SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 19, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Saxe, Manzanet-Daniels, Gische, JJ.

13520 Miguel Bonano, Index 7502/04
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for appellant.

Candice A. Pluchino, Bronx, for respondent.

_____

Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 30, 2013, upon a jury verdict allocating 85% of the fault to defendant and 15% to plaintiff, and awarding plaintiff $500,000 for past pain and suffering and $1,140,000 for future pain and suffering, unanimously affirmed, without costs.

Plaintiff testified that he was injured while operating a motorized dirt bike on a roadway, when a police officer in an unmarked police car opened his door, blocking plaintiff's lane of travel and causing him to lose control of the bike and crash into

a parked car. The officer testified to a different version of events. It is clear that the jury resolved the credibility issues presented in plaintiff's favor, and its finding that the officer's conduct proximately caused plaintiff's injuries is supported by legally sufficient evidence and is not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 498 [1978]). In particular, the jury credited plaintiff's testimony that, fearing he was about to be robbed by the person who had opened the car door and stretched out an arm, he rode onto the sidewalk and accelerated, whereupon his motor bike went up on one wheel and he lost control of it.

The court properly allowed testimony and argument relating to the officer's act of reaching out his hand from the car since the factual information was needed to place plaintiff's actions in context and establish his claim of negligence.

Plaintiff, who was 19 years old at the time of the accident, sustained, inter alia, a serious injury to his right ankle, including open, comminuted fractures of the fibula, tibia and talus, requiring three surgeries. A fourth surgery is likely required to eliminate pain by either fusing the ankle bones or replacing the ankle, which healed with malunion, and has caused significant, permanent, and arthritic changes, which are of a

progressive nature. In addition, one of the screws that was placed in plaintiff's ankle broke, destroying the talus bone, causing plaintiff to suffer from daily pain, restricting the ankle's range of motion, and limiting his physical activities.

Given the extent of the 19 year old plaintiff's injuries, some of which are of a progressive and arthritic nature, and the likelihood of further surgery to either restrict motion in the ankle or eliminate it altogether by replacing the ankle, the damages awarded by the jury for future pain and suffering did not materially deviate from what would be considered reasonable compensation (*see* CPLR 5501[c]; *Rivera v New York City Tr. Auth.*, 201 AD2d 378 [1st Dept 1994]; *Lowenstein v Normandy Group, LLC*, 51 AD3d 517 [1st Dept 2008]).

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13936- Index 600515/08
13937-
13938 Kars Jewelry, Inc.,
Plaintiff-Appellant,

-against-

Levitan Design Associates, Inc.,
et al.,
Defendants-Respondents.

_____

Schlam Stone & Dolan LLP, New York (Jonathan Mazer and Andrew S. Harris of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Levitan Design Associates, Inc. and Leonard Levitan, respondents.

Altschul & Altschul, New York (Barbara S. Friedman of counsel), for Scarlet Kim and 39 West 29th Street Owners Corp., respondents.

_____

Judgment, Supreme Court, New York County (Doris Ling-Cohan, J.), entered August 20, 2013, dismissing the complaint, and bringing up for review an order, same court (Geoffrey D. Wright, J.), entered July 29, 2013, which granted the motion of defendants Scarlet Kim and 39 West 29th Street Owners Corp. for a directed verdict dismissing the complaint, and an order, same court (Doris Ling-Cohan, J.), entered April 12, 2011, which granted the motion of defendants Levitan Design Associates and Leonard Levitan for summary judgment, unanimously affirmed,

without costs. Appeal from the July 29, 2013 order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court properly dismissed the claims against the Levitan defendants in that they demonstrated that they took minimal precautions to protect plaintiff from foreseeable harm by providing locks on all the doors to the leased premises (*see Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]). Moreover, the burglary was not foreseeable based on a single prior burglary 11 years earlier.

With respect to the remaining defendants, while the better practice would have been to let the case be decided by the jury, the court nevertheless did not improperly direct a verdict in their favor at the conclusion of plaintiff's case as no evidence was produced linking their conduct to the burglary. Although there was testimony that the front door and the door to the basement were left unlocked at times, and unauthorized persons were permitted to operate the freight elevator, it was undisputed that those doors all had functioning locks and the elevator

required a key. Moreover, no evidence was presented that the burglars gained entry to plaintiff's premises through the unlocked doors (*see Perez v McFarlane*, 18 AD3d 232 [1st Dept 2005]).

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

ENTERED: FEBRUARY 19, 2015

CLERK

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

14164-
14165 Trilegiant Corporation, Index 651850/11
Plaintiff-Respondent,

-against-

Orbitz, LLC, et al.,
Defendants-Appellants.

_____

Baker & Hostetler LLP, New York (John S. Letchinger of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

Morgan, Lewis & Bockius LLP, Chicago, IL (Kenneth M. Kliebard of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 7, 2013, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, and order, same court and Justice, entered December 24, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to dismiss defendants' second, third, fifth, eighth, ninth and eleventh affirmative defenses, unanimously affirmed, with costs.

In this action for breach of contract, defendants exercised an early termination option pursuant to which they were required to make quarterly payments compensating plaintiff for the early

termination of the parties' master services agreement (MSA). Defendants, who began making the payments but ceased making them in June 2010, argue that the obligation to make early termination payments was mooted by the enactment of the Restore Online Shoppers' Confidence Act (ROSCA) (15 USC §§ 8401-8405, as added by Pub L 111-345, 124 Stat 3618 [2010]), a federal statute governing the passing of certain customer data for online third-party retail transactions, as well as the fact that in or about January 2010, plaintiff voluntarily changed its online marketing methods to comply with the soon to be enacted requirements of ROSCA. The motion court properly denied the motion for summary judgment seeking dismissal of the complaint based on defendants' malum in se illegality defense. The marketing practices prohibited by the statute are not malum in se, but merely malum prohibitum and, under the circumstances, there is no basis to render unenforceable the contractual provision requiring defendants to pay fees based on early termination of the parties' agreement (*see e.g. Stardial Communications Corp. v Turner Constr. Co.*, 12 AD3d 181, 182 [1st Dept 2004]). We note that the termination payments were premised on projected revenues for the term ending December 31, 2010 and ROSCA became effective as of December 29, 2010. Thus, the fees,

although scheduled to be paid out through 2016, reflect only two days of projected revenues that were earned through means made illegal by ROSCA.

There is no merit to defendants' affirmative defense that, in anticipation that plaintiff's service would become illegal, they properly repudiated the agreement. Defendants exercised the agreement's early termination option three years before the law was changed, and two years before plaintiff itself changed its marketing procedures. Defendants cannot invoke impossibility of performance, as it was they who terminated the agreement (*see Folsom Metal Prods., Inc. v Torus Equip. Co.*, 113 F3d 212, 215 [11th Cir 1997]; Restatement [Second] of Contracts § 261). Nor does the early termination option constitute a liquidated damages provision based on impossibility of performance; it is a contractual remedy for defendants' choice to terminate the agreement early.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14257 The People of the State of New York, Ind. 1827/12
Respondent,

-against-

Steven Rosado,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (Jayme Jonat of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered March 20, 2013, convicting defendant, after a jury trial, of burglary in the third degree, criminal possession of stolen property in the fifth degree, possession of burglar's tools and attempted petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 2½ years to 5 years, unanimously modified, on the law, to the extent of vacating the burglary conviction and dismissing that count of the indictment, and otherwise affirmed.

The evidence was legally insufficient to establish defendant's knowledge that his entry was unlawful, which is an essential element of burglary (Penal Law § 140.20). During a

weekday afternoon, defendant simply walked into the loading dock area of a commercial retail building, which contained no signs restricting access, and which received truck deliveries while defendant was present. The area had a gate that was normally kept closed, but at the time of the incident it was in an open position while it was being repaired. However, there was nothing to indicate to the general public that the gate was normally closed and that entry was normally gained by way of a buzzer system. The evidence did not support a conclusion that the loading dock area was obviously or inherently a nonpublic place (*compare People v Barksdale*, 50 AD3d 400, 402 [1st Dept 2008] [pharmacy area of drugstores "unmistakably" nonpublic], *lv denied* 10 NY3d 932 [2008]*; see also People v White*, 250 AD2d 500 [1st Dept 1998], *lv denied* 92 NY2d 952 [1998]). Furthermore, defendant did not engage in any conduct that would warrant an inference that he was aware that his entry, as such, was unlawful, notwithstanding that the evidence established that he entered with the intent to steal property. Accordingly, the evidence did not establish the element of knowledge (*see Matter of Gregory W.*, 26 AD3d 221 [1st Dept 2006]).

In light of this determination, we find it unnecessary to reach any other issues relating specifically to the burglary

conviction. Defendant's argument that the court should have made certain inquiries of the jury is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. Accordingly, there is no basis for ordering a new trial on the misdemeanor charges.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14259 Jeanne McLeod, Index 308075/10
Plaintiff-Respondent,

-against-

NDI Webster/Clay Housing Development Fund Corporation, et al.,
Defendants-Appellants.

_____

Rubin, Fiorella & Friedman LLP, New York (Stewart B. Greenspan of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered March 14, 2014, which granted plaintiff's motion to expand the record to include an affidavit by a nonparty witness, and denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Contrary to defendants' contention, the discrepancy between plaintiff's testimony that there was an inch of snow on the stoop on which she slipped and fell and the nonparty witness's statement that there may have been as much as a foot of snow on the stoop does not warrant denial of plaintiff's motion to expand the record to include the affidavit (*see Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 324 [1st Dept 2006], *affd* 8 NY3d 931

[2007]). Since only trace amounts of snow fell the night before plaintiff's accident, plaintiff's testimony that there was an inch of snow on the stoop when she exited the building in the morning raises an inference that, whatever snow removal defendants' superintendent and porter performed the day before, the snow had not been fully cleared. Thus, even without the witness's affidavit, issues of fact exist whether the snow or ice on which plaintiff slipped resulted from the trace amounts that had fallen overnight or remained from the previous day's snowfall, and thus whether defendants had a reasonable amount of time to clear it (*see Pipero v New York City Tr. Auth.*, 69 AD3d 493 [1st Dept 2010]).

