SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 16, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

12893 Eugene Stolowski, et al., Index 8850/05
Plaintiffs-Respondents,

-against-

234 East 178th Street LLC,
Defendant-Respondent,

The City of New York,
Defendant-Appellant.

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

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for Eugene Stolowski, Brigid Stolowski, Eileen Bellew, Jeffrey G. Cool, Sr., Jill Cool, Joseph G. DiBernardo and Brendan K. Cawley, respondents.

Meyer, Suozzi, English & Klein, P.C., Garden City (Andrew J. Turro of counsel), for Jeanette Meyran, respondent.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for 234 East 178th Street LLC, respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 27, 2013, which denied defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously modified, on the law, to dismiss that portion of the General Municipal Law § 205-a claims

that are predicated on alleged violations of 29 CFR § 1910.134(g)(4), the common-law negligence claims to the extent they are barred by the firefighter rule, any claim of improper building inspection, any spousal derivative claims, and the cross claim seeking contribution to the extent it is based on General Municipal Law § 205-a, and otherwise affirmed, without costs.

The motion court properly declined to dismiss the portion of plaintiffs' General Municipal Law (GML) § 205-a claims predicated on an alleged violation of Labor Law § 27-a(3)(a)(1). The City unavailingly contends that Labor Law § 27-a(3)(a)(1) cannot provide a valid predicate for any General Municipal Law § 205-a claim. However, the statute, known as the Public Employee Safety and Health Act (PESHA), which imposes a general duty on an employer to provide employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees" (Labor Law § 27-a[3][a][1]), is sufficient since it is "a requirement found in a well-developed body of law and regulation that imposes clear duties" (*Williams v City of New York*, 2 NY3d 352, 364 [2004]; *see also Fisher v City of New York*, 48 AD3d 303 [1st Dept 2008]).

Moreover, the City failed to "show that it did not negligently violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause plaintiff's injuries" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]). There is evidence, including testimony and an investigative report, that the failure to issue personal ropes to the firefighters contributed to the injuries and deaths suffered when the firefighters jumped from windows using either no safety devices or a single rope that had been independently purchased by one of the firefighters. The City is also not entitled to dismissal of these claims pursuant to governmental function immunity, since the evidence concerning the removal of existing personal ropes in 2000, and the failure to provide new ropes in the period of more than four years from then until the fire giving rise to these claims, raises issues of fact concerning whether the absence of ropes "actually resulted from discretionary decision-making -- i.e., the exercise of reasoned judgment which could typically produce different acceptable results" (*see Valdez v City of New York*, 18 NY3d 69, 79-80 [2011]).

Contrary to the City's argument, plaintiffs pleaded the alleged PESHA violations in their complaints. We do not consider the City's argument that the investigative report is

inadmissible, which was improperly raised for the first time in its reply brief.

However, the City established its entitlement to dismissal of that portion of the GML § 205-a claims that is based on alleged violations of 29 CFR § 1910.134(g)(4). Regardless of whether that regulation was breached, plaintiffs and the building owner failed to raise an issue of fact as to the causal link between the alleged violation and the fate that befell plaintiffs.

The common-law negligence claims, to the extent they are not barred by the firefighter rule, any claim alleging improper building inspection, the spousal derivative claims, and the cross claim seeking contribution to the extent it is based on General Municipal Law § 205-a, are deemed abandoned.

The Decision and Order of this Court entered herein on March 3, 2015 is hereby recalled and vacated (*see* M-1155-1169-1172-1414, decided simultaneously herewith).

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

ENTERED: JUNE 16, 2015

CLERK

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

13815 Joe Sheng Kwong, etc., et al., Index 111429/08
Plaintiffs-Respondents, 150034/09
591093/09

-against-

Southeast Grand Street Guild Housing Development Fund Company Inc., et al.,
Defendants-Appellants.

- - - - -

Raquel Margary,
Plaintiff-Respondent,

-against-

Southeast Grand Street Guild Housing Development Fund Company Inc., et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

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Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants.

Morelli Alters Ratner, P.C., New York (Marta M. McBrayer of counsel), for Joe Sheng Kwong, Canarida Gonzalez, Elida Gonzalez, Dolores Guzman and Luis Pena, respondents.

Richard J. Katz, LLP, New York (Jonathan A. Rapport of counsel), for Raquel Margary, respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 7, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiffs' negligence causes of action, modified, on the law, to grant the motion as to plaintiff Dolores Guzman's claim, and otherwise affirmed, without costs.

There is no evidence in the record that defendants caused the fire in their building, which was confined to a single tenant's apartment, or that the condition of the building's stairwells exacerbated the smoke conditions. Defendants submitted an affidavit by their porter, who averred that defendants' employees did not open the fire stair doors and that he did not observe any of the doors open on the day of the fire. While two plaintiffs testified that the doors on their floors were open, allowing smoke to enter the hallways, there is no evidence that it was defendants' employees who opened the doors, and one of the firefighters testified that the firefighters held certain doors open with wooden blocks to fight the fire. Plaintiffs' experts' opinions as to defects in the stairwell and the doors to the stairwell were conclusory and speculative (*see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 8-9 [2005]; *Zvinys v Richfield Inv. Co.*, 25 AD3d 358, 359-360 [1st Dept 2006], *lv denied* 7 NY3d 706 [2006]).

However, questions of fact exist whether defendants complied with Administrative Code of City of NY former §§ 408.9.1 and 408.9.1.2, which required them to create and disseminate a fire safety guide and an evacuation procedure plan to be employed in the event of a fire (*see Elliott v City of New York*, 95 NY2d 730 [2001]). Defendants submitted evidence that an evacuation

procedure plan was mailed to their tenants. However, plaintiffs deny that they received any such plan. Plaintiffs also deny that there was a notice of evacuation procedures on the insides of their apartment doors, as required, and they assert that in the absence of these notices, with one exception, they attempted to leave the fireproofed building, and suffered smoke inhalation.

The exception was plaintiff Dolores Guzman, who, as advised by the 911 operator, remained in her apartment during the fire, placed a wet towel against the threshold of her door, and waited for rescue. This being the proper procedure to follow in the event of a fire, Guzman was not harmed by the absence of a posted notice of the procedure.

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

All concur except Kapnick, J. who dissents in part in a memorandum as follows:

KAPNICK, J. (dissenting in part)

I dissent only to the extent that I would not dismiss plaintiff Dolores Guzman's claim. Notwithstanding the fact that Guzman was advised by her son, who was also a tenant in the building, and a 911 operator, to remain in her apartment, place a wet towel under the doorway and open her windows (which she was unable to do) while she waited for help to arrive, I agree with the motion court that issues of fact remain as to the sufficiency of the fire safety plan, allegedly created and disseminated by defendants, including whether there were sufficient precautionary instructions given to the tenants as to what to do in the event of a fire that creates a dangerous smoke condition, such as the one that overcame Guzman in her apartment on the day of the fire.

I otherwise concur with the majority's opinion.

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

ENTERED: JUNE 16, 2015

CLERK

Andrias, J.P., Saxe, Feinman, Clark, JJ.

14492 Alexander Miuccio, et al., Index 117406/08
Plaintiffs-Respondents,

-against-

Ronald Straci,
Defendant-Appellant.

_____

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

Bisceglie & Associates, P.C., New York (Mark I. Silberblatt of counsel), for respondents.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered May 14, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant contends that, even if there is a triable issue of fact as to his responsibility for the delay in transferring plaintiffs' assets from Amalgamated Bank to Western Asset Management (WAM), the damages plaintiffs seek, namely, the difference between the low interest rate the funds earned at Amalgamated and the higher return they would have received at WAM, are too speculative. This argument is unavailing. "[B]ut for" defendant's alleged negligence (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer,* 8 NY3d 438, 442 [2007]), plaintiffs would have earned a higher return earlier than June 2005, and the

difference between the amount they earned at Amalgamated and the amount they would have earned at WAM is "readily ascertainable" (*id.* at 443) and, indeed, was "calculated" (*id.*) by their expert.

