SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 1, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1303 In re Natasha W., Index 100624/14
Petitioner-Respondent,

-against-

New York State Office of Children and Family Services, et al.,
Respondents-Appellants,

New York City Administration for Children's Services,
Respondent.

_____

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for appellants.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Elana Rose Beale of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered February 18, 2015, which granted the petition seeking to, among other things, amend and seal an indicated report of child maltreatment by petitioner, to the extent of annulling the report and the determination of an administrative law judge (ALJ), dated February 11, 2014, which had denied petitioner's request, and remanding the matter to respondents for further proceedings, affirmed, without costs.

Respondent New York City Administration for Children's Services (ACS) explicitly concluded, after a two-month long investigation, that petitioner's child was not "likely to be in immediate or impending danger of serious harm." Nonetheless, the ALJ determined that the child is in imminent danger. Accordingly, and as more fully set forth below, the motion court correctly found that the ALJ's decision was based on an error of law in that it misapplied the legal standard, lacked a reasonable basis, and was made without regard to the facts (CPLR 7803[3]; *see also Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). Moreover, the motion court correctly found that the ALJ failed to consider the 10 factors set forth in the Guidelines for Determining Whether Indicated Instances of Child Abuse and Maltreatment Are Relevant and Reasonably Related to Employment or Licensure (the Guidelines), which is published by respondent New York State Office of Child and Family Services (OCFS).

Before addressing the legal issues, it is important to clarify exactly what is at stake on this appeal. No one disagrees that what petitioner did was foolish and demonstrated poor judgment. However, notwithstanding that, no city or state agency has contended that petitioner's son should be removed from her, or that she cannot safely care for him, or that her care of him should be supervised by any court or agency. What is at

issue here is solely whether her name should be maintained on a list which would make it difficult for her to obtain a job in childcare, which is her chosen profession.

The essential underlying facts are undisputed. At the time of the relevant events, petitioner, then 25, and her five-year-old son lived with petitioner's parents. Petitioner had an associate's degree in early childhood education, and was planning to obtain a bachelor's degree and pursue a career in that field. On December 30, 2012, petitioner and her son entered Bloomingdale's department store. After they emerged from a fitting room, a store detective detained petitioner, and found a coat hidden under her own coat and several concealed cell phone cases. In addition, he found two coats under her son's clothing, and determined that the child was wearing a pair of boots for which petitioner had not paid. Petitioner immediately phoned her family and arranged for her sister to pick her child up.[1] Petitioner was arrested for shoplifting and later pleaded guilty to disorderly conduct, a violation, which was later sealed. She has no criminal record from this incident, or before.

[1]Respondents-appellants' brief states that the police took petitioner and the child to the precinct. However, the only relevant evidence in the record shows that the child's aunt picked him up at the store and he was not present when his mother was arrested.

For the next two months, ACS conducted an investigation of a report of child maltreatment to the Statewide Central Register of Child Abuse and Maltreatment (SCR) based on these events. The store detective reported that, during the incident, the child was "not at all distraught," and was playing video games and "interacting normally." After visits to petitioner's home, a Child Protective Specialist (CPS) concluded that the child did not need medical or mental health treatment and that the petitioner was not a danger to the child. The investigation established that neither petitioner nor her family had any history with ACS, and that petitioner's mother, father and sisters were all surprised by her actions on December 30, and had never known her to have done anything similar in the past, consistent with petitioner having no prior criminal history. Petitioner's family members also reported having no concerns for her ability to care for her son, and uniformly stated that he was well cared for. Similarly, the child's school social worker confirmed that she had never had any reason for concern, and the child had nearly perfect school attendance. Petitioner advised the investigator that she did not use physical discipline, but disciplined her son by giving him "timeouts" and taking away games. The ACS investigator observed that the child had no marks or other signs of physical harm.

The child, interviewed on at least three occasions, was "clean, healthy looking and cared for," "calm," and consistently stated that he felt safe and happy and was not afraid of anyone at home. When asked, he stated that the police took his mother to jail because she stole, and that she had not told him to steal. Although petitioner declined to discuss the details of the events of December 30 on the advice of her attorney, she told the ACS investigator that she had "learned her lesson."

ACS's investigation summary concluded that "there is no child[] likely to be in immediate or impending danger of serious harm," the "Final Risk Rating" was "Low," "No Safety Factors were identified at this time," and "No Safety Plan/Controlling Interventions are necessary at this time." Consistent with its findings, ACS did not commence a neglect proceeding against petitioner, or in any other way seek the assistance of a court with regard to petitioner's child. Nonetheless, the final progress narrative states: "The investigation is approved for closing *indicated*. Child reported that his mother was arrested with him in her care due to her stealing. CPS is to provide mom with information to community based services such as parenting to teach her appropriate disciplinary method as well as decision making" (emphasis added). Despite this conclusion, the record does not show that ACS saw any need to, or did, take any steps to

ensure that petitioner took a parenting class or engaged in any other community based services.

Once petitioner was advised that OCFS determined, as stated above, that the report against her was "indicated," petitioner promptly requested that SCR amend the report to "unfounded." OCFS denied the request, and scheduled a hearing.

At the hearing on October 25, 2013, the ALJ received into evidence only the ACS investigation notes and summary, and the New York State Criminal Record search for petitioner dated October 23, 2013, which showed that petitioner had no criminal history as of that date. No witnesses testified. Counsel for the parties made opening and closing statements, and statements on the record denominated "direct testimony . . . in narrative form" for their respective clients.

The ALJ issued a decision dated February 11, 2014 (the decision). The ALJ determined that petitioner had "maltreated" her child and therefore denied her request that the "indicated" report against her be amended. Although he did not find any evidence in the record that petitioner's child had been harmed, he concluded that her "action creates an imminent risk to the child's emotional condition in that [the child] will not control his impulses and will proceed from accompanying his mother in shoplifting to doing it on his own." The decision also found

that petitioner's actions were relevant and reasonably related to childcare employment, adoption and foster care because petitioner had failed to present "evidence of remedial steps which would prevent this behavior from reoccuring." This roughly corresponds to Guidelines factor eight, information regarding rehabilitation, but the decision does not address any of the other nine Guidelines factors.

Petitioner sought judicial review of the decision pursuant to CPLR 7803(3), which authorizes the court to determine "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]). The motion court granted the petition, and held that 1) the ALJ made errors of law because the undisputed facts do not, as a matter of law, show that the petitioner put the child in "imminent danger," which is the requisite standard for a finding of maltreatment; and 2) the ALJ erred by failing to consider the 10 Guideline factors for determining whether the acts giving rise to the report were relevant and reasonably related to employment in childcare, provision of foster care, or adoption.

Under New York's child protective scheme, a report of suspected child abuse or neglect will be marked "indicated" if the local agency determines after investigation that there is

"some credible evidence of the alleged abuse or maltreatment" (Social Services Law § 412[7]). All childcare agencies and other agencies licensed by the state to provide certain services to children are required to inquire whether applicants for employment or to become foster or adoptive parents are subjects of indicated reports (Social Services Law § 424-a). An agency may choose to hire or approve persons on the list of those with indicated reports, but if it does, the agency must "maintain a written record, as part of the application file or employment record, of the specific reasons why such person was determined to be appropriate" for approval (Social Services Law § 424-a[2][a]). The names of subjects of indicated reports remain on the list until 10 years after the youngest child referred to in the report turns 18, unless earlier expunged (Social Services Law § 422[6]).

If the subject of an indicated report timely requests that SCR amend the report, SCR must consider whether there is sufficient evidence that the subject committed child maltreatment or abuse, and, if so, must also determine whether, based on the Guidelines, the acts of maltreatment or abuse are "relevant and reasonably related" to, among other things, certain employment involving children, or approval as a foster or adoptive parent (Social Services Law § 422[8][a][ii]). If the request to amend the report is denied, the person is entitled to a fair hearing

(Social Services Law § 422[8][a][v]; 18 NYCRR 434.3[a][2]).

Until 2008, the Social Services Law provided that the investigating child protective agency only had to show that there was "some credible evidence" of maltreatment or abuse, at both the SCR administrative review and at any subsequent fair hearing. However, in 1994 and 1996, respectively, the Second Circuit and the New York State Court of Appeals held that the use of the "some credible evidence" standard violates the Due Process Clause of the US Constitution because the resulting impediment to potential future employment, licensure as foster parents, or approval as adoptive parents as a consequence of an indicated report implicates constitutionally protected liberty interests (*Matter of Lee TT v Dowling*, 87 NY2d 699 [1996]; *Valmonte v Bane*, 18 F3d 992 [2d Cir 1994]). As a result, the Social Services Law was amended in 2008 to require that the state prove child maltreatment or abuse at the administrative level by a fair preponderance of the evidence (Social Services Law § 422[8][a][i], [ii]; [b][ii]; [c][ii]; *see also* L 2008, ch 323, §§ 10, 11; 18 NYCRR 434.3).[2] Only if the agency makes that

[2] The statutory standard for the initial determination that a report is indicated was not amended, so a person who does not request a review does not have the benefit of the higher standard (*compare* Social Services Law §§ 412[7], *and* Social Services Law § 422[8][a][i], [ii]; [c][ii]).

determination may it go on to consider whether the person is unsuited for employment in the childcare field (Social Services Law § 422[8][c][ii]).

The fair preponderance of the evidence standard requires the finder of fact to weigh conflicting evidence, and is intended to protect against rulings based on "'the subjective values of' the factfinder," a risk that is particularly high in cases where child abuse and neglect are alleged (*Valmonte*, 18 F3d at 1004, quoting *Santosky v Kramer*, 455 US 745, 762 [1982]).

The statutory definition of a maltreated child, as relevant to this matter, includes a child under 18 "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature *requiring the aid of the court* . . . ." (18 NYCRR 432.1[b][1][ii] [emphasis added]; *see also* Family Ct Act § 1012[f][i][B] [supplying an identical

definition of the term "neglected child"]).

Consistent with this, the Court of Appeals held in *Nicholson v Scoppetta* (3 NY3d 357, 368 [2004]) that a finding of neglect requires a showing, by a preponderance of the evidence, that (1) a child's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired," and (2) "the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship." This standard is intended to "ensure[] that the [agency] . . . will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior" (*id.* at 369; *see also Matter of Parker v Carrion*, 80 AD3d 458, 459 [1st Dept 2011] [parent who intended to hit child on her behind, but instead hit her on the face with a belt, entitled to amendment of report finding maltreatment where there was no evidence the child required medical treatment or that the parent used excessive corporal punishment]).

Under article 10 of the Family Court Act, "'[i]mpairment of emotional health' and 'impairment of mental or emotional condition' includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of

aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior, including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child" (Family Ct Act § 1012[h]). A finding of imminent risk of impairment "must be near or impending, not merely possible" (*Nicholson v Scoppetta*, 3 NY3d at 369), and, particularly when based on a single incident, must "make the necessary causative connection to all the surrounding circumstances that may or may not produce impairment" (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995] [positive toxicology for controlled substance in newborn infant and mother generally not sufficient to prove imminent danger of impairment]; *see also Nicholson*, 3 NY3d at 369).