As to the handrail missing from the stairs, defendant failed to establish prima facie that the New York City Building Code is not applicable to the subject building (*see Pappalardo v New York*

Health & Racquet Club, 279 AD2d 134, 140 [1st Dept 2000]). Moreover, an issue of fact exists whether the absence of a handrail was a proximate cause of plaintiff's accident.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14260 The People of the State of New York, Ind. 9845/97
Respondent,

-against-

William Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered on or about October 26, 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 resentencing (*see e.g. People v Arroyo*, 99 AD3d 515, 517 [1st Dept 2012], *lv denied* 20 NY3d 1059 [2013]). In addition to having a long criminal record including both drug and robbery convictions, defendant absconded, remained a fugitive for many years, and was convicted

of a new felony arising out of his participation in large-scale drug activity. These considerations outweighed the mitigating factors cited by defendant, including his good prison record.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14261 Rafael Galvez Ortiz, Index 301656/13
Plaintiff,

-against-

Food Machinery of America, Inc.,
Defendant.

- - - - -

Food Machinery of America, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Union Square Restaurant Group, LLC,
doing business as Maoz Vegetarian
Restaurant, et al.,
Third-Party Defendants,

La Minerva Omega Group SRL,
Third-Party Defendant-Respondent.

_____

Law Office of Lori D. Fishman, Tarrytown (D. Bradford Sessa of counsel), for appellant.

Cozen O'Connor, New York (Melissa F. Brill of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 4, 2014, which granted third-party defendant La Minerva Group SRL's motion to dismiss the third-party complaint as against it on the basis of lack of personal jurisdiction, unanimously affirmed, without costs.

The sole argument advanced in support of reversal is that

the motion court erred in considering the affidavit submitted by La Minerva in support of its motion to dismiss, because the affidavit was not accompanied by a translator's affidavit. However, the witness's affidavit is in English, and La Minerva's counsel represents that the witness, an Italian citizen, speaks English, and communicated with counsel in English concerning the drafting of the affidavit (*see* CPLR 2101[b]; *Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548 [1st Dept 2012]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011]). An Italian translation of the affidavit was provided for the benefit of the Italian notary, but the witness provided his sworn statement in English.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14262 In re Woodbridge Structured Funding, LLC, Petitioner-Appellant, Index 100336/13

-against-

Pissed Consumer and PissedConsumer.com, et al., Respondents-Respondents.

_____

Finger & Finger, White Plains (Carl L. Finger of counsel), for appellant.

Goetz Fitzpatrick LLP, New York (Ronald D. Coleman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol E. Huff, J.), entered October 8, 2013, which denied the petition pursuant to CPLR 3102(c) to compel respondents to disclose the identity of the person or persons who posted alleged defamatory statements on respondent's weblog or blog, and dismissed the petition, unanimously affirmed, without costs.

Petitioner, a private finance/structured settlement business, seeks pre-action discovery of the identity of anonymous speaker(s) who posted negative comments on respondents' website, "PissedConsumer.com," regarding petitioner's alleged failure to fulfill an advertising promise to award prospective customers with a $500 gas card that included statements such as petitioner

"Lie[s] To Their Clients" and "will forget about you and . . . all the promises they made to you" once "you sign on the dotted line." The motion was properly denied since petitioner failed to demonstrate that it has a meritorious cause of action as required to obtain pre-action discovery (see CPLR 3102[c]; *Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 38 [1st Dept 2011]). Nothing in the petition identifies specific facts that are false and when the statements complained of are viewed in context, they suggest to a reasonable reader that the writer was a dissatisfied customer who utilized respondent's consumers' grievance website to express an opinion. Although some of the statements are based on undisclosed, unfavorable facts known to the writer, the disgruntled tone, anonymous posting, and predominant use of statements that cannot be definitively proven true or false, supports the finding that the challenged statements are only susceptible of a non-defamatory meaning, grounded in opinion (*see Sandals Resorts Intl. Ltd.*, 86 AD3d at 43-45). Petitioner also

has inadequately asserted the damage element of a defamation claim, inasmuch as it has not alleged facts that would indicate injury to its business reputation from the postings (*see id.* at 39; *see also Liberman v Gelstein*, 80 NY2d 429, 436 [1992]).

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14263 Kenneth Couillard, et al., Index 111969/10
Plaintiffs-Respondents,

-against-

Shaw Environmental & Infrastructure Engineering of New York, P.C., sued herein as The Shaw Group, Inc.,
Defendant-Respondent,

C.M. Camparetti, et al.,
Defendants-Respondents-Appellants,

Women's Health Professionals, LLP,
Defendant-Appellant-Respondent.

- - - - -

Shaw Environmental & Infrastructure Engineering of New York, P.C., initially sued herein as The Shaw Group, Inc.,
Third-Party Plaintiff-Respondent.

-against-

Newborn Construction, Inc.,
Third-Party Defendant-Respondent.

_____

Lewis Johs Avallone Aviles, Islandia (Robert A. Lifson of counsel), for appellant-respondent.

Leahy & Johnson, P.C., New York (Joanne Filiberti of counsel), for respondents-appellants.

Law Office of Edmond C. Chakmakian, P.C., Hauppauge (Edmond C. Chakmakian of counsel), for Couillard respondents.

Ahmuty Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Shaw Environmental & Infrastructure Engineering of New York, P.C., respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Stacy I. Malinow of counsel), for Newborn Construction, Inc., respondent.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered August 7, 2013, which, to the extent appealed from, granted plaintiffs' motion for summary judgment on the issue of liability against defendants Women's Health Professionals, LLP (WHP), C.M. Camparetti, and April A. Clark, granted third-party defendant Newborn Construction, Inc.'s motion to amend its answer to assert cross claims against Camparetti and Clark, and denied WHP's motion for summary judgment dismissing the complaint as against it or, in the alternative, to change venue to Suffolk County, unanimously affirmed, without costs.

Defendant Clark, an employee of defendant Women's Health Professionals, LLP, operating a vehicle owned by defendant Camparetti, drove out of her lane and off the road, hitting plaintiff Kenneth Couillard in the process. Clark had been traveling within inches of the car in front of her, and drove off the road in an attempt to avoid that car when it stopped. Having created the very situation that caused her to drive off the road, Clark cannot avail herself of the emergency doctrine (*see Joplin v City of New York*, 116 AD3d 443 [1st Dept 2014]). The

possibility that other defendants bear liability in this matter does not bar the grant of summary judgment to plaintiffs on the issue of Camparetti's, Clark's and WHP's liability (*see Asante v Williams*, 227 AD2d 123 [1st Dept 1996]).

Clark, who was transporting patient files from one WHP office to another at the time of the accident, was using the car in the course of her employment at that time; thus, WHP is liable for plaintiff's injuries under the doctrine of respondeat superior (*see Matter of St. Paul Fire & Mar. Ins. Co. [Brown-Aetna Cas. & Sur. Co.]*, 161 AD2d 498 [1st Dept 1990], *lv denied* 76 NY2d 707 [1990]).

WHP failed to establish that venue should be changed in the interests of justice.

Newborn's submissions in support of its motion to amend establish the merit of its cross claims against Camparetti and Clark.

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

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14267 The People of the State of New York, Ind. 8162/02
Respondent,

-against-

Angel Rios,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Leticia M. Olivera of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Renee A. White, J.), entered on or about April 22, 2013, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly determined that substantial justice dictated the denial of defendant's resentencing application. Resentencing is a discretionary determination (*see 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 were outweighed by his extensive criminal history

and generally poor prison disciplinary record. In particular, defendant's inability to control his behavior is demonstrated by his robbery and other convictions while on parole from the drug conviction at issue (*see e.g. People v Arroyo*, 99 AD3d 515, 517 [1st Dept 2012], *lv denied* 20 NY3d 1059 [2013]).

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14268-
14269 The People of the State of New York,
Respondent,

-against-

Jeremy Fulton,
Defendant-Appellant.

Ind. 5973/09

Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

Jeremy Fulton, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered December 20, 2011, convicting defendant, upon his plea of guilty, of rape in the first degree, and sentencing him to a term of 22 years, unanimously affirmed.

The court properly exercised its discretion when, on the basis of the written submissions, it denied defendant's motion to withdraw his plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest largely in the discretion of the Judge to whom the motion is made

and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks and citation omitted]). The record establishes the voluntariness of the plea.

In accepting the plea, the court conducted a thorough allocution, in which it warned defendant that if he had any issues to raise that would affect the voluntariness of the plea he should raise them at that time. Defendant freely admitted that he was guilty, and that his plea was free from coercion.

In his plea withdrawal motion, in which he was represented by new counsel, defendant claimed that the attorney who had represented him at the time of the plea had failed to conduct a proper factual investigation. In support of this claim, defendant alleged that his new counsel had found various items of information casting doubt on the credibility of one or more of the complainants. However, a careful examination of the allegedly exculpatory information supports the court's finding that this information was dubious and unreliable.

The record also supports the court's rejection of defendant's claims of coercion and misadvice by his plea counsel. Defendant was charged with sex crimes committed against multiple victims, including predatory sexual assault against a child

(Penal Law § 130.96), which carries a life sentence. By advising defendant to plead guilty in order to avoid a life sentence, the attorney was rendering her professional opinion about the probable result of going to trial.

Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses review of his sentencing-related claims, including those contained in his pro se supplemental brief. As an alternative holding, we reject them on the merits. The lack of timely notice of a victim's intent to make a statement at sentencing merely entitled defendant to "request a reasonable adjournment" (CPL 380.50[2][b]). Defendant made no such request on that ground, nor was he prevented from doing so. In any event, defendant received the sentence to which he had agreed. We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14270-
14271 In re Marissa Tiffany C-W.,

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

Faith W., et al.,
Respondents-Appellants,

The Children's Aid Society,
Petitioner-Respondent.

_____

Carol Kahn, New York, for Faith W., appellant.

Neil D. Futerfas, White Plains, for Gilbert C., appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about January 28, 2014, which, upon a fact-finding of permanent neglect, terminated respondents' parental rights to the subject child and transferred custody and guardianship of the child to petitioner and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs. Appeal from fact-finding order, same court and Judge, entered on or about November 22, 2013, unanimously dismissed, without costs, as subsumed in

the appeal from the order of disposition.

The findings that respondents permanently neglected the child are supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). The evidence shows that the agency made diligent efforts to strengthen the parents' relationship with the child by, among other things, scheduling regular visitation and referring them for therapy to address the conditions that led to the child's removal (*see* Social Services Law § 384-b[7][f]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Gina Rachel L.*, 44 AD3d 367 [1st Dept 2007]). However, respondents were uncooperative. The father was verbally abusive during visitation, and the mother failed to engage with the child. Both parents continued to deny the conditions that led to the child's removal, and failed to gain insight into the reasons for the child's placement into foster care (*see Matter of Dina Loraine P. [Ana C.]*, 107 AD3d 634 [1st Dept 2013]).

The finding that termination of respondents' parental rights is in the child's best interests is supported by a preponderance of the evidence, which shows that the child was placed into foster care within 10 days of her birth, neglect findings having been made against respondents based on the physical and sexual

abuse of the child's two older siblings, and has remained with the same foster family since then. The child, who has special needs, is well cared for by the foster parents and is thriving in the stable and loving home they have provided (see *Matter of Ibrahim B.*, 57 AD3d 382 [1st Dept 2008]).

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14272 The People of the State of New York, Ind. 9046/96
Respondent,

-against-

Daryl Madison,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about August 7, 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 resentencing. This conclusion was warranted by the totality of the circumstances, including defendant's extensive criminal history, which included multiple violent offenses, and his generally poor prison disciplinary record (*see e.g. People v Arroyo*, 99 AD3d 515 [1st Dept 2012], *lv denied* 20 NY3d 1059 [2013]). In particular, defendant absconded to another state while under parole supervision pursuant to the underlying judgment, and was subsequently convicted in that state of drug and firearm offenses

(*see e.g. People v Perez*, 110 AD3d 528 [1st Dept 2013], *lv denied* 22 NY3d 1043 [2013]). While the court credited defendant for his successful completion of various programs and the strides defendant has taken to put his life back together it properly found that such mitigating factors did not outweigh his extensive criminal history.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14273N- Index 310817/11
14273NA Tashena Ampratwum, etc.,
Plaintiff-Appellant,

-against-

Faustina Appiah,
Defendant-Respondent.

_____

Tashena Ampratwum, appellant pro se.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about January 22, 2013, which, to the extent appealed from as limited by the brief, determined that plaintiff, as administrator of the estate of her husband, was entitled to judgment in an amount equal to his interest in a certain property, and appointed a referee to ascertain and report on the value of said interest, and order, same court and Justice, entered on or about April 26, 2013, which, to the extent appealed from as limited by the brief, confirmed the referee's report, awarded plaintiff, as administrator, a judgment in the amount of $4,000, unanimously affirmed, without costs.

"While there is a presumption that tenants-in-common share equally in their common tenancy, such a presumption may be rebutted if the facts show that they hold the tenancy in unequal

shares. A court acting in equity may take into account the amounts invested in the property by the respective tenants in determining the shares to which they are entitled" (*McGuire v McGuire*, 93 AD3d 701, 703 [2d Dept 2012], *lv denied* 19 NY3d 808 [2012]). Here, the court properly considered defendant's undisputed testimony that she alone contributed all of the funds utilized to purchase and maintain the property, and that she resided in the home since its purchase. Defendant further testified that her son, plaintiff's husband, never resided in the home and that his name was put on the deed solely for defendant's convenience.

Pro se plaintiff failed to articulate or provide evidence that the deceased contributed to the purchase or maintenance of the property, that the valuation placed on the property by the referee was in error or that the estate that she represented was entitled to a greater percentage of its value. The court properly found that defendant's alleged failure to disclose at the inquest that the property was in foreclosure was not relevant

to an assessment of the value of the estate's interest in the property.

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

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

ENTERED: FEBRUARY 19, 2015

CLERK

Tom, J.P., Saxe, Manzanet-Daniels, Gische, Clark, JJ.

14274N Francesco Regini, Index 112994/11
Plaintiff-Respondent,

-against-

Board of Managers of Loft
Space Condominium,
Defendant,

SDS Leonard, LLC,
Defendant-Appellant.

_____

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Michael J. Schwarz of counsel), for appellant.

Advocates for Justice, Chartered Attorneys, New York (Arthur Z. Schwartz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 1, 2013, which insofar as appealed from as limited by the briefs, granted plaintiff's motion for leave to file a second amended complaint asserting claims against defendant SDS Leonard, LLC, for breach of fiduciary duty and breach of warranty, unanimously modified, on the law, to deny the motion as to the breach of fiduciary duty claim, and otherwise affirmed, without costs.

To the extent it asserts a claim against defendant SDS Leonard for breach of warranty under the offering plan, the proposed amendment is not plainly lacking in merit. Nor will

defendant suffer any prejudice as a result of it. However, the breach of fiduciary duty claim is duplicative of the breach of warranty claim, since both are based on SDS's alleged breach of its obligations under the offering plan, i.e., to repair and maintain the common elements of the building (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421 [1st Dept 2014]). The breach of fiduciary duty claim is also otherwise palpably without merit, since, to the extent it purports to assert a fiduciary duty arising from something other than the terms of the offering plan, it fails to identify any other basis for finding such duty.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14275 The People of the State of New York, Ind. 1786/09
Respondent,

-against-

Peter Roman,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at expert witness ruling; Marcy L. Kahn, J. at jury trial and sentencing), rendered December 14, 2010, as amended January 6, 2011, convicting defendant of attempted murder in the second degree, two counts of attempted assault in the first degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 10 years on each conviction, unanimously affirmed.

We reject defendant's claim that the verdicts convicting him of attempted murder and attempted assault were against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The requisite intent for each crime was established by testimony, by numerous witnesses, that defendant was aiming his

pistol at the police and civilian victims. Defendant's testimony that he was firing over the victims without intending to hit them presented a credibility issue for the jury, and in exercising our factual review powers, we find no basis for disturbing the jury's determinations.

The court properly denied defendant's motion to present expert testimony on false confessions, as defendant's motion papers, which contained no expert affidavit, did not establish that the proposed expert's testimony would be "relevant to the defendant and interrogation before the court" (*see People v Bedessie*, 19 NY3d 147, 161 [2012]). Moreover, we decline to second-guess the court's exercise of discretion as this is not a case that turns on the accuracy of defendant's confession with little or no other evidence connecting him to the crimes of which he was convicted (*cf. People v Abney*, 13 NY3d 251, 268-269 [2009], citing *People v LeGrand*, 8 NY3d 449, 452 [2007]). In any event, there is no reasonable possibility that the proposed testimony would have resulted in a more favorable verdict. Although the allegedly false confession was somewhat more incriminating than defendant's trial testimony, the confession was generally exculpatory with respect to the issue of intent.

After defense witnesses testified, the trial court properly

exercised its discretion in denying defense counsel's request to delay the trial in order to provide him with a "substantial opportunity" to "prepare" defendant for his testimony (*see Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]). Counsel had ample time to consult with his client before and during trial, and there is no reason to believe the defense was surprised in any way by the testimony of its own witnesses. Defendant did not preserve his claim that he was denied adequate time to consult with counsel regarding his decision to testify, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, because the record establishes that at the time of the request for a delay of the trial, defendant had already announced his decision to testify.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of

justice. As an alternative holding, we reject them on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14276 Wormser, Kiely, Galef & Jacobs, LLP, Plaintiff-Respondent, Index 160569/13

—against—

Jacob Frumkin, individually, Defendant-Appellant,

Jacob Frumkin, as managing member of Hamilton Heights Partners, LLC, et al., Defendants.

_____

Citak & Citak, New York (Donald L. Citak of counsel), for appellant.

Wormser, Kiely, Galef & Jacobs, LLP, New York (Joseph E. Czerniawski of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered March 17, 2014, which denied the motion of defendant Jacob Frumkin to dismiss the complaint as against him in his individual capacity, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying Frumkin's motion to dismiss the complaint as against him in his individual capacity, as the retainer agreement, which supplemented a prior agreement, is ambiguous as to who may be liable for attorneys' fees (*see Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204 [1st Dept 2006]). In

determining whether the person signing an agreement may be held liable in his individual capacity, "it is not sufficient to look only at the signature line in isolation. What is written on a signature line must be understood in the light of the entire agreement" (*Bonnant v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 467 Fed Appx 4, 8 [2d Cir 2012]).

Although "[i]t has long been the rule that ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it" (*151 W. Assoc. v Printsiples Fabric Corp.*, 61 NY2d 732, 734 [1984]), the doctrine is inapplicable here given Frumkin's status as an experienced attorney and his acknowledged participation in negotiating the terms of the retainer agreement (*see Cummins, Inc. v Atlantic Mut. Ins. Co.*, 56 AD3d 288, 290 [1st Dept 2008).

