SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 11, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Gische, JJ.

14009-
14010 Index 300386/11

Roberto Passos, et al.,
Plaintiffs-Respondents,

-against-

MTA Bus Company, et al.,
Defendants-Appellants.

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Barry, McTiernan & Moore, LLC, New York (David H. Schultz of counsel), for appellants.

Ephrem J. Wertenteil, New York, for Roberto Passos, respondent.

Law Office of Judah Z. Cohen, PLLC, Woodmere (Judah Z. Cohen of counsel), for Johnny Miranda, Jr., Shamek Brown and Lisa Watson Brown, respondents.

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Orders, Supreme Court, Bronx County (Barry Salman, J.), entered September 13, 2013, and October 21, 2013, which granted plaintiffs' motions for summary judgment on the issue of liability, reversed, on the law, without costs, and the motions denied.

On May 3, 2010 three cars were involved in a double rear end collision on Second Avenue, between 78th and 79th Streets. The first vehicle was driven by nonparty DiPaoli, the middle vehicle, a truck, was driven by plaintiff Passos (plaintiffs Miranda and

Mr. Brown were passengers), and the rear vehicle (an MTA bus) was driven by defendant Victor Moses. At his deposition, DiPaoli testified that he was at a complete stop at a red light, and that he was hit twice in the rear. He described the second impact as "substantially less [forceful] than the first impact."

Plaintiffs moved for summary judgment against the MTA and the driver of the bus (MTA defendants), claiming that the driver of the bus failed to maintain a safe distance between the bus and the Passos truck. The motion court granted plaintiffs' motions for summary judgment. We reverse, and deny the motions.

When approaching another vehicle from behind, drivers are required to maintain a reasonably safe rate of speed, maintain control over the vehicle, and use reasonable care to avoid a collision, by, among other things, including maintaining a safe distance (Vehicle and Traffic Law § 1129[a]). Under the law applicable to rear end collisions, a presumption of negligence is established by proof that a stopped car was struck in the rear (*Stalikas v United Materials*, 306 AD2d 810, 810 [4th Dept 2003], *affd* 100 NY2d 626 [2003]). However, that presumption can be rebutted if the operator of the rear vehicle comes forward with an adequate non-negligent explanation for the accident (*id.*; *Vavoulis v Adler*, 43 AD3d 1154, 1155 [2d Dept 2007]).

The Court of Appeals decision in *Tutrani v County of Suffolk*

(10 NY3d 906 [2008]) is instructive. In that case, a defendant police officer abruptly came to a near stop in the middle of a roadway (*id.* at 907). The plaintiff, traveling immediately behind the police vehicle, was able to stop "within a half a car length" of the vehicle without striking it (*id.*). Seconds later, a third car rear-ended the plaintiff's car (*id.*). The jury rendered a verdict apportioning liability 50% against the police officer and 50% against the third car (*id.*). The Second Department reversed, and found the rear car 100% liable for the accident (42 AD3d 496, 497 [2007], *revd* 10 NY3d 906 [2008]). The Court of Appeals reversed (10 NY3d at 907). Recognizing the presumption that a rear end collision with a stopped car establishes a prima facie case of liability on the part of the driver of the rear vehicle, the Court nonetheless concluded that the front driver/police officer was not absolved of liability because his actions

> "created a foreseeable danger that vehicles would have to brake aggressively in an effort to avoid the lane obstruction created by his vehicle, thereby increasing the risk of rear-end collisions. That a negligent driver may be unable to stop his or her vehicle in time to avoid a collision with a stopped vehicle is a normal or foreseeable consequence of the situation created by [the police officer's] actions" *id.* at 908 (internal citations and quotation marks omitted).

(10 NY3d 906, 908).

Viewing this record, including DiPaoli's deposition

testimony, in the light most favorable to the MTA defendants, we cannot conclusively determine liability as a matter of law (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). DiPaoli, the driver of the front vehicle, testified that his vehicle was struck in the rear, in a manner he described as a "decent jolt." He then testified to feeling a second "impact from behind." Given uncontested evidence that Passos's truck was directly behind the DiPaoli car, and that the MTA Bus was behind Passos' truck, this testimony raises an issue of fact as to whether Passos hit DiPaoli before being rear-ended. In a multi vehicle accident, "where, as here, there is a question of fact as to the sequence of the collisions," it cannot be said as a matter of law there was only one proximate cause of plaintiffs' injuries (*Vavoulis*, 43 AD3d at 1156).

The police accident report, which the dissent cites as evidence that the bus precipitated a chain collision, conflicts with DiPaoli's testimony, bolstering the conclusion that there are disputed issues of fact.

A jury question is presented - namely, whether Passos's collision with the DiPaoli vehicle created a foreseeable danger that the MTA defendants would also have to brake aggressively, increasing the risk of a second rear end collision (*Tutrani*, 43 AD3d at 1156; *Vavoulis*, *supra*; *Carhuayano v J&R Hacking*, 28 AD3d

413 414-415 [2006]; *Schmidt v Guenther*, 103 AD3d 1162, 1163 [4th Dept. 2013]). Alternatively the jury may determine that the accident was the sole fault of the MTA defendants. In either event, our role on these motions is limited to issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

All concur except Manzanet-Daniels, J. who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

I would affirm the orders appealed from granting plaintiffs' motions for summary judgment as to liability.

Pursuant to Vehicle and Traffic Law § 1129(a), "[d]rivers must maintain safe distances between their cars and cars in front of them[,] and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages" (*Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). Hence, "a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the second vehicle," and "the injured occupants of the front vehicle are entitled to summary judgment on liability, unless the driver of the following vehicle can provide a non-negligent explanation, in evidentiary form, for the collision" (*id.*). A claim that the lead vehicle came to a sudden or unanticipated stop is generally insufficient to rebut the presumption of negligence on the part of the rear-ending vehicle (*see Profita v Diaz*, 100 AD3d 481, 482 [1st Dept 2012]; *Dicturel v Dukureh*, 71 AD3d 558, 559 [1st Dept 2010]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]).

Defendants' opposition is based on DiPaoli's testimony that there were two impacts. Defendants theorize that DiPaoli could only have felt two impacts if plaintiff Passos struck DiPaoli's car (the lead car), followed by the bus hitting Passos and

pushing him into DiPaoli's car. However, DiPaoli had absolutely no idea as to the sequence of events or what caused the two impacts. The bus driver, who purported to be looking straight ahead at the time of the accident, did not observe Passos's vehicle hit the DiPaoli vehicle before he struck Passos. Defendants' contention that Passos struck the DiPaoli vehicle first, precipitating the accident, is thus surmise and conjecture.

Even assuming the Passos vehicle struck DiPaoli's vehicle first, as defendants argue, this still would not furnish a nonnegligent explanation for why the bus rear-ended the Passos vehicle. It is undisputed that the DiPaoli and Passos vehicles were at a complete stop when the bus rear-ended the Passos vehicle. The vehicles were proceeding through normal rush-hour traffic on a busy Manhattan thoroughfare. It was therefore incumbent on bus driver Moses to maintain a safe rate of speed and stopping distance in anticipation of the potential need to stop, even suddenly, particularly since the road was wet. If Moses were driving five miles per hour or less, as he testified, there does not appear to be any reason why he could not have stopped prior to rear-ending the Passos vehicle.

Tutrani v County of Suffolk (10 NY3d 906 [2008]) does not compel a different result. *Tutrani* involved a lead vehicle that

abruptly decelerated from 40 miles per hour to 1 or 2 miles per hour while changing lanes on a highway where one "could reasonably expect that [the] traffic would continue unimpeded," thus setting into motion a chain collision (*id.* at 907). It is not difficult to see why, under those circumstances, the Court of Appeals determined that the jury's apportionment of 50% fault to the driver of the lead vehicle was appropriate, notwithstanding the fact that the driver of the second vehicle was able to stop "within a half a car length" (*id.*). The facts here, of course, are very different. The vehicles were traveling through normal rush-hour traffic. The first and second vehicles were at a complete stop, and the driver of the bus was allegedly traveling no more than 5 miles per hour, immediately preceding the collision.