We have considered defendant's remaining contentions, including that lost profits can be awarded only if a fiduciary engages in self-dealing, and find them unavailing. Notably, the case sounds in legal malpractice, not breach of fiduciary duty. The claim is that defendant was negligent in handling paperwork to effect the transfer of assets from one company to another, not that he retained the assets or invested them in a manner disadvantageous to plaintiffs.

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

ENTERED: JUNE 16, 2015

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Kapnick, JJ.

14999 In re Mohamed Z.G.,
Petitioner-Appellant,

-against-

Mairead P.M.,
Respondent-Respondent.

_____

Carol L. Kahn, New York, for appellant.

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

Karen P. Simmons, The Children's Law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Sue Levy, Referee), entered on or about June 13, 2014, which dismissed petitioner father's petition seeking visitation with the subject children, unanimously affirmed, without costs.

Three days before the father commenced this proceeding seeking visitation, the Referee had issued, upon the father's default, an order granting respondent mother sole custody of the children and an order of protection directing the father to stay away from the mother and the children for two years. Under these circumstances, the Referee, whose familiarity with the case enabled her to make an informed determination, properly dismissed the visitation petition after the father presented his case at the hearing, because the father failed to meet his burden of

showing that there had been a change in circumstances warranting modification of the order of protection and that visitation would be in the children's best interests (*see Matter of Luis F. v Dayhana D.*, 109 AD3d 731 [1st Dept 2013]; *Matter of Stitzel v Brown*, 1 AD3d 826, 827-828 [3d Dept 2003]). Among other things, the father's testimony showed that he failed to recognize the effect his actions had on the children and had not addressed the issues that led to the order of protection being issued against him, and thus the requisite evidentiary basis existed for the Referee's finding that modifying the order to allow visitation would not be in the children's best interests (*see Matter of Craig S. v Donna S.*, 101 AD3d 505 [1st Dept 2012], *lv denied* 20 NY3d 862 [2013]; *Matter of Frank M. v Donna W.*, 44 AD3d 495 [1st Dept 2007]).

Contrary to the father's contention, the Referee was not required to order a forensic evaluation because she possessed sufficient information to make a comprehensive and independent review of the children's best interests after having issued the custody order and order of protection, following an inquest, just days earlier (*see Matter of Susan A. v Ibrahim A.*, 96 AD3d 439 [1st Dept 2012]).

The father's contention that the Referee erred in relying upon the statements of the children's attorney concerning the

views of the children's therapists is unpreserved (*see e.g. Matter of Matthew W. v Meagan R.*, 68 AD3d 468, 469 [1st Dept 2009]), and we decline to review the issue in the interest of justice. Nevertheless, in a different context, the better practice would be for the court to hear directly from the therapists, either through testimony or a report.

Although the better practice would have been for the Referee to conduct an in camera interview with the children, who were 10 and 11 years old at the time of the hearing, under the circumstances before us it was appropriate for the attorney for the children to inform the court of the children's preference not to have contact with the father (*see Matter of Gloria DD. [Brenda DD.]*, 99 AD3d 1044, 1046-1047 [3d Dept 2012]).

In any event, any error in considering the statements of the attorney for the children would be harmless given the father's failure to meet his prima facie burden to establish that

there had been a change of circumstances that warranted the modification of the order of protection and that visitation would be in the children's best interests.

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

ENTERED: JUNE 16, 2015

CLERK

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

15412 The People of the State of New York Ind. 3317/07
Respondent,

-against-

Donnell Pruitt,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, Bronx (William B. Carney of counsel), for appellant.

Donnell Pruitt, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered October 22, 2010, convicting defendant, after a jury trial, of murder in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The testimony at issue on appeal to which defendant objected at trial on hearsay grounds was properly admitted, not for its truth, but for legitimate nonhearsay purposes (*see People v Tosca*, 98 NY2d 660 [2002]). Defendant's other hearsay claims, and his claim that the various evidence at issue was inadmissible under the Confrontation Clause, are unpreserved (*see People v Kello*, 96 NY2d 740, 743-744 [2001]), and we decline to review

them in the interest of justice. As an alternative holding, we reject them on the merits. As to all of the claims, whether preserved or not, we conclude that the evidence was admissible for nonhearsay purposes (*see Tennessee v Street*, 471 US 409, 414 [1985]), and that, in any event, any constitutional or state-law errors were harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). None of the evidence at issue directly incriminated defendant or implied that nontestifying declarants had done so, all the evidence was cumulative to essentially similar nonhearsay evidence or was insignificant, and there was overwhelming evidence of defendant's guilt, including persuasive forensic evidence.

Defendant's claim that the court unduly restricted his cross-examination of the People's witnesses is unpreserved because defendant did not make offers of proof that articulated the bases for admissibility he asserts on appeal (*see People v George*, 67 NY2d 817, 819 [1986]), including his constitutional arguments (*see People v Lane*, 7 NY3d 888, 889 [2006]), and we decline to review it in the interest of justice. As an alternative holding, we find that in each alleged instance of improper curtailment, the court acted within its wide latitude to impose reasonable limits on cross-examination in order to avoid repetition, confusion and focus on collateral matters, and that

defendant's right to confront witnesses and present a defense was not impaired (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]; *People v Corby*, 6 NY3d 231, 234 [2005]). In any event, to the extent there were any errors in this regard, we find them harmless in light of the overwhelming evidence of defendant's guilt.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

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

ENTERED: JUNE 16, 2015

CLERK

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

15413 Diana Parris, Index 306352/12
Plaintiff-Appellant,

-against-

Francisco A. Gonzalez-Martinez,
Defendant-Respondent.

_____

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 25, 2014, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries she allegedly sustained in a collision between a vehicle she was driving and a vehicle driven by defendant. Supreme Court correctly denied plaintiff's motion for partial summary judgment, as she failed to show the absence of material issues of fact as to her comparative negligence (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Defendant testified that he stopped at an intersection, looked to his right (the direction of oncoming traffic), and observed that plaintiff's vehicle was at a corner one block away. Defendant further testified that he began to

move his vehicle because he believed that he had time to cross over the intersection, as plaintiff's vehicle was "at the other corner." He also testified that he blew his horn five seconds before the vehicles collided, and that the impact occurred between the front bumper of his vehicle and the front driver's side of plaintiff's vehicle. Accordingly, issues of fact exist as to which driver entered the intersection first, which driver had the right-of-way, and whether plaintiff could have exercised reasonable care to avoid the collision (*see Raposo v Robinson*, 106 AD3d 593, 593 [1st Dept 2013]). That defendant's approach in the intersection was regulated by a stop sign and no traffic control devices regulated plaintiff's approach is not a basis for awarding plaintiff summary judgment (*id.*; *Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 297 [1st Dept 2008]). Moreover, even if plaintiff had the right-of-way, she was "still obliged to be

vigilant for oncoming traffic" as she traveled down the street (*see Calcano v Rodriguez*, 91 AD3d 468, 472 [1st Dept 2012]).

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 16, 2015

CLERK

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

15414 In re Autumn P.,

A Child Under Eighteen Years of Age, etc.,

Alisa R.,
Respondent-Appellant,

Good Shepherd Services, et al.,
Petitioners-Respondents.

_____

The Center for Family Representation, Inc., New York (Susan Jacobs of counsel), for appellant.

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

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about April 30, 2014, which, after a fact-finding determination of permanent neglect, terminated respondent mother's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b [7][a]). that the agency made diligent efforts to strengthen the parental relationship by scheduling visitation, providing referrals for services, repeatedly encouraging respondent to engage in therapy

that would address the reason for the child's placement into foster care and encouraging her to engage in domestic violence counseling (*see Matter of Alexander B. [Myra R.]*, 70 AD3d 524, 524-525 [1st Dept 2010], *lv denied* 14 NY3d 713 [2010]).

Despite the agency's diligent efforts, respondent permanently neglected the child by failing to complete her service plan after she refused to comply with the agency's referral for domestic violence counseling (*see Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545, 546 [1st Dept 2014]). The fact that respondent consistently visited with the child did not preclude a finding of permanent neglect, since she failed to plan for her daughter's future by not gaining insight into the reasons for the child's placement during the relevant statutory period (*see Matter of Jonathan Jose T.*, 44 AD3d 508, 509 [1st Dept 2007]).