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

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14277 VNB New York Corp., Index 114222/10
Plaintiff-Appellant,

-against-

Chatham Partners, LLC,
Defendant,

Barry Akrongold, et al.,
Defendants-Respondents.

_____

Cullen and Dykman LLP, Garden City (Erin M. Tregarthen of counsel), for appellant.

Dreifuss Bonacci & Parker PC, New York (JoAnne M. Bonacci of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 25, 2013, which, to the extent appealed from, denied plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in plaintiff's favor in the amount sought in the complaint.

Plaintiff demonstrated, by the requisite clear and convincing evidence, that it was entitled to reformation of the subject guaranty to correct the name of the borrower of the underlying loan (*see Nash v Kornblum*, 12 NY2d 42, 46 [1962]).

The testimony of the draftsperson and the loan documents,

including the guaranty, which were executed on the same day, named a loan in the same amount, and applied to the same property, and the fact that no loan was ever extended to the entities named in the guaranty as borrowers establishes that the parties had come to an agreement that the individual defendants were guaranteeing the loan to Chatham Partners, LLC, rather than to the named entities, and that the insertion of the names of those entities in the guaranty was a scrivener's error (*see US Bank N.A. v Lieberman*, 98 AD3d 422, 424 [1st Dept 2012]; *Stonebridge Capital, LLC v Nomura Intl. PLC*, 68 AD3d 546, 548 [1st Dept 2009], *lv dismissed* 15 NY3d 735 [2010]).

Moreover, defendants ratified the guaranty by accepting its benefits in the form of the loan proceeds and not acting promptly to repudiate it (*see Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013]). Indeed, they confirmed their role as guarantors by signing a loan modification in that capacity, despite the absence of any new guaranty in that document, and by providing the lender with their financial statements pursuant to the guaranty.

Defendants' contention that the document they signed had the limited purpose of guaranteeing the lender's obligation to pay the expenses and costs related to preparation for the closing of

the loan in the event the closing did not take place is belied by the fact that the guaranty is unconditional and not so limited by its terms. Moreover, the document was executed at the closing.

Contrary to defendants' contention, neither the statute of frauds nor the parol evidence rule bars the reformation claim (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Similarly, the rules with respect to strictly construing guarantees and construing documents against their drafter have no bearing here.

Defendants' affirmative defenses are barred by the guaranty's "absolute and unconditional" nature and its waiver of defenses provision (*see Citibank v Plapinger*, 66 NY2d 90, 92 [1985]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008]). The record does not support defendants' contention that the waiver of defenses provision was rendered ineffective because the lender caused or contributed to the loan default. In any event, none of the defenses had merit.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Sweeny, Andrias, Moskowitz, DeGrasse, JJ.

14278 Daimler Chrysler Insurance Company, etc., Plaintiff-Appellant, Index 101314/10

-against-

New York Central Mutual Fire Insurance Co., Defendant-Respondent.

Buckley Law Group, P.A., New York (Erdal Turnacioglu of counsel), for appellant.

Boeggeman George & Corde, P.C., White Plains (Richard G. Corde of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 12, 2013, which denied plaintiff's motion for summary judgment on its claim for defense costs expended in the underlying personal injury action, and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The underlying personal injury action was discontinued by stipulation, to which plaintiff's insured was a signatory, agreeing that all cross claims between the defendants in that action were "discontinued and waived." The stipulation contained no reservation of any insurer's subrogation rights (*see Weinberg v Transamerica Ins. Co.*, 62 NY2d 379, 381-382 [1984]; *Ziegler v*

Raskin, 100 AD2d 814 [1st Dept 1984], *appeal dismissed* 65 NY2d 925 [1985]). Thus, plaintiff, as subrogee of its insured, standing in its insured's shoes and having no greater rights than its insured has, may not assert a subrogation claim against defendant (*see Progressive Ins. Co. v Sheri Torah, Inc.*, 44 AD3d 837, 838 [2d Dept 2007]).

Plaintiff's claim is also time-barred, because plaintiff is seeking common-law subrogation relief, and the statute of limitations on the underlying personal injury cause of action (three years) commenced to run as of the date of the accident (*see* General Construction Law § 20; *Vigilant Ins. Co. of Am. v Housing Auth. of El Paso, Tex.*, 87 NY2d 36, 43 [1995]; CPLR 214[5]; *cf. Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 221 [1996] [subrogation rights created by no-fault statute commenced on date benefits were paid]).

Although defendant informed plaintiff six months before the limitations period expired that the lessee had failed to name plaintiff's insured as an additional insured on his personal automobile insurance policy and that plaintiff's insured was afforded coverage under the policy as a loss payee only, plaintiff did not assert a breach of contract claim against the lessee, or bring a declaratory judgment action against defendant

or a subrogation action until well after the time to do so had expired (*see Allstate Ins. Co. v Stein*, 1 NY3d 416, 423 [2004]).

Thus, even if plaintiff were, as it contends, an additional insured solely by operation of the terms of the policy issued by defendant, and without reference to the terms of the lease, it could not assert a subrogation claim because its time to do so has expired.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14279 The People of the State of New York, Ind. 30068/13
Respondent,

-against-

Miguel Munoz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered on or about June 19, 2013, which adjudicated defendant a level two sex offender following a hearing pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supported the court's assessment of 20 points for defendant's establishment of a relationship for the purpose of victimization, and we reject defendant's arguments to the contrary. The court properly

exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Given the seriousness of the underlying conduct, defendant's arguments in favor of such a departure are unavailing.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14280 Coleman & Associates Enterprises, Inc., Plaintiff-Appellant, Index 652641/12

-against-

Verizon Corporate Services Group, Inc., Defendant-Respondent.

Henrichsen Siegel, PLLC, New York (Marcia A. McCree of counsel), for appellant.

Ballard Spahr Stillman & Friedman LLP, New York (Scott M. Himes of counsel), for respondent.

Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered September 13, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss plaintiff's breach of contract and promissory estoppel causes of action, deemed appeal from judgment, same court and Justice, entered November 1, 2013, inter alia, dismissing said causes of action, and, so considered, the judgment is unanimously affirmed, with costs.

Even though plaintiff appealed from the order and not the ensuing final judgment, in the interests of justice, we deem plaintiff's notice of appeal from the order a valid notice of

appeal from the judgment (*see* CPLR 5520[c]; *Robertson v Greenstein*, 308 AD2d 381 [1st Dept 2003], *lv dismissed* 2 NY3d 759 [2004]).

The agreements unambiguously provided that the Professional Services Agreement was to be the overarching agreement governing the parties' relationship; that Statement of Work No. 1 (SOW 1) governed the work at the Norfolk, Virginia call center; and that Statement of Work No. 2 (SOW 2) governed the work at the Tampa, Florida call center. Contrary to plaintiff's contention, nothing in the agreements indicates that the annual labor rate increases provided for in SOW 1 also applied to SOW 2. Given the unambiguous language of the agreements, the motion court properly declined to consider plaintiff's extrinsic evidence (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]).

The court also properly dismissed the promissory estoppel claim, as the alleged conduct underlying the claim was governed by the written contracts, and plaintiff failed to allege a duty independent of the contracts (*see Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda v Elman Invs., Inc.*, 117 AD3d

447, 449 [1st Dept 2014]; *Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]).

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14282 The People of the State of New York, Ind. 4145N/12
Respondent,

-against-

Anthony Vargas,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about November 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 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14283 In re John Murano, Index 100212/12
Petitioner-Appellant,

-against-

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

_____

Jeffrey L. Goldberg, P.C., Port Washington (Jeffrey L. Goldberg of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered June 27, 2013, denying the petition to annul and vacate respondents' determination, dated September 27, 2011, which denied petitioner's application for accidental disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Credible evidence in the record existed to support respondents' determination, inasmuch as the implicit findings and recommendation of the Medical Board, upon which the Board of Trustees could rely (*see Matter of Santangelo v Kelly*, 81 AD3d 439 [1st Dept 2011]; *Matter of Galli v Bratton*, 238 AD2d 252 [1st Dept 1997]), established that petitioner was not mentally incapacitated from performing his regular duties at the time of

his retirement (*see* Administrative Code of the City of New York § 13-252.1[2][a]). Petitioner, who was present at Ground Zero during the September 11, 2001 attack on the World Trade Center, and thereafter worked security in the Ground Zero area, was promoted to sergeant in late September 2001 and ultimately retired in October 2010 on full service retirement, following twenty years of full duty service, with firearms, and without any need for psychiatric intervention.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14284 Lloyds of London, as subrogee of Mike Rutherford,
Plaintiff-Respondent,

-against-

James W. Evanston,
Defendant-Appellant.

Index 151786/12

_____

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

Barrett Lazar, LLC, Forest Hills (Marc B. Schuley of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered on or about June 5, 2014, which, to the extent appealed from, denied defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Triable issues of fact exist, including whether defendant's act of turning on his HVAC unit, after having been told by the technician that examined it that it was defective and that defendant should not use it, caused the leak that damaged plaintiff's subrogor's apartment, which was below defendant's apartment (*compare Admiral Indem. Co. v Jeng*, 2010 NY Slip Op 30794[U] [Sup Ct, NY County 2010] [dismissal of complaint warranted where there was a lack of evidence that tenant was

aware of defect to HVAC system that ultimately resulted in a leak into an apartment below]). If, as defendant contends, it would require an expert to prove that his actions caused the leak, it would also be true that an expert would be required to show, as a matter of law, that defendant's actions did not cause the leak. Defendant has failed to offer such proof.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14285 Joseph Astil, etc., Index 151650/13
Plaintiff-Respondent,

-against-

Kumquat Properties, LLC, et al.,
Defendants-Appellants.