The police accident report corroborates that the bus hit the Passos vehicle in the rear, precipitating the chain collision. Defendants cannot object to the motion court's reliance on the report, given that they failed to register an objection and that they attached the report and referenced its content in opposition papers to the motion of plaintiff passengers.

The report does not reflect the unobserved conclusions of the police officer, but merely records the statements of the drivers, including defendant bus driver's admission that he rear-

ended the Passos vehicle, causing it to hit the rear of the DiPaoli vehicle. The police officer who prepared the report was acting within the scope of his duty in recording defendant bus driver's statement, and thus, the statement is admissible as a party admission (*see Jackson v Trust*, 103 AD3d 851, 852 [2d Dept 2013]; *Ramos v Rojas*, 37 AD3d 291, 292 [1st Dept 2007]).

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

ENTERED: JUNE 11, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15050 The People of the State of New York, Respondent, Ind. 4332/00

-against-

Darnell Macon, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered November 1, 2011, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered June 12, 2002, unanimously affirmed.

The motion court properly found that the claimed new evidence did not create a probability that, if introduced at trial, the verdict would have been more favorable to defendant (*see* CPL 440.10[1][g]). The court conducted a thorough hearing, which included, among other things, the testimony of defendant and his allegedly exculpatory witness, and the record supports the court's denial of the motion (33 Misc 3d 1216[A], 2011 NY Slip Op 51945[U] [Sup Ct, Bronx County 2011]). The court had the unique opportunity to see and hear the witnesses (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), and there is no basis for

disturbing its credibility determinations. We have reviewed the photographic and videotape evidence introduced at the hearing and find it equivocal and insufficient to warrant a new trial. Furthermore, as the motion court found, the record does not satisfactorily explain why defendant's witness, who has a personal connection to defendant, did not come forward sooner.

To the extent defendant is claiming that he is actually innocent, that claim is without merit because it is based on the same evidence that the court properly discredited. Thus, we find it unnecessary to address any issues relating to the procedural requirements for an actual innocence claim.

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Clark, JJ.

15237 Nexbank, SSB, Index 652072/13
Plaintiff-Respondent,

-against-

Jeffrey Soffer, et al.,
Defendants-Appellants.

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Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellants.

Debevoise & Plimpton, New York (Shannon Rose Selden of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 2, 2014, which denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court correctly concluded that Nevada law applies to the definition of "lien," as found in the guaranty. The guaranty provides that the definition is to be drawn from the loan agreement, which in turn provides that "lien" is to be construed in accordance with Nevada law.

Defendants triggered the guaranty when they filed a lis pendens on the property, since the lis pendens falls within the definition of lien as an "encumbrance" under Nevada law (*see e.g. Uranga v Montroy Supply Co. of Nevada*, 281 P3d 1227, *2 [Nev 2009] ["Uranga encumbered Wojna's personal residence with a

notice of lis pendens"; *Levinson v Eighth Jud. Dist. Ct.*, 109 Nev 747, 752, 857 P2d 18, 21 [1993] [by placing a lis pendens on it, "Read is now attempting to encumber the property"]; *see also Guertin v OneWest Bank, FSB*, 2012 WL 3133736, *3, 2012 US Dist LEXIS 106244, *7 [D Nev 2012] [expunging "lis pendens encumbering the property"]).

By explicitly agreeing in the guaranty that, notwithstanding any other occurrence whatsoever, the only defense to their obligations thereunder would be the full and final payment and satisfaction of their guaranteed obligations, including the payment of plaintiff's attorneys' fees, defendants waived the defense of res judicata (*see Stoner v Culligan, Inc.*, 32 AD2d 170 [3d Dept 1969]).

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Sweeny, Moskowitz, DeGrasse, Richter, JJ.

15310 The People of the State of New York, Respondent, Ind. 1617/12

-against-

Dwayne Johnson, Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 23, 2012, convicting defendant, after a jury trial, of menacing in the second degree, and sentencing him to a term of three years' probation, unanimously affirmed.

The court properly admitted the victim's statement to responding police as an excited utterance (*see generally People v Johnson*, 1 NY3d 302 [2003]). The statement at issue clearly was precipitated by an event that was startling and traumatic to the victim, notwithstanding the absence of physical injury. Her demeanor, described by the police officer as "in shock," "shaking," and "crying," indicated that she had remained under the influence of the stress of the incident despite the lapse of time (*see People v Brown*, 70 NY2d 513, 520-522 [1987]). In any event, the victim testified at trial, and "prior consistent

statements are notably less prejudicial to the opposing party than other forms of hearsay, since by definition the maker of the statement has said the same thing in court as out of it, and so credibility can be tested through cross-examination" (*People v Ludwig*, 24 NY3d 221, 230 [2014]).

The court should not have participated, as a reader, in a readback of testimony over defense counsel's objection. While this is not prohibited by CPL 310.30, the Court of Appeals has cautioned that "as a general matter, a trial judge should shun engaging in readbacks of testimony," a task that should usually be assigned to nonjudicial personnel (*People v Alcide*, 21 NY3d 687, 695 [2013]). In the present case we conclude that the court's participation did not deprive defendant of a fair trial, and does not warrant reversal.

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15366 The People of the State of New York, Respondent, Ind. 1966/11

-against-

Raul Barrera, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered November 13, 2012, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Defendant claims his attorney misadvised him to forgo a defense of extreme emotional disturbance, and to accept a plea to murder without any sentence promise except that the court would determine the sentence after hearing evidence from both sides at

a presentence conference. These claims would require a CPL 440.10 motion in order to expand the record as to counsel's strategic analysis of the case and his discussions with defendant (*see People v Davis*, 265 AD2d 260 [1st Dept 1999], *lv denied* 94 NY2d 879 [2000]). Counsel's brief discussion of these matters on the record contains insufficient explanation to permit review.

Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's advice fell below an objective standard of reasonableness, or that it was prejudicial. In particular, the record before us fails to support defendant's assertion that he

had a viable extreme emotional disturbance defense (*see People v Roche*, 98 NY2d 70 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15367-
15368 In re Diana C.,

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

Felipe J.,
Respondent-Appellant,

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

Balbina L.,
Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Linda Tally, J.), entered on or about February 6, 2014, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondent-appellant sexually abused the subject child, Diana C, unanimously modified, on the facts, to vacate the finding as to appellant's violation of Penal Law § 130.67, and otherwise affirmed, without costs. Appeal from fact-finding order, same court and Judge, entered on or about December 30, 2013, unanimously dismissed, without costs,

as subsumed in the appeal from the order of disposition.

The court's finding that appellant sexually abused Diana in violation of Penal Law §§ 130.52, 130.55 and 130.60 was supported by a preponderance of the evidence, including the sworn testimony of the child, which the court found credible. There is no basis to disturb the court's credibility determination (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]; *Matter of Daniela R. [Daniel R.]*, 118 AD3d 637 [1st Dept 2014]). Contrary to appellant's claim, a child's testimony is competent evidence and need not be corroborated by evidence of serious physical injury or by other evidence (*see Matter of Marelyn Dalys C.-G. [Marcial C.],* 113 AD3d 569 [1st Dept 2014]). The court properly rejected appellant's testimony as self-serving, and noted that the mother's testimony conflicted with her consent to a neglect finding against her on the basis of the same allegations.

Petitioner concedes that it failed to prove that appellant violated Penal Law § 130.67.

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15369 Sephronia Bravo, et al., Index 21151/12
Plaintiffs-Appellants,

-against-

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

"John Does 1 through 15", etc., et al.,
Defendants.

_____

Benno & Associates P.C., New York (Ameer Benno of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Judith Vale of counsel), for State respondents.

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

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered January 17, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the first through fifth causes of action in the complaint on the ground of lack of standing, unanimously modified, on the law, to deny defendants' motions with respect to plaintiff Sephronia Bravo, remand the matter to Supreme Court for consideration of defendants' alternative arguments for dismissal, and otherwise affirmed, without costs.

