SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 8, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Andrias, Webber, Gesmer, JJ.

1790 The People of the State of New York, Ind. 3606/09
Respondent,

-against-

Durville Small,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney[1], New York (Philip Morrow of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Darcel D. Clark, J.), rendered December 21, 2011, as amended January 23, 2012, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to consecutive terms of 25 years to life and 10 years, reversed, on the law, and the matter remanded for a new trial.

The trial court's denial of a for-cause challenge by defense

[1] Appearing as special prosecutor on this appeal by order of Deputy Chief Administrative Judge Fern A. Fisher.

counsel was reversible error. The prospective juror's voir dire over two days, when viewed as a whole, demonstrates that her state of mind was likely to preclude her from rendering an impartial verdict. Moreover, her expressions of bias during her voir dire were not replaced by an unequivocal assurance of impartiality, despite further inquiry by the trial court and defense counsel. Accordingly, we remand for a new trial.

On October 5, 2011, during its preliminary voir dire, the trial court individually asked each prospective juror if he or she had been a crime victim. The prospective juror at issue (Ms. J.) stated that her sister had been raped by a man who "had took her eye out (sic)," and that her brother had been murdered. The questioning continued as follows:

"The Court: So the fact that you had two siblings that were the victims of very serious crimes, would that prevent you from being fair and impartial on a criminal case?

"Ms. J.: Probably.

"The Court: You won't be able to do it?

"Ms. J.: I don't know. I am not sure.

"The Court: I can't hear you.

"Ms. J.: I am not sure.

"The Court: Have you ever served as a juror before?

"Ms. J.: No.

> "The Court: And you don't think you can set aside what happened to your siblings and listen to what happened here because this case has nothing do with what happened to them? I know it's difficult and it's tough, and it's terrible what happened. But what we need to know, can you keep an open mind and listen to stuff that happened in this case, listen to what happen (sic) in this courtroom, and not what happened in your personal life or outside the courtroom? You think you would be able to do that?
>
> "Ms. J.: I do.
>
> "The Court: You can?
>
> "Ms. J.: Yes."

Later in its voir dire, the trial court asked Ms. J. if there was any reason why she would not be fair and impartial in the case and she answered, "No." The trial court then asked, "You could be fair and impartial?" Ms. J. answered, "Yes."

However, the next day, October 6, 2011, during the People's voir dire, Ms. J. returned to her initial position, as follows:

> "[The People]: Now, I know, [Ms. J.], you have unfortunately had family members who were the victim of crimes. Do you think anything about that experience will impact your ability to be fair in this particular case?
>
> "Ms. J.: It probably will.
>
> "[The People]: It probably will?
>
> "Ms. J.: Mm-hmm.
>
> "[The People]: Okay. Thank you."

The trial judge did not inquire further after this exchange. At a later point, defense counsel asked Ms. J. if she would have any difficulty in returning a not guilty verdict if she had a reasonable doubt. She stated, "No," and repeated this when the People asked her to repeat her response.

When defense counsel moved to excuse her for cause, the trial court denied the challenge, stating that Ms. J. said "she could still be fair, that she would be able to listen, she could render a verdict."

Under CPL 270.20(1)(b), a prospective juror should be excused for cause if it is found that, "[she] has a state of mind that is likely to preclude [her] from rendering an impartial verdict based upon the evidence adduced at the trial." If a prospective juror has expressed a "state of mind likely to preclude impartial service, [she] must in some form give *unequivocal* assurance that [she] can set aside any bias and render an impartial verdict based on the evidence" (*People v Johnson*, 94 NY2d 600, 614 [2000] [emphasis added]). Accordingly, when a prospective juror has failed to follow an indication of bias during voir dire by an unequivocal assurance of impartiality, a for-cause challenge should be granted (*see People v Torpey*, 63 NY2d 361, 367-68 [1984]; *People v Blyden*, 55 NY2d 73, 78-79 [1982]). There are no magic words or talismans that

render a response equivocal or unequivocal; a prospective juror's statements during voir dire must be taken in context and as a whole (*People v Chambers*, 97 NY2d 417, 419 [2002]). However, once a prospective juror expresses doubts about his or her ability to serve, "nothing less than a personal, unequivocal assurance of impartiality can cure a juror's prior indication that she is predisposed against a particular defendant or particular type of case" (*People v Arnold*, 96 NY2d 358, 364 [2001]).