In this case, there was no evidence before the ALJ that the child suffered any injury or required any treatment as a result of petitioner's conduct, and no evidence that petitioner had ever engaged in the behavior at issue at any other time. Instead, the only evidence at the hearing with regard to harm to the child was the ACS finding that the child had not suffered any harm and that petitioner was not a danger to the child. Consequently, the ALJ's finding of maltreatment was not supported by a

preponderance of evidence and was therefore made in violation of lawful procedure. Indeed, this Court and its sister courts have refused to find maltreatment in cases involving far more immediate harm (*see Matter of Parker v Carrion*, 80 AD3d at 458; *Matter of Sulayne G., [Sulay J.]*, 126 AD3d 791 [2d Dept 2015] [corporal punishment without evidence of physical or emotional injury and a pattern of such behavior did not constitute maltreatment]; *Matter of Senande v Carrion*, 83 AD3d 851 [2d Dept 2011] [mother who hit child on thigh with house slipper, leaving a mark, did not commit maltreatment where no evidence of lasting injury or that mother had ever done this before]).

In the absence of any evidence to support a finding that petitioner had caused actual harm to the child, the ALJ stated, "there are circumstances where a parent's behavior is so outrageous, that in and of itself, creates an imminent risk of emotional harm to the child . . . . Exploitation of a child to commit a crime, as well as teaching a child how to commit a crime, rises to such a level of outrageous behavior . . . . The [petitioner's] action creates an imminent risk to the child's emotional condition in that [the child] will not control his impulses, and will proceed from accompanying his mother in shoplifting to doing it on his own." This is just the type of imposition of the factfinder's subjective views of parental

behavior that the use of the higher evidentiary standard was intended to correct (*Valmonte*, 18 F3d at 1004; *Nicholson*, 3 NY3d at 368-369). Instead of applying the correct legal standard to determine whether there was serious potential for harm requiring the aid of a court, the ALJ substituted his conjecture that the child might commit crimes in the future, even though the record reveals that the mother had no criminal history, that the child understood that his mother was arrested because she tried to steal, and that he was, by all accounts, calm, happy, well cared for, well behaved in school and not in need of any medical or mental health intervention.

The ALJ cites *Matter of Rashard D.* (15 AD3d 209 [1st Dept 2005]) for the proposition that the child in this case was in imminent danger of physical harm due to his mother's acts. However, *Rashard D.* involved a parent who made her 12-year-old child rob a bank by handing a teller a note that said "GIVE ME $30,000 OR I WILL SHOOT YOU!!!" (*id.* at 210). Here, there was no evidence that petitioner's child was ever in any physical danger. No mental health expert testified as to the impairment, or imminent risk of impairment, of the child's emotional or mental condition as a result of petitioner's behavior, and ACS had made an explicit finding to the contrary.

These facts also distinguish this case from the cases relied

upon by the ALJ for the proposition that certain parental behaviors create imminent risk of emotional harm. In each of those cases, the court relied on mental health experts' findings in determining that the subject child was emotionally harmed by a parent's behavior (*Matter of Christina LL.*, 233 AD2d 705 [3d Dept 1996], *lv denied* 89 NY2d 812 [1997]; *Matter of Jessica G.*, 151 Misc 2d 694 [Fam Ct, Richmond County 1991]).[3]

Similarly, *Matter of Bernthon v Mattioli* (34 AD3d 1165 [3d Dept 2006], *appeal withdrawn* 8 NY3d 918 [2007]), cited by the dissent and by respondents for the proposition that using a child to facilitate shoplifting constitutes maltreatment as a matter of law, does not so hold. In that case, the only issue on appeal was the admissibility of hearsay statements at a custody modification trial. The Appellate Division, Third Department held that the hearsay exception under Family Court Act section 1046(a)(vi) applies in custody proceedings involving allegations of abuse or neglect (*id.* at 1165). Indeed, the Court in *Bernthon*

[3] Use of expert testimony is available at the fair hearing stage. The Child Protective Services Administrative Hearing Procedures provide that "[p]roof of the impairment of emotional health or impairment of mental or emotional condition as a result of the unwillingness or inability of the appellant to exercise a minimum degree of care toward a child may include competent opinion or expert testimony and may include proof that such impairment lessened during a period when the child was in the care, custody or supervision of a person or agency other than the appellant" (18 NYCRR 434.10[e]).

found only that the child's statements about having been used to aid her mother's shoplifting "would support a finding of neglect" (*id.* at 1166), but no neglect proceeding was brought, the issue of neglect was not tried, and no finding of neglect was made, since the applicable standard was whether a change of circumstances justifying modification had occurred, and the custody arrangement that would best serve the child's interest.

The legal questions at stake in *Bernthon* are very different than the question in this case: whether the ALJ applied the proper legal standard in determining whether respondents met their burden at the hearing to show imminent harm to the child justifying government intrusion into petitioner's private life. Furthermore, the facts of *Bernthon* are distinguishable from the instant matter. In *Bernthon*, the mother had a "history of petit larceny," and had violated a court order by discussing the litigation with her daughter and conveying that she would never see her mother again if she spoke to child protective service workers (34 AD3d at 1166). Here, petitioner had no criminal history, her family members interviewed all agreed that her behavior was out of character, petitoner told the ACS investigator that she had "learned her lesson," the child was reportedly "not at all distraught," and ACS did not find the child to be in danger.

Similarly, the cases cited by respondents for the proposition that shoplifting in and of itself creates a risk of violence and physical harm to the child are also distinguishable. In the first instance, each is an excessive sentence appeal, having nothing to do with a finding of child maltreatment. In *People v Jones* (199 AD2d 648 [3d Dept 1993], *lv denied* 83 NY2d 854 [1994]), the defendant threatened to use a baseball bat as a weapon, and choked the property owner's son, whom the defendant encountered while attempting to burglarize the property. *People v Callahan* (89 AD2d 517, 518 [1st Dept 1982]) involved a robbery arising out of a "drunken escapade," in which the complaining witness sustained injuries. There was no evidence that petitioner in this case intended to or did commit violence. Rather, ACS's investigation notes indicate that she was cooperative when stopped by the store detective.

The cases relied on by respondents involving unreasonable exposure of children to risk by other behavior are similarly inapposite, since all involve far more extreme parental behavior resulting in obvious danger. In *Matter of Rosemary V.* (*Jorge V.*) (103 AD3d 484 [1st Dept 2013]), a father left his children home alone at night while he engaged in a drug transaction, as a result of which the children locked themselves out of the

apartment and went to a stranger's home. In *Matter of Febles v Dutchess County Dept. of Social Servs. Child Protective Servs.* (68 AD3d 993 [2d Dept 2009]), a mother left her seven-year-old child alone in a running car for 20 minutes. In *Matter of Pedro C.* (*Josephine B.*) (1 AD3d 267 [1st Dept 2003]), a mother was intoxicated on the street at night with her two-year-old child.

Finally, the ALJ's determination that petitioner's actions were reasonably related to a position in childcare, the field of study petitioner is pursuing, was not rational. The legal standards for determining whether a child is maltreated (18 NYCRR 432.1[b]; *Nicholson*, 3 NY3d at 368-369) are repeated in the Guidelines. The ALJ failed to set forth his consideration of the relevant Guidelines for making such a determination, many of which, as the motion court pointed out, weighed in petitioner's favor, including factors 2 (the seriousness and extent of any injury to child), 3 (harmful effect on the child of the subject's actions or inactions), 5 (time since most recent incident of maltreatment), 6 (number of indicated incidents of abuse or maltreatment), 8(a) (whether the acts have been repeated), and 10 (whether reported behavior involved serious injury to, or death of, a child). The single factor the ALJ discussed, factor 8(b), "any information produced . . . in regard to . . . rehabilitation," failed to consider that all of the evidence at

the hearing indicated that petitioner has never been convicted of any crime, including for the events of December 30, 2012; no further such incidents had occurred; petitioner had no prior history with ACS; all of her family members interviewed expressed surprise at her behavior on the occasion leading to the report; and she told the caseworker she had "learned her lesson."

Like the plaintiffs in the cases leading up to amendment of Social Services Law section 422 to require a higher burden of proof to deny a request to amend an indicated child abuse or neglect report, petitioner here will essentially be barred from pursuing a career in her chosen field of early childhood development, since "she will be refused employment simply because her inclusion on the list results in an added burden on employers who will therefore be reluctant to hire her" (*Valmonte*, 18 F3d at 1001).

Furthermore, although "[a] trier of fact may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding" (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d at 79), the ALJ improperly inferred that the behavior in which petitioner engaged "will in fact reoccur," based solely on petitioner's failure to testify at the hearing, even though no evidence supported such a finding.

Accordingly, we affirm the motion court's order annulling the indicated report against petitioner.

All concur except Tom, J.P. and Manzanet-Daniels, J. who dissent in a memorandum by Tom, J.P. as follows:

TOM, J.P. (dissenting)

In this article 78 proceeding, petitioner challenges a determination by respondents that she was "indicated" for child maltreatment based on the use of her child to facilitate a crime. I would find that petitioner's utilization of her five-year-old son to steal two coats and a pair of boots from Bloomingdale's constituted maltreatment and was sufficiently egregious so as to create an imminent risk of physical, mental and emotional harm to the child (*see Matter of Bernthon v Mattioli*, 34 AD3d 1165, 1166 [3d Dept 2006], *appeal withdrawn* 8 NY3d 918 [2007]; *see generally* Social Services Law § 412[2][a]). Further, I would find that the ALJ's determination that petitioner's actions were reasonably related to employment in childcare was rational (*see Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]), and that petitioner's name should remain on the registry maintained by respondent New York State Office of Children and Family Services (OCFS) for the purposes of informing providers and licensing agencies that she is the subject of an indicated child maltreatment report for future employment in child care or foster care, and adoption (*see* Social Services Law [SSL] §§ 422, 424-a).

Initially, petitioner does not contest any of the underlying facts regarding the shoplifting incident or the factual findings made by the ALJ. Nor did she testify or present any evidence at

the hearing before the ALJ to contradict respondent New York City Administration for Children's Services' (ACS) investigation notes and summary admitted into evidence. Thus, all the evidentiary facts and record evidence presented to the ALJ's were unchallenged.

The undisputed evidence shows that on December 30, 2012 petitioner tried to steal merchandise from Bloomingdale's using her five-year-old son to facilitate the theft. Specifically, after entering a fitting room, she hid two coats under her son's clothing and made him put on a pair of boots. She also concealed a coat under her own clothing and hid several cell phone cases on her person. The total value of the stolen merchandise was approximately $2,700.

A store detective noticed the merchandise was missing and stopped petitioner immediately as she tried to exit the fitting room. In response to questioning, petitioner admitted stealing the items. Petitioner was detained and arrested in the presence of the child and petitioner's sister came to pick up the child.[1]

[1]While the majority correctly notes that there is no evidence that the child was transported to the precinct, contrary to the majority's description, the statement of the store detective contained in the ACS investigation notes was that the child was present when his mother was arrested. The separate statement from petitioner in which she claims her son was not present when she was arrested may refer to her formal arrest at the precinct.

Petitioner was charged with petit larceny, criminal possession of stolen property, and endangering the welfare of a child. She ultimately pleaded guilty to a lesser violation of disorderly conduct which was later sealed.

The Statewide Central Register of Child Abuse and Maltreatment (SCR) - operated by OCFS - received a telephone report of petitioner's arrest and referred the matter to ACS. Over the next two months, ACS investigated the issue.

According to the ACS notes in evidence, on December 31, 2012, the investigator went to petitioner's home and spoke with the family members including her mother and sisters. They were surprised about the stealing incident and stated that the child "gets everything he needs."

The investigator also met with the child, who appeared "calm," stated that he felt "happy" and "safe" at home. However, the child reported that petitioner had hit him in the past with her hands and had once smacked his lip causing him to bleed. The child also reported that his mother was taken to jail by the police because she was stealing, and, when asked if petitioner had ever stolen before, first responded "yes," then "no." The child also stated that the mother put shoes on him and the police took them away.

On January 4, 2013, the investigator spoke with the store

detective who handled the matter at issue, and who stated that he did not see any suspicious marks on the child, that the child did not appear distraught by the incident, and that the child was playing with video games and interacting normally at that time.

On that same date, the investigator spoke with the school social worker, who also stated that she never observed any marks or bruises on the child or anything concerning regarding the child.

On January 7, 2013, the investigator met with petitioner at her home, who declined to comment on the shoplifting incident on the advice of counsel. She claimed that the child's basic needs were met at home and, in contrast with the child's statements, denied using any physical discipline. At the end of the visit, the child was described as "clean, healthy looking and cared for."

On January 31, 2013, the investigator again met with petitioner at her home. She asserted that the child did not see her getting arrested, that he was not separated from her for a long time, and that he was not "effected [sic]."

Apparently based on its investigation summary that "there is no child[] likely to be in immediate or impending danger of serious harm" and that no "Safety Plan/Controlling Interventions are necessary at this time," ACS did not commence a neglect

proceeding against petitioner. However, on February 28, 2013, ACS closed the report as "indicated" against petitioner. In particular, the investigation narrative found that the allegation of inadequate guardianship was substantiated as petitioner was arrested for shoplifting in the presence of the child and used the child to "harbor stolen items." The narrative found that petitioner exercised poor judgment "and as a result the child's mental and emotional condition has been placed at risk of impairment. Child reported that he witnessed [petitioner] stealing items and being arrested as a result." CPS was directed to provide petitioner "with information to community based services such as parenting to teach her appropriate disciplinary method as well as decision making."

As noted above, the sole consequence of an "indicated" report is that petitioner's name was included in the registry maintained by OCFS for the purposes of informing providers and licensing agencies concerning petitioner's future application for childcare related employment, and foster care and adoption. Yet, as the majority notes, an agency may still choose to hire or approve persons with indicated reports provided they "maintain a written record as part of the application file or employment record, of the specific reasons why such person was determined to be appropriate to receive a foster care or adoption placement or

to provide day care services" (Social Services Law § 424-a[2][a]).

Because petitioner claimed the indicated report would be a "huge barrier in obtaining employment in the childcare/education fields" she was interested in, she asked SCR to amend the report of maltreatment to unfounded. In May 2013, SCR denied the request, scheduled a hearing, and specifically determined that the maltreatment report "is relevant and reasonably related to employment, licensure or certification in the child care field." SCR noted that it had considered each of the factors set forth in the Guidelines for Determining Whether Indicated Instances of Child Abuse and Maltreatment are Relevant and Reasonably Related to Employment or Licensure, and referenced the factors that it deemed particularly relevant, including the detrimental or harmful effects of petitioner's actions on her son and her son's age at the time of the incident.

A hearing was held on October 25, 2013. ACS introduced its investigation records, and petitioner, who was represented by counsel, did not testify or call witnesses. Petitioner's attorney argued that her actions did not rise to the level of maltreatment and that "there's no sign that this is a pattern of behavior at all." Petitioner's attorney also contended that ACS argued that petitioner's actions rose to the level of

maltreatment because any act of theft risks a physical confrontation, even though no violence occurred in this case. ACS also contended that her actions placed the child at risk of mental or emotional harm by exploiting her child to commit a crime. ACS further argued that her improper conduct was reasonably related to work in the field of childcare because it showed that she failed to exercise even a minimum degree of care of her child and showed that she would be a poor role model for children.

In a written decision on February 11, 2014, the ALJ denied petitioner's appeal, finding that (i) a fair preponderance of the evidence demonstrated maltreatment; and (ii) the maltreatment was relevant and reasonably related to employment in childcare. Significantly, the ALJ made the following relevant findings of fact:

> "The [petitioner] was arrested while attempting to steal three coats, a pair of shoes, and several cell phone cases from Bloomingdales [sic]. At the time of her arrest, the [petitioner] had hidden two coats under [the child's] clothing and stolen a pair of boots, by having [the child] put on the stolen boots.
>
> "[The child] was present when the [petitioner] was arrested.
>
> "[The child] was not at all distraught and was playing with video games and interacting normally after the [petitioner] was detained for shoplifting.

> "[Petitioner] exploited . . . her 5 year old son for the purposes of shoplifting."

Based on the record evidence, the ALJ concluded that petitioner's actions placed the child "at imminent risk of physical and mental impairment," that petitioner "failed to exercise a minimum degree of care under the circumstances in question," and "[t]hat failure is what placed [the child] in imminent risk of physical and emotional impairment." More specifically, the ALJ found that "[t]he criminal act of shoplifting can result in a physical or violent response, creating a threat of harm to the child's physical condition." As to the child's mental or emotional health, the ALJ found that "[e]xploitation of a child to commit a crime, as well as teaching a child how to commit a crime, rises to . . . a level of outrageous behavior," and "create[d] an imminent risk to the child's emotional condition in that [the child] will not control his impulses, and will proceed from accompanying his mother in shoplifting to doing it on his own." He also remarked that "[o]ne expects a parent to teach a child . . . to not steal" but that petitioner exploited her son and taught him stealing was "acceptable behavior" and "how to shoplift." Moreover, he noted that the fact that the child does not "comprehend the gravity of the circumstances under which the mother is being arrested, does

not negate the fact that the child is being endangered by the mother's action."

The ALJ also found that petitioner's maltreatment is "currently relevant and reasonably related to childcare employment, the adoption of a child or the provision of foster care." This determination was based on his prior discussion of petitioner's actions in "exploiting a child in order to commit a criminal act," and a negative inference he drew against petitioner for failing to testify. In that regard, he noted that petitioner failed to present "evidence of remedial steps which would prevent [her] behavior from reoccurring."

Petitioner commenced this article 78 proceeding challenging the determination as affected by errors of law and as lacking a rational basis in law and fact. Supreme Court granted the petition on the grounds that the ALJ "misapplied the statutory standard for maltreatment and misapplied the *Nicholson* standard," and that the ALJ failed to consider all of the OCFS Guideline factors for whether maltreatment is relevant and reasonably related to employment or licensure.

It is well established that the scope of review of petitioner's article 78 petition is whether respondents' determination denying petitioner's request to amend her indicated report to unfounded was arbitrary and capricious, lacked a

rational basis or was affected by an error of law (CPLR 7803[3]; *Peckham*, 12 NY3d at 431; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Notably, "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Pell*, 34 NY2d at 231). If there is a rational basis for the determination, a reviewing court may not substitute its own judgment even if the court concludes that it would have reached a different result than the one reached by the agency (*Peckham*, 12 NY3d at 431).

Here, in determining whether ACS established maltreatment by a fair preponderance of the evidence in accordance with Social Services Law § 422(8) (which was amended in 2008 to comply with rulings that the prior "some credible evidence" standard violated due process), the ALJ applied the correct standard of review pursuant to *Nicholson v Scopetta* (3 NY3d 357, 368 [2004]), i.e.,

> "first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship."

Indeed, the ALJ specifically cited to these standards in his decision.

It is therefore unclear why the majority sets forth the litigation and legislative history relating to the Social Services Law and the pre-2008 standard requiring that a child protective agency had to show that there was "some credible evidence" of maltreatment. Nothing in this record supports a finding that this outdated standard was applied by the ALJ.

Further, the ALJ properly utilized the statutory definition of a maltreated child pursuant to 18 NYCRR 432.1(b)(1), which provides in pertinent part that a maltreated child is one

> "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . .
>
> "(ii) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court . . . ."

The ALJ also applied the correct definition for impairment of mental or emotional health pursuant to Family Ct Act § 1012(h). That section provides as follows:

> "'Impairment of emotional health' and 'impairment of mental or emotional condition' includes a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehavior,

> including incorrigibility, ungovernability or habitual truancy; provided, however, that such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child."

Based on the foregoing applicable standards and the undisputed record evidence, the ALJ rationally concluded that petitioner's actions in exploiting her five-year-old son to steal caused the child's mental and emotional condition to be in imminent danger of impairment. There can be no doubt that exploiting a child to steal and teaching a child that such behavior is acceptable has long-lasting consequences for that child's emotional and mental development at an age when the child primarily learns from observation of the parent's actions. There is simply nothing irrational about reaching such a conclusion.

Similarly, the ALJ rationally found that petitioner's action in using her child to commit a crime placed her son in imminent danger of physical harm. While this case does not entail the more extreme circumstances present in *Matter of Rashard D.* (15 AD3d 209 [1st Dept 2005][child directed to rob a bank]), even the commission of minor crimes, especially those involving theft, raises the potential for physical harm to the participants.

In fact, using a child to aid in shoplifting "would support a finding of neglect" (*Matter of Bernthon v Mattioli*, 34 AD3d at 1166).[2] Even a single incident "where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect" (*Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008][internal quotation marks omitted]]). And, utilizing and teaching a child to steal is the type of outrageous behavior which in and of itself creates an imminent risk of emotional harm to the child (*see e.g. Matter of Christina LL.*, 233 AD2d 705 [3d Dept 1996], *lv denied* 89 NY2d 812 [1997]).

Contrary to the majority's contention, it is of no moment that there was no evidence before the ALJ that the child suffered a specific tangible injury (*see Nicholson*, 3 NY3d at 369 ["'Imminent danger' reflects the Legislature's judgment that a finding of neglect may be appropriate even when a child has not actually been harmed"]). The imminent danger standard exists specifically to protect children who have not yet been harmed and

---

[2]The "legal questions at stake in *Bernthon*" are different from those raised here, **but** the reason the Third Department permitted hearsay statements at the custody trial was because those statements - that the child had been used by her father to aid his shoplifting - supported the allegations of neglect raised in that custody proceeding. In any event, it is a correct statement of the law to note that evidence of using a child to aid in shoplifting would support a finding of neglect.

to prevent impairment (*see Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]). Here, the basis for the ALJ's determination was not actual harm but a risk of imminent harm to the child. Thus, for example, we have upheld a finding of neglect where a mother was found intoxicated on the street with her child even though the child did not suffer actual injury (*see Matter of Pedro C. [Josephine B.]*, 1 AD3d 267 [1st Dept 2003]). It is of no moment that ACS determined in its discretion not to pursue a neglect proceeding against petitioner.

Nor were findings from mental health experts necessary to support the ALJ's determination. While such additional evidence may have been helpful, it was rational for the ALJ to conclude that this serious incident of theft, which, according to the child, may have occurred before, presented an imminent risk of impairment to the child.

As to the issue of imminence, I see nothing irrational about finding that the risk to this child caused by petitioner's actions was "near or impending" and not "merely possible" (*Nicholson*, 3 NY3d at 369). Initially, the potential for physical confrontation during a theft is imminent. Further, utilizing a child to commit a crime and teaching a child that such behavior is acceptable must have an immediate impact on that child's emotional and mental well-being, particularly in a young

child who is just learning to differentiate between right and wrong. As the ALJ noted, this is so even where the child does not "comprehend the gravity of the circumstances."

I disagree with the majority that cases finding no maltreatment where a parent engaged in a single instance of corporal punishment are dispositive here (*see e.g. Matter of Senande v Carrion*, 83 AD3d 851 [2d Dept 2011][mother hit child with a slipper]). While the majority may consider only physical harm to be "far more immediate," mental and emotional harm can be just as immediate. Nor is a finding of maltreatment limited to situations in which parents engage in even more "extreme parental behavior resulting in obvious danger" (*see e.g. Matter of Rosemary V. [Jorge V.]*, 103 AD3d 484 [1st Dept 2013][father left children home alone at night so he could engage in a narcotics transaction]).