Plaintiffs allege that they have standing to pursue state and federal constitutional claims against defendants-respondents

(hereinafter defendants) with respect to Public Health Law § 3345, which provides that "[e]xcept for the purpose of current use by the person or animal for whom such substance was prescribed or dispensed, it shall be unlawful for an ultimate user of controlled substances to possess such substance outside of the original container in which it was dispensed [and that] [v]iolation of this provision shall be an offense punishable by a fine of not more than fifty dollars." Plaintiff Bravo alleges that she was wrongfully arrested for violation of Public Health Law § 3345 and incurred an injury-in-fact. Plaintiff McEachnie alleges that she carries her daily medications with her in a pill organizer and believes that she could be subject to arrest and criminal prosecution under Public Health Law § 3345.

Defendants contend that plaintiff Bravo was not arrested for violating Public Health Law § 3345, but rather for violating Penal Law § 220.03, which makes it a crime for an individual to "knowingly and unlawfully" possess a controlled substance. However, Penal Law § 220.03 explicitly requires an underlying Public Health Law offense, as the word "unlawfully" is defined in Penal Law § 220.00(2) as "in violation of article thirty-three of the public health law." Given plaintiff Bravo's allegations that she was told she was being arrested for possessing a controlled substance outside of its original container and that she incurred

injuries when she was deprived of her medication following her arrest, Bravo has sufficiently pleaded that she suffered an "injury-in-fact" and that such injury falls "within the zone of interests sought to be protected by the statute" (*Matter of Association for a Better Long Is., Inc. v New York State Dept. of Envtl. Conservation*, 23 NY3d 1, 6 [2014]). Bravo, therefore, has standing to pursue the first five causes of action in the complaint. However, we do not reach defendants' alternative arguments for dismissal, which should be addressed in the first instance by Supreme Court.

McEachnie does not have standing to pursue the first five causes of action, as there are no allegations of a "credible threat of prosecution" (*McCollester v City of Keene*, 668 F2d 617, 619 [1st Cir 1982]).

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15370 In re Denise McDonald, Index 100247/14
Petitioner,

-against-

William J. Bratton, etc., et al.,
Respondents.

_____

Law Office of Harry Kresky, New York (Harry Kresky of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

_____

Determination of respondents, dated November 21, 2013, dismissing petitioner from her position as a police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Cynthia S. Kern, J.], entered September 8, 2014) dismissed, without costs.

Substantial evidence supports the determination that petitioner disobeyed a lawful order of her supervisor and engaged in conduct prejudicial to the good order, efficiency or discipline of the police department (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). As the Deputy Commissioner of Trials found, petitioner failed to obey two orders directing her to go out on assignment and then, by her actions, challenged and threatened her supervisor.

The penalty is not so disproportionate as to shock the conscience (*see Matter of Kelly v Safir*, 96 NY2d 32 [2001]). Contrary to petitioner's apparent contention, respondents properly considered her prior disciplinary record in determining the penalty (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 340 [1974]).

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15371-
15372 William DiMarzo, et al.,
Plaintiffs-Respondents,

-against-

Jones Lang LaSalle Americas Inc., et al.,
Defendants-Appellants.

[And a Third-Party Action]

Index 107593/11

McGaw, Alventosa & Zajac, Jericho (Ross P. Massler and Dawn C. DeSimone of counsel), for Jones Lang Lasalle Americas Inc., appellant.

Barry, McTiernan & Moore, LLC, New York (Laurel A. Wedinger of counsel), for Ocean Pacific Interiors, Inc., appellant.

Alexander J. Wulwick, New York, for respondents.

Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 16, 2014, which, in this action for personal injuries sustained when plaintiff William DiMarzo tripped over an extension cord, denied defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record presents triable issues of fact as to whether defendants caused the condition that caused plaintiff's fall. A security manager for the premises testified that after viewing video footage from two days before the accident, he observed defendants' employees working at the subject location the weekend before the accident. Furthermore, issues of fact exist as to

whether defendants had constructive notice of the extension cord that was on the floor prior to the accident. Defendants never established when the subject location was last inspected by their employees before plaintiff fell even though their witnesses testified that defendants would inspect the area (*see Moore v 1772 Weeks Ave. Hous. Dev. Fund Corp.*, 123 AD3d 456 [1st Dept 2014]*; Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept 2011]).

The fact that the extension cord was bright yellow, the floor was white and the cord was seen by two nonparty witnesses prior to the accident does not establish that the condition was open and obvious. Plaintiff testified that his accident did not happen until after he passed the portable air conditioning unit and that from his vantage point, the air conditioning unit obscured a view of the extension cord (*see Powers v 31 E 31 LLC*, 123 AD3d 421, 422-423 [1st Dept 2014]*; Drotar v 60 Sweet Thing, Inc.*, 106 AD3d 426, 427 [1st Dept 2013]).

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15373- Ind. 3187/11
15374 The People of the State of New York, 3617/11
Respondent,

-against-

Carlos Torres,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (John Moore, J.), rendered on or about October 18, 2012,

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

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

ENTERED: JUNE 11, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15375 In re The Exoneration Initiative, Index 104004/12
Petitioner-Respondent,

-against-

The New York City Police Department,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for appellant.

Cooley, LLP, New York (Lauren Gerber Lee of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Peter H. Moulton, J.), entered October 24, 2013, granting the petition brought pursuant to CPLR article 78 to the extent of directing respondent NYPD to disclose two-and-a-half unredacted pages from a file pertaining to an attempted homicide investigation pursuant to the Freedom of Information Law (FOIL), and awarding petitioner $2,000 in attorney's fees, unanimously modified, on the law, to deny the petition as to pages 1 and 2 and the identifying personal information on page 5, to vacate the award of attorney's fees, and to deny petitioner's request for attorney's fees, and otherwise affirmed, without costs.

Upon our in camera review of the records at issue, we find that NYPD's determination denying petitioner's FOIL request was not affected by an error of law, except as to pages 1, 2 and the

aforementioned portion of page 5 (*see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). In light of the particular circumstances of this case involving an underlying conviction of attempted murder by shooting, the disclosure of identifying information about two witnesses, and further details provided in the account of one of those witnesses, "could endanger the life or safety" (Public Officers Law § 87[2][f]) of those witnesses (*see Matter of Exoneration Initiative v New York City Police Dept.*, 114 AD3d 436, 438-439 [1st Dept 2014]; *Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874 [1st Dept 2011], *affd* 20 NY3d 1028 [2013]; *Matter of Laporte v Morgenthau*, 11 AD3d 410 [1st Dept 2004]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 348-349 [1st Dept 1999], *lv dismissed* 94 NY2d 791 [1999]). The identifying information is also covered by the exemption for records whose disclosure would "constitute an unwarranted invasion of personal privacy" (Public Officers Law § 87[2][b]), in light of those public safety concerns, as well as the potential "chilling effect the release of such personal information to the general public would have on future witnesses to intentional murder from cooperating with the police" (*Exoneration Initiative*, 114 AD3d at 439).

Though academic, respondent's argument based on the

confidentiality exemption (Public Officers Law § 87[2][e][iii]) is not properly before us, since respondent failed to cite that exemption at the administrative level (*see Matter of Law Offs. of Adam D. Perlmutter, P.C. v New York City Police Dept.*, 123 AD3d 500 [1st Dept 2014]; *see generally Matter of Natural Fuel Gas Distrib. Corp. v Public Serv. Commn. of the State of N.Y.*, 16 NY3d 360, 368 [2011]).

Since petitioner has not substantially prevailed, it is not entitled to attorney's fees pursuant to Public Officers Law § 89(4)(c).

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15376 In re Jennifer Lopez, Index 103102/12
Petitioner-Appellant,

-against-

City University of New York,
Respondent-Respondent.

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Law Offices of Stewart Lee Karlin, P.C., New York (Daniel E. Dugan of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Andrew W. Amend of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered January 28, 2014, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 to set aside a determination by respondent City University of New York (CUNY), dated January 12, 2012, dismissing petitioner from its law school, unanimously affirmed, without costs.

The proceeding is untimely since it was commenced on June 25, 2012, more than four months after respondent's final and binding January 12, 2012 determination (*see* CPLR 217[1]). Contrary to petitioner's argument, her subsequent correspondences

with respondent did not toll or recommence the statutory period (*see Aranoff v Fordham Univ.*, 171 AD2d 434 [1st Dept 1991], *lv denied* 78 NY2d 858 [1991]).

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Mazzarelli, Sweeny, Gische, JJ.

15379 The People of the State of New York, Respondent, Ind. 2252/10

-against-

Tyrell Ward,
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 (Gina Mignola of counsel), for respondent.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered February 28, 2012, as amended, March 6, 2012, convicting defendant, after a jury trial, of attempted robbery in the first degree (two counts) and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years, unanimously affirmed.

The court properly denied defendant's motion to suppress his postlineup statement to the police. Before the lineup, defendant waived his *Miranda* rights and made statements. As the police were setting up the lineup, defendant asked for a lawyer, but he expressly placed this request in the context of his complaint about a perceived unfairness in the lineup. After the police corrected the defect in the lineup to defendant's satisfaction, he made no further mention of a lawyer. The record supports the

hearing court's meticulous findings after a full hearing, that defendant never made an unequivocal request for counsel in the distinct context of interrogation (*see People v Ramirez*, 59 AD3d 206 [1st Dept 2009], *lv denied* 12 NY3d 858 [2009]). There is no evidence to support defendant's claim that when he mentioned a lawyer at the lineup, he meant he had come to the realization that he needed a lawyer for interrogation purposes as well. Nor was there any need for the police to repeat previously administered *Miranda* warnings before resuming questioning. The subsequent interview came within a reasonable time after the warnings had last been given (*see People v Holmes* 82 AD3d 441 [1st Dept 2011], *lv denied* 16 NY3d 895 [2011]), and, for the reasons previously stated, the questioning cannot be viewed as having followed a request for counsel.

The court also properly declined to suppress any statements as fruits of an allegedly unlawful home arrest. The record supports the court's finding that defendant's mother's consent to the police entry into the apartment she shared with defendant was voluntary under the totality of circumstances, including her cooperative attitude and the absence of coercive police conduct (*see People v Gonzalez*, 39 NY2d 122, 128-130 [1976]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its acceptance of the accounts of defendant's cooperating accomplices.

The court properly discharged a sworn juror who lived in the neighborhood where the crime had occurred and where defendant and his accomplices lived, after the juror stated that his fear of the drug dealers in his neighborhood would prevent him from rendering an impartial verdict. The juror's fear provided grounds for the court to dismiss him as "grossly unqualified to serve" pursuant to CPL 270.35(1), even if the court did not cite the statutory phrasing, because it was clear that the juror could not remain impartial. Additionally, since the juror had not mentioned that he feared for his safety when questioned by the court and the parties before being sworn, he was properly discharged for cause, on a newly discovered ground, pursuant to CPL 270.15(4). We have considered and rejected defendant's remaining arguments concerning the discharge of the juror.

The court properly exercised its discretion in giving an adverse inference charge, but denying preclusion of related evidence, as an appropriate sanction for the loss by the police of defendant's phone, recovered by the police from one of his

accomplices (*see People v Medina*, 9 AD3d 251, 252 [1st Dept 2004], *lv denied* 3 NY3d 741 [2004]). The loss of the phone was unintentional, and the adverse inference charge was sufficient to alleviate the minimal prejudice to defendant.

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15382 In re Marina Ayvazayan also known as Marina Vance, Petitioner, Index 100453/14

-against-

The City of New York Department of Housing Preservation and Development, et al., Respondents.

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Goldberg, Scudieri & Lindenberg, P.C., New York (Samuel Evan Goldberg of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for City of New York Department of Housing Preservation and Development, respondent.

Gallet Dreyer & Berkey, LLP, New York (Michelle P. Quinn of counsel), for East Midtown Plaza Housing Company, Inc., respondent.

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Determination of respondents, dated December 23, 2013, issuing a certificate of eviction upon a finding that the apartment at issue was not petitioner's primary residence, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Paul Wooten, J.], entered June 13, 2014), dismissed, without costs.

Substantial evidence supports respondents' determination that the subject apartment was not petitioner's primary residence *(see Pell v Board of Educ. of Union Free School Dist. No. 1 of*

Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 230-231 [1974]). By submitting tax returns for 2008 through 2011 that listed two different addresses, petitioner failed to "provide[s] proof that ... she ... filed a New York City Resident Income Tax return at the claimed primary residence for the most recent preceding taxable year for which such return should have been filed" (28 RCNY 3-02[n][4][iv]). Petitioner's W-2 forms also showed two different addresses, and various other documents admitted into evidence at the hearing listed yet a third address. Moreover, the hearing officer found that petitioner's and petitioner's son's testimony was not credible, and that determination is entitled to deference (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15383 The People of the State of New York, Ind. 5301/11
Respondent,

-against-

Pebbles Branch,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about August 7, 2012,

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

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

ENTERED: JUNE 11, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15384 The People of the State of New York, Respondent, Ind. 1483/11

-against-

Lawrence Beatty, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (William J. Condon, J.), rendered June 14, 2013, convicting defendant, after a jury trial, of resisting arrest and criminal possession of marijuana in the fifth degree, and sentencing him to an aggregate term of 30 days, concurrent with 3 years' probation, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5) regarding the probation portion of the sentence.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). Defendant's prior conviction for selling marijuana was probative of his credibility, and it was

not unduly prejudicial. Moreover, there is little or no reason to believe that cross-examination about the prior sale caused defendant any prejudice, given that the jury acquitted him of numerous felony charges and only convicted him of misdemeanors.

Defendant's belated, postsummation objection failed to preserve his challenges to the prosecutor's summation (*see People v Romero*, 7 NY3d 911, 912 [2006]), and his arguments on different grounds from those raised on appeal failed to preserve his present claims regarding uncharged crimes evidence and his request to remove items from a clear plastic evidence bag for display to the jury (*see People v Graves*, 85 NY2d 1024, 1026-1027 [1995]). We decline to review any of these claims in the interest of justice. As an alternate holding, we find that the prosecutor's reference to defendant as a drug dealer was inappropriate, but not so egregious as to warrant reversal (*see People v Williams*, 65 AD3d 484, 489 [1st Dept 2009], *lv denied* 13 NY3d 840 [2009]), that the court's rulings on the other issues

were proper exercises of discretion, and that any errors were harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15385 The People of the State of New York, Respondent, Ind. 1862/10

-against-

Sandy Toribio, Defendant-Appellant.

_____

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

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Judgment, Supreme Court, Bronx County (Doris Gonzalez, J. at plea; John Moore, J. at sentencing), rendered on or about October 12, 2011, unanimously affirmed.

Application by defendant'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 defendant'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: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15386 North Hill Funding of New York, LLC, Plaintiff-Respondent, Index 602997/09 603397/09

-against-

Maiden & Madison Holdings, LLC, et al., Defendants-Appellants.

[And Another Action]

Brody, O'Connor & O'Connor, New York (Scott A. Brody of counsel), for appellants.

Goetz Fitzpatrick, LLP, New York (Douglas Gross and Maxwell Rubin of counsel), for respondent.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 16, 2014, in favor of plaintiffs, unanimously reversed, on the law, with costs, the judgment vacated, and the matter remanded for further proceedings in accordance herewith.

In an order entered December 23, 2011, Supreme Court construed the limitation in defendants' guaranty of a loan by plaintiff to apply to the total of the guaranteed obligation minus any money collected by plaintiff. Defendants noticed but failed to perfect an appeal from the order; "after allowing the first [appeal] to die on the vine," they do not have the right to raise the same issues on a subsequent appeal (*Rubeo v National Grange Mut. Ins. Co.*, 93 NY2d 750, 755 [1999], citing *Bray v Cox*, 38 NY2d 350 [1976]). Nor is this one of the rare cases in which

the interest of justice compels us to exercise our discretion to reach these issues (*see generally Faricelli v TSS Seedman's*, 94 NY2d 772, 774 [1999]). Were we to do so, we would find that the court correctly construed the limitation in the guaranty (*see Gateway State Bank v Winchester Bldrs.*, 248 AD2d 588 [2d Dept 1998], *lv denied* 92 NY2d 807 [1998]). However, the "corrected" judgment would nonetheless have to be vacated. After a final judgment was entered in 2010, the court allowed plaintiff, on a CPLR 5019 motion, and after the referee's report to enter a new judgment which recalculated the amount due based on the deficiency between the nonparty borrower's obligation and plaintiff's collections. Plaintiff's motion was in essence an impermissible motion for a deficiency judgment in an action on a mortgage debt (*see* RPAPL 1301, 1371). Moreover, the correction of the judgment impermissibly affected a substantial right of defendants (CPLR 5019[a]; *see Poughkeepsie Sav. Bank, FSB v Maplewood Land Dev. Co.*, 210 AD2d 606, 608 [2d Dept 1994]).

Defendants' objections to the special referee's calculations of the value of certain collateral obtained by plaintiff for which they are due credit are not barred. Defendants are correct that plaintiff is obligated to show that it disposed of the collateral in a commercially reasonable manner (*see Weinsten v Fleet Factors Corp.*, 210 AD2d 74 [1st Dept 1994]). Thus, the

credit due defendants must be reconsidered in light of plaintiff's burden to establish that its disposition of the collateral was commercially reasonable.

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

ENTERED: JUNE 11, 2015

CLERK

Mazzarelli, J.P., Sweeny, Gische, Clark, JJ.

15387- Index 600010/12
15388N In re Denis M. Field,
Petitioner-Appellant,

-against-

BDO USA, LLP,
Respondent-Respondent.

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Shapiro, Arato LLP, New York (Eric S. Olney of counsel), for appellant.

DLA Piper LLP (US), New York (Cary B. Samowitz of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 22, 2013, which dismissed the petition to vacate the arbitration award, dated July 17, 2012, and order, same court (Saliann Scarpulla, J.), entered November 25, 2014, which denied petitioner's motion to renew the petition, unanimously affirmed, with costs.

With respect to the renewal order, petitioner Field has failed to meet his heavy burden of establishing that the arbitration award should be vacated on the basis of fraud (*Imgest Fin. Establishment v Shearson Lehman Hutton*, 172 AD2d 291, 291 [1st Dept 1991]). Such showing can only be established "by clear and convincing evidence" that the fraud "materially related to an issue in [the] arbitration," and that "the fraud would not have

been discoverable upon exercise of due diligence prior to or during the arbitration" (*id.*). Field failed to make either of these showings.

Specifically, Field has not shown – and the record does not establish by clear and convincing evidence – that BDO was in possession of the Skadden memo or was aware of the possible negative implications stemming from the use of certain tax shelters in 2001. Moreover, even if BDO did have this knowledge and fraudulently concealed this fact from the arbitrator, as Field claims it did, the issue of whether Field acted alone or complicitly with BDO is ultimately irrelevant to whether Field's actions were "ordinary and proper," and thus not materially related to his entitlement to indemnification from BDO (*id.*). The parties do not dispute that New York Partnership law controls their agreement, or that Field was required to show that his actions were "ordinary and proper" to be entitled to indemnification. Nor has Field shown that he could not have discovered the alleged fraud through proper due diligence, an independent basis for affirmance (*id.*).

The dismissal order is also affirmed. When a party has agreed to an arbitration organization's rules, and those rules shift arbitrability questions to the arbitrator, the issue of arbitrability is taken from the court's purview and resides

solely with the arbitrator (*Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [1st Dept 2009], *affd* 14 NY3d 850 [2010], *cert denied* 562 US 962 [2010]). Rule 11[c] of the JAMS rules explicitly gives the arbitrator the power to decide the scope of the arbitration clause. The arbitrator properly declined Field's request for reimbursement of vexatious litigation fees based on a separate, but related litigation, finding that the issue was not arbitrable under the parties' agreement.

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15389- Index 17100/04
15389A Erica Perez,
Plaintiff-Appellant,

-against-

Hunts Point I Associates, Inc., et al.,
Defendants-Respondents,

"John Doe", etc.,
Defendant.

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

Law Offices of Cheng & Associates, PLLC, Long Island City (Pui Chi Cheng of counsel), for Hunts Point I Associates, Inc., Building Management Associates, Inc. and SEBCO Development, Inc., respondents.

Kaufman Borgeest & Ryan, LLP, Valhalla (Jacqueline Mandell of counsel), for Sentry Security Company, Inc., respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 8, 2014, which granted the motion of defendant Sentry Security Company, Inc. (Sentry) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs. Order, same court and Justice, entered January 10, 2014, which granted the motion of defendants Hunts Point I Associates, Inc., Building Management Associates, Inc., and Sebco Development, Inc. (collectively, Hunts Point) for summary judgment dismissing the complaint as against them,

unanimously affirmed, without costs.

Summary judgment was properly granted in this action for personal injuries sustained by plaintiff tenant when she was the victim of a crime in a building owned and managed by Hunts Point; Sentry provided security for the building pursuant to a contract with Hunts Point. The record demonstrates that plaintiff failed to rebut Hunts Point's prima facie showing that minimal security was provided at the building (*see Alvarez v Masaryk Towers Corp.*, 15 AD3d 428, 429 [2d Dept 2005]). Plaintiff offered tenants' affidavits stating that the building's interior door lock could be disengaged by pressing one of the unit's buttons. However, there was no evidence that Hunts Point was on notice of this latent defect prior to the incident (*see Ramirez v BB & BB Mgt. Corp.*, 115 AD3d 555 [1st Dept 2014]). While there was a problem with drug dealers at the project, the record indicates that Hunts Point instituted roving patrols, met with the police regularly, and evicted those tenants found to be connected with the drug trade. Furthermore, there is no evidence connecting the attack upon plaintiff to the drug dealing at the project, and plaintiff failed to show how that activity rendered her assault reasonably predictable (*see Kumar v Farber*, 115 AD3d 567 [1st Dept], *lv denied* 24 NY3d 908 [2014]).

Summary judgment was also properly granted to Sentry on the

ground that plaintiff was not a third-party beneficiary of the contract between Sentry and Hunts Point (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234 [1st Dept 2013]). Although the contract did not contain an explicit provision on the issue, the contract terms taken as a whole lead to the conclusion, as a matter of law, that plaintiff was not an intended third-party beneficiary of the contract *(see Anchumdia v Tahl Propp Equities, LLC*, 123 AD3d 505 [1st Dept 2014]).

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

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15390 In re Star Marie S., and Another,

Children Under the Age of
Eighteen Years, etc.,

Sonia S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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

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

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the children.

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Order of fact-finding, Family Court, New York County (Susan K. Knipps, J.), entered on or about April 15, 2014, which found that respondent mother had neglected the subject children, unanimously affirmed, without costs.

The neglect finding is supported by a preponderance of the evidence (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The evidence shows that the mother failed to comply with court-ordered treatment for drug and mental health problems that led to prior findings of neglect against her (*see Matter of Liarah H. [Dora S.]*, 111 AD3d 514 [1st Dept 2013]). The mother tested positive for cocaine and showed symptoms of being impaired

shortly before the filing of the petitions. Further, the mother displayed flawed judgment when she left her toddler son sleeping in their room at a homeless shelter to engage in a violent altercation with her pregnant neighbor, which resulted in her arrest (*Matter of Imani W. [Hilrett S.]*, 117 AD3d 621 [1st Dept 2014]). The mother further neglected her son by failing to arrange for his care — or even showing that she was concerned about what would happen to him — following her arrest (*Matter of Rosemary V. [Jorge V.]*, 103 AD3d 484 [1st Dept 2013]). Her lack of impulse control, exhibited in her decision to punch her pregnant neighbor in the stomach, further supported the court's finding of neglect.

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15391- Index 113520/08
15391A Sunita Fruchtman,
Plaintiff-Appellant,

-against-

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

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Meenan & Associates, LLC, New York (Shelley Ann Quilty-Lake of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered March 21, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court (Barbara Jaffe, J.), entered February 2, 2012, which denied plaintiff's motion for leave to reargue a discovery application, unanimously dismissed, without costs, as taken from a nonappealable paper and, in any event, untimely.

Plaintiff's claim of gender discrimination in employment under the New York City Human Rights Law (Administrative Code of City of NY § 8-107[1][a]) was correctly dismissed since she failed to establish prima facie that she suffered an adverse employment action and that that action was taken under

circumstances giving rise to an inference of discrimination (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]). With the exception of her termination from her probationary employment, the conduct of which she complains amounts to no more than "petty slights and trivial inconveniences," rather than adverse employment action (*see Williams v New York City Hous. Auth.*, 61 AD3d 62 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). Moreover, it resulted in no harm (*see Abe v Cohen*, 115 AD3d 491 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014]).

While termination is indisputably an adverse action, plaintiff's conclusory claim that her termination was motived by a gender-related bias is insufficient to establish discrimination (*Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621 [1st Dept 2013]). Nor do stray derogatory remarks, "without more, constitute evidence of discrimination" (*Melman*, 98 AD3d at 125). Plaintiff's reliance on *EEOC v PVNF, LLC* (487 F3d 790 [10th Cir 2007]), a hostile work environment case, is misplaced, since in that case the plaintiff and others were subjected to numerous gender-based remarks.

Moreover, plaintiff failed to raise an issue of fact whether defendants' evidence of a legitimate, independent, and nondiscriminatory reason for her termination was pretextual and the real reason was gender discrimination (*see id.* at 120). She

does not dispute that she kept a departmental vehicle for nine consecutive days, during which time she used it only once for the authorized purpose of driving to a facility being audited, and that she inaccurately reported, in a daily log, the vehicle's use and overnight location.

Plaintiff also failed to establish a prima facie case of retaliation (*see* Administrative Code § 8-107[7]). In her complaints to defendants, she made no reference to the fact that she was female and did not otherwise implicate gender; therefore, the complaints did not constitute "protected activity" (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313 [2004]; *Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]).

We note that no appeal lies from the denial of a motion for leave to reargue (*see D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]), and that, in any event, plaintiff's appeal from the order on reargument is untimely (*see* CPLR 5513).

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15395- Ind. 2415/12
15396 The People of the State of New York, 3028/12
Respondent,

-against-

Jorge Molina,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about August 1, 2012,

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

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

ENTERED: JUNE 11, 2015

CLERK

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

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15397 Cambridge Petroleum Holdings, Inc., Index 650081/12
Plaintiff-Respondent,

-against-

Lukoil Americas Corporation,
Defendant-Appellant.

_____

Akin Gump Strauss Hauer & Feld LLP, New York (Deborah J. Newman of counsel), for appellant.

Eisenberg & Carton, Port Jefferson (Lloyd M. Eisenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered October 23, 2014, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the remaining causes of action in the amended complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

In 2010, defendant began to search for potential purchasers of a financially distressed subsidiary, GPMI. Plaintiff's offer to acquire GPMI for one dollar in exchange for a $25 million cash infusion into GPMI was accepted by defendant, in the hopes that plaintiff could turn the company around. The parties executed a Stock Purchase Agreement memorializing the transaction, which closed on February 28, 2011. Plaintiff subsequently commenced

this action for the breach of certain warranties contained in the transaction.

However, the Stock Purchase Agreement explicitly limited defendant's requirement to indemnify plaintiff to certain circumstances, such as income tax payments and third-party claims. Plaintiff's causes of action herein are not for damages arising from such claims, but rather, are for breaches of the warranties that defendant allegedly made directly to it. These claims are not permitted under the agreement. That these restrictions leave plaintiff without a remedy is of no moment, as a party may not rewrite the terms of an agreement because, in hindsight, it dislikes its terms (*see Ambac Assur. Corp. v EMC Mtge. LLC*, 121 AD3d 514, 520 [2014]).

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

15398 In re David Suker, Index 103742/12
Petitioner-Respondent,

-against-

The New York City Board/
Department of Education,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for appellant.

Eisner & Associates, P.C., New York (Maria L. Chickedantz of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered August 23, 2013, which, in this proceeding brought pursuant to CPLR article 75, granted the petition to vacate a hearing officer's award to the extent of annulling the portion of the award that sustained the third set of charges against petitioner and imposed the penalty of termination of his employment as a tenured New York City public school teacher, and remanded the matter to respondent New York City Department of Education (DOE) for the imposition of an appropriate lesser penalty, unanimously affirmed, without costs.

There is no evidence in the record to support petitioner's claims that his due process rights were violated, since he was

provided with the third set of charges more than 10 days before he offered testimony with respect to those charges, and he did not object to DOE's request for consolidation of all of the charges against him. Even though DOE did not specify the precise sections of the Penal Law allegedly violated, the allegations in the three specifications fairly apprised petitioner of the basis of the alleged misconduct (*see Duncan v New York City Dept. of Educ.*, 124 AD3d 463, 464 [1st Dept 2015]).

Nevertheless, Supreme Court did not exceed its authority in finding that the third set of charges against petitioner was time-barred. Education Law § 3020-a(1) requires that disciplinary charges against a teacher be brought within three years from the date of the alleged misconduct, unless the alleged misconduct constituted a crime when committed. Petitioner was not required to raise the statutory time limitation set forth in Education Law § 3020-a(1) as a defense in the disciplinary proceeding. Where, as here, "a statute creates a right unknown at common law, and also establishes a time period within which the right may be asserted, the time limit is . . . a condition attached to the right as distinguished from a [s]tatute of

[l]imitations which must be asserted by way of defense" (*Lincoln First Bank of Rochester v Rupert*, 60 AD2d 193, 196 [4th Dept 1977]). Accordingly, DOE had the burden of establishing that it met the time requirement set forth in Education Law § 3020-a(1) or that the crime exception to the time requirement applied (*see Matter of Aronsky v Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 NY2d 997, 999-1000 [1990]). DOE failed to meet its burden. The record shows that the alleged misconduct, petitioner's submission of false documentation to DOE in order to improperly obtain his daughter's admission to DOE schools for which she was not zoned, occurred more than three years before DOE brought the third set of charges against petitioner. Although DOE requested that the Hearing Officer take judicial notice of two sections of the Penal Law and repeatedly characterized petitioner's conduct as "criminal," the Hearing Officer never found that the conduct constituted a crime, and there is no basis for making such a finding. Accordingly, the third set of charges were time-barred.

As the DOE essentially conceded at the disciplinary hearing, the first and second set of charges against petitioner do not

support the penalty of terminating petitioner's employment with DOE. Accordingly, Supreme Court correctly remanded the matter to DOE for the imposition of an appropriate lesser penalty.

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15400 The People of the State of New York, Ind. 2124/13
Respondent,

-against-

Daffton Bloomfield,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 August 27, 2013,

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

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

ENTERED: JUNE 11, 2015

CLERK

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

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15401 The People of the State of New York, Ind. 7044/00
Respondent,

-against-

Orlando Medina,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Daniel Conviser, J.), entered on or about April 19, 2010, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered January 3, 2001, unanimously affirmed.

The court properly exercised its discretion in denying defendant's CPL 440.10 motion without holding a hearing (*see People v Samandarov*, 13 NY3d 433, 439-440 [2009]). Defendant's assertion that his attorney misadvised him that his guilty plea would not lead to deportation is conclusory, self-contradictory, and unsupported by any information from the attorney or any other evidence (*see People v Melo-Cordero*, 123 AD3d 595 [1st Dept 2014]; *People v Simpson*, 120 AD3d 412 [1st Dept 2014], *lv denied* 24 NY3d 1046 [2014]). Furthermore, defendant did not

sufficiently allege that he was prejudiced by the misadvice he claims to have received (*see People v Hernandez*, 22 NY3d 972, 974-976 [2013]).

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, JJ.

15402-
15402A AJ Holdings Group, LLC,
Plaintiff-Appellant,

-against-

IP Holdings, LLC, et al.,
Defendants-Respondents.

Index 600530/09

Nesenoff & Miltenberg, LLP, New York (Philip A. Byler of counsel), for appellant.

Blank Rome, LLP, New York (Leslie D. Corwin of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered September 19, 2014, which, insofar as appealed from, granted defendants' motion for spoliation sanctions, unanimously reversed, on the law and the facts, without costs, and the imposition of discovery sanctions vacated. Appeal from order, same court and Justice, entered on or about July 7, 2014, which denied that portion of plaintiff's cross motion which sought "renewal" of its summary judgment motion, unanimously dismissed, without costs, as taken from a nonappealable order.

Plaintiff's failure to ensure that its principals, who were all involved in the instant transactions, preserved their emails on various accounts used by them, and its failure to implement any uniform or centralized plan to preserve data or even the

various devices used by the "key players" in the transaction, demonstrated gross negligence with regard to the deletion of the emails (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). This gross negligence gave rise to a rebuttable presumption that the spoliated documents were relevant (*id.*). However, plaintiff sufficiently rebutted that presumption by demonstrating that the defenses available to defendants all necessarily turned on communications to or with them, not plaintiff's internal communications.

In particular, defendants claim that there was an oral modification to the parties' contract, whereby plaintiff waived the termination provisions. This is despite the fact that the agreement contained a clause barring oral modifications. In such a circumstance, defendants must establish an executed oral modification, or partial performance or estoppel "unequivocally referable" to the alleged oral modification (*Greenberg v Frey*, 190 AD2d 546, 547 [1st Dept 1993]). Because defendants can have only relied on communications they received from plaintiff to establish this defense, there is no sense in which the deleted internal emails of plaintiff would be relevant. As such, it was error to impose spoliation sanctions.

The IAS court correctly held that plaintiff's motion to "renew" its previous summary judgment motion was actually an

untimely motion to reargue, as plaintiff based it not on any newly discovered information, but on the theory that the IAS court had "overlooked" the integration clause in the agreement (*see* CPLR 2221 [d], [e]). Moreover, as the IAS court held, plaintiff can bring the motion again at the close of discovery.

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15404 In re Fritz G. Phucien, Index 101173/13
Petitioner-Appellant,

-against-

The City of New York Department of Correction, sued herein as The City of New York Department of Corrections, et al.,
Respondents-Respondents.

_____

Law Office of Kevin P. Sheerin, Mineola (Kevin P. Sheerin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih Sadrieh of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Doris Ling-Cohan, J.), entered on or about March 20, 2014, which denied the petition seeking to annul the determination of respondent City of New York Department of Correction dated April 23, 2013, terminating petitioner's employment as a probationary correction officer, granted respondents' cross motion to dismiss, and dismissed the proceeding brought pursuant to CPLR Article 78, unanimously affirmed, without costs.

Petitioner's unsupported assertions that respondent Department of Correction improperly terminated his probationary employment are insufficient to satisfy his burden of establishing that his dismissal was in bad faith (*see Matter of Swinton v*

Safir, 93 NY2d 758, 763 [1999]; *Matter of York v McGuire*, 63 NY2d 760, 761 [1984]; *Matter of Thomas v Abate*, 213 AD2d 251 [1st Dept 1995]). Mere conclusory allegations of bad faith based on speculation are not sufficient.

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15405 Joseph Sanchez, et al., Index 20017/14E
Plaintiffs-Appellants,

-against-

Kathiana Taveraz, et al.,
Defendants-Respondents.

_____

The Sullivan Law Firm, New York (James A. Domini of counsel), for appellants.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for Kathiana and Roque Taveraz, respondents.

Adams, Hanson, Rego, Kaplan & Fishbein, Yonkers (Steven Grgas of counsel), Liberato Food, Inc. and Domingo Perez, respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered on or about May 23, 2014, which denied plaintiffs' motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiffs failed to establish entitlement to judgment as a matter of law in this action where plaintiffs, passengers in a vehicle owned by defendant Roque Taveraz and operated by defendant Kathiana Taveraz, were injured when the vehicle in which they were riding was involved in an accident with a vehicle driven by defendant Domingo Perez and owned by defendant Liberato Food. Plaintiffs failed to show that any of the defendants' negligence was a proximate cause of the accident (*see Coleman v*

Maclas, 61 AD3d 569 [1st Dept 2009]). The police report upon which plaintiffs relied was uncertified (*see Raposo v Robinson*, 106 AD3d 593 [1st Dept 2013]), and plaintiffs' affidavits lack any details as to how the accident occurred (*compare Delgado v Martinez Family Auto*, 113 AD3d 426 [1st Dept 2014] [the plaintiff submitted an affidavit in which she stated that the driver of the vehicle in which she was riding apologized for driving at an excessive rate of speed, which constituted a party admission and established a violation of the Vehicle and Traffic Law]). To the extent the motion court found plaintiffs' possible failure to wear a seatbelt would be a defense to liability, such was error (*id.* at 428) because that would go to the issue of comparative negligence.

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15406 Karen L. Pruden, as Attorney-In-Fact for Ericka K. Spinner, Incapacitated,
Plaintiff-Respondent,

-against-

Jeffrey N. Bruce, M.D., et al.,
Defendants,

Ira R. Abbott, III, M.D., et al.,
Defendants-Appellants. Index 310733/11

_____

Kaufman, Borgeest & Ryan, LLP, Valhalla (Adonaid C. Medina of counsel), for appellants.

Duffy & Duffy, PLLC, Uniondale (James N. LiCalzi of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about May 31, 2013, which, to the extent appealed from as limited by the briefs, sua sponte, appointed plaintiff Karen Pruden to act as guardian ad litem of Ericka Spinner, nunc pro tunc, pursuant to CPLR 1202, and denied the motion of defendants Ira R. Abbott, III, M.D. and Montefiore Medical Center (collectively Montefiore) to dismiss the complaint as against them pursuant to CPLR 3211(a)(3), unanimously affirmed, without costs.

In 2009, the 21-year-old Spinner was diagnosed with a benign brain tumor. On January 13, 2010, she executed a durable power

of attorney in which she designated Pruden, her mother, to serve as her attorney-in-fact and as her guardian, should guardianship proceedings become necessary. Spinner's signature was acknowledged by her physician and notarized by a witness. Acting pursuant to powers given to her by the validly executed power of attorney (*see* General Obligations Law § 5-1501, *et seq.*), Pruden commenced this medical malpractice action in December 2011.

In support of their motion to dismiss pursuant to CPLR 3211(a)(3), Montefiore asserted that Spinner was not competent to execute the power of attorney. A party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function, and "the party asserting incapacity bears the burden of proof" (*Er-Loom Realty, LLC v Prelosh Realty, LLC*, 77 AD3d 546, 548 [1st Dept 2010], *lv denied* 16 NY3d 710 [2011]; *see Matter of Mildred M.J.*, 43 AD3d 1391 [4th Dept 2007]; *Feiden v Feiden*, 151 AD2d 889, 890 [3d Dept 1989]). Since Montefiore failed to submit any evidence concerning Spinner's competence at the time she executed the power of attorney, other than the document itself, it did not meet its initial burden in support of the motion, and the burden did not shift to plaintiff to demonstrate competency.

Under the circumstances presented, where Spinner has been rendered quadriplegic and unable to communicate, the court acted

within its discretion in appointing Pruden to be Spinner's guardian ad litem without a hearing (CPLR 1202[a]).

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

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15407 The People of the State of New York, Respondent, Ind. 5580/11

-against-

Lazaro Sainz-Mantilla, Defendant-Appellant.

_____

Stephen N. Preziosi, New York, for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression hearing; Marcy L. Kahn, J. at jury trial and sentencing), rendered February 1, 2013, convicting defendant, of criminal possession of a controlled substance in the third and fifth degrees, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of six years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The court properly denied defendant's suppression motion. Defendant engaged in a pattern of suspicious behavior that reasonably appeared to be the result of his awareness of the presence of uniformed police. Among other things, defendant discarded a canister, and then ran away as the police came

closer. Before defendant fled, the police merely had him under surveillance and did not pursue him (*see People v Thornton*, 238 AD2d 33, 36 [1st Dept 1998]). It is clear that defendant did not simply exercise his "right to be let alone," but "actively fled from the police" (*People v Moore*, 6 NY3d 496, 500-501 [2006]). Based on all these circumstances, the police at least had reasonable suspicion of criminality (*see People v Woods*, 98 NY2d 627 [2002]), which warranted a brief detention of defendant while the police recovered and inspected the canister, whereupon the discovery of drugs in the canister created probable cause for defendant's arrest. Furthermore, defendant abandoned the canister, and did not do so in response to any unlawful police activity. Moreover, the police also intended to issue a summons for littering in regard to the canister, and defendant's flight provided an additional justification for the pursuit and detention.

The hearing court also properly denied defendant's motion to suppress a statement he made during the processing of his arrest. Although defendant had not yet received *Miranda* warnings, defendant's admission about the contents of the canister was spontaneous and was not the product of interrogation or its functional equivalent (*see People v Smith*, 298 AD2d 182 [1st Dept 2002], *lv denied* 99 NY2d 585 [2003]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the inference that when the police saw defendant make a throwing motion, defendant was throwing the canister that the police had previously seen in his hand, and that was found to contain drugs.

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

Defendant'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 find that the challenged remarks generally constituted fair comment on the evidence, and

that the summation did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15408 Andres Uribe, Index 22713/12
Plaintiff-Respondent,

-against-

Pronto Gas Heating Supplies, Inc., et al.,
Defendants-Appellants.

_____

The Law Offices of Edward M. Eustace, White Plains (Christopher M. Yapchanyk of counsel), for appellants.

Weiss & Rosenbloom, P.C., New York (Erik L. Gray of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered December 17, 2014, which, in an action for personal injuries sustained in a motor vehicle accident, granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, with costs.

There is no dispute that defendants' truck failed to stop at a red traffic light, and hit the side of plaintiff's vehicle as he was driving through the intersection with a green light in his favor. Defendant driver testified that he was unable to stop the truck in time to avoid the collision, because a bottle had become stuck under the brake pedal, so that he had to use the emergency brake. Defendant driver's failure to yield the right of way to plaintiff in violation of Vehicle & Traffic Law § 1142

established his negligence (*see Pace v Robinson*, 88 AD3d 530 [1st Dept 2011]). Plaintiff, who averred that he was driving at the speed limit, and "who had the right-of-way, was entitled to anticipate that other vehicles would stop at the red lights against them, and he had no duty to watch for and avoid one that failed to do so" (*Tiefenthaler v Islam*, 66 AD3d 588, 589 [1st Dept 2009]).

Defendants' speculation concerning what plaintiff might have been able to do to avoid the accident is insufficient to raise an issue of fact (*see id.*).

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15409 Marnie Omanoff, Index 315506/11
Plaintiff-Appellant,

-against-

Louis Rohde,
Defendant-Respondent.

_____

Law Offices of Richard C. Ebeling, Putnam Valley (Richard C. Ebeling of counsel), for appellant.

Niehaus LLP, New York (Paul R. Niehaus of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered July 30, 2014, which granted defendant's motion to, among other things, direct plaintiff to disgorge payments she received as beneficiary of defendant's mother's New York City Employees' Retirement System (NYCERS) pension plan, unanimously affirmed, without costs.

The motion court correctly held that, pursuant to section 5.3 of the parties' stipulation of settlement, incorporated by reference, but not merged, into the judgment of divorce, plaintiff waived her rights to receive payments as the designated beneficiary of her former mother-in-law's NYCERS pension plan.

We reject plaintiff's claim that the waiver violates the Employee Retirement Income Security Act's (ERISA) anti-alienation provision (29 USC § 1056[d][1]). ERISA does not apply to the

NYCERS pension plan at issue here. The plan is a "government plan" within the meaning of the statute (*see* 29 USC § 1002[32]), and is therefore excluded from ERISA's coverage (*see* 29 USC § 1003[b][1]; *see also Jernigan v NYCERS*, 2010 WL 1049585, *4, 2009 US Dist LEXIS 126182, *14 [ED NY, March 18, 2010, No. 08-CV-3829 (RRM)(LB)]; *Trang v Local 1549*, 2001 US Dist LEXIS 12676, *18 n 1 [SD NY, Aug. 7, 2001, 98-Civ-5927 (GEL)(KNF)]).

Given the inapplicability of ERISA, the court correctly applied standard principles of contract interpretation to the stipulation, as it is a settlement agreement in a divorce action (*Rainbow v Swisher*, 72 NY2d 106, 109 [1988]). The court properly gave effect to all of the terms of the stipulation (*Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 986-987 [1st Dept 2009]), gleaned the parties' intent from what was expressed in their writing, and reached a practical interpretation of the parties' intent based on the language in the stipulation (*Strong v Dubin*, 75 AD3d 66, 68 [1st Dept 2010]).

Section 5.3 of the stipulation, titled "Retirement Funds," read as a whole, evinced an intent to waive the parties' rights to each other's retirement funds, and the clause in which plaintiff waived her claim "to any and all pension funds set up during the marriage in [plaintiff's] name by . . . a member of [defendant's] family," evinced a related intent to waive

plaintiff's rights to defendant's relatives' retirement funds, including her rights to her former mother-in-law's pension benefits.

The court sufficiently addressed, and correctly rejected, implicitly or explicitly, all of plaintiff's challenges to the stipulation (*see Corteguera v City of New York*, 179 AD2d 362, 363 [1st Dept 1992]; CPLR 2219[a]).

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: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15410N Acadia Realty Limited Partnership, Index 652054/13
Plaintiff-Respondent,

-against-

Benjamin O. Ringel, et al.,
Defendants.
- - - - -
RCG LV Debt IV Non-REIT
Assets Holdings, LLC,
Proposed Intervenor-Appellant.

_____

Stroock & Stroock & Lavan, LLP, New York (Daniel A. Ross of counsel), for appellant.

Otterbourg P.C., New York (Adam C. Silverstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about December 12, 2014, which denied proposed intervenor's motion to intervene in this action and to vacate the default judgment in favor of plaintiff Acadia Realty Limited Partnership, and against defendants AC I Manahawkin LLC and AC I Manahawkin Mezz LLC, unanimously affirmed, with costs.

While the motion to intervene by proposed intervenor RCG LV Debt IV Non-REIT Assets Holdings, LLC (RCG) is timely (*see Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]), RCG has failed to demonstrate that it is

entitled to intervene in this action for the purpose of trying to vacate a judgment entered on default against the Manahawkin defendants. The default judgment has no res judicata effect on RCG because a default is not a determination on the merits (*see Amalgamated Bank v Helmsley-Spear, Inc.*, 109 AD3d 418, 419 [1st Dept 2013], *leave dismissed* 22 NY3d 1148 [2014]).

Moreover, RCG has no "real, substantial interest in the outcome of this litigation" (*Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 201), since its right to recover on its loan was not cut off by the judgment. The fact that plaintiff might be paid before RCG in the related bankruptcy proceedings is an insufficient basis for RCG's intervention here (*see Gladstein v Martorella*, 75 AD3d 465, 466 [1st Dept 2010]; *Taw Intl. Leasing v Overseas Private Inv. Corp.*, 57 AD2d 799, 799-800 [1st Dept 1977]). RCG has also failed to demonstrate that it has a meritorious defense; indeed, it raises no defenses of its own (*see Amalgamated Bank v Helmsley-Spear, Inc.*, 109 AD3d at 420).

Nor is RCG an interested party (*see Nachman v Nachman*, 274 AD2d 313, 315 [1st Dept 2000]). Further, judicial assistance is

not required to avoid injustice, since the Manahawkin entities have twice tried, and failed, to vacate the judgment relying on the same arguments made here by RCG (*id*).

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

ENTERED: JUNE 11, 2015

CLERK

Tom, J.P., Renwick, Andrias, Manzanet-Daniels, Kapnick, JJ.

15411 In re Joel Herrera, Ind. 3109/14
[M-1383] Petitioner,

-against-

Hon. Laura A. Ward, etc., et al.,
Respondents.

_____

Joel Herrera, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Jonathan D. Conley of counsel), for Hon. Laura A. Ward, respondent.

Cyrus R. Vance, Jr., District Attorney, New York (Michael A. McIntosh of counsel), for Cyrus R. Vance, Jr., respondent.

_____

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

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

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

ENTERED: JUNE 11, 2015

CLERK