Viewing this prospective juror's two-day voir dire as a whole, we find that she did not give unequivocal assurance of an ability to be impartial for two reasons. First, we disagree with the dissent that Ms. J.'s response to defense counsel's question on October 6 alleviated the concerns of bias raised by her answers earlier that day in response to the People's questions. Although Ms. J. did tell the trial court on October 5, 2011 that she could set aside the crimes against her siblings when considering the evidence, she informed the People during their voir dire on October 6, 2011 that these tragedies would "probably" impact her ability to be fair. Following this response to the People, the only inquiry of Ms. J. was by defense counsel, who asked if she could return a not guilty verdict if she believed the People did not meet their burden beyond a

reasonable doubt.

However, the Court of Appeals has been clear that a general inquiry as to whether a prospective juror can follow the court's instructions does not "[f]orce [a juror] to confront the crucial question whether she could be fair to this defendant in light of her expressed predisposition," and therefore does not rehabilitate a juror who has expressed doubts about his or her ability to serve (*Arnold*, 96 NY2d at 363-364). In *Arnold*, a prospective juror stated that she could not serve on a domestic violence case because her prior academic study of domestic violence might impede her ability to be impartial (*id.* at 363). Later on, defense counsel asked the entire panel of prospective jurors if they would follow the court's instructions and not use the case as a "referendum" on domestic violence (*id.*). Although the prospective jurors all answered in the affirmative during this group inquiry, the Court of Appeals found this insufficiently curative as to the prospective juror at issue, since "[t]he group answer by the entire panel did not address her personal attitudes . . ." (*id.*). While it is true that the trial judge in this case asked Ms. J. on October 5, 2011 whether the crimes suffered by her siblings would affect her ability to be fair, the judge did not repeat this inquiry the next day when Ms. J. repeated her belief that her siblings' experience might affect

her ability to be fair. Defense counsel's general inquiry into whether Ms. J. would have difficulty returning a not guilty verdict if she had a reasonable doubt was insufficient to elicit an unequivocal assurance of her impartiality, as this questioning failed to confront the very issue she had raised: that her siblings' experiences would affect her, thus making it less likely that she might have any reasonable doubt. Just as defense counsel's venire-wide inquiry in *Arnold* did not directly address a prospective juror's personal bias, in this case, defense counsel's general inquiry about reasonable doubt did not directly address the concerns of bias raised by Ms. J. on October 6, 2011.

Second, we find that the totality of Ms. J.'s responses did not indicate that she could set aside what happened to her brother and sister. The Court of Appeals has held that, even when a prospective juror ultimately gives some assurance of an ability to be impartial, if the prospective juror's voir dire as a whole suggests equivocation, the juror is not fit to serve (*see Torpey*, 63 NY2d at 367-368; *Blyden*, 55 NY2d at 78-79). In *Torpey*, a prospective juror stated that she had a negative view of the defendant due to her impression that he had ties to organized crime as a result either of things she had read in the newspaper or conversations with her husband who worked for the local sheriff's office. The prospective *Torpey* juror's voir dire

ended with the trial court asking her if she could set aside what she heard about the defendant and give both sides a fair trial based on the evidence alone. She replied, "I think I can" (*Torpey*, 63 NY2d at 363-365). In *Blyden*, the prospective juror expressed race-based bias towards the defendant, after which the trial court obtained an assurance by the prospective *Blyden* juror that he thought he could set aside his bias and that his mind was "absolutely" not made up (*Blyden*, 55 NY2d at 75). In both cases, the Court of Appeals concluded that, despite some assurance that these prospective jurors could set aside their biases, the voir dire taken as a whole indicated that each prospective juror had not given an unequivocal assurance of impartiality (*Torpey*, 63 NY2d at 369; *Blyden*, 55 NY2d at 79). As the Court of Appeals cautioned in *Blyden*, "A hollow incantation, made without assurance or certitude, is not enough. Where there remains any doubt in the wake of such statements, when considered in the context of the juror's over-all responses, the prospective juror should be discharged for cause" (*Blyden*, 55 NY2d at 78).

That is precisely the issue at play in this case. Although Ms. J. told the trial court on October 5, 2011 that she could be fair and impartial, only one day later she raised the very same concerns about bias that had prompted the trial court's inquiry. Accordingly, the trial court should have retained a doubt about

her ability to be impartial when considering all of her statements in context and taken as a whole.

We therefore disagree with our dissenting colleagues that the trial court's ability to observe firsthand Ms. J's demeanor supports the denial of defense counsel's for-cause challenge. Regardless of the genuineness of Ms. J's answers on October 5, 2011, she still had doubts about her ability to be fair and impartial, as demonstrated by her own words on October 6, 2011. As the Court of Appeals has stated, "[T]he trial court should lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve" (*People v Branch*, 46 NY2d 645, 651 [1979]). We find that based on the totality of her voir dire, Ms. J. was indeed of dubious impartiality and should have been excused for cause; she openly reiterated, understandably, that the heinous crimes committed against her siblings would affect her despite her prior assurance to the trial court that they would not.

The decision not to excuse Ms. J. for cause constituted reversible error as defense counsel was forced to use a peremptory challenge to excuse her and subsequently expended all of his peremptory challenges prior to the end of jury selection (*see* CPL 270.20[2]; *People v Braxton*, 277 AD2d 39, 40 [1st Dept

2000], *lv denied* 95 NY2d 961 [2000]). Although Ms. J. would have sat as an alternate, the replacement juror who ultimately sat in the alternate seat wound up serving on the jury. Therefore, the issue is not moot (*see People v White*, 297 AD2d 587, 588 [1st Dept 2002], *lv denied* 99 NY2d 565 [2002]).

We have considered and rejected defendant's arguments concerning suppression rulings. Since we are ordering a new trial, we find it unnecessary to reach any other issues.

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

WEBBER, J. (dissenting)

I respectfully dissent. In my opinion, the trial court properly denied defendant's challenge for cause to a prospective juror. The totality of the responses by the prospective juror established that she could be fair and impartial.

Defendant was charged with second-degree murder, first-degree manslaughter and second-degree criminal possession of a weapon. It was alleged that defendant quarreled with the deceased during a basketball game at a neighborhood playground, that he left the playground and returned 20 minutes later with a gun and shot and killed the deceased.

During the preliminary voir dire by the court, the prospective juror, referred to as Ms. J., informed the court of crimes that had been committed against two of her siblings. Ms. J. responded to follow-up questions from the court, and provided multiple unequivocal assurances that she could consider what "happen[ed] in the courtroom" rather than in her personal life. Ms. J. also informed the court that while her son had been convicted of a drug-related crime, his conviction would not prevent her from being a fair and impartial juror. Thus, she assured the court that she would be able to render an impartial verdict based on the evidence (*see People v Chambers*, 97 NY2d 417 [2002]).

Contrary to the conclusion of the majority, defense counsel's question to Ms. J. as to reasonable doubt also allayed any concerns as to her bias or inability to be fair and impartial. During the People's voir dire, Ms. J. stated that the fact that her siblings had been the victims of crimes would "probably" impact her ability to be fair. During the voir dire by the defense, defense counsel asked if she would have any problem in returning a verdict of not guilty if she had a reasonable doubt. She stated, she would have, "no problem." She then repeated her response when asked by the People to do so. Thus, Ms. J. stated unequivocally that she would be fair and impartial and would have no difficulty returning a not guilty verdict if she had a reasonable doubt (*see People v Chambers*, 97 NY2d at 419; *People v Narvaez*, 125 AD3d 415 [1st Dept 2015], *lv denied* 25 NY3d 991 [2015]).

Here, unlike in *People v Arnold* (96 NY2d 358, 364 [2001]), which is cited by the majority, defense counsel's question regarding reasonable doubt, which was directed specifically to Ms. J., did "force her to confront the crucial question whether she could be fair to this defendant in light of her expressed predisposition" (*id.* at 363-364). Further, unlike in *People v Blyden* (55 NY2d 73, 78-79 [1982]) also cited by the majority, the totality of Ms. J.'s responses indicated that she could set aside

any bias or hostility based upon what happened to her siblings.

As noted by the Court of Appeals in *People v Williams* (63 NY2d 882 [1984]):

> "most if not all jurors bring some predispositions, of varying intensity, when they enter the jury box. It is only when it is shown that there is a substantial risk that such predispositions will affect the ability of the particular juror to discharge his responsibilities (a determination committed largely to judgment of the Trial Judge with his peculiar opportunities to make a fair evaluation) that his excuse is warranted. Were the rule otherwise, it would be difficult not to require the discharge . . . of every potential juror who disclosed anything but total absence of prejudice . . . , notwithstanding his stated readiness to lay his feelings aside in the discharge of his duties as a juror" (*id.* at 885).

Clearly Ms. J. brought with her certain life experiences. However, her final and unequivocal responses to the questions posed by the court and defense counsel clearly indicated that those life experiences would not interfere with her ability to be fair and impartial or to follow the court's instructions to render an impartial decision.

Finally, this Court should defer to the determination of the trial court that the challenge for cause should have been denied. As noted in *Williams,* the trial court was in the best position to observe the demeanor of the prospective juror and to determine if her promise to be impartial was credible (*People v Arnold*, 96 NY2d at 363; *see also People v Shulman*, 6 NY3d 1, 27 [2005], *cert denied* 547 US 1043 [2006]; *People v Ellis*, 305 AD2d 208 [1st Dept

2003], *lv denied* 100 NY2d 580 [2003]).

Based on the voir dire record as a whole, and giving due deference to the determination of the trial court, I do not believe it was an improvident exercise of discretion to have denied defendant's challenge for cause.

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

ENTERED: DECEMBER 8, 2016

CLERK

Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1915 Alfonso Marin, Index 105616/06
Plaintiff-Respondent,

-against-

New York City Health and Hospitals Corporation, et al.,
Defendants-Appellants,

Reginald E. Manning, M.D.,
Defendant.

_____

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for appellants.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for respondent.

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Judgment, Supreme Court, Supreme Court, New York County (Ellen M. Coin, J.), entered February 18, 2015, after a jury verdict, awarding plaintiff $2,000,000 in past pain and suffering, $4,000,000 in future pain and suffering over 30 years, $6,477.10 for medical care annually for 30 years with a cost growth rate of 4%, $3,351.42 for medication annually for 30 years with a cost growth rate of 4%, $12,555.79 for equipment and supplies annually for 30 years with a cost growth rate of 4%, and $7,084.48 for physical therapy annually for 30 years with a cost growth rate of 4%, and assessing interest on the judgment against defendant Brian A. Donaldson at a rate of 6%, unanimously modified, on the law and the facts, to assess interest on the

judgment against Brian A. Donaldson at 3% and to reduce the annual cost growth rate on the future expenses to 3%, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly.

This case arises out of a surgical amputation following plaintiff's suffering a crush injury to his leg from being hit by a car. Defendants' argument that the jury's verdict was not supported by legally sufficient evidence or was against the weight of evidence is unavailing. Sufficient evidence was adduced by plaintiff supporting his theory that Dr. Donaldson should have, in his attempt to save plaintiff's leg, employed a Fogarty catheter to reestablