. on February 29, 2008), the temperature and wind chill in New York City were approximately 34°F and 25.5°F, respectively.

police reason to fear for their safety before defendant was subdued, the same action gave the police reason to fear for their safety after defendant was subdued, since any weapon in the jacket would remain a source of danger until properly secured, even if defendant had no access to it.[3] While the police witness did not affirmatively testify to such safety concerns, *Jimenez* makes clear that affirmative testimony concerning an officer's subjective state of mind is not necessary where the facts to which the officer testified would have rendered such apprehension "objectively reasonable" (22 NY3d at 723).

As I pointed out with regard to *Jimenez* earlier in this writing, unlike this case, where defendant's threatening conduct while being escorted out of the restaurant gave the police grounds to suspect that there was a weapon in his jacket pockets, the police in the cases on which the majority relies (with the sole exception of *People v Jenkins*, 24 NY3d 62 [2014], which I

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[3]The majority chooses not to discuss defendant's meritless argument that the police "illegally seized [him]" when they grabbed his arms in response to his jamming his hands into his pockets as he was being escorted out of the restaurant. The majority's failure to address this argument (which, as previously noted, is point I of defendant's appellate brief) is telling: the majority cannot deny that the police reasonably perceived danger from defendant's act, but the reasonably perceived danger of the possible presence of a weapon (a danger that was, in fact, actually present) obviously did not disappear simply because defendant had been subdued.

will discuss in the following two paragraphs) had no objectively reasonable grounds for concern that the containers in question contained weapons. For example, in granting the motion to suppress evidence recovered from the defendant's purse in *Jimenez*, the Court of Appeals noted that "there was no indication that the demeanor or actions of either defendant or [her companion] lent them a threatening appearance in any respect," and that "the unremarkable fact that a woman's purse appeared heavy is insufficient, on its own, to support a reasonable belief that it contains . . . a weapon" (22 NY3d at 723).[4] *People v Gokey* (60 NY2d 309 [1983]), where the search of a duffel bag was held unreasonable, is likewise distinguishable; as noted in *Jimenez*, the *Gokey* defendant had been "arrested for two nonviolent crimes," and the People conceded that the police "merely searched the bag because they suspected it contained drugs" (22 NY3d at 722). Similarly, the detailed decision in *People v Boler* (106 AD3d 1119 [3d Dept 2013]) gives no indication

[4]Notably, the Court of Appeals in *Jimenez* distinguished its earlier decision in *People v Smith* (59 NY2d 454 [1983]), in which a search of the defendant's briefcase simultaneous with his arrest for turnstile jumping had been held lawful, on the ground that the *Smith* defendant "wore a bulletproof vest and denied this fact when questioned by police" (22 NY3d at 722). Thus, the Court pointed to *Smith* as an example of "[e]xigency . . . deriv[ing] from circumstances other than the nature of the offense" for which the arrest was made (*id.*). The same can be said of the instant case.

that the police had any grounds to suspect that the purse on the hood of the defendant's car contained a weapon (as opposed to narcotics). *Arizona v Gant* (556 US 332 [2009]), to the extent it might have any relevance to the standards for the search of a container outside of a vehicle, is similarly distinguishable (*see id.* at 335-336 [setting forth the relevant facts]).

While *People v Jenkins* (24 NY3d 62 [2014], *supra*) held that exigency could not support a warrantless opening of a closed box that was believed to contain a gun, that case is distinguishable on the ground that, under the circumstances that existed at the time of that search, any weapon in the closed box did not pose a danger to the police or anyone else. In *Jenkins*, two men suspected of firing a gun from the roof of a building fled from police into an apartment in the building. The police used a sledgehammer to enter the apartment, located and handcuffed the men, placed all of the occupants of the apartment under their control in the living room, and then searched the apartment for the gun. In the course of the search, an officer found a "silver box" on the floor, "picked up the box, shook it, and, upon hearing a sound, opened it and discovered the gun" (*id.* at 64). The Court held that the warrantless search of the closed box was

not justified by exigent circumstances because, by the time the box was opened, the two suspects had been handcuffed, "the police were in complete control of the house," and no "danger to the public or the police" existed (*id.* at 65 [internal quotation marks and brackets omitted]). Thus, the result in *Jenkins* depended not only upon the suspects' lack of access to the box believed to contain a gun, but upon the fact that the box was inside an apartment under the "complete control" of the police. Without danger to themselves or the public, the police could have delayed their search of the box — and, by parity of reasoning, of the entire apartment and its contents — until a warrant had been obtained.

The facts of this case contrast with those of *Jenkins*. Here, the suspect container was not a closed box but a jacket with open pockets, and the jacket was not located inside of premises under police control but was simply lying on the trunk of a police car parked on the street. If the search could not lawfully be conducted until a warrant was obtained, the police would subject themselves to possible danger from a loose weapon in the pocket of the jacket while transporting it to the precinct station. The only alternative would have been to lock the jacket

in the trunk of the car and to leave the car parked on the street until a warrant to look in the pockets could be obtained. The majority apparently takes the position that the police were required either (1) to transport the jacket to the station house without first looking in the pockets, thereby incurring the danger of an accident from any loose weapon that might be secreted in the pockets (as one actually was), or, alternatively, (2) to lock the jacket in the car's trunk and to leave the car parked where it was, unavailable for its intended use, for however many hours it would have taken to obtain a warrant. Nothing in *Jenkins*, where the suspected gun was in a closed box in premises under police control, forces such a choice on police officers facing dissimilar circumstances of the kind that faced the officers in this case.

Looking for a basis for the holding that the police should have abided the likely presence of a weapon in the jacket until they obtained a warrant to look in the pockets, the majority points to the fact that the police witness did not spell out, in haec verba, his obvious concern, based on the conduct that provoked the police to seize defendant (a seizure that the majority does not criticize), that a dangerous instrumentality was secreted in the pockets of the jacket. Thus, the majority

relies, in the end, on the fact that "Officer Svenstrup . . . did not testify that . . . he searched the jacket due to any concern that it might contain a gun or other weapon." This ignores the majority's own recognition, just a few paragraphs before, that, as previously noted, *Jimenez* establishes that "affirmative testimony is not necessary" to evidence the concern that rendered a search reasonable if the facts in evidence make it obvious that apprehension of an exigency justifying the search was, under the circumstances, objectively reasonable (*see Jimenez*, 22 NY3d at 723 ["While an officer need not affirmatively testify as to safety concerns to establish exigency, such apprehension must be objectively reasonable"]).

The majority asserts that "even if there had been a legitimate concern, at some earlier time during the encounter between defendant and the police, that defendant might retrieve a weapon from the jacket, that possibility no longer existed at the time the police conducted the search." To reiterate, the presence of a weapon in the jacket was dangerous whether or not defendant could retrieve it at the time of the search. While the majority expresses concern that my position "would eviscerate the grabbable area doctrine," the fact is that not all dangers in the world emanate from a defendant's "grabbable area," and the

doctrine was not intended to restrict the police from addressing those other dangers. Further, contrary to the majority's assertion, nowhere do I suggest that the existence of exigent circumstances should be measured at any time other than that of the search. Here, the exigency of the suspected presence of a loose weapon, which could present a serious danger regardless of defendant's access to it, was present when the police searched the jacket.

The majority mischaractizes my position as being that "whenever there is the possible presence of a weapon, the police can search a container to protect themselves, even if it is nowhere near the suspect's grabbable reach." In fact, I take the position that police can search a container to protect themselves when they reasonably suspect that a weapon is secreted within the container and such a weapon, if not secured, would present a danger to the public or themselves. This is precisely the situation with which the police were presented in this case. Again, I do not see how the jurisprudence of this state requires the police to subject themselves and the public to the risk of accidental injury that may emanate from an unsecured weapon suspected of being secreted within a container.

In the end, since it cannot deny that the record establishes that defendant's conduct gave the police reason to suspect that the pockets of his jacket contained a weapon, the majority resorts to the position that the danger emanating from such a weapon (regardless of defendant's access to it) could not support a warrantless search of the jacket because the People did not use the phrase "emergency doctrine" in justifying the search. However, it is plain that the People, in defending the search of the jacket, relied, both in the motion court and on appeal, on the reasonable suspicion by the police that a weapon was present in the pockets of the jacket. Since the People did rely on the potential presence of a weapon in the jacket, and the danger of accidental harm from an unsecured weapon is obvious, I believe that the point is preserved. The scenarios I posit are to show the impracticality (at best), and public danger (at worst), following from the majority's position that the police should not have searched the jacket until they obtained a warrant. In so instructing the police, the majority offers no suggestion for what they should have done with the jacket in the interim.

In sum, I believe that defendant's jamming his hands in his jacket pockets while being escorted out of the restaurant, and his resistance to attempts by the police to remove his hands from the pockets, gave the police grounds for reasonable apprehension

that a weapon might be present in the jacket, and constituted an exigent circumstance that justified the warrantless search of the jacket after defendant had been subdued, even though he was no longer wearing it. Accordingly, I respectfully dissent and vote to affirm the judgment of conviction and the underlying denial of defendant's motion to suppress the evidence recovered from the jacket.

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

ENTERED: FEBRUARY 10, 2015

CLERK