More significant, to describe the ALJ's determination as "subjective" or to intimate that petitioner's actions were merely "foolish" or constituted "undesirable parental behavior" (*Nicholson*, 3 NY3d at 369) is simply unfounded and erroneous. The majority relies on cases involving the accidental or passive creation of a risk to a child. However, this case does not concern the type of accidental corporal punishment at issue in

Matter of Parker v Carrión (80 AD3d 458 [1st Dept 2011]). Nor does it concern the range of things that might be considered merely undesirable parenting such as corporal punishment, allowing a child to stay up late, permitting the consumption of excessive unhealthy foods, or allowing a child to watch an extremely violent film. Here, we have a parent teaching a child how to commit a crime.

Certainly, this case bears no relation to the "undesirable parental behavior" at issue in *Nicholson*, which concerned the difficult choices faced by battered mothers (*see* 3 NY3d at 371). Indeed, this case is not akin to the circumstances of a child being exposed to domestic violence against his parent. Rather, this case concerns petitioner exhibiting a strongly impaired judgment when she purposely used her child to steal and taught him such behavior was appropriate. Once again, a child of such tender age learns from observing the parent's actions whose actions will have a long-lasting effect on the child. Of course, the majority can identify no precedent treating the intentional exploitation of a child to commit a crime as merely undesirable.

I would also find that the ALJ rationally found that petitioner's actions are reasonably related to a position in childcare. As a matter of common sense, it should go without saying that an individual who utilizes her own child to commit a

crime and teaches the child how to steal lacks the necessary judgment to care for children, and would serve as a poor role model for them. In any event, the ALJ's decision indicates that he considered the relevant OCFS Guidlines. Initially, SCR's denial of petitioner's request was before the ALJ and it detailed various relevant factors, including the detrimental or harmful effects of petitioner's actions on her son and her son's age at the time of the incident. In addition, the Guidelines emphasize that "not all factors will be relevant to each particular case" and thus, contrary to the majority's position, the ALJ was not mandated to discuss all the factors.

Also contrary to the majority's claim, the ALJ considered more than one factor. Indeed, by referring to his previous discussion about the nature of petitioner's actions, the ALJ was considering the seriousness of the incident (factor 1) and the age of the child (factor 4), both of which do not weigh in petitioner's favor. Nor would I find that the passage of only one year between the incident and the hearing (factor 5) weighed in petitioner's favor. The fact that no serious injury occurred to the child (factor 2) or that no other incidents of maltreatment were known to the ALJ (factor 6) are not factors that needed to be discussed. Nor was factor 10, which concerns incidents of serious injury or death, relevant to the

determination.

Moreover, as the majority recognizes, the ALJ properly took a strong inference against petitioner for failing to testify at the hearing (*see Denise J.*, 87 NY3d at 79). Accordingly, he properly found that factor 8(b), which concerns whether there is any evidence of rehabilitation, weighed against petitioner, who decided not to testify at the hearing. Further, a negative inference could be drawn not only that shoplifting would reoccur but also that it had happened in petitioner's past based on the child's response to ACS' investigator's question concerning whether petitioner had ever stolen before; the child initially responded "yes" then "no."

Finally, it appears that the majority's decision is based in part on a concern that petitioner "will essentially be barred from pursuing a career in her chosen field of early childhood development." First, this ignores the fact that petitioner will not be precluded from such work but would be required to face an appropriate obstacle given her actions. If petitioner can demonstrate she has changed, an employer may choose to hire her and will simply explain why she is an appropriate hire in writing. More important, the majority ignores what should be the main concern: the purpose of the registry is primarily to protect children who may have the misfortune of being cared for and

miseducated by caregivers such as petitioner. If petitioner can exploit her own child to commit a crime, how can she be entrusted to care for other children when no evidence was presented to show petitioner has been rehabilitated? The focus of concern should be on the vulnerable children who are in need of child or foster care and adoption. Regardless, the majority is improperly substituting its judgment for that of the agency, which most certainly had a rational basis for its determination.

For these reasons, I would reverse Supreme Court's order and dismiss this proceeding.

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

ENTERED: DECEMBER 1, 2016

CLERK

Sweeny, J.P., Manzanet-Daniels, Feinman, Webber, JJ.

1732 Newmark & Company Real Estate, Inc., Index 650769/12
Plaintiff-Respondent,

-against-

Paul Frischer,
Defendant-Appellant,

Newmark Energy Solutions, LLC,
Defendant.

- - - - -

Paul Frischer,
Counterclaim-Plaintiff-Appellant,

-against-

Newmark & Company Real Estate, Inc.,
Counterclaim-Defendant-Respondent.

_____

White and Williams LLP, New York (John McDonald of counsel) and White and Williams LLP, Philadelphia, PA (Thomas B. Fiddler of the bar of the State of New Jersey and Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for appellant.

David A. Paul, New York, for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 25, 2014, which granted plaintiff's motion to dismiss defendant Frischer's counterclaims, affirmed, without costs.

The operative employee handbook stating, inter alia, that bonuses were paid at the sole discretion of plaintiff, and the acknowledgment of the handbook's terms signed by defendant, conclusively refute the counterclaims based on the alleged oral

promise to pay an annual nondiscretionary bonus (*see Kaplan v Capital Co. of Am.*, 298 AD2d 110 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]).

Nor was the discretionary bonus policy modified by the alleged oral agreement. As defendant's acknowledgment makes clear, "[N]o supervisor, manager or other representative of [plaintiff] has the authority to make any verbal promises, commitments, or statements of any kind regarding the Company's policies, procedures, or any other issues that are legally binding on the Company."

The quasi-contractual counterclaims based on the alleged agreement are likewise precluded by the discretionary bonus policy (*see Kaplan*, 298 AD2d at 111; *De Madariaga v Union Bancaire Privée*, 103 AD3d 591 [1st Dept 2013], *lv denied* 21 NY3d 854 [2013]).

The alleged oral promise to pay acquisition proceeds, however, was not established to be a "bonus" within the scope of the discretionary bonus policy. The complaint alleges that the promised payment was not performance-based, but was an inducement to keep defendant from quitting (*see Gruber v J.W.E. Silk, Inc.*, 52 AD3d 339 [1st Dept 2008]). The breach of contract counterclaim based on this alleged promise is nonetheless barred because the promise was not in writing, as required by the broad

language of the acknowledgment (*see Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 179-180 [1st Dept 2007]).

The quasi-contractual counterclaims, to the extent predicated on an alleged agreement to pay acquisition proceeds, likewise fail. Such claims require an element of reasonable reliance on a promise, a reasonable expectation of compensation, or an inequity, all of which are negated where, as here, the plaintiff receives adequate compensation and signed a written acknowledgment confirming the fact that no representative of plaintiff had authority to make legally binding verbal promises (*see Kaplan*, 298 AD2d at 111; *De Madariaga*, 103 AD3d 591).

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

FEINMAN, J. (dissenting in part)

This appeal raises the familiar question of when an employee's bonus constitutes a discretionary bonus subject to forfeiture at the will of the employer or earned compensation *not* subject to forfeiture. The majority answers this question in favor of the plaintiff-employer, dismissing each of the defendant-employee's counterclaims, based upon plaintiff's documentary evidence. While I agree with the majority that plaintiff's documentary evidence is sufficient to conclusively refute defendant's counterclaims insofar as they relate to an alleged oral promise to pay an annual nondiscretionary bonus, I disagree that it conclusively refutes defendant's counterclaim for unjust enrichment as it relates to the alleged oral promise to pay acquisition proceeds. In my view, dismissal of this counterclaim at this early stage is premature.

On a motion to dismiss pursuant to CPLR 3211(a)(1), we must accept the "factual allegations [in defendant's counterclaim] as true, according [him] the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270 [1st Dept 2004] [internal quotation marks omitted]). Dismissal of a counterclaim is warranted only where plaintiff's documentary

evidence "utterly refutes" defendant's factual allegations (*see Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Therefore, documentary evidence that "fails to resolve all factual issues as a matter of law" is insufficient to support dismissal (*Sirius XM Radio Inc. v XL Speciality Ins. Co.*, 117 AD3d 652, 652 [1st Dept 2014]).

In general, "[a]n employee's entitlement to a bonus is governed by the terms of the employer's bonus plan" (*see e.g. Hall v United Parcel Serv. of Am.*, 76 NY2d 27, 36 [1990]). It is well-settled under New York law that an employee has no enforceable right to payment of a bonus where a bonus plan clearly vests the employer with absolute discretion in making bonus decisions (*Gruber v J.W.E. Silk, Inc.*, 52 AD3d 339, 340 [1st Dept 2008]; *Weiner v Diebold Group*, 173 AD2d 166, 167 [1st Dept 1991]).

However, this rule is limited by the "long standing policy against the forfeiture of earned wages" (173 AD2d at 167). Therefore, when an employer fails to clearly indicate that bonuses are discretionary, the question of whether unpaid incentive compensation constitutes a discretionary bonus or

earned wages not subject to forfeiture becomes one of fact (*Ryan v Kellogg Partners Inst. Servs.*, 79 AD3d 447, 448 [1st Dept 2010], *affd* 19 NY3d 1 [2012]; *Mirchel v RMJ Sec. Corp.*, 205 AD2d 388, 389 [1st Dept 1994]).

In this case, defendant's counterclaims arise from two alleged oral promises made by plaintiff to defendant: (1) a promise to pay an annual nondiscretionary bonus of $100,000 for the year of 2011; and (2) a promise to pay a portion of the proceeds derived from BGC Partners, Inc.'s acquisition of plaintiff. More specifically, in regard to the latter, defendant alleges that after communicating his desire to leave the company prior to the acquisition, plaintiff's CEO promised defendant he would receive acquisition proceeds in an amount no less than the amount received by the partner with the smallest partnership interest. Defendant further alleges that in reliance upon this promise, he did not seek alternative employment and took on additional acquisition-related responsibilities. Given the procedural posture, these allegations must be accepted as true.

In support of its motion to dismiss, plaintiff submitted as documentary evidence a copy of its employee handbook and a form signed by defendant, acknowledging his receipt and understanding of the terms of the handbook. The handbook provides that bonuses were left to the plaintiff's "sole discretion." Additionally,

the signed acknowledgment form requires that any modifications to the employee handbook be in writing.

In light of the discretionary bonus plan, I agree with the majority that defendant's counterclaims based on the alleged oral promise to pay an annual nondiscretionary bonus are conclusively refuted by plaintiff's documentary evidence (*see De Madariaga v Union Bancaire Privée*, 103 AD3d 591 [1st Dept 2013], *lv denied* 21 NY3d 854 [2013]; *Kaplan v Capital Co. of Am.*, 298 AD2d 110 [1st Dept 2002], *lv denied* 99 NY2d 510 [2003]). I also agree with the majority that documentary evidence makes clear that the alleged oral promise to pay defendant acquisition proceeds cannot be a "bonus" within the scope of the discretionary bonus policy. The policy provides that bonuses are "generally paid at year end" and that plaintiff will consider "overall performance" and "[c]ompany profitability" in awarding them. Defendant alleges that the promised payment was not based on performance or profitability, but rather, was an inducement to keep defendant from leaving the company and was given in consideration for defendant taking on additional acquisition-related responsibilities.

However, because plaintiff's bonus plan does not contemplate the alleged oral promise to pay defendant acquisition proceeds, the question of whether such unpaid incentive compensation constitutes a discretionary bonus or earned wages not subject to

forfeiture becomes one of fact (*see Gruber*, 52 AD3d at 340). This conclusion is in accordance with New York law. In cases where employers induce employee reliance by promising bonuses, New York courts have permitted employee claims to go forward (*see Gruber*, 52 AD3d at 339 [finding issues of fact precluded summary judgment where employee alleged she was promised an additional bonus to remain working for her employer]; *see also Ryan*, 19 NY3d at 14 [denying employer's motion for judgment notwithstanding the verdict where employee left previous job in reliance on promise to receive bonus]; *Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc 3d 926, 931 [Sup Ct, NY County 2006] [denying employer's motion to dismiss where it induced its employee to bring in business by promising to pay her a bonus]; *see also* Restatement of Employment Law § 3.02, Comment *d* ["Bonuses . . . to ensure that employees will continue working for the employer during some period of corporate change . . . normally constitute earned compensation once the conditions of the bonus are satisfied."]).

Defendant's counterclaims for breach of contract, promissory estoppel, and quantum meruit are, as the majority holds, conclusively refuted by the signed acknowledgment form. The breach of contract counterclaim is barred by the statute of frauds, because the promise was not in writing, as required by

the acknowledgment form (*see* General Obligations Law § 15-301 [1]). Likewise, the promissory estoppel and quantum meruit counterclaims must fail, because, as the majority concludes, such claims require either a reasonable reliance on a promise or an expectation of compensation. Neither can be established here, because as the signed acknowledgment form demonstrates, defendant should have known that the promise of acquisition proceeds had to be in writing (*see Kaplan*, 298 AD2d at 111).

However, I part company with the majority to the extent it affirms the dismissal of defendant's counterclaim for unjust enrichment. The signed acknowledgment form is insufficient to conclusively refute defendant's counterclaim for unjust enrichment (*see Mirchel*, 205 AD2d at 390-391 ["It is well established that a claim . . . of unjust enrichment may be . . . employed as an alternative basis for recovery should the contract sued upon be held void under the [s]tatute of [f]rauds."]). To prevail on a claim of unjust enrichment, defendant must show (1) plaintiff was enriched (2) at defendant's expense, and (3) that "it is against equity and good conscience to permit the [plaintiff] to retain what is sought to be recovered" (*e.g. Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973]).

Defendant has alleged that plaintiff promised to pay him acquisition proceeds in consideration for his remaining in plaintiff's employ, as to not interrupt business activities throughout the acquisition. In acceptance and reliance upon this promise, defendant did not seek alternative employment and took on additional acquisition-related responsibilities beyond his job description. These factual allegations are sufficient to allege a cause of action for unjust enrichment (*see Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept 1998]; *see also Guggenheimer*, 11 Misc 3d at 934 [unjust enrichment claim sufficiently pleaded where plaintiff alleged she was induced to bring business into the firm and defendant refused to pay promised bonus]). The majority necessarily views the signed acknowledgment form as conclusively refuting each of these allegations.[1] However, the only way to reach this result is to conclude that defendant's allegations are incredible as a matter of law, a finding that is not appropriate at this juncture. Accepting defendant's allegations as true, he

[1] The majority concludes that defendant's promissory estoppel, quantum meruit, and unjust enrichment counterclaims must fail because plaintiff's acknowledgment form negates "reasonable reliance on a promise, an expectation of compensation, or an inequity." Because reasonable reliance and an expectation of compensation are elements of promissory estoppel and quantum meruit respectively, the majority apparently takes the position that defendant's unjust enrichment counterclaim must fail because an inequity is refuted by the acknowledgment form.

has satisfied the pleading requirements for unjust enrichment.

Accordingly, the order appealed from should be modified to deny plaintiff's motion to dismiss defendant's counterclaim for unjust enrichment, and otherwise affirmed.

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

ENTERED: DECEMBER 1, 2016

CLERK

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1751 In re Michael B.,
Petitioner-Respondent,

Lillian B.,
Respondent-Appellant.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

George E. Reed, Jr., White Plains, attorney for the child.

_____

Order, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about August 31, 2015, which, after a hearing, awarded sole legal and primary physical custody of the parties' child to petitioner father, with liberal parenting time to respondent mother, unanimously reversed, on the facts and in the exercise of discretion, without costs, and primary physical and sole legal custody awarded to the mother, with parenting time awarded to the father. Family Court shall enter an order within 30 days encompassing the provisions set forth below.

This is the unusual case where we should exercise our authority to reverse a custody determination by the trial court (*Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]). The Family Court Judge presiding over the trial of this complex and long-running custody matter was clearly concerned with the child's best interests and wrestled with concerns about the

mother's history of mental health issues, and the effect on the child of a "temporary" award of custody to the father, issued years prior to assignment of the case to the trial judge. However, a thorough review of the record does not provide a sound and substantial basis for the award of custody to the father, and requires an award of custody to the mother.

The mother and father, who have never been married or resided together, have a child together, B.B., born in October 2007. For the first three years of her life, B.B. lived with her mother. The father was not present when B.B. was born, did not visit her at all for the first six months of her life and had limited contact with her thereafter. In or about fall 2010, when the mother was pregnant with her youngest child, she stopped taking her psychiatric medication. As a result, she was hospitalized in November 2010. During her hospitalization, the father obtained an order giving him temporary custody of B.B. and requiring that the mother's parenting time be supervised. This temporary order remained in place for nearly five years.

It is undisputed that, since the father was granted temporary custody, the paternal grandmother has acted as B.B.'s primary caretaker during the father's parenting time. The father has been only tangentially involved in B.B.'s day to day care, sometimes dropping her off at, or picking her up from, school, or

taking her to doctor appointments. His primary involvement was in enrolling her in school and providing for her material needs. While the father has adequately provided for her financially, and the paternal grandmother capably ensured that B.B. was fed and clothed, their relationship with B.B. is not warm or affectionate.

Upon the mother's discharge from the hospital in December 2010, she and B.B.'s older half sister and two younger half brothers went to live with the mother's sister in New Haven, Connecticut, where the mother's parents and four of her five siblings reside. In 2012, the mother obtained her own apartment in New Haven, where she continues to reside with her other three children.

Starting immediately after her discharge from the hospital, the mother regularly visited with B.B. From May 2011 until the time of trial, B.B. spent every weekend with her mother. In addition, in winter 2011 and 2013, B.B. spent either Thanksgiving or Christmas and part of her winter school break, and the majority of the summers in 2013 and 2014, with her mother and siblings in Connecticut. The mother attended B.B.'s graduation from kindergarten in 2013 and from the first grade in 2014, in New York City, and met her teachers. While following the requirement in effect until January 2015 that an adult family

member be present, the mother provided the care for B.B. and her siblings during her parenting time.

On January 16, 2015, immediately after hearing the mother's testimony at trial, the Family Court terminated the temporary order's requirement that the mother's parenting time be supervised, and instead provided that a family member be present only at the exchanges of B.B., and that the child's attorney be permitted to communicate with the mother's mental health treatment providers to ensure that she remained compliant with treatment.

It is undisputed that the mother is an excellent, warm and responsive parent, as the father himself testified. The neutral forensic evaluator, Dr. Mark Rand, Ph.D., M.P.H., found that the child has an "attachment" with her father, which "grows out of routine involvement," as well as family connection and love, but is not of the same quality as the rich emotional bond she has with her mother. He concluded that the child's bond with her mother is "such that it would foster emotional growth of the child, maturity, a good feeling about herself and connectedness with others, while the relationship that she has with her father and paternal grandmother would fail in nurturing this child's emotional development nearly to the same degree." Dr. Rand also determined that the mother is the parent best able to foster the

child's relationship with her siblings and with her father. He concluded that the child would be "significantly happier" living with her mother.

The child was below grade level in all of her academic subjects. Dr. Rand determined that neither the father nor the paternal grandmother understood either the grading system at B.B.'s school or the academic expectations for children B.B.'s age. He determined that the mother did understand the grading system, and that she "is more attuned and more skilled at promoting the school development of the child in a manner appropriate to the school level that the child is in."

The Family Court heard testimony over 18 days between November 18, 2013 and January 16, 2015, and held an in camera interview with the child. On August 31, 2015, the Family Court issued its custody order after trial, which awarded primary physical and sole legal custody to the father and visitation to the mother, eliminating the requirement that a family member be present at exchanges.

In its award of custody to the father, the Family Court erred in several respects. First, it gave substantial weight to the fact that the father had temporary custody of the child for four years and nine months. This fact should not have been a basis, without more, for a final custody award. A temporary

award, especially one issued ex parte as this one was, is not given the same weight as an award of custody after trial, since a temporary award is not based on "consideration of all relevant evidence introduced during a plenary trial" (*Friederwitzer v Friederwitzer*, 55 NY2d 89, 94-95 [1982]). Moreover, "stability is important but the disruption of change is not necessarily determinative" (*Friederwitzer*, 55 NY2d at 94, citing *Matter of Nehra v Ullar*, 43 NY2d 242, 248, 250 [1977]). Here, the child spent more time with her mother during her mother's parenting time than she did with her father during his, and the child remained more strongly emotionally bonded to her mother throughout the nearly five years that the father had temporary custody. Under these circumstances, any "stability" for the child from leaving the temporary arrangement in place is negligible and is far outweighed by the other custody factors, all of which favor awarding custody to the mother.

Secondly, the Family Court gave excessive weight to the parties' financial circumstances, noting that their finances favored the father because the father works, and the mother is unemployed and receives Supplemental Security Income (SSI). However, "[w]hile concerns such as the financial status and the ability of each parent to provide for the child should not be overlooked by the court, an equally valid concern is the ability

of each parent to provide for the child's emotional and intellectual development" (*Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]). Here, the mother is far more capable of meeting the child's emotional and intellectual needs than is the father.

Third, there is no support for the Family Court's finding that the neutral forensic evaluator "made an initial superficial assessment of the parties at the commencement of his evaluative process, cast his lot with [the mother], and worked from that point to present his findings in her favor." In addition to meeting with each parent on more than 10 occasions, with the child at least 6 times, and with extended family members, Dr. Rand spoke with the mother's therapist, and reviewed the mother's psychiatric records. In his 52-page initial report, his 39-page updated report, and in his testimony, Dr. Rand carefully evaluated and weighed the parties' strengths and weaknesses as parents, and concluded that "the mother's psychiatric history does not present a risk factor for the child's optimal development that would outweigh the negative factors in the home of the father and the paternal grandmother."

Fourth, Family Court's concern about the mother's mental health history is understandable, but its conclusions disregard crucial evidence and its determination is not in the child's best interests. In March 2015, when the trial was completed, the

mother was in remission, had not been hospitalized since November 2010, and, in the five years since then, had been compliant with treatment by her psychiatrist and therapist. In addition, it is undisputed that the mother had custody of her three other children throughout the litigation, and there was no evidence that she was unable to care for them. Although certainly relevant, a parent's mental health is not determinitive of custody (*Moor v Moor*, 75 AD3d 675, 678 [3d Dept 2010]). Particularly where, as here, a parent seeks appropriate treatment for a mental health condition, and there is no evidence that he or she is presently unable to care for the child, a history of mental illness does not preclude an award of custody (*Sendor v Sendor*, 93 AD3d 586, 587 [1st Dept 2012]). Family Court's focus on the possibility that the mother may experience a relapse was speculative and not supported by the record, and thus an inappropriate basis for its custody determination (*Matter of Lawrence C. v Anthea P.*, 79 AD3d 577, 579 [1st Dept 2010]).

Moreover, Dr. Rand determined that, should her symptoms recur, the mother is not at risk of acting out in an aggressive or suicidal manner; rather, "there would be a risk of her isolating herself somewhat and her getting depressed." He also found that she had good insight into her condition, that her treatment was important to her, and that she was compliant with

treatment. In addition, the mother has a supportive bond with her close-knit extended family who live near her in Connecticut, and, in particular, with her mother, whom the mother saw even more frequently than Dr. Rand recommended would be optimal to support the mother's mental health and mitigate any risk to B.B. in the event of a recurrence of the mother's symptoms. The maternal grandmother testified that she was able to reach the mother's therapist and psychiatrist, and that if she believed any of her grandchildren were in danger, she would do so.

Fifth, B.B.'s close relationship to her siblings, all of whom reside with her mother, also weighs in favor of awarding custody to the mother, since "the stability and companionship to be gained from keeping the children together is an important factor for the court to consider" in making a custody determination (*Eschbach*, 56 NY2d at 173), because "[y]oung brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful" (*Obey v Degling*, 37 NY2d 768, 771 [1975]).

Finally, Family Court improperly considered this a relocation case, governed by *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]). However, since there has been no prior custody order, *Tropea* does not govern, and relocation should have

been considered as one factor in determining the child's best interests (*Matter of Quistorf v Levesque*, 117 AD3d 1456, 1456-1457 [4th Dept 2014]). Even if this Court were to consider the *Tropea* factors, they would still weigh in favor of awarding custody to the mother. Significantly, as the Family Court found, the distance between the parties' homes is not great. Furthermore, the father spends time with B.B. only a few hours each week during his parenting time. Since the mother has had weekend visits since 2011 and summer visits since 2013, the father has generally spent little leisure time with B.B. Accordingly, a regular schedule of alternate weekend and midweek dinner parenting time, and telephone and/or Internet communication, would permit at least as much contact between the father and the child as currently exists.

Joint legal custody is not appropriate where, as here, the parties' relationship is characterized by acrimony and mistrust (*Lubit v Lubit*, 65 AD3d 954 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* 560 US 940 [2010]).

Consideration of every applicable factor, in the totality of the circumstances of this case (*Eschbach*, 56 NY2d at 171-173; *Friederwitzer*, 55 NY2d at 93-94), and in particular the "primary" factors of "ability to provide for the child's emotional and intellectual development, [and] the quality of the home

environment and the parental guidance provided" (*Matter of Louise E.S.*, 64 NY2d at 947; *see also Eschbach*, 56 NY2d at 172-173), leads to the conclusion that an award of custody to the mother is in the child's best interests, and an award of custody to the father, which is essentially an award of physical custody to the paternal grandmother, is antagonistic to the child's best interests.

Accordingly, we direct the Family Court to enter an order within 30 days encompassing the following provisions:

Commencing immediately at the end of the current school semester, the mother shall have primary physical custody of B.B., with access by the mother until then as set out in the Family Court's decision and order after trial. In addition, the mother shall have sole legal custody, and she shall be directed to advise the father at least one week in advance of all major decisions about B.B.'s health and education. In the event of an emergency affecting B.B., the parent who is with B.B. at the time shall notify the other parent as soon as possible.

The father shall have the right to communicate with, and obtain records from, the child's educational and medical providers, and shall be entitled to attend all of B.B.'s school events to which parents are invited.

Commencing with the end of the current school semester, the

father shall have parenting time with B.B. every Wednesday from 4:00 to 7:00 p.m. in New Haven, and on alternate weekends from 4:00 p.m. on Friday to Sunday at 5:00 p.m.

The holiday schedule, which shall supersede the regular parenting time schedule above, shall be as follows: (1) the parties shall split B.B.'s winter school break, with the mother having B.B. with her for Christmas Day in odd years, and the father in even years; and (2) each parent shall be entitled to have B.B. with him or her for two weeks during her summer school break, provided that the father give the mother notice each year by April 1 of the dates, and the mother give the father notice each year by May 1 of the dates.

The father shall pick B.B. up from the mother's residence or school, and shall drop her off curbside at the mother's residence for all visits.

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

ENTERED: DECEMBER 1, 2016

CLERK

Friedman, J.P., Saxe, Moskowitz, Gische, Kahn, JJ.

1817 People of the State of New York, Ind. 5769/10
Respondent,

-against-

Weston Coote,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Lawrence T. Hausman of counsel) and Kirkland & Ellis LLP, New York (Shireen A. Barday of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael R. Sonberg, J.), entered December 16, 2014, which denied defendant's CPL 440.20 motion to set aside his sentence as a second violent felony offender and to be resentenced as a first felony offender, unanimously affirmed.

Supreme Court correctly determined that defendant's CPL 440.20 motion was procedurally barred by this Court's prior affirmance, on the merits, of defendant's 2010 conviction and his adjudication as a second violent felony offender (CPL 440.20[2]; 110 AD3d 485 [1st Dept 2013], *lv denied* 22 NY3d 1198 [2014]). Defendant's submission of additional evidence in support of his argument that his prior conviction was obtained in violation of *People v Catu* (4 NY3d 242 [2005]) does not constitute new grounds

under CPL 440.20(2).

Moreover, on its merits, defendant's claim is unavailing in light of *People v Smith* (__ NY3d __, 2016 NY Slip Op 07106 [2016] [*Catu* not to be retroactively applied in predicate felony offender adjudication]).

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2349 The People of the State of New York, Respondent,

Ind. 3018/13

-against-

Edward Ramos,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Alexis E. Kim), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 14, 2015, convicting defendant, upon his plea of guilty, of auto stripping in the second degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and remanding for resentencing, and otherwise affirmed.

Defendant's 2008 drug conviction under a Florida statute (Fla Stat Ann § 893.13[1][a]) that, unlike New York law, contains no element of knowledge that the item at issue was, in fact, the controlled substance the defendant is charged with selling or possessing, did not qualify as a predicate felony conviction. The absence of a scienter element comparable to New York's requirement is clear from both the plain language of the statute

and its interpretation by Florida courts (*see e.g. Miller v State*, 35 So 3d 162, 163 [Fla Dist Ct App 2010]). Moreover, in 2002 Florida enacted a clarifying statute (Fla Stat Ann § 893.101) expressly stating that guilty knowledge is not an element of drug offenses, although lack of such knowledge is an affirmative defense. We have considered and rejected the People's arguments to the contrary, including those that rely on case law that does not reflect the 2002 enactment.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2351 In re Jamel W.,
Petitioner-Appellant,

Stacey J.,
Respondent-Respondent.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Stacey J., respondent pro se.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order, Family Court, New York County (George J. Jurow, J.H.O.), entered on or about November 5, 2015, to the extent it placed petitioner father on probation, pursuant to Family Court Act § 656, and directed him to comply with the conditions of probation, including monthly psychiatric monitoring as arranged by the New York County Mental Health Services, for a two-year time period, as a component of visitation, unanimously affirmed, without costs.

The father argues that the court lacked jurisdiction over his modification petition because he did not consent to have the matter heard and determined by a judicial hearing officer (JHO). However, it was undisputed that he signed a consent form in the underlying custody proceeding that included his consent to a determination by a JHO in any supplementary proceedings. The

father does not dispute that his modification petition was a supplementary proceeding and he fails to cite evidence of bias or other misconduct by the JHO (*see Matter of Bay v Solla*, 113 AD3d 482, 483 [1st Dept 2014], *lv denied* 23 NY3d 901 [2014]). Thus, the court had the requisite jurisdiction (*see Baines v Shapiro,* 299 AD2d 193 [1st Dept 2002]).

Visitation is premised upon a consideration of the best interests of the child, and visitation with a biological parent is presumed to be in the child's best interests, absent proof that such visitation would be harmful (*see Matter of Tristam K.,* 25 AD3d 222, 228 [1st Dept 2005]).

This Court previously affirmed the determination that monthly psychiatric monitoring of the father as a component of visitation was appropriate given the recommendations of the evaluator and other experts (*see Matter of Jamel W. v Stacey J.,* 136 AD3d 552 [1st Dept 2016]). The father failed to present evidence of a change in his mental health status warranting

elimination of this component of visitation. His recent custody of a special needs child making compliance with this requirement more difficult did not demonstrate that it was in the best interests of the parties' child to remove this requirement.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2352 Robert Fletcher, Jr., Index 150732/13
Plaintiff-Appellant,

-against-

Brookfield Properties, et al.,
Defendants-Respondents.

_____

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 15, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established his entitlement to partial summary judgment on his Labor Law § 240(1) claim through witnesses' testimony that the ladder from which he was descending suddenly kicked out to the left, resulting in his fall (*see Fanning v Rockefeller Univ.*, 106 AD3d 484 [1st Dept 2013]). Contrary to the motion court's finding, plaintiff was not required to

demonstrate that the ladder was defective in order to satisfy his prima facie burden (*see Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526 [1st Dept 2014]; *Fanning* at 485).

In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of the accident. Plaintiff was not responsible for setting up the ladder, and there was no testimony establishing the existence of any other readily available, adequate safety devices at the work site (*see Caceres v Standard Realty Assoc., Inc.*, 131 AD3d 433 [1st Dept 2015], *appeal dismissed* 26 NY3d 1021 [2015]; *Gove v Pavarini McGovern, LLC*, 110 AD3d 601, 602 [1st Dept 2012]; *Figueiredo v New Palace Painters Supply Co. Inc.*, 37 AD3d 363 [1st Dept 2007]). Furthermore, given the undisputed testimony that the ladder kicked out because it was unsecured, the testimony that plaintiff unsafely descended from the ladder by carrying pipe fittings in his arms established, at most,

"contributory negligence, a defense inapplicable to a Labor Law § 240(1) claim" (*Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 403 [1st Dept 2013]; *see Diaz v City of New York*, 110 AD3d 577, 578 [1st Dept 2013]).

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2353 Carlos Gonzalez, et al., Index 653242/14
Plaintiffs-Respondents,

-against-

Vicki L. Been, etc., et al.,
Defendants.

Board of Directors and Officers of Lindsay Park Housing Corp., et al.,
Defendants-Appellants.

_____

Gallet Dreyer & Berkey, LLP, New York (Jerry A. Weiss of counsel), for appellants.

Brooklyn Legal Services Corporation A, Brooklyn (Lina Lee of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered June 30, 2015, which, to the extent appealed from as limited by the briefs, denied the Lindsay Park defendants' cross motion for summary judgment dismissing plaintiffs' third cause of action, alleging "bad faith" under the business judgment rule, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Supreme Court erred in declining to grant that portion of the Lindsay Park defendants' motion for summary judgment dismissing plaintiffs' third cause of action, alleging bad faith. The business judgment rule "bars judicial inquiry into actions of

corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]; *see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537–538 [1990]).

Plaintiffs and other shareholders initiated a petition under Article II, section 2 of Lindsay Park's bylaws calling for a special meeting to amend the bylaws to require the use of only directed proxies in election of directors and limit any one individual to holding no more than 91 proxies, and to discuss the maintenance increase that took place in 2014 and the one scheduled for 2015. Plaintiffs commenced this action alleging, inter alia, that by refusing to call the special meeting demanded by the petition, based on the results of the signature verification by an independent company, the board acted in bad faith. The independent company found that 326 signatures were found not to be signed by legitimate shareholders or were duplicates, and therefore invalid, which plaintiffs did not challenge.