_____

Kerley, Walsh, Matera & Cinquemani, PC, Seaford (Lauren B. Bristol of counsel), for appellants.

Imbesi Christensen, New York (Jeanne Christensen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 22, 2013, which, in this action alleging personal property damage, granted plaintiff's motion to voluntarily discontinue the action, with prejudice as to the named plaintiff and without prejudice as to all other similarly situated plaintiffs, and denied as moot defendants' motion for partial summary judgment dismissing the proposed class action claims with prejudice, unanimously affirmed, with costs.

The motion court providently exercised its discretion in granting plaintiff's motion to discontinue this action (*see Tucker v Tucker*, 55 NY2d 378, 383 [1982]; *Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31, 32 [1st Dept 2001]).

Given the foregoing determination, the motion court properly denied as moot defendants' motion for partial summary judgment dismissing the proposed class action claims with prejudice. As the motion court noted, even if it had granted defendants' motion on the ground that plaintiff failed to seek class certification within the time required by CPLR 902, the determination would apply only to the named plaintiff and would not bar other potential class members from bringing an action and seeking class certification (*see Huebner v Caldwell & Cook*, 139 Misc 2d 288, 292 [Sup Ct, NY County 1988] ["when a class is not certified, unnamed plaintiffs are not subject to res judicata effects of judicial decisions pertaining to the class"]).

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

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14286 The People of the State of New York, Ind. 3105/11
Respondent,

-against-

Omi R. Peralta,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Andrew C. Fine of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi 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 (Renee A. White, J.), rendered on or about December 14, 2011,

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

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

ENTERED: FEBRUARY 19, 2015

CLERK

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

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14287 Robertina Steele, Index 104278/11
Plaintiff-Appellant,

-against-

Castillo D. Santana, et al.,
Defendants-Respondents.

_____

Ephrem J. Wertenteil, New York, for appellant.

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

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 11, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claim that she suffered a serious injury to her right shoulder within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleges she suffered injuries to, inter alia, her right shoulder, and was incapacitated from work for three months as a result of an accident in which she was knocked from her bicycle by defendants' motor vehicle. Defendants made a prima facie showing that plaintiff did not sustain permanent consequential or significant limitation injuries to her right

shoulder as a result of the accident, by submitting the affirmed reports of an orthopedic surgeon and radiologist. The orthopedic surgeon found full range of motion in plaintiff's right shoulder, and the radiologist concluded that plaintiff's injuries were degenerative in nature (*see Kang v Almanzar*, 116 AD3d 540 [1st Dept 2014]; *Paduani v Rodriguez*, 101 AD3d 470 [1st Dept 2012]).

In opposition, plaintiff raised a triable issue of fact. She submitted an affirmation of her orthopedic surgeon, who averred that he reviewed the MRI of the shoulder, which showed a tear to her tendon, and that during surgery he visualized a tear in plaintiff's rotator cuff, which he attributed to the accident (*see Venegas v Singh*, 103 AD3d 562, 563 [1st Dept 2013]; *Calcano v Rodriguez*, 103 AD3d 490 [1st Dept 2013]).

Defendants failed to meet their initial burden of establishing, prima facie, the absence of a 90/180-day injury. The examinations by defendants' physicians took place well after the relevant 180-day period, they did not opine about plaintiff's condition during that period, and defendants submitted no other

evidence refuting plaintiff's claim that, as a result of her injuries, she did was unable to return to work for three months following the accident (*see Jeffers v Style Tr. Inc.*, 99 AD3d 576, 577-578 [1st Dept 2012]).

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14289 The People of the State of New York, Respondent, Ind. 3814/11

-against-

Daniel Reyes, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered January 5, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

The court properly denied defendant's request for assignment of new counsel, made in the midst of jury selection. Defendant received a sufficient opportunity to state the grounds for his application (*see People v Porto*, 16 NY3d 93, 99-100 [2010]; *People v Sides*, 75 NY2d 822, 824-25 [1990]). His sole complaint was that his attorney had not complied with his request to file "a couple of" unidentified motions, and the court did nothing to prevent defendant from being more specific. Furthermore, the

court observed, based on its knowledge of the case, that there were no motions to be made, and that assessment is supported by the record. At most, defendant's allegations evinced a disagreement with counsel over strategy (*see People v Linares*, 2 NY3d 507, 511 [2004]). Finally, we note that defense counsel was retained, and defendant neither sought to hire different counsel nor explained why the court should grant him assigned counsel (*see People v Wall*, 56 AD3d 361 [1st Dept 2008], *lv denied* 12 NY3d 763 [2009]; *People v Wilburn*, 40 AD3d 508, 509 [1st Dept 2007], *lv denied* 9 NY3d 883 [2007]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14290 In re Tristen O., and Others,

Children Under Eighteen
Years of Age, etc.,

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

Commissioner of the Administration
for Children's Services of the City
of New York,
Petitioner-Respondent.

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

Geanine Towers, P.C., Brooklyn (Geanine Towers of counsel), for Leroy W., appellant.

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

Bruce A. Young, New York, attorney for the children.

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Order, Family Court, Bronx County (Kelly O'Neill Levy, J.), entered on or about December 20, 2013, which, after a hearing, determined that the respondents parents had failed to substantially comply with an order of adjournment in contemplation of dismissal (ACD), and granted petitioner agency's motion to restore the matter to the calendar for a fact-finding hearing on the underlying neglect petitions, unanimously affirmed, without costs.

The parents' objections to the untimeliness of the proceedings are unpreserved because they are raised for the first time on appeal (*see Matter of Antoine M.*, 276 AD2d 793 [2d Dept 2000]). Although we are concerned about the amount of time this case took, the record contains some explanation for the delay and there is no contention that the parents objected to the adjournments.

The court properly found that both parents had failed substantially to observe the terms and conditions of the ACD order (*see* Family Ct Act § 1039[e]; *Matter of James S. [Annemarie R.]*, 90 AD3d 1099 [3d Dept 2011]). The agency caseworker testified that the mother had failed to complete required services. Further, the court credited the testimony of the caseworker and the children's foster mother that the father had violated an order of protection.

We have considered appellants' remaining contentions for affirmative relief and find them unavailing.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14292-
14293 Index 114612/11

Carole Weinstein,
Plaintiff-Appellant,

-against-

WB/Stellar IP Owner, LLC,
Defendant-Respondent,

Friends of Greenwich Street, Inc.,
Defendant-Appellant.

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Law Offices of Brad A. Kauffman, New York (David S. Zwerin of counsel), for Carole Weinstein, appellant.

Willkie Farr & Gallagher LLP, New York (Timothy J. McGinn of counsel), for Friends of Greenwich Street, Inc., appellant.

Babchik & Young, LLP, White Plains (Jack Babchik of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about November 6, 2013, which granted plaintiff and defendant Friends of Greenwich Street, Inc. (Friends) leave to reargue, and effectively denied Friends leave to renew, and, upon reargument, adhered to its prior order, entered July 3, 2013, granting defendant WB/Stellar IP Owner, LLC (Stellar)'s motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, Friends' motion for leave to renew granted,

and upon renewal, Stellar's motion for summary judgment denied as premature without prejudice to renew following discovery. Appeals from order, same court and Justice, entered July 3, 2013, unanimously dismissed, without costs, as academic.

In this trip and fall case, plaintiff alleges that she fell on a public sidewalk abutting a building owned by defendant Stellar. Before any discovery, Stellar moved for summary judgment, arguing that it was not responsible for maintaining the portion of the sidewalk where the accident occurred, because the City had assumed responsibility for it. Stellar's property manager explained that the sidewalk was extended beyond its original width in 2000 as part of the Greenwich Street Improvement Project undertaken by the New York City Economic Development Corporation (EDC). Stellar relied on an unsworn letter sent to its predecessor in 2000 by an EDC project manager, who stated that, after the project was completed, maintenance requirements would remain the same as they had been, meaning that the owner of the abutting building would remain responsible only to the limits of the existing sidewalk. Plaintiff opposed the motion on the ground that it was premature since "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]). The motion court granted Stellar's motion, finding

that there was no dispute as to where plaintiff fell, and that Stellar had established that the City had assumed responsibility for that area.

Plaintiff moved to reargue, noting that the court had not taken into account that Stellar had a nondelegable duty to maintain the sidewalk under Administrative Code of City of NY § 7-210, enacted in 2003. Defendant Friends, which had not been a party to the action when Stellar made its original motion, also moved to reargue and to renew, submitting a letter written to it in 2006 by a commissioner of the New York City Department of Transportation, which stated that, in the absence of a maintenance agreement providing otherwise, maintenance of the sidewalk at issue is the responsibility of the adjacent property owner.

In light of the legal and factual issues raised on reargument and renewal, Stellar's motion should have been denied as premature, since plaintiff had no opportunity to depose

Stellar, codefendant Friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion (CPLR 3212[f]; *Brooks v Somerset Surgical Assoc.*, 106 AD3d 624, 624-625 [1st Dept 2013]).

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

ENTERED: FEBRUARY 19, 2015

CLERK

Friedman, J.P., Andrias, Moskowitz, DeGrasse, Richter, JJ.

14294-
14295N Index 309367/12

Nathalie Karg,
Plaintiff-Respondent,

-against

Anton Kern,
Defendant-Appellant.

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Law Offices of Stark & Levoritz, P.C., Brooklyn (Yonatan S. Levoritz and Steven Amshen of counsel), for appellant.

The McPherson Firm, PC, New York (Laurie J. McPherson of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered April 3, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff wife's application for interim counsel fees in the amount of $136,000, and directed defendant husband to pay the real estate taxes on the parties' farm property, unanimously affirmed, without costs. Order, same court and Justice, entered June 5, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion to hold plaintiff in contempt, to dismiss the claims related to the prenuptial agreement, and to modify the support award, and granted plaintiff's motions to stay defendant's plenary action and consolidate it with this action, to vacate the automatic stay

of the April 3, 2014 order awarding counsel fees, and for an additional award of counsel fees, unanimously affirmed, without costs.

Supreme Court properly awarded the wife interim counsel fees after considering the financial positions of the parties and the circumstances of the case (*see* Domestic Relations Law § 237; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]). Plaintiff was the less monied spouse, the disparity between the parties' respective income and assets was significant.

To the extent the legal fees awarded in the April 3, 2014 order may have related to the litigation over the parties' prenuptial agreement (there is no indication that they were so related), and to the extent the court awarded fees in connection with that litigation in its June 5, 2014 order, the awards were proper. Plaintiff was not precluded from recovering legal fees under Domestic Relations Law § 237 for services provided in opposing defendant's affirmative defense predicated on the prenuptial agreement (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 579 [2008]).

The court properly directed defendant to pay the real estate taxes on the parties' farm property to preserve that asset for equitable distribution (*see Rosenshein v Rosenshein*, 211 AD2d 456

[1st Dept 1995]). At the time that the court issued its previous pendente lite support award, the issue of the real estate taxes was not raised by either party.

The court correctly denied the part of defendant's motion seeking a downward modification of the support award since defendant failed to attach a statement of net worth (22 NYCRR 202.16[k][2]). In any event, defendant failed to show exigent circumstances or that the court failed to consider the relevant factors (*see Strauss v Saadatmand*, 89 AD3d 415 [1st Dept 2011]).

The court properly denied the part of defendant's motion seeking to hold plaintiff in contempt since defendant failed to show that plaintiff had violated a clear and unequivocal mandate of the court or that he was prejudiced by the actions of which he complains (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]). Given the deeply damaged relationship between defendant and his 14-year-old son, following an incident of violence that occurred in July 2013, defendant cannot show that he was prejudiced by remarks plaintiff may have made about him to the child.

The court correctly denied the part of defendant's motion seeking to dismiss any claims relating to the prenuptial agreement. Defendant pleaded an affirmative defense based on the

prenuptial agreement, and demanded in his answer that the court declare the agreement valid. He moved for summary judgment declaring the agreement valid and enforceable, and plaintiff opposed the motion, raising an issue of fact as to the validity and enforceability of the agreement. The parties then stipulated to a hearing on the validity of the agreement, and defendant fully and actively participated in the hearing.

The court properly consolidated this action with defendant's plenary action, which sought relief relating to the prenuptial agreement; the actions present common questions of law and fact (*see Geneva Temps, Inc. v New World Communities*, Inc., 24 AD3d 332 [1st Dept 2005]).

The court properly vacated the automatic stay of the April 3, 2014 order obtained by defendant's posting of an undertaking to secure his obligation to pay interim counsel fees (*see* CPLR 5519[c]; *Wechsler v Wechsler*, 8 Misc 3d 328 [Sup Ct, NY County 2005]). The court was appropriately concerned that defendant was taking advantage of the automatic stay to prevent plaintiff from receiving interim counsel fees, thereby preventing an even

playing field in the litigation. Further, defendant can recoup the counsel fee award from plaintiff's share of equitable distribution, while plaintiff would be severely prejudiced if she were forced to wait months to obtain the interim award.

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

ENTERED: FEBRUARY 19, 2015

CLERK

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

13572 In re The State of New York, Index 30096/10
Petitioner-Respondent,

-against-

Frank P., etc.,
Respondent-Appellant.

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Marvin Bernstein, Mental Hygiene Legal Service, New York (Kent Mackzum of counsel), for appellant.

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

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Order, Supreme Court, New York County (Daniel Conviser, J.), entered on or about February 4, 2013, reversed, on the law, without costs, and the petition dismissed.

Opinion by Renwick, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
David B. Saxe
Karla Moskowitz
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

13572
Index 30096/10

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In re The State of New York,
Petitioner-Respondent,

-against-

Frank P., etc.,
Respondent-Appellant.

_____x

Respondent appeals from the order of the Supreme Court, New York County (Daniel Conviser, J.), entered on or about February 4, 2013, which, upon a jury verdict that he suffers from a mental abnormality, determined, after a dispositional hearing, that he is a sex offender requiring strict and intensive supervision and treatment.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Kent Mackzum and Sadie Zea Ishee of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo and Steven C. Wu of counsel), for respondent.

RENWICK, J.P.

The State of New York brought this Mental Hygiene Law (MHL) article 10 proceeding seeking civil commitment of respondent as a dangerous sex offender. This proceeding, however, preceded the recent pronouncement by the Court of Appeals in *Matter of State of New York v Donald DD.* (24 NY3d 174 [2014]).[1] In *Donald DD.*, the Court of Appeals limited the evidence that can be used to civilly commit a convicted sex offender, and clarified that a sex offender cannot be subject to civil commitment solely because the individual is diagnosed as suffering from an abnormality that predisposes him to commit sexual offenses. In so doing, the Court of Appeals clarifies the line between civil commitment and penal commitment. In this case, we heed this clarification by dismissing this MHL article 10 proceeding on the ground that the State has failed to establish by clear and convincing evidence that respondent has or will have serious difficulty controlling his behavior.

Procedural and Factual Background

Respondent is a 67 year old sex offender who was convicted of raping and sodomizing four women in their homes, and accused

[1] *Donald DD.* also decided the appeal in *Matter of State of New York v Kenneth T.* (106 AD3d 829 [2013], *revd* 24 NY3d 174 [2014]).

of raping seven more women, over 30 years ago. Respondent's relevant criminal history began in 1970. During a four-month period in 1970, respondent committed four home invasions against four different women in July, August and November. The four home invasions were virtually identical. He targeted women he did not know in the middle of the day. He followed the women to their apartments, forced his way inside as the women opened the door, often with the use of a weapon, and threatened to harm or kill them if they did not cooperate. Respondent forced the women to undress, raped them, and then stole small amounts of cash and petty household items from them.

In addition to the four home invasions and rapes, respondent also robbed two other women and burglarized the apartment of a third woman in August and October 1970. In those cases, respondent followed each woman to her apartment, but was only able to get inside the home of one victim. In all three cases, he stole either very little cash or minor household items.

The four women whose homes respondent invaded identified respondent as their rapist. Respondent was arrested on sexual assault charges in all four cases. However, respondent was indicted for sexual offenses in only one of the home invasions and the indicted charges were dismissed before trial. He was also indicted for various other nonsexual offenses, such as

burglary, robbery, and grand larceny, against all of the women he victimized in 1970. For these various cases, respondent was convicted of burglary in the second and third degrees, robbery in the first, second, and third degrees, and grand larceny. He received a maximum prison sentence of 25 years. He was released on parole in May 1977.

Less than a month after his release in May 1977, respondent raped another woman. Over the next four months, he also committed five other home invasions and rapes that followed a similar pattern as his 1970 crimes. As before, he followed the women to their apartments, where he raped and sodomized them. He left the women tied up or in a closet while he burglarized their homes, fleeing with minor items. All six 1977 victims identified respondent as their rapist. He was indicted for all six rapes in 1977, and was also indicted for various nonsexual offenses, such as robbery and burglary, against all six women.

Respondent was tried first for the charges related to an October 28 rape, and subsequently tried for the charges concerning August 5 and August 30 rapes. A jury convicted him of raping and sodomizing the three women. He was also convicted of nonsexual offenses against each woman. Respondent was sentenced to 12½ to 25 years' imprisonment. Because he violated his parole as a result of his convictions, his maximum prison sentence was

extended from 25 years to 46 years — reflecting the time he had not served on his 1970 convictions.

Following these convictions, the prosecution dismissed the indicted (but not tried) charges related to the remaining three rape victims from 1977. In part, the indicted charges were dismissed because as a result of his conviction for the three rapes, respondent had received the maximum sentence allowable under state law and his sentence would not be extended even with additional sexual offense convictions.

Respondent then spent 33 years of continuous incarceration for these convictions. In May 2010, as he was about to be paroled, at the age of 62, the State commenced this civil commitment proceeding against respondent. At trial, the State presented the testimony of two expert witnesses, Dr. Harris and Dr. Kunkle. They similarly testified that respondent has a qualifying mental abnormality under MHL article 10, and they diagnosed him as suffering from paraphilia "not otherwise specified" (NOS) based on urges related to nonconsenting partners, and antisocial personality disorder (ASPD).

To reach their diagnoses, both experts reviewed respondent's juvenile, criminal, prison, and mental health records. Dr. Kunkle also interviewed respondent. In addition to reviewing the crimes for which respondent was convicted, both experts also

examined the aforementioned sexual offense charges for which he was arrested or indicted, but not tried.[2]

The State experts testified that paraphilia is a "sexual disorder where an individual gets sexual pleasure from sources that are abnormal from typical sexual conduct." Paraphilia NOS permits "clinicians to render a diagnosis of an individual having a paraphilia" when "that paraphilia is not listed specifically" in the Diagnostic Manual of Mental Health Disorders (DSM). Individuals with paraphilia NOS derive "specific sexual gratification from rape" and are aroused by its "nonconsensual nature."

To diagnose paraphilia NOS, the State experts "looked for a recurrent pattern of rape behaviors" that was consistent over at least a six-month period. They also examined whether the behavior was "chronic" and always involved rape. They evaluated the manner in which respondent engaged in the rapes to determine whether he was "aroused enough and interested enough in committing the act to engage in those extra behaviors to carry it

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[2] Information related to those sexual offense charges were contained in official criminal records such as grand jury indictments, two victim affidavits submitted in criminal court, a presentence report prepared in connection with respondent's 1979 convictions, police reports, documents in the District Attorney's files, and criminal court papers, such as a memorandum submitted to the court by the District Attorney.

out." Finally, they looked for evidence of penetration and ejaculation to demonstrate that respondent was aroused by the rape.

After reviewing respondent's offense history, both experts concluded that the foregoing criteria were satisfied. They also testified that respondent's paraphilia NOS predisposes him to commit sexual offenses and causes him serious difficulty in controlling his sexual impulses, and that he is aroused by forcing someone to have sex with him. Neither expert explained how he arrived at his conclusion that respondent has or will have serious difficulty controlling his sexual behavior.

Further, both experts also diagnosed respondent with ASPD — a disorder that "affects an individual[']s interpersonal relationships" and is characterized by the pervasive "violation of the rights of others." They found that respondent suffered from several of the characteristics of ASPD, including (1) "a lack of conformity to social norms with regard to the law;" (2) deceitfulness; (3) impulsivity; (4) irritability and aggression; (5) lack of remorse; (6) "disregard for the safety of others;" and (7) "irresponsibility for common needs."

The State experts concluded that respondent's ASPD satisfied the definition of a mental abnormality. Dr. Harris explained that respondent's ASPD is so severe that he would satisfy the

criteria for a mental abnormality even without a diagnosis of paraphilia NOS because "his volitional control is so poor and the way he thinks about the world and himself is so compromised" that he is still at risk of committing sexual assaults.[3]

Dr. Kunkle acknowledged that respondent had never been disciplined in prison for any sexual misconduct throughout his 33-year incarceration, and that there were no documented instances of his engaging in inappropriate sexual behavior, masturbating, touching female prison staff, or even making inappropriate sexual comments. Dr. Kunkle, however, felt that the paraphilia diagnosis was appropriate because respondent had committed sex crimes shortly after being released from prison in 1977, after serving seven years' incarceration for his 1970 convictions.

Dr. Kunkle also acknowledged that respondent had attended anger management training and sex offender treatment programming while in prison, and, according to the DSM, ASPD tends to remit after the fourth decade of life. He nevertheless felt that respondent continued to suffer from ASPD. Dr. Kunkle also relied

[3] A diagnosis of ASPD also requires evidence that the individual has conduct disorder — or "antisocial type conduct" prior to the age of 15. In this case, the experts noted that respondent engaged in such conduct starting at 14, when he assaulted a teacher.

upon his interview with respondent shortly before respondent was scheduled to be released from prison, when Dr. Kunkle informed him that he was under consideration for civil commitment pursuant to MHL article 10. According to Dr. Kunkle, respondent expressed "a great deal of hostility toward the criminal justice system." He referred numerous times to the process of MHL article 10 as "double jeopardy." Dr. Kunkle believed that this was evidence that respondent's antisocial "attitudes are still present."

Dr. Harris also acknowledged that respondent had not been disciplined in prison for any sexual misconduct throughout his 33-year incarceration. He opined, however, "I don't think his behavior in prison will at all be the behavior that he would engage in outside of prison." Further, the fact that respondent continued to deny his sex crimes demonstrated to Dr. Harris that he had not learned to manage his sexual arousal patterns. He added, "The mindset that he didn't do it is the very mindset that . . . allows him to commit another offense and another offense."

Ultimately, the jury found that respondent suffers from a mental abnormality qualifying him for civil management under MHL article 10. Following a dispositional hearing where the State experts and respondent testified, Supreme Court found that respondent is not a dangerous sex offender in need of confinement, and ordered instead that he submit to strict and

intensive supervision and treatment (SIST) in the community. Supreme Court was persuaded by respondent's lack of sexually deviant behavior while incarcerated; his lack of prison disciplinary violations during the last six years of his sentence; his "constructive work in prison" to complete his education and assist other inmates; his "realistic goals" upon release; and the continued involvement of his family and relatives in his life, to conclude that respondent could live at liberty without reoffending if strictly supervised. Respondent now appeals his SIST on sufficiency grounds.

Discussion

In reaching its decision in *Matter of State of New York v Donald DD.*, the New York Court of Appeals relied on two United States Supreme Court cases, *Kansas v Hendricks*, 521 US 346 [1997] and *Kansas v Crane*, 534 US 407 [2002]. Beginning with *Kansas v. Hendricks*, the Supreme Court set forth the substantive due process requirements of statutes that civilly commit sexual offenders (521 US 346). The Kansas Sexually Violent Predator Act permits the State to civilly commit sexually violent predators.[4]

[4] The statute defines a sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence" (Kan Stat Ann § 59-29a02[a]). It defines "mental abnormality" as "a congenital or acquired

In *Kansas v Hendricks*, the State sought to civilly commit Hendricks, an inmate about to be released from prison after serving time for sexually molesting children (521 US at 350). Hendricks challenged the Act on substantive due process grounds, among others. The Supreme Court upheld the constitutionality of Kansas's civil commitment of sexually violent predators, as well as Hendricks's confinement (*id.*).

Kansas v Hendricks explained that the liberty afforded to citizens by the Constitution is not absolute and that certain exceptions are necessary for the "common good" (*521 US* at 356-357 [internal quotation marks omitted]). The Court noted that, under certain conditions, it had upheld statutes providing for the civil confinement of individuals who could not control their actions and who posed a threat to the community (*id.* at 357). Articulating the narrow standard under which a person may be committed, the Court explained that a mere finding of dangerousness is generally insufficient to warrant commitment (*id.* at 358). However, proof of a mental illness or abnormality that is linked to the finding of dangerousness "serve[s] to limit involuntary civil confinement to those who suffer from a

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condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others" (§ 59-29a02[b]).

volitional impairment rendering them dangerous beyond their control," thereby fulfilling the narrow tailoring required by the Due Process Clause (*id.*).[5] In upholding Hendricks's civil commitment, the Court found that an "admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishe[d] Hendricks from other dangerous persons who [were] perhaps more properly dealt with exclusively through criminal proceedings" (*id.* at 360).

Kansas v Hendricks's reference to lack of control left uncertainty in the governing law – namely, whether a showing that a defendant completely lacked the ability to control himself was necessary to justify civil commitment. Five years later, *Kansas v Crane* (534 US 407) directly answered this question. Crane was a very different man from Hendricks, the child molester with no self-control whose commitment the US Supreme Court had upheld. There was less evidence of sex crime recidivism in Crane's case. In *Kansas v Crane*, the State sought civil commitment of Crane, who had previously been convicted of aggravated sexual battery and lewd and lascivious behavior for exposing himself (534 US at 416). The State witnesses agreed that Crane had significant

[5] The Court left individual states with the discretion to define what constitutes a mental illness or abnormality and explained that the legal significance of these terms need not directly equate with medical standards (*id.* at 359).

control over his actions (*In re Crane*, 269 Kan 578, 581, 7 P3d 285, 288 [2000], *vacated* 534 US 407 [2002]). Finally, the State's own psychiatric witness estimated that more than seventy-five percent of all prisoners suffer from ASPD, hardly making the potential class of committees a narrow group (*id.* at 290). Against this backdrop, the Kansas Supreme Court revisited the question of the Kansas Act's constitutionality.

In *Crane*, the respondent argued that the Constitution required the State to show that he could not control his dangerous behavior in order to commit him (*Crane*, 269 Kan. at 582, 7 P3d at 288). The Kansas Supreme Court agreed, seizing on language in *Kansas v Hendricks* upholding the Act based largely on the committee's lack of volitional control (269 Kan at 586, 7 P3d at 290). The Kansas Supreme Court reversed Crane's commitment and remanded for a new trial at which the jury was to determine whether he could control his behavior (*id.*). The Court reasoned that, because Crane was committed on the basis of a "personality disorder," which was not defined in the Kansas Act to include a lack of volitional control, the jury had not made the required finding in the initial trial (*id.*). The Court also suggested that the definition of the term "mental abnormality" was unconstitutionally broad, since it includes behavior that a

potential committee can control (269 Kan at 585-586, 7 P3d at 290).

The Supreme Court, while agreeing with some of the Kansas Court's reasoning, vacated the state decision; the Justices rejected as unworkable the premise that only those with a complete lack of volitional control – who experience "irresistible impulses" – may be civilly committed (*Crane*, 534 US at 411-412 [internal quotation marks omitted]). The Court found that most severely ill people retain some degree of volitional control, and "[i]nsistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities" (*id.* at 412). The Court, however, also rejected the Kansas Attorney General's position that no lack-of-control determination whatsoever is required. "[T]here must be proof of serious difficulty in controlling behavior" (*id.* at 413). The majority stressed that such findings keep the Act constitutional by distinguishing between those eligible for civil commitment and those who must be dealt with exclusively through ordinary criminal proceedings. "That distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence' – functions properly those of criminal law, not civil

commitment" (*id.* at 412, quoting *Hendricks*, 521 US at 372-373 [Kennedy, J., concurring]).

The New York Court of Appeals has interpreted the Mental Hygiene Law article 10 statute to be consistent with the constitutional requirements of *Hendricks* and *Crane*. Indeed, the statute requires that all offenders subject to civil management, including SIST, must be found to have a mental abnormality as a threshold qualification. MHL § 10.03(i) defines a mental abnormality as

> "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct."

Article 10 authorizes civil confinement only of those sex offenders whose "mental abnormality" involves such a strong disposition to commit sexual misconduct and an inability to control behavior that the person is dangerous to society (MHL §§ 10.03[e], 10.07[f]). MHL article 10, as written, is also designed to provide courts with a mechanism for deciding whether the mental condition of a sex offender suffering from a mental abnormality is so extreme that the more restrictive alternative of confinement is warranted or whether, on the other hand, the

least restrictive option, namely SIST, is permitted (*see* MHL § 10.07[f]).[6]

Drawing from *Hendricks and Crane,* the New York statutory structure does not run afoul of substantive due process because it requires the State to prove that the individual is dangerous, and the dangerousness must be coupled with a mental abnormality, which — by definition — incorporates the additional requirement that the offender have serious difficulty with behavioral control (Matter of *State of New York v Donald DD.,* 24 NY3d 174 [2014]). Moreover, the Court of Appeals has limited the evidence that can be used to civilly confine a convicted sex offender.

Specifically, in *Donald DD.* (24 NY3d at 190-191) the Court held that Donald DD's ASPD diagnosis, by itself, was insufficient to establish a "condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having

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[6] The standards applicable in a proceeding seeking confinement pursuant to Mental Hygiene Law § 10.11(d)(4), after an alleged SIST violation, are the same as those applicable when the proceeding is brought while the sex offender is still incarcerated. "The court shall make its determination of whether the respondent is a dangerous sex offender requiring confinement in accordance with the standards set forth in subdivision (f) of section 10.07" (Mental Hygiene Law § 10.11[d][4]). Section 10.07 in turn relies on the definitional provisions of Mental Hygiene Law § 10.03.

serious difficulty in controlling such conduct" (*id.*, quoting MHL § 10.03[i] [emphasis omitted]). In so concluding, the Court stated that "[a] diagnosis of ASPD alone — that is, when the ASPD diagnosis is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute a mental abnormality — simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case. ASPD means little more than a deep-seated tendency to commit crimes. Its use in civil confinement proceedings, as the single diagnosis underlying a finding of mental abnormality as defined by Mental Hygiene Law article 10, proves no sexual abnormality" (*id.* at 190 [internal citation and quotation marks omitted]).

Furthermore, in *Donald DD. (Kenneth T.)*, the Court of Appeals clarified that the State must prove, separate from a finding of mental abnormality required for civil commitment, that the defendant has serious difficulty controlling his behavior. Specifically, the State must demonstrate that as a result of the "serious mental illness, abnormality or disorder," a person also would have serious difficulty controlling his behavior if released (24 NY3d at 187, 189). This is because, as *Crane* explained, sex offenders do not face detention simply because society considers them likely to re-offend; offenders face

detention only if society also deems that they are substantially unable to control their behavior (*Crane*, 534 U.S. at 411-412).

In addition, in *Donald DD. (Kenneth T.)*, the Court of Appeals rejected the expert's qualitative description of the respondent's ability to control his sexual misconduct as not meeting the clear and convincing standard (24 NY3d at 187-188). Kenneth T.'s article 10 trial differed from Donald DD.'s in that the fact finder heard evidence that Kenneth T. suffered not only from ASPD but also from paraphilia NOS. At the outset, the Court of Appeals expressed some misgivings as to whether a diagnosis of paraphilia NOS is sufficient to support a finding of mental abnormality within the meaning of MHL article 10 (*id.* at 186). Nevertheless, the Court found it "unnecessary . . . to decide any issue concerning paraphilia NOS, because we need not decide whether there was legally sufficient evidence that Kenneth T. had a condition 'that predispose[d] him . . . to the commission of conduct constituting a sex offense' within the meaning of Mental Hygiene Law § 10.03(i)" (*id.* at 187). Instead, in *Donald DD. (Kenneth T.)*, the Court held "that, even assuming that mental abnormality was demonstrated to that extent, there was not clear and convincing evidence that Kenneth T. had 'serious difficulty in controlling' his sexual misconduct within the meaning of § 10.03(i)" (*id.*).

In *Donald DD. (Kenneth T.)*, the State relied primarily on expert testimony on the issue of whether the respondent had serious difficulty controlling conduct amounting to sex offenses (*id.* at 187). On this issue, Dr. Kirschner identified the fact that respondent carried out both rapes in a way that would allow for identification by his victims, and the fact that he committed the second rape despite having spent many years in prison for the earlier crime (*id.*). The Court of Appeals, however, found this qualitative description of defendant's ability to control his sexual urges legally insufficient, explaining:

> "It is evident that circumstances of this nature are insufficient to show, by clear and convincing evidence, that a person has serious difficulty in controlling his sexual urges within the meaning of Mental Hygiene Law § 10.03(i). A rapist who killed his victims so that they could not identify him may have serious difficulty controlling his sexual urges. Conversely, one who raped an acquaintance and permitted her to escape may not have serious difficulty controlling his sexual urges within the meaning of article 10. A person who committed a rape soon after serving a very short sentence for sexual abuse may have serious difficulty in controlling his sexual misconduct. Conversely, one who committed a rape soon after serving a very lengthy sentence may not have serious difficulty controlling his sexual urges. Rather, the rape may be a crime of opportunity, and the defendant willing to risk the prospect of a return to incarceration.

> "Undoubtedly, sex offenders in general are not notable for their self-control. They are also, in general, not highly risk-averse. But beyond these truisms, it is rarely if ever possible to say, from the facts of a sex offense alone, whether the offender had great difficulty in controlling his urges or simply decided to gratify them, though he knew he was running a significant risk of arrest and imprisonment" (*id.* at 187-188).

While in *Donald DD.* the Court of Appeals declined to elaborate "from what sources sufficient evidence of a serious difficulty controlling sex-offending conduct may arise," as aforementioned, the Court did provide some important guidelines that are helpful to the instant appeal (24 NY3d at 188). First, in *Donald DD.*, the Court made clear that a finding that respondent had serious difficulty controlling his sexual conduct must be made independent of the threshold determination that the respondent suffers from a mental abnormality within the meaning of the statute (*id.*). In doing so, the Court explicitly rejected the dissent's suggestion that *Crane* does not impose an additional element to justify civil confinement because such requirement is implicit "where the State's evidence conforms to the statutory definition of a mental abnormality, i.e., the State shows that the offender suffers from any 'congenital or acquired condition, disease or disorder' that predisposes the person to sexual misconduct and results in difficulty controlling sexual urges"

(*Donald DD.*, 24 NY3d at 196, quoting MHL § 10.03[i] [Graffeo, J., dissenting in *Donald DD*]).

Second, as indicated, *Donald DD.* also makes clear that the burden of proof, to establish serious difficulty of controlling sex-offending conduct, is clear and convincing evidence. The Court explained that such evidence "cannot consist of such meager material as that a sex offender did not make efforts to avoid arrest and reincarceration" (*24 NY3d at* 188). Likewise, while noting that "[a] detailed psychological portrait of a sex offender would doubtless allow an expert to determine the level of control the offender has over his sexual conduct," the Court found that expert testimony that a sex offender lacks "internal controls such as a conscience that might curb his impulses" is also "not a basis from which serious difficulty in controlling sexual conduct may be rationally inferred" (*id.*) This is because "[i]t is as consistent with a rapist who could control himself but, having strong urges and an impaired conscience, decides to force sex upon someone, as it is with a rapist who cannot control his urges" (id.).

Applying the parameters established in *Donald DD.* to the proceeding herein, we find that the State failed to meet its burden of proof required to establish that respondent is a sex offender that mandates SIST under MHL article 10. As fully

detailed above, besides relying on respondent's criminal history that occurred prior to his 33-year incarceration, the State relies primarily on two expert witnesses, both of whom diagnosed respondent as suffering from two abnormalities (Paraphilia NOS and ASPD) that predispose him to commit sexual offenses. However, as *Donald DD.* held, a diagnosis of ASPD cannot serve as the factual predicate of sexual abnormality under MHL article 10 (24 NY3d at 190).

With regard to the experts' diagnosis of Paraphilia NOS, the experts opined that the abnormality resulted in respondent's serious difficulty in controlling his sexual behavior. Neither of the two State experts, however, conducted a quantified analysis of the factors that led to their individual conclusions. Instead, both State experts opined in a conclusory fashion that respondent's paraphilia NOS "predispose[s] him to commit sexual offenses and cause[s] him to have serious difficulty controlling his sexual impulses" (*id.* at 198). But drawing a conclusion that a respondent has a volitional impairment from only a diagnosis of sexual abnormality violates the Court of Appeals' recent mandate in *Donald DD.* that the State must prove separate from the abnormality that a sex offender has serious difficulty controlling his behavior. As *Donald DD.* recognized, the concept of predisposition and volition are separate and distinct. A

disorder like Paraphilia NOS might predispose someone to the commission of sexual offenses, but the offender might have enough degree of control over the disposition.

Nor do we find the evidence in the record relied on by the State experts, for their diagnosis, sufficient to establish by clear and convincing evidence that respondent has or will have serious difficulty controlling his behavior. Significantly, respondent spent 33 consecutive years in prison and there is no evidence that he engaged in any inappropriate sexual behavior during that prolonged period to suggest that he had serious difficulty controlling his behavior in such an environment. Instead, defendant voluntarily attended anger management and sex offender treatment programs while in prison. To be clear, one of the State experts noted that, during his recent interview of respondent, he "expressed great deal of hostility toward the criminal justice system" and constantly asserted that he only engaged in "consensual" sex with his victims. However, given *Donald DD*, we find that the inferences that logically flow from such evidence are insufficient to support a determination, under the clear and convincing evidence standard, that respondent has or will have serious difficulty controlling his sexual behavior.

Accordingly, the order of the Supreme Court, New York County (Daniel Conviser, J.), entered on or about February 4, 2013,

which, upon a jury verdict that respondent suffers from a mental abnormality, determined, after a dispositional hearing, that respondent is a sex offender requiring SIST, should be reversed, on the law, without costs, and the petition dismissed.

All concur.

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

ENTERED: FEBRUARY 19, 2015

CLERK