In addition, the record supports the Family Court's determination that it is in the child's best interest to terminate respondent's parental rights to free her for adoption (*see id.; see also Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Termination is warranted because the child has been living with the foster mother since September 2009, when she was approximately 10 months old, is thriving in her care and there is

no evidence that respondent has a realistic plan to provide an adequate and stable home for the child.

The Family Court properly declined to enter a suspended judgment. After spending over five years in foster care, the child should not be denied permanence through adoption in order to provide respondent additional time to demonstrate that she can be a fit parent (*see Matter of Isabella Star G.*, 66 AD3d 536, 537 [1st Dept 2009]).

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

ENTERED: JUNE 16, 2015

CLERK

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

15415 The People of the State of New York, Ind. 870/12
Respondent,

-against-

Shaun Simmons,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about December 18, 2013, which adjudicated defendant a level one sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in denying defendant's request for an exemption from sex offender registration for his conviction of unlawful surveillance under Penal Law § 250.45(3). Although an exemption for such a conviction may be available if "registration would be unduly

harsh and inappropriate" (Correction Law § 168-a[2][e]), defendant has not made such a showing. The circumstances of the surveillance were repulsive, and they raise concerns about defendant's character and potential for recidivism. Furthermore, he has an extensive criminal record including crimes of violence.

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

ENTERED: JUNE 16, 2015

CLERK

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

15416-
15417 In re Laura Cohen, et al.,
Petitioners-Appellants,

-against-

Pauline De Grunne Cohen,
as Trustee of the Stanley
Cohen 2006 Insurance Trust,
Respondent-Respondent.

Index 153236/14

Leitner & Getz LLP, New York (Gregory J. Getz of counsel), for appellants.

Law Offices Of A. Grant McCrea, New York (Grant McCrea of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D.S. Wright, J.), entered on or about September 25, 2014, which denied the petition to remove respondent as trustee of the Stanley Cohen 2006 Insurance Trust, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 4, 2014, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

The court properly determined that there was no basis for removing respondent as trustee. Although there is evidence of antagonism between respondent and the trust beneficiaries, the record fails to show that respondent took any action that interfered with or adversely impacted the trust, which currently

is not funded (*see* SCPA 711[2]); *compare Matter of Duell*, 258 AD2d 382, 382-383 [1st Dept 1999] [trustee was properly removed where, among other things, antagonisms between trustee and trust beneficiaries resulted in trustee's interference with proper administration of the estate]).

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

ENTERED: JUNE 16, 2015

CLERK

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

15418 Beta Holdings, Inc., et al,
Plaintiffs-Appellants,

-against-

Robert J. Goldsmith, et al.,
Defendants-Respondents,

Corinthian-Beta Investments, LLC, et al.,
Counterclaim Defendants.

Index 652401/12

Lowenstein Sandler LLP, New York (R. Scott Thompson of counsel), for appellants.

Boyar Miller, Houston, TX (Andrew Pearce of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about December 22, 2014, which, insofar as appealed from, granted defendants' cross motion for summary judgment dismissing plaintiffs' claims alleging, inter alia, breaches of the stock purchase agreement, fraud and unjust enrichment, and denied in part plaintiffs' motion for partial summary judgment as to liability, unanimously affirmed, without costs.

The bulk of plaintiffs' claims are barred by the fact that the representations breached were qualified by a materiality standard. As such, plaintiffs' representation to their auditors and among their officers that none of the alleged breaches had a material affect on the business supports the court's conclusion

that there is no triable issue of fact as to a breach of the warranties. With regard to the warranty as to licenses, the complained of license was notably absent from the schedule of licenses the company claimed to have.

We decline to consider plaintiffs' arguments, raised for the first time on appeal, that the materiality requirements were eliminated by section 10.2(g) of the stock purchase agreement. This argument, which requires parol evidence to resolve, is not one purely of law, and cannot be resolved on the record before us (*cf. Rojas-Wassil v Villalona*, 114 AD3d 517 [1st Dept 2014]).

While the foregoing requires affirmance of the motion court, it is noted that the court did err with regard to the damages issue. There is no dispute that plaintiffs' damages could be measured by the difference between the purchase price of the company and the actual value of the company, given the false statements made in connection with the purchase (see *Merrill Lynch & Co. Inc. v Allegheny Energy, Inc.*, 500 F3d 171, 184-185 [2d Cir 2007]). The motion court erred in accepting the opinion of defendants' expert with regard to a consultant's report prepared for plaintiffs valuing the company. The court also erred in rejecting the report of plaintiffs' damages expert. The expert was qualified, and his report set forth generally accepted methodology and relevant facts (see *generally Generale Bank v*

Bell Sec., Inc., 21 AD3d 844, 845 [1st Dept 2005]). While one expert may have been more persuasive, that is not a basis for the grant of summary judgment.

Furthermore, for the same reason that the court correctly concluded that there was no issue of fact as to any breach of representation in the stock purchase agreement, it was correct to dismiss the fraud claim for lack of any actionable misrepresentation.

We have considered plaintiffs' remaining arguments, including that the unjust enrichment claim should be reinstated, and find them unavailing.

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

ENTERED: JUNE 16, 2015

CLERK

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

15419- Ind. 2327/11
15420 The People of the State of New York,
Respondent,

-against-

Leonard Nesbit,
Defendant-Appellant.

_____

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 (Ryan Gee of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about May 23, 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 16, 2015

CLERK

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

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

15422 Kemperi Baihua Huani, et al., Index 151372/13
Plaintiffs-Appellants,

-against-

Steven Donziger, et al.,
Defendants-Respondents,

Frente De Defensa De La Amazonia, etc., et al.,
Defendants.

_____

Judith Kimerling, New York, for appellants.

Law Offices of Steven R. Donziger, New York (Steven R. Donziger of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered September 2, 2014, which granted so much of the motion of defendants Steven Donziger, The Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC, to dismiss the complaint as against them on the ground of forum non conveniens, unanimously affirmed, without costs.

The motion court providently exercised its discretion in weighing the relevant factors and finding that defendants carried their burden of demonstrating that this action lacks a substantial New York nexus (*see generally Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). Ecuador is the forum more convenient to the parties and

witnesses than New York; there is no unfairness in requiring plaintiffs to prosecute their claims in Ecuador where they reside; the underlying litigation took place there; the underlying judgment, to which plaintiffs claim a proportional share, was issued there; and defendant Frente De Defensa De La Amazonia a/k/a Amazon Defense Front or Amazon Defense Coalition, which was directed to distribute the proceeds of the judgment, is domiciled there (*see Phat Tan Nguyen v Banque Indosuez*, 19 AD3d 292, 294-295 [1st Dept 2005], *lv denied* 6 NY3d 703 [2006]). Furthermore, plaintiffs' claims of improper conduct by defendant Donziger, a New York attorney, relate to his actions in the underlying Ecuadorian litigation and judgment.

The motion court correctly rejected plaintiffs' contention that Ecuador is not a suitable forum. In any event, New York does not require an alternate forum for a non conveniens dismissal (*see Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176-178 [1st Dept 2004]).

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

ENTERED: JUNE 16, 2015

CLERK

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

15424 The People of the State of New York, Respondent, Ind. 2204/13

-against-

Darryl Bryan, Defendant-Appellant.

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Marianne Karas, Thornwood, for appellant.

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered May 14, 2013, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him to a term of six years, unanimously affirmed.

Since defendant did not move to withdraw his plea, his challenge to the voluntariness of the plea is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. During the plea allocution itself, defendant admitted his guilt and said nothing that negated any element of the crime or raised any defenses (*see People v Toxey*, 86 NY2d 725 [1995]). Accordingly, the court had no obligation to conduct a sua sponte inquiry into postplea statements by defendant regarding his intoxication at the time of the crime that were reflected in the presentence report (*see e.g.*

People v Praileau, 110 AD3d 415 [1st Dept 2013], *lv denied* 22 NY3d 1201 [2014]; *People v Pantoja*, 281 AD2d 245 [1st Dept 2001], *lv denied* 96 NY2d 905 [2001]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters outside the record including attorney-client consultations on such matters as plea negotiations, the advisability of raising an intoxication defense, and whether to make a plea withdrawal motion (*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 nothing to cast doubt on counsel's effectiveness.

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

ENTERED: JUNE 16, 2015

CLERK

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

15425 The People of the State of New York, SCI 304/13
Respondent,

-against-

Ruben Garcia,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered February 20, 2013, convicting defendant, upon his plea of guilty, of two counts of criminal possession of a weapon in the third degree, and sentencing him, as a second felony offender, to consecutive terms of 3½ to 7 years, unanimously modified, on the law, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

As the People concede, defendant possessed two handguns through a single act, and is thus entitled to concurrent

sentences (*see People v Salazar*, 290 AD2d 256 [1st Dept 2002], *lv denied* 97 NY2d 760 [2002]).

We perceive no basis for any further modification of the sentences.

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

ENTERED: JUNE 16, 2015

CLERK

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

15427 Lauren Wichter Friedman, Index 159599/13
Plaintiff-Respondent,

-against-

Arenson Office Furnishings Inc.,
Defendant-Appellant.

_____

Bond Schoeneck & King PLLC, New York (Richard G. Kass of counsel), for appellant.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (David M. Cooper of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 22, 2014, which denied defendant's motion for partial summary judgment dismissing plaintiff's claim alleging violations of article 6 of the Labor Law, unanimously affirmed, with costs.

In February 2008, defendant hired plaintiff to start up, manage, and solicit business for a newly created division of its business, Architectural Products. In addition to an annual salary, plaintiff's employment contract entitled her to yearly bonuses comprised of 15% of the Architectural Products division's net profits, less a charge for of 5% of divisional sales for corporate overhead. In July 2013, defendant terminated plaintiff's employment without having paid her any bonuses.

Defendant failed to establish that the bonuses are not "wages," as defined by article 6 of the Labor Law (Labor Law §

190[1]). The employment agreement creates "a direct relationship between [plaintiff's] own performance and the compensation to which [she] is entitled" (*Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 224 [2000]). In the event that plaintiff can establish that her division earned net profits during the periods in question, payment of the bonuses would be non-discretionary and based upon services plaintiff rendered as the manager of a newly created division to be run by her (*see Ryan v Kellogg Partners Inst. Servs.*, 79 AD3d 447, 449 [1st Dept 2010], *affd* 19 NY3d 1 [2010]), and not "upon [the] employer's overall financial success" (*Truelove* at 224).

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

ENTERED: JUNE 16, 2015

CLERK

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

15428 In re the Port Authority of New York and New Jersey, Petitioner-Appellant, Index 451628/12

-against-

The Union of Automotive Technicians, Respondent-Respondent.

_____

James M. Begley, New York (Toby J. Russell of counsel), for appellant.

Wintham & Kozan, P.A., New York (Craig Kozan of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered May 13, 2014, to the extent appealed from as limited by the briefs, modifying an arbitration award dated July 24, 2012, to rule that the E-Z Pass benefit is a vested lifetime benefit available to members of respondent who retired from petitioner's employment under the parties' 2006-2011 Memorandum of Agreement, unanimously affirmed, without costs.

In light of our disposition of previous appeals raising the same issue, Supreme Court reached the right result in this matter (*see e.g. Matter of Port Auth. of N.Y. & N.J. v Local Union No. 3, Intl. Bhd. of Elec. Workers*, 117 AD3d 424 [1st Dept 2014], *lv*

denied 24 NY3d 916 [2015]; *Matter of Port Auth. of N.Y. & N.J. v Port Auth. Police Lieutenants Benevolent Assn.*, 124 AD3d 473 [1st Dept 2015]; *Matter of Port Auth. N.Y. & N.J. v Port Auth. Police Sergeants Benevolent Assn.*, 124 AD3d 475 [1st Dept 2015]).

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

ENTERED: JUNE 16, 2015

CLERK

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

15429 David N. Hoffman, Index 653685/12
Plaintiff-Appellant,

-against-

Wyckoff Heights Medical Center,
Defendant-Respondent.

_____

David N. Hoffman, appellant pro se.

Eaton & Van Winkle LLP, New York (Joseph T. Johnson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 19, 2014, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment, unanimously affirmed, without costs.

Pursuant to his employment agreement with defendant as its general counsel and vice president for ethics and compliance, plaintiff could be terminated "with cause," if he engaged in certain specifically defined conduct, including dishonesty, or "without cause," in which event defendant would provide him with 90 days' notice and a severance payment. It is uncontested that plaintiff was not afforded 90 days' notice. He contends that he was not terminated "with cause," and is therefore entitled to severance under the terms of the contract.

Plaintiff failed "to demonstrate the absence of genuine issues of material fact on every relevant issue raised by the pleadings, including any affirmative defenses" and counterclaims (*Aimatop Rest. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516, 517 [1st Dept 1980]). In its responsive pleadings, defendant alleged that plaintiff, inter alia, breached his fiduciary duty and was a faithless servant. Plaintiff's submissions failed to eliminate issues of fact raised by defendant's allegations concerning the circumstances under which his most recent contract was entered, and whether, given these circumstances, he breached any duty owed to defendant.

Even assuming, arguendo, that plaintiff satisfied his initial burden, defendant raised issues of fact as to "cause" for his termination by submitting evidence to suggest that plaintiff was dishonest in failing to inform it about an occurrence rendering him incapable of continuing to serve as general counsel.

Plaintiff's motion was also premature (CPLR 3212[f]). Defendant demonstrated that discovery was necessary because proof of whether plaintiff engaged in misconduct constituting cause for termination resided exclusively within his knowledge, including, for example, why he withheld information about being the target

of an investigation by the Kings County District Attorney's Office.

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

ENTERED: JUNE 16, 2015

CLERK

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

15430 The People of the State of New York, Ind. 2083/12
Respondent,

-against-

Darlene Brown,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Andrea L. Bible of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 25, 2013, convicting defendant, upon her plea of guilty, of attempted robbery in the second degree and assault in the second degree, and sentencing her to an aggregate term of four years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 16, 2015

CLERK

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

15432N 2470 Cadillac Resources, Inc., et al.,
Plaintiffs-Appellants,

Bear Franchising (Connecticut), LLC, et al.,
Plaintiffs,

-against-

DHL Express (USA), Inc.,
Defendant-Respondent,

Deutsche Post AG,
Defendant.

Index 603613/08

_____

Einbinder & Dunn, LLP, New York (Michael Einbinder of counsel), for appellants.

Dechert LLP, New York (Edwin V. Woodsome of the bar of the District of Columbia, the Commonwealth of Massachusetts and the State of California, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about August 12, 2014, which denied plaintiffs-appellants' motion for leave to file a third amended complaint, unanimously affirmed, with costs.

Supreme Court providently exercised its discretion in denying appellants' motion for leave to amend, as the proposed amendment is "palpably insufficient [and] clearly devoid of merit" (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011] [internal quotation marks omitted]; *see*

Eighth Ave. Garage Corp. v H.K.L. Realty Corp., 60 AD3d 404 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]). Seven years after initiating this action, appellants seek to assert three new claims for breach of implied contracts to continue to resell shipping services without any factual basis. The deposition testimony cited by appellants does not support their new claims.

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

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

ENTERED: JUNE 16, 2015

CLERK

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

15433N Samuel Alan Spearin, Index 155561/12
Plaintiff-Appellant,

-against-

Linmar, L.P., et al.,
Defendants-Respondents.

_____

Wingate, Russotti, Shapiro & Halperin, LLP, New York (David M. Schwarz of counsel), for appellant.

Cascone & Kluepfel, LLP, Garden City (Ajay C. Bhavnani of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 2, 2014, which, insofar as appealed from as limited by the briefs, upon defendant Linmar, L.P.'s motion pursuant to CPLR 3126 and 3124, ordered plaintiff to provide an authorization for access to his Facebook account records from the date of the subject accident to the present, unanimously reversed, on the law and the facts, without costs, and the matter remanded for an in camera review of plaintiff's post-accident Facebook postings for identification of information relevant to plaintiff's alleged injuries.

Defendant established a factual predicate for discovery of relevant information from private portions of plaintiff's Facebook account by submitting plaintiff's public profile picture from his Facebook account, uploaded in July 2014, depicting

plaintiff sitting in front of a piano, which tends to contradict plaintiff's testimony that, as a result of getting hit on the head by a piece of falling wood in July 2012, he can longer play the piano (*see Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620 [1st Dept 2013]; *Richards v Hertz Corp.*, 100 AD3d 728 [2d Dept 2012]). However, the direction to plaintiff to provide access to all of his post-accident Facebook postings is overbroad. We remand for an in camera review of plaintiff's post-accident Facebook postings for identification of information relevant to his alleged injuries (*see Richards*, 100 AD3d at 730).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15434 The People of the State of New York, Ind. 1816/08
Respondent,

-against-

Horacio Blackwood,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about May 30, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors sufficient to establish a total point score of 75. Clear and convincing evidence supported the assessment of 20 points for defendant's relationship with the victim, since the underlying offense "arose in the context of a professional . . . relationship between the offender and the victim and was an abuse of such relationship" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 [2006]). The trial evidence, which is summarized in this

Court's decision on the direct appeal (108 AD3d 163 [1st Dept 2013], *lv denied* 22 NY3d 1197 [2014]), showed that defendant recruited the 17-year-old victim at a talent scouting event and repeatedly contacted her to encourage her to retain his services to pitch her demo tape to people in the entertainment industry. Shortly after she moved to New York City, defendant offered her alcoholic drinks, at least one of which secretly contained Ecstasy, and which she willingly drank, rendering her mentally incapacitated by the time defendant had sexual intercourse with her. The evidence supported the conclusion that defendant's abuse of his position of trust contributed to the victim's unquestioning acceptance of the drinks.

Clear and convincing evidence also supported the assessment of 10 points for failure to accept responsibility. Defendant initially told both the victim and the police that there had been no sexual intercourse. After the trial, defendant admitted to sexual intercourse with the victim during sentencing and in a probation interview, but sought to minimize or negate his guilt by stating that the victim removed her clothing and insisted on

performing that act with defendant (*see People v Hernandez*, 117 AD3d 524, 524 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014]). We have considered defendant's remaining arguments concerning both point assessments at issue and find them unavailing.

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15436 In re Toteanna M., etc.,

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

Keyshana M.,
Respondent-Appellant,

St. Vincent's Services, Inc.,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Patricia Lee Moreno, Bronx, attorney for the child.

_____

Order, Family Court, Bronx County (Linda Tally, J.), entered on or about April 28, 2014, which, upon a fact-finding determination that respondent mother abandoned her child, terminated her parental rights and transferred custody and guardianship of the child jointly to petitioner agency and the New York City Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of abandonment was warranted since it was established by clear and convincing evidence that during the six-month period immediately prior to the date of filing of the petition, respondent evinced an intent to forgo her parental rights as manifested by her failure to visit or communicate with

the child or agency, although able to do so and not prevented or discouraged from doing so by that agency (*see* Social Services Law § 384-b [3][g]; [5][a]). Her "[s]poradic or insubstantial contact [was] insufficient to defeat a finding of abandonment" (*Matter of Gabriella I. [Jessica J.]*, 79 AD3d 1317, 1318 [3d Dept 2010], *lv denied* 16 NY3d 704 [2011]). The record established that, at most, the mother called the agency once or twice during the six-month period prior to the filing of the petition. The mother never followed-up, visited in person, or made any other attempts to contact the child. If any error occurred in admitting the case records of the Graham Windham agency, it was harmless given that ample evidence of abandonment was presented through the testimony of the St. Vincent's Services caseworker and the respondent herself.

Although the agency may have improperly directed the mother to seek visitation of the child through court proceedings, an inappropriate referral is insufficient to defeat a showing of abandonment, as the agency is not required to prove that it made diligent efforts to encourage the parent to make contact with the child (*Matter of Bibianamiet L.-M. [Miledy L.N.]*, 71 AD3d 402, 403 [1st Dept 2010]).

In determining the best interests of the child, the court considered "among other things, the quality of the relationship

the child has with both his natural mother and his foster parents, the natural mother's ability to care for [the child] and plan for his future, the mental health of those individuals seeking custody of [the child], and [the child]'s current educational and social situation" (*Matter of Lamond B.*, 64 AD2d 625, 626 [2d Dept 1978]).

The child has lived with her foster family since she was six months old, and has only spent a matter of hours with the mother, accumulated during inconsistent monthly, one-hour visits. Notwithstanding the mother's completion of her service plan, there was clear and convincing evidence that she had failed to plan for her child's future. The determination as to the child's best interests, in furtherance of finding her a permanent home, was supported by a preponderance of the evidence highlighting the current positive environment of the foster mother who desires to adopt (*see Matter of Violeta P.*, 45 AD3d 352 [1st Dept 2007]). The foster mother has cared for the child, addressed numerous health issues, and provided quality care (*see Matter of Taaliyah Simone S.D.*, 28 AD3d 371 [1st Dept 2006]). There is no reason to disturb the finding of the Family Court that consideration of the best interests of the child require that custody and guardianship of the child be transferred jointly to the petitioner agency and

the Commissioner of Social Services for the purpose of adoption by the foster parents, rather than directing a suspended judgment.

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15438 Jane Wilson, etc., Index 116085/07
Plaintiff-Respondent,

-against-

Southampton Urgent Medical Care, P.C., et al.,
Defendants.

Andrea Libutti,
Defendant-Appellant.

_____

Keller O'Reilly & Watson, P.C., Woodbury (Patrick J. Engle of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered December 1, 2014, which, upon renewal, denied defendant Andrea Libutti's motion for summary judgment dismissing plaintiff's claims against her as time barred, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the action as against defendant Libutti.

We previously found that questions of fact existed as to whether the decedent's visits to defendant doctors from September 1, 2003 and July 21, 2005 were part of a continuous treatment for symptoms (headaches) that were ultimately traced to her metastasized lung cancer, making those claims for treatment that

occurred before June 4, 2005 timely (*see Wilson v Southampton Urgent Med. Care, P.C.*, 112 AD3d 499 [1st Dept 2013]). On that appeal, Libutti also argued that the action should be dismissed as against her because she was not added as an additional defendant until March 31, 2008, more than 2 ½ years after the decedent was last treated at defendant Southampton Urgent Medical Care, P.C. (Urgent Care) on July 21, 2005. Although the issue was improperly raised for the first time on that appeal, we directed that she be afforded the opportunity to renew her motion on that ground.

Upon renewal, the action against Libutti should have been dismissed since plaintiff failed to establish that the relation back doctrine should apply to make the action timely as against Libutti (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 615 [1st Dept 2014]). Here, plaintiff failed to satisfy the third prong of the *Buran* test. There is no evidence Libutti was aware of this lawsuit until she was served with the complaint after the expiration of the statute of limitations (*see Garcia*, 114 AD3d at 616; *Lopez v Wyckoff Hgts. Med. Ctr.*, 78 AD3d 664, 665 [2d Dept 2010]).

Similarly, plaintiff failed to show that Libutti knew, or should have known that plaintiff intended to sue her (*see Garcia*, 114 AD3d at 615). Libutti stated that she was unaware of this action until she was served, and nothing in the record contradicts her statement (*id.*).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15439 Francisco Contreras Hernandez, et al., Plaintiffs-Appellants, Index 800157/10

-against-

New York City Health and Hospital Corporation. Defendant-Respondent.

_____

H. Bruce Fischer P.C., Tappan (H. Bruce Fischer of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered May 21, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff Francisco Contreras Hernandez alleges that Harlem Hospital Center's delay in calling for a surgical consult and proceeding to surgery proximately caused the amputation of the distal portion of his finger. Defendant made a prima facie showing of its entitlement to summary judgment by submitting its medical expert's opinion that there was no departure from the standard of care, and that defendant's doctors did not proximately cause the partial loss of the finger, as the partially severed finger could not be salvaged due to the extent

of damage from the initial injury (*see DeFilippo v New York Downtown Hosp.*, 10 AD3d 521, 523 [1st Dept 2004]).

In opposition, plaintiffs raised an issue of fact by submitting the affirmation of a physician with expertise in emergency medicine, who opined that the delays in seeking a surgical consult were a departure from the standard of care, that the viability of the partially severed finger diminished with every passing hour, and that amputation could have been avoided had the surgery occurred within 4-6 hours, rather than 16-18 hours, of the injury. Although plaintiffs' expert did not quantify the extent to which defendant's negligence decreased the chance of saving the distal portion of the finger, his competing opinion that the delay in treatment diminished plaintiff's chance of a better outcome was sufficient to raise an issue of fact as to proximate cause (*see King v St. Barnabas Hospital*, 87 AD3d 238, 245 [1st Dept 2011]; *see also Goldberg v Horowitz*, 73 AD3d 691, 694 [2d Dept 2010]).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15440 The People of the State of New York, Ind. 1451/12
Respondent,

-against-

Regina L.,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 10, 2013, convicting defendant, upon her plea of guilty, of identity theft in the second degree, and sentencing her to a term of five years' probation, unanimously modified, as a matter of discretion in the interest of justice, to the extent of adjudicating defendant a youthful offender, and otherwise affirmed.

We find the sentence excessive only to the extent it did not

include youthful offender treatment.

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15441 Boies, Schiller & Flexner LLP, Index 651456/13
Plaintiff-Appellant,

-against-

Shelby Modell,
Defendant-Respondent.

_____

Boies, Schiller & Flexner LLP, New York (David Ata of counsel), for appellant.

Davidoff Hutcher & Citron LLP, New York (Joshua Krakowsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 10, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its account stated claim and to dismiss defendant's counterclaim for breach of contract and her affirmative defenses, unanimously modified, on the law, to grant the motion for summary judgment on the account stated claim in the amount of $30,525, and to dismiss the breach of contract counterclaim, and otherwise affirmed, without costs.

Plaintiff established prima facie that it entered into a retainer agreement with defendant and sent her regular invoices pursuant thereto, and that, after plaintiff withdrew from representation, defendant paid more than $400,000 towards those bills, with a promise to pay the remainder in exchange for

plaintiff's agreement to represent her a second time in the same or related matters (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51 [1st Dept 2004]; *Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668 [1st Dept 2003], *lv denied* 1 NY3d 509 [2004]). Accordingly, plaintiff is entitled to summary judgment on its account stated claim for the outstanding amount of $30,525 for bills dated July 31, 2012, August 20, 2012, and September 20, 2012, in connection with the first representation.

However, as plaintiff withdrew and then agreed to represent defendant again, defendant's partial payments in connection with the first representation cannot be construed as consent to the amounts due in connection with the second representation. Accordingly, plaintiff is not entitled to summary judgment to the extent the account stated claim is based on work performed and invoiced for October 2012 through February 2013, i.e., during the second representation.

While the parties agree that defendant paid the October 2012 bill, purportedly for work performed in September 2012, the record does not conclusively establish the services billed for in that invoice, including whether the invoice related to the first or second representation. Coupled with defendant's objections to and refusal to pay any subsequent invoice, the payment of the October 2012 bill does not suffice to eliminate any triable issue

of fact as to defendant's consent to the amounts due under later invoices.

Moreover, defendant averred that she called plaintiff within a day or two after receiving each invoice, spoke to the lawyer primarily handling her case and her assistant, and objected that she did not understand the charges, that they appeared to be unwarranted, and that she could not pay. This evidence of defendant's oral objections is sufficiently detailed to create a triable issue of fact as to her consent to the amounts due (*compare Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000] ["self-serving, bald allegations of oral protests" insufficient to raise issue of fact]; *Zanani v Schvimmer*, 50 AD3d 445 [1st Dept 2008] [assertion of oral objection to bills insufficient because the defendant failed to state when objection was made or specific substance thereof]).

As plaintiff correctly notes, numerous emails cited in an affidavit by defendant's daughter (who exercised a power of attorney on defendant's behalf) and relied upon by the motion court, when read in context, fail to raise any specific, timely objections to any bills. However, defendant's oral objections are supported by at least two emails to plaintiff from defendant's daughter, advising plaintiff on December 31, 2012, that she intended to go over the "outlandish bills" with her

accountant, and on January 25, 2013, that she would not pay any bills until they were reviewed by the accountant (*see RPI Professional Alternatives, Inc. v Citigroup Global Mkts. Inc.*, 61 AD3d 618 [1st Dept 2009]; *see also Herrick, Feinstein v Stamm*, 297 AD2d 477, 479 [1st Dept 2002]).

The breach of contract counterclaim should be dismissed since defendant fails to identify any provision of the retainer agreement that promises to produce a particular result, rather than setting forth general professional standards (*see Boslow Family Ltd. Partnership v Kaplan & Kaplan, PLLC*, 52 AD3d 417 [1st Dept 2008], *lv denied* 11 NY3d 707 [2008]; *Sarasota, Inc. v Kurzman & Eisenberg, LLP*, 28 AD3d 237 [1st Dept 2006]).

The motion court correctly declined to dismiss the affirmative defenses at this point in the litigation since they are supported by more than bare legal conclusions (*see Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15442- Index 152960/14
15443-
15444 Annabelle Sarah Bond,
Plaintiff-Respondent,

-against-

Warren Lichtenstein,
Defendant-Appellant.

_____

Arkin Solbakken LLP, New York (Stanley S. Arkin of counsel), for appellant.

Blank Rome LLP, New York (Seth J. Lapidow of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 22, 2014, awarding plaintiff the total sum of $599,644.76, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered July 17, 2014, which granted plaintiff's motion for summary judgment in lieu of a complaint, and denied defendant's motion to disqualify plaintiff's attorneys, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court properly granted plaintiff summary judgment based on the judgment she obtained from Hong Kong (*see Sung Hwan Co., Ltd. v Rite Aid Corp.*, 7 NY3d 78 [2006]; *Downs v Yuen*, 298 AD2d 177 [1st Dept 2002]). Defendant was accorded due process in the Hong Kong proceeding, which he commenced, and the court had

personal jurisdiction over him. The judgment did not violate New York's public policy regarding child support as it recognized both parents' obligation to pay support.

Nor was the judgment procured through fraud (*see Greschler v Greschler*, 51 NY2d 368, 376 [1980]). To the extent defendant raised the issue of the status of certain monies received by plaintiff, the Hong Kong court considered that issue and found it irrelevant. Thus, the court was not defrauded.

Supreme Court also properly denied defendant's disqualification motion. Defendant did not have standing to make the motion because he did not have a prior attorney-client relationship with plaintiff's attorneys (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]; Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a]). Nor was a conflict of interest presented by the attorneys' representation of plaintiff

(*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7 [a] [1]).

We have considered defendant's remaining claims and find them unavailing.

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15445 Robert Krieger, Index 111766/11
Plaintiff-Respondent,

-against-

Denise Glatter,
Defendant,

Tablecloth Company, Inc.,
Defendant-Appellant.

_____

Downing & Peck, PC, New York (John Downing Jr. of counsel), for appellant.

The Field Law Firm PC, New York (Michael J. Lynch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 19, 2014, as supplemented by order entered on or about August 5, 2014, which denied defendant Tablecloth Company, Inc.'s motion to dismiss the complaint on forum non conveniens grounds, and granted plaintiff's motion for summary judgment as against Tablecloth Company on liability, unanimously affirmed, without costs.

Defendant Tablecloth Company failed to meet its heavy burden of establishing that New York is an inconvenient forum and that there is no substantial nexus between New York and the action (CPLR 327[a]; *see Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599, 600 [1st Dept 2008]). While all

the parties and a number of plaintiff's treating healthcare providers are New Jersey residents, the balance of the relevant factors weighs in favor of a New York forum (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *Terrones v Morera*, 295 AD2d 254 [1st Dept 2002]; *Brodherson v Ponte & Sons*, 209 AD2d 276 [1st Dept 1994]). The motor vehicle accident occurred in New York County, plaintiff and defendant Glatter were traveling in the course of their employment at the time, plaintiff received considerable treatment in New York, including at a hospital emergency room and an orthopedics practice, and underwent knee surgery here. The New York City Police Department responded to the accident, and the police officer could testify as to an inculpatory statement made by Glatter. Moreover, discovery is complete, and liability has been determined.

Plaintiff established prima facie that he was crossing the street, within the crosswalk, with a green traffic signal in his favor, when he was struck by Glatter's vehicle, which was making a left turn (*see Coutu v Santo Domingo*, 123 AD3d 410 [1st Dept 2014], *lv dismissed* 24 NY3d 1214 [2015]). In opposition, Tablecloth Company, Glatter's employer, failed to raise an issue of fact as to its vicarious liability since it offered only conjecture as to plaintiff's comparative negligence (*see id.*).

Plaintiff's failure to observe Glatter's vehicle before it struck him is not suggestive of comparative negligence, since he testified that he looked both ways before entering the intersection, Glatter admitted that plaintiff had crossed almost half the avenue when she first observed him, at which time his back was to her, and plaintiff consistently testified that he was struck from behind (*cf. Thoma v Ronai*, 82 NY2d 736 [1993], *affg* 189 AD2d 635, 636 [1st Dept 1993] [affirming denial of summary judgment to the plaintiff since "if the facts were as stated by (her), and she had looked to her left while crossing, she almost certainly would have seen defendant's van turning left on East 79th Street from First Avenue and might have avoided the accident"]).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15446 In re Gladys Quinones, Index 400415/14
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Gladys Quinones, petitioner pro se.

David I. Farber, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent, dated March 6, 2014, which, after a hearing, terminated petitioner's public housing tenancy, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered June 16, 2014), dismissed, without costs.

The determination that petitioner violated a stipulation that excluded her son from her apartment is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The record shows that petitioner repeatedly failed to exclude her son from the premises, despite having agreed to do so on multiple occasions.

Under the circumstances presented, the penalty of

termination does not shock our sense of fairness (*see e.g. Matter of Lopez v New York City Hous. Auth.*, 121 AD3d 610 [1st Dept 2014], *lv denied* 24 NY3d 917 [2015]; *Matter of Grant v New York City Hous. Auth.*, 116 AD3d 630 [1st Dept 2014]).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15447 The People of the State of New York, Ind. 1742/12
Respondent,

-against-

Steven Bush,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 25, 2013, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of five years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing.

The court properly denied defendant's suppression motion. On a block that was particularly prone to shootings, an officer saw defendant using both hands to adjust an object about the size of a brick against his chest, under his sweatshirt. Based on his experience, the officer believed that defendant may have been carrying a weapon. When defendant "locked eyes" with the officer, he appeared "very frightened, like his eyes widened," and he immediately stopped adjusting the object on his chest and

dropped his arms to his sides. This behavior evinced a consciousness of guilt that went beyond mere nervousness, and, when added to the prior observations, it gave the officer a founded suspicion of criminality, thereby justifying a common-law inquiry (*see Matter of Steven McC.*, 304 AD2d 68, 72-73 [1st Dept 2003], *lv denied* 100 NY2d 511 [2003]; *People v Pines*, 281 AD2d 311 [1st Dept 2011], *affd* 99 NY2d 525 [2002]). Defendant's immediate flight, before the police could even approach him to make an inquiry, established reasonable suspicion and justified the police pursuit, during which defendant discarded a pistol (*see People v Hernandez*, 3 AD3d 325 [1st Dept 2004], *lv denied* 2 NY3d 741 [2004]). The record also supports the court's alternative finding that, regardless of the legality of the police pursuit, the seizure was lawful under the doctrine of abandonment (*see People v Boodle*, 47 NY2d 398, 402 [1979], *cert denied* 444 US 969 [1979]).

Although defendant was convicted of an armed felony, he was potentially eligible for youthful offender treatment pursuant to

the mitigation provisions of CPL 720.10(3). Accordingly, under *People v Rudolph* (21 NY3d 497, 501 [2013]), the court was required to make a youthful offender determination (*see People v Flores*, 116 AD3d 644 [1st Dept 2014]).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15448 Samuel Ansah, et al., Index 151032/12
Plaintiffs-Respondents,

-against-

A.W.I. Security & Investigation, Inc., et al.,
Defendants-Appellants,

Whitestone Construction Corp.,
Defendant.

_____

David N. Singer & Associates, LLP, New York (David H. Singer of counsel), for appellants.

Virginia & Ambinder, LLP, New York (LaDonna Lusher of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered April 11, 2014, which, to the extent appealed from as limited by the briefs, denied the cross motion of defendants A.W.I. Security and Investigation, Inc., Adaze W. Imafidon, and any other entities affiliated with or controlled by them, for summary judgment dismissing the complaint, and granted plaintiffs' motion for an extension of time to file a motion for class certification, unanimously affirmed, without costs.

Plaintiffs bring this putative class action on behalf of themselves and others who worked as security guards and fire safety workers for defendants to recover prevailing wages, supplemental benefits, and overtime pay in connection with work

they performed on various public construction projects. The court properly denied the motion for summary judgment as premature (CPLR 3212[f]), since the merits of plaintiffs' claims cannot be determined prior to production of the relevant public work contracts. Moreover, the parties presented conflicting affidavits concerning the nature of the work performed by plaintiffs, which would preclude summary judgment.

Appellants' argument that the contracts require arbitration, raised for the first time on appeal, is unpreserved (*Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525 [1st Dept 2014]). Even if the argument were preserved, it would fail as a matter of law since plaintiffs never agreed to arbitrate (*Matter of Belzburg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 630 [2013] ["nonsignatories are generally not subject to arbitration agreements"]).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15451 Melody Nieves, Index 306427/08
Plaintiff-Appellant,

-against-

Bus Maintenance Corp.,
Defendant-Respondent,

Frederick Morancie,
Defendant.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Litchfield Cavo LLP, New York (Jerry Giardina of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about May 14, 2014, which granted the motion of defendant Logan Realty Corp. & Logan Maintenance Corp. s/h/a Bus Maintenance Corp. (Logan) for summary judgment dismissing the complaint based on, among other things, the lack of a 90/180-day claim, unanimously affirmed, without costs.

Plaintiff alleges that her foot was run over by a vehicle driven by Logan's employee, defendant Morancie, causing her to fall down and suffer various injuries. Logan made a prima facie showing that plaintiff did not sustain a 90/180-day serious injury within the meaning of Insurance Law § 5102(d). Logan relied on plaintiff's deposition testimony and medical records, which showed, among other things, that she stayed off her foot

for "just about the first month" following the accident and was not confined to her home after the accident (*see Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [1st Dept 2009]).

In opposition, plaintiff failed to present medical evidence showing that a medically determined, nonpermanent injury prevented her from performing substantially all of her usual and customary daily activities during the relevant period (*Rojas v Livo Car Inc.*, 85 AD3d 652, 653 [1st Dept 2011]; *see Ortiz*, 63 AD3d at 557). That plaintiff missed more than 90 days of work is not determinative (*Ortiz*, 63 AD3d at 557). Moreover, two months after the accident, her treating doctor told her that she could bear weight on her foot and that she no longer needed crutches.

It is noted, however, that the Court erred in determining that Morancie's criminal plea collaterally estopped plaintiff from asserting a claim of vicarious liability against employer Logan, as issues of fact existed (*see City of NY v. College Point Sports ASS'N Inc.* 61 AD3D 33 (2d Dept 2009).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15452-
15453 The People of the State of New York, 1040/13
Respondent, 1073/13

-against-

Abdul Harrison,
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 (Malancha Chanda of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered January 15, 2014, convicting defendant, upon his pleas of guilty, of burglary in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 10 years, unanimously affirmed.

Regardless of whether defendant made a valid waiver of his right to appeal from his burglary conviction, we perceive no basis for reducing the sentence.

As to the weapon conviction, application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with

appellant's assigned counsel that there are no nonfrivolous points which could be raised on this appeal as to that conviction.

Pursuant to CPL 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 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 16, 2015

CLERK

Acosta, Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15454 The People of the State of New York, Ind. 2634/13
Respondent,

-against-

Dwight Partlow,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about March 4 2014,

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 16, 2015

CLERK

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

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15458 Josephine Alonge, Index 104878/11
Plaintiff-Appellant,

-against-

Town Sports International Holdings, Inc., et al.,
Defendants-Respondents.

_____

Omrani & Taub, PC, New York (Michael Taub of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Lorraine M. Girolamo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered February 25, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff is barred by the doctrine of primary assumption of risk from seeking damages for injuries suffered when another person in a "boot camp" exercise group ran into her. Plaintiff participated in the group exercise every Saturday for approximately a year, and after observing the open and obvious risk of running into participants in the class during drill exercises, and after fully appreciating the risk of colliding with other participants, plaintiff nonetheless elected to participate in the activity, thereby assuming the risk that

resulted in her injuries (*see Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *Turcotte v Fell*, 68 NY2d 432, 437-439 [1986]; *Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 247-248 [2008], *affd* 10 NY3d 889 [2008]).

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15459 The People of the State of New York, Ind. 791/10
Respondent,

-against-

Reynel Vega,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered March 21, 2011, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that 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 combination of eyewitness testimony and a videotape support the

conclusion that defendant possessed a pistol, which he deposited in a hiding place where the police found it. The absence of defendant's fingerprints or DNA on the weapon was satisfactorily explained by the People's expert witnesses.

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

ENTERED: JUNE 16, 2015

CLERK

Acosta, J.P., Renwick, Moskowitz, Manzanet-Daniels, Feinman, JJ.

15460- Index 654038/12
15461-
15462N SBE Wall, LLC, et al.,
Plaintiffs-Respondents,

-against-

New 44 Wall Street, LLC, et al.,
Defendants-Appellants.

_____

Franzino & Scher, LLC, New York (Davida S. Scher of counsel), for appellant.

Russ & Russ, P.C., Massapequa (Jay Edmund Russ of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered October 31, 2014, which (i) denied defendants' motion to strike plaintiffs' first demand for discovery, and to dispense with a privilege log, (ii) denied defendants' motion to strike a subpoena duces tecum, and vacate a subpoena ad testificandum, and (iii) granted in part plaintiffs' motion to compel production of documents, and (iv) awarded attorney's fees, unanimously affirmed, with costs.

The court did not abuse its discretion (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223 [1st Dept 2003]) in determining that plaintiff Baruch 44 Wall, LLC's first demand was not "palpably improper," that defendants should produce documents in response to plaintiff Baruch's first demand,

and that defendants should provide an accompanying privilege log detailing the basis for withholding certain documents, whether for privilege or based upon Swedish or Norwegian law. The court also did not abuse its discretion by declining to strike and vacate the subpoena duces tecum and subpoena ad testificandum. Plaintiff Baruch was not precluded by the court's March 19, 2014 status conference order from making further discovery requests. As plaintiff Baruch did not file a cross appeal seeking reinstatement of the second demand, this Court does not reach that issue. Finally, the court's award of attorney's fees pursuant to 22 NYCRR § 130-1.1 shall not be disturbed, as the court properly found that defendants' arguments waivered between "absurdity and frivolity, and carry no weight with the court." This Court declines to award additional sanctions.

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

ENTERED: JUNE 16, 2015

CLERK

Tom, J.P., Acosta, Andrias, Moskowitz, Clark, JJ.

15574 Seth Mitchell, CFA, Index 150622/13
Plaintiff-Appellant,

-against-

New York University ("NYU"), et al.,
Defendants-Respondents.

_____

Seth Mitchell, appellant pro se.

Terrance Nolan, New York (William H. Miller of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about January 14, 2014, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion for a default judgment against defendants, unanimously affirmed, without costs.

The motion court properly determined that an Article 78 proceeding, not a plenary action, is the "appropriate vehicle" for plaintiff's challenges to defendant New York University's administrative decision to exclude him from the university after he failed to submit to an evaluation by the university's mental health center following a report that his behavior allegedly caused one of his instructors to be concerned that he might pose a threat to others in the classroom (*see Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]). However, such a proceeding is time-barred.

The complaint alleges that NYU informed plaintiff on September 7, 2012, that he had been declared persona non grata. However, plaintiff did not commence the instant action until January 22, 2013, more than four months later (*see Padiyar v Albert Einstein Coll. of Medicine of Yeshiva Univ.*, 73 AD3d 634, 635 [1st Dept 2010], *lv denied* 15 NY3d 708 [2010]). That plaintiff had not yet withdrawn from the university or that he engaged in settlement discussions did not toll the four month limitation period (*see Goonewardena v Hunter Coll.*, 40 AD3d 443 [1st Dept 2007]). Plaintiff's request that this Court convert his plenary action to an Article 78 proceeding, pursuant to CPLR 103(c), must be denied since the statute of limitations expired (*see Gertler v Goodgold*, 107 AD2d 481, 487 [1st Dept 1985], *affd* 66 NY2d 946 [1985]).

The motion court properly dismissed plaintiff's additional claims for failure to state a cause of action. The complaint failed to set forth the particular words complained of or to satisfy the publication requirement in support of the claim for defamation per se (*see* CPLR 3016; *Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). NYU's direct communications with plaintiff did not constitute a publication to any third party, and any communication by NYU to its public safety officers is protected by a qualified privilege (*see Foster v Churchill*, 87 NY2d 744, 751 [1996]). Plaintiff's conclusory allegations of

malice are insufficient to overcome the privilege (*see Gondal v New York City Dept. of Educ.*, 19 AD3d 141 [1st Dept 2005]).

The assault claim fails to allege that the public safety officers engaged in intentional physical conduct that placed plaintiff in apprehension of harmful contact (*see Gould v Rempel*, 99 AD3d 759, 760 [1st Dept 2012).

The complaint also fails to allege conduct that approaches the level of outrageousness or extremeness necessary to support a claim of intentional infliction of emotional distress or a causal connection between the alleged conduct and plaintiff's claimed distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121–122, [1993]).

Inasmuch as the complaint fails to allege that plaintiff was confined by the public safety officers, it does not state a cause of action for false imprisonment (*see Elson v Consolidated Ed. Co. of N.Y*, 226 AD2d 288, 289 [1st Dept 1996]).

The negligence claim was merely a challenge to NYU's determination to declare plaintiff persona non grata; defendants had no legal duty to allow plaintiff to remain on the premises or enrolled as a student following his non-compliance with the request for a mental health evaluation.

Plaintiff's claim for violation of his First Amendment right to free speech was properly dismissed. Neither private

universities nor their employees are "state actors" for the purpose of constitutional claims, including claims alleging violation of the right to free speech (*see Powe v Miles*, 407 F2d 73, 80-81 [2d Cir 1968]).

The complaint fails to allege that defendants received anything rightfully belonging to plaintiff, or that they were otherwise enriched at his expense to support his claim for unjust enrichment (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). To the extent plaintiff's claim was based on tuition expenses he has paid, this argument was improperly raised for the first time on appeal and, in any event, is unavailing, since such a claim must be asserted in an Article 78 proceeding, which, as discussed, is time-barred (*see Kickertz v New York Univ.*, 110 AD3d 268, 276-277 [1st Dept 2013]).

Plaintiff's eighth cause of action, for front pay, is not an independent cause of action, but a remedy available in the context of employment law (*see e.g. Whittlesey v Union Carbide Corp.*, 742 F2d 724 [1984]).

Plaintiff's cross motion for a default judgment against defendants on the ground that their motion to dismiss was untimely filed was properly denied. Since the twentieth day following service of the summons fell on a public holiday, President's Day, the deadline was extended until the following

business day (*see* CPLR 320; General Construction Law § 25-a), the day that defendants served their motion to dismiss (*see Robayo v Edison Price, Light., Inc.*, 119 AD3d 763 [2d Dept 2014]).

Contrary to plaintiff's contention, a motion made pursuant to CPLR 3211 does not need to be supported by an affidavit from someone with personal knowledge of the facts (*see Town New Development Sales & Marketing LLC v Price*, 127 AD3d 549 [1st Dept2015]).

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 16, 2015

CLERK