Plaintiffs failed to raise a triable issue of fact as to whether the Lindsay Park defendants acted in bad faith, so as to

preclude application of the business judgment rule (*see Owen v Hamilton*, 44 AD3d 452, 456-457 [1st Dept 2007], *lv dismissed* 10 NY3d 757 [2008]). Even though the use of an independent verification company was not authorized by the bylaws, it was also not prohibited by the bylaws, and the remaining correspondence plaintiffs rely upon to show bad faith is insufficient to satisfy their burden (*see Jones v Surrey Coop. Apts.*, 263 AD2d 33, 37 [1st Dept 1999]).

We have considered the parties' remaining contentions and find them unavailing or academic.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2354 The People of the State of New York, Respondent, Ind. 789/14 2636/13

-against-

Joyce Campbell, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered September 12, 2014, convicting defendant, after a jury trial, of assault in the second degree, and sentencing her, as a second felony offender, to a term of four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports the conclusion that defendant injured the victim intentionally and without justification.

Defendant's challenges to her indictment on additional charges after a mistrial, to the court's admonitions to defendant during her testimony, to the court's charge, and to the court's handling of a note from the deliberating jury all require

preservation, and we decline to review any of these unpreserved claims in the interest of justice. As an alternative holding, we find that defendant was not prejudiced by any alleged errors, and that there is no basis for reversal. We have considered and rejected defendant's ineffective assistance of counsel claim (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]), and we do not find that any lack of preservation may be excused on the ground of ineffective assistance.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2355 John Koeppel, Index 650889/13
Plaintiff-Appellant,

-against-

Volkswagen Group of America, Inc., et al.,
Defendants-Respondents.

_____

Michael H. Zhu, P.C., New York (Michael H. Zhu of counsel), for appellant.

Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL (Andrew Spangler of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered October 26, 2015, which denied plaintiff's motion for leave to renew defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

This Court affirmed the dismissal of the complaint for failure to allege facts from which it could be inferred that defendants participated in plaintiff's business partners' alleged scheme to defraud plaintiff out of his ownership of a Volkswagen dealership (128 AD3d 441 [1st Dept 2015]). Plaintiff seeks renewal on the basis of an affidavit by one of his partners that he contends implicates defendants in the alleged scheme.

Plaintiff failed to provide reasonable justification for his

failure to present the new evidence on defendants' motion (CPLR 2221[e][3]). In any event, the new facts do not change the original determination (CPLR 2221[e][2]). The affidavit contains no facts establishing that defendants knew of the alleged fraud.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2356-
2357 The People of the State of New York,
Respondent,

-against-

Jamarr Fowler,
Defendant-Appellant.

Ind. 3219/06

_____

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

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered December 17, 2013, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (SORA) (Correction Law art 6-c), unanimously affirmed, without costs. Order, same court and Justice, entered September 3, 2014, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered July 31, 2008, as amended April 20, 2010, unanimously affirmed.

After a thorough evidentiary hearing, the court properly denied defendant's CPL 440.10 motion, in which he claimed ineffective assistance of counsel. Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or

collectively, they deprived defendant of a fair trial or affected the outcome of the case (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defense counsel adequately investigated the possibility that the victim, who was 14 years old at the time of the incident, had a consensual sexual encounter with two teenagers but had falsely accused defendant of rape in order to give her family a more acceptable story. Counsel pursued this theory, but based on the teenagers' equivocal and contradictory statements, he made a legitimate strategic decision not to call them to testify, opting instead to use other evidence.

Defense counsel adequately investigated and rejected defendant's purported "alibi" defense, which was no alibi at all, as it placed defendant within one block of the crime scene around the time of the incident, and corroborated certain details in the complainant's testimony. Accordingly, there was no need for counsel to delve further into the purported alibi evidence.

Where defendant's DNA was the only DNA on the condom, and the victim had suffered a vaginal injury, defense counsel effectively challenged that evidence by eliciting that another condom noticed by the police at the crime scene was never recovered or tested, and by providing an innocent theory, which did not involve the victim, for the incriminating condom. There

is no indication that consulting a medical expert or DNA expert, or further investigating this aspect of the case would have provided any benefit to defendant, or that counsel's handling of this issue prejudiced the defense.

Finally, although the jury convicted defendant of second-degree rape, a class D felony, based on the age of the victim, it acquitted defendant of the class B felony counts, which were based on forcible compulsion. There is no reason to believe that further efforts by counsel could have resulted in an outright acquittal.

Turning to defendant's civil appeal from his sex offender adjudication, we find that the court properly assessed 30 points for defendant's commission of a prior violent felony, notwithstanding that it resulted in a youthful offender adjudication (*see People v Wilkins*, 77 AD3d 588 [1st Dept 2010], *lv denied* 16 NY3d 703 [2011]). However, there was an insufficient basis for assessing 15 points for refusal to participate in sex offender treatment, rather than 10 points for mere failure to accept responsibility, because the People argued at the SORA hearing that defendant was prevented from completing the program due to his disciplinary record, which is not

"tantamount to a refusal to participate" (*People v Ford*, 25 NY3d 939, 941 [2015]). Nevertheless, defendant remains a level two offender, and there is no basis for a discretionary downward departure (*see generally People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2359 In re Mia Veronica B., and Another,

Dependent Children Under Eighteen Years of Age, etc.,

Brandy Veronica R.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau, etc.,
Petitioner-Respondent.

_____

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

Joseph T. Gatti, New York, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the children.

_____

Order of fact-finding and disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 27, 2014, which, to the extent appealed from as limited by the briefs, upon a finding of permanent neglect by the respondent mother, terminated her parental rights to the subject children and committed custody and guardianship of the children to petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supported the Family Court's finding that respondent mother, despite the petitioner agency's diligent efforts in referring her for mental health counseling,

parenting skills programs, drug treatment programs and random drug screens, domestic violence programs, and anger management, failed to cooperate and thus, permanently neglected the children by failing to plan for their return. The mother continually refused to engage in services, and maintained that she would not comply with referred services absent court order (*see e.g. Matter of Darryl Clayton T. [Adele L.]*, 95 AD3d 562, 562-563 [1st Dept 2012]; *Matter of Marah B. [Lee D.]*, 95 AD3d 604, 605 [1st Dept 2012], *lv denied* 19 NY3d 810 [2012]; *Matter of Tanisha Shabazz A. [Latisha G.]*, 91 AD3d 482, 483 [1st Dept 2012]).

The finding that termination of respondent's parental rights was in the subject children's best interests was supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 143-144 [1984]; *Matter of Anthony P. [Shanae P.]*, 84 AD3d 510, 511 [1st Dept 2011]; *Matter of Racquel Olivia M.*, 37 AD3d 279, 280 [1st Dept 2007], *lv denied* 8 NY3d 812 [2007]).

Moreover, in light of the mother's failure to address the circumstances that resulted in the children's placement in foster

care, termination of her parental rights rather than a suspended judgment is warranted (*see Matter of Charles Jahmel M. [Charles E.M.]*, 124 AD3d 496, 497 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]).

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2360 Stephanie Steigelman, et al., Index 21805/14E
Plaintiffs-Appellants,

-against-

Transervice Lease Corp., et al.,
Defendants-Respondents,

Government Employees Insurance Company,
Defendant.

_____

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for appellants.

McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered December 23, 2015, which denied plaintiffs' motion for partial summary judgment on the issue of liability as against defendants-respondents, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiffs submitted affidavits averring that their car, which was in the left lane of traffic, was suddenly struck in the side and rear by the trailer of defendants' tractor-trailer truck, which came "from the right lane into the left lane." Plaintiff driver averred that she could not avoid the accident. Accordingly, plaintiffs met their prima facie burden by demonstrating that defendant driver entered the left lane when it

was not safe to do so, in violation of Vehicle and Traffic Law § 1128(a), and that plaintiff driver did not contribute to the accident (*see Guerrero v Milla*, 135 AD3d 635 [1st Dept 2016]; *Zummo v Holmes*, 57 AD3d 366 [1st Dept 2008]).

In opposition, defendants failed to raise a triable issue of fact. They submitted the affidavit of their driver, defendant Stroud, who averred that there was no vehicle to his left when he began to go through a traffic circle in the right lane, but that, after he signaled his intention to turn left and was bearing left, he felt a catch on the rear tire and saw in the mirror that a vehicle was "squeezed in" on his left. Defendants also submitted a police accident report that contained Stroud's statement that he was unaware that he had struck a vehicle at all until he was stopped by an officer, which undermined Stroud's affidavit purporting to describe how the accident occurred (*see Garzon-Victoria v Okolo*, 116 AD3d 558 [1st Dept 2014]). These submissions do not provide any nonnegligent explanation for the accident, but instead indicate that Stroud was negligent in failing to see what was there to be seen, namely plaintiffs' car (*see Guerrero* at 636). Defendants' arguments about how plaintiff

driver may have contributed to the accident, or been able to avoid it, are speculative (*see id.*). Nor do defendants contend that discovery is needed to defend the motion (*see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]).

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2361 National Financial Partners Corp., et al., Plaintiffs-Respondents, Index 651808/12

-against-

USA Tax and Insurance Services, Inc., Defendant-Appellant,

Does 1-50, Defendants.

_____

Law Offices of Kenneth L. Kutner, New York (Kenneth L. Kutner of counsel), for appellant.

Winget, Spadafora & Schwartzberg, LLP, New York (William G. Winget of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 15, 2015, which, to the extent appealed from as limited by the briefs, denied defendant USA Tax and Insurance Services, Inc.'s motion for summary judgment dismissing the causes of action asserted in the amended complaint for aiding and abetting breach of fiduciary duty and tortious interference with contractual relations, unanimously affirmed, with costs.

Issues of fact preclude dismissal of the claim for tortious interference with contractual relations. Plaintiffs have established the existence of the nonsolicitation and noncompete provisions in the Management and Merger Agreements between them and Stephen Delott, as well as USA Tax's knowledge of the

restrictive covenants (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). However, while the record shows that Delott and USA Tax were in contact regarding plaintiff Delott & Associates, Inc.'s (D&A) recruited agents at a time when Delott was still working as D&A's president, there are issues of fact as to whether Delott actually breached the noncompete and nonsolicitation provisions, whether USA Tax intentionally procured any such breach without justification (*id.*), and whether the alleged breach of contract would not have occurred but for the activities of USA Tax (*Twin City Fire Ins. Co. v Arch Ins. Group, Inc.*, 143 AD3d 533 [1st Dept 2016]; *Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]). Issues of fact also exist as to plaintiffs' damages. USA Tax's argument that it was not the sole proximate cause of D&A's damages is unavailing, as it need not be the sole proximate cause to sustain a claim for tortious interference with contract (*Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 318 [1st Dept 2006]).

In addition, issues of fact as to whether Delott breached his fiduciary duties, and whether USA Tax knowingly induced or participated in any such breach, preclude summary judgment dismissing the claim for aiding and abetting breach of fiduciary

duty (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *see also Smallberg v Raich Ende Malter & Co., LLP*, 140 AD3d 942, 944 [1st Dept 2016]).

USA Tax's collateral estoppel argument is not properly before this Court as it was raised for the first time in its reply brief (*Matter of Erdey v City of New York*, 129 AD3d 546, 546-547 [1st Dept 2015]).

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2362- Ind. 4449/12
2362A The People of the State of New York, 3596/12
Respondent,

-against-

Lawrence Femminella,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Laura Ward, J.), rendered January 22, 2013, as amended January 30, 2013,

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

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

ENTERED: DECEMBER 1, 2016

CLERK

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

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

2363 In re Kent D.,
Petitioner-Appellant,

Rachel D.,
Respondent-Respondent.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Melissa Paquette, Brooklyn, for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about May 7, 2015, which denied petitioner's motion for a forensic evaluation and granted the cross motion of the attorney for the subject child to dismiss the petition seeking, in effect, to modify a judgment of divorce to provide for visitation with the child, unanimously affirmed, without costs.

In February 2008, petitioner stabbed respondent mother seven times with a kitchen knife and repeatedly punched her, while their child was in the room. Petitioner was convicted of assault in the first degree and endangering the welfare of the child, and sentenced to a prison term of 11 years. A 19-year order of protection was subsequently issued prohibiting him from having any contact with the child, except by order of the Family Court. In proceedings in Family Court, the mother was awarded custody of

the child, who was suffering from post-traumatic stress disorder, and petitioner was directed to engage in services including anger management and a mental health evaluation. The judgment of divorce issued by Supreme Court in 2012 granted custody to the mother and adjudged that petitioner had no rights of visitation with the child pursuant to the order of protection.

The Family Court properly granted the cross motion to dismiss the visitation petition without a hearing, because petitioner failed to make any evidentiary showing of changed circumstances (*see Matter of Naomi S. [Hadar S.]*, 87 AD3d 936, 938 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]; *Matter of Timson v Timson*, 5 AD3d 691, 692 [1st Dept 2004]). His claim that he completed an anger management program in prison was unsubstantiated, and his belief that enough time had passed so that the child should be emotionally ready to see him was unsupported and contradicted by a social worker's affidavit submitted in opposition. Given petitioner's failure to establish

his entitlement to a hearing, and the evidence of the child's continuing symptoms and desire not to see him, the court also providently exercised its discretion in denying his motion for a forensic evaluation.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2365 The People of the State of New York, Ind. 4899/09
Respondent,

-against-

Miguel Torres,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered July 18, 2013, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. The record supports the court's finding that defendant's statement was voluntary under the totality of the circumstances, notwithstanding that his arraignment on the drug charge for which he was under arrest was delayed by interrogation regarding the homicide for which he was a suspect (*see People v Jin Cheng Lin*, 26 NY3d 701, 723-725 [2016]).

At trial, the court properly exercised its discretion in making a preliminary ruling that, in the event defendant

attempted to cast doubt on the voluntariness of his statements by claiming he did not understand English, and by challenging a detective's testimony that *Miranda* warnings were given in Spanish, the People would be permitted to introduce defendant's videotaped statement, in connection with an unrelated arrest, which the People represented would demonstrate that defendant spoke and understood English. Defendant ultimately avoided opening the door to the videotape, and it was not placed in evidence. The court's tentative ruling was appropriate, since the videotape would presumably have been probative of defendant's ability to speak English, even if it revealed an uncharged crime. Moreover, this was only a provisional ruling, and had defendant actually pursued the line of defense at issue, matters such as redaction of prejudicial matter could have been litigated. Defendant did not preserve his claim that his constitutional right to present a defense was violated, and we decline to review it in the interest of justice. As an alternative holding, we

find it without merit, because the right to present a defense does not include the right to be free of the consequences of opening the door to otherwise inadmissible evidence.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2366 JPMorgan Chase Bank formerly known as The Chase Manhattan Bank, Plaintiff-Appellant, Index 6873/05

-against-

Mamadi Kaba, Defendant-Respondent,

DZ Bank AG Deutsche Zentral-Genossenschaftsbank, et al., Defendants.

_____

Parker Ibrahim & Berg LLC, New York (Scott W. Parker of counsel), for appellant.

Mamadi Kaba, respondent pro se.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 10, 2014, which, inter alia, denied plaintiff's motion for an order of reference and granted defendant Mamadi Kaba's cross motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion granted and the cross motion denied.

The motion court did not have the benefit of *Aurora Loan Servs., LLC v Taylor* (25 NY3d 355 [2015]), which said, "to have standing, it is not necessary to have possession of the mortgage at the time the action is commenced. . . . [T]he note, and not the mortgage, is the dispositive instrument that conveys standing

to foreclose under New York law" (*id.* at 361). Therefore, the court's finding that plaintiff lacked standing because it did not own the mortgage at the time it commenced this action, cannot stand.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2367 Sunkyung LLC, as assignee of BPD Bank, Index 850123/12
Plaintiff-Appellant,

-against-

Porto Resources, LLC, et al.,
Defendants-Respondents,

NYC Environmental Control Board,
et al.,
Defendants.

_____

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Law Offices of James C. Mantia PC, New York (James C. Mantia of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 3, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

In this mortgage foreclosure action, plaintiff failed to submit uncontroverted evidence that defendants-respondents defaulted under the mortgage agreement (*see JPMCC 2007-CIBC19 Bronx Apts., LLC v Fordham Fulton LLC*, 84 AD3d 613 [1st Dept 2011]). Issues of fact are presented by the June 18, 2012 letter from plaintiff's predecessor in interest (the bank) to defendant Joseph Porto setting forth the structure of the new loan term, and emails to Joseph Porto from defendants' relationship manager

at the bank stating that the extension had been approved.

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

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2368 The People of the State of New York, Ind. 2664/12
Respondent,

-against-

George Liggins,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan P. Mansell of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic Massaro, J.), rendered March 3, 2014, 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: DECEMBER 1, 2016

CLERK

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

2369 RLR Realty Corp., Index 159509/14
Plaintiff-Appellant,

-against-

Duane Reade, Inc., et al.,
Defendants-Respondents.

_____

Coran Ober P.C., Flushing (Steven T. Beard of counsel), for appellant.

Clair & Gjertsen, White Plains (Ira S. Clair of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered October 6, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff, as landlord, leased the subject premises to nonparty B&P Pharmacy, Inc. (B&P), for use, as stated in the lease, as a "pharmacy and general merchandise" business. The lease expired on July 31, 2013. B&P thereafter tendered, and plaintiff accepted, rent, at the last effective rate under the expiring lease, for the months of August through October 2013, thereby creating a month-to-month tenancy during that time, under the terms of the former lease (*see* Real Property Law § 232-c;

City of New York v Pennsylvania R.R. Co., 37 NY2d 298, 300 [1975]). On October 29, 2013, plaintiff served a 30-day notice of termination, terminating the month-to-month tenancy as of November 30, 2013 (*see JPMorgan Chase Bank, N.A. v Rocar Realty Northeast, Inc.*, 47 AD3d 425, 427 [1st Dept 2008], *lv dismissed* 11 NY3d 761 [2008]).

Meanwhile, B&P entered into an asset purchase agreement (the APA) with defendants for the sale of the goodwill of its pharmacy business. The APA closed on November 20, 2013, on which date B&P posted a notice on its premises advising its customers that the pharmacy was closed, and directing them to fill their prescriptions at defendants' nearby competing pharmacy. The APA had a noncompete provision — under which B&P would forfeit half of the compensation due thereunder if a pharmacy was operated at the premises prior to November 20, 2014 — which strongly motivated B&P to remain on the premises, in order to prevent plaintiff from leasing the premises to another pharmacy. Viewing the record in the light most favorable to plaintiff, triable issues of fact exist as to the first four elements of a cause of action for tortious interference with contract, namely the existence of a valid contract, defendants' knowledge of the contract, defendants' intentional procurement of a breach of the

contract, and breach of the contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Snyder v Sony Music Entertainment*, 252 AD2d 294, 299 [1st Dept 1999]).

Plaintiff has, however, failed to raise triable issues of fact as to the last element of damages. Plaintiff seeks damages only for the period of December 1, 2013, through the end of B&P's holdover on September 24, 2014, in the form of lost rent from a viable pharmacy during the holdover period. It is impossible for plaintiff to incur such damages during this period, because B&P, while unlawfully holding over, was not in breach of the lease's pharmacy provision, which expired on November 30, 2013. In other words, any losses suffered by plaintiff during this period were not occasioned by defendants' inducement of B&P to breach the lease's restricted premises provision, because such provision was no longer in effect, having expired upon the end of the tenancy on November 30, 2013. There was no longer any contract in force for B&P to breach. Likewise, plaintiff could not seek any lost rent damages for the short period from November 21 to 30, 2013, when the restricted premises provision was still in effect, because it remained lawfully in possession of the premises during that time.

The motion court properly dismissed plaintiff's negligence claim, since plaintiff has not "posit[ed] any source of duty"

owed to it by any of the defendants upon which to premise a negligence claim (*Regini v Board of Mgrs. of Loft Space Condominium*, 107 AD3d 496, 497 [1st Dept 2013]; *see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]).

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2370N Allan Gillard, Index 300637/07
Plaintiff-Respondent,

-against-

Bashon Reid, et al.,
Defendants-Appellants.

_____

Gallo Vitucci Klar LLP, New York (Mary L. Maloney of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered November 20, 2015, which denied defendants' motion to join this negligence action with two other actions with the same plaintiff pending in Bronx County, Supreme Court, unanimously affirmed, without costs.

The court providently exercised its discretion by refusing to join three unrelated actions for trial: a motor vehicle negligence action, a premise liability action, and a medical malpractice action. When Supreme Court decided the motion, this motor vehicle negligence action was ready for trial, while the other two actions were still in discovery. Where actions are at completely different procedural postures with one ready for trial and the other in discovery, denial of a joint trial is appropriate, as it would unduly delay the resolution of the older

action (*see McGinty v Structure-Tone*, 140 AD3d 465, 466 [1st Dept 2016]; *Maron v Magnetic Constr. Group Corp.*, 128 AD3d 426, 427 [1st Dept 2015]).

In addition, the cases involve different facts, witnesses, claims, injuries, and defendants. As such, "'individual issues predominate . . . so as to preclude the direction of a joint trial'" (*Abbondandolo v Hitzig*, 282 AD2d 224, 225 [1st Dept 2001], quoting *Bender v Underwood*, 93 AD2d 747, 748 [1st Dept 1983]), and there is a real risk of jury confusion (*see Witherspoon v New York City Hous. Auth.*, 238 AD2d 276 [1st Dept 1997]; *see also County of Westchester v White Plains Ave., LLC*, 105 AD3d 690, 691 [2d Dept 2013]).

The court has considered defendants' other arguments and find them unavailing.

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

ENTERED: DECEMBER 1, 2016

CLERK

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

2371N Shop Architects, P.C., Index 101043/12
Plaintiff-Respondent,

-against-

25th Street Art Partners LLC,
et al.,
Defendants-Appellants.
- - - - -
[And a Third Party Action]

_____

Sills Cummis & Gross P.C., New York (James M. Hirschhorn of counsel), for appellants.

Seyfarth Shaw LLP, New York (Jerry A. Montag of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 5, 2015, which, to the extent appealed from as limited by the briefs, denied the motion of defendants 25th Street Art Partners LLC, 25th Street Art Holdings LLC, and Fidelity and Deposit Company of Maryland, to appoint an expert to conduct a forensic examination of plaintiff's computer system, unanimously affirmed, with costs.

The court's determination was a provident exercise of discretion (*see generally Arts4All, Ltd. v Hancock*, 54 AD3d 286, 286 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *cert denied* 559 US 905 [2010]). Discovery of electronically stored information may be court ordered where the party seeking such discovery makes a

showing that includes that the files sought can actually be obtained by the methods suggested (*see Tener v Cremer*, 89 AD3d 75, 82 [1st Dept 2011]). Here, defendants do not seek any particular document, but instead seek an examination of plaintiff's drives to determine whether any documents exist that have not been exchanged or obtained from third parties. Although defendants had also previously sought to determine when particular invoices were created, plaintiff has admitted that they were all created together, outside of its accounting program, and backdated, mooting that basis for forensic examination of plaintiff's system.

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

ENTERED: DECEMBER 1, 2016

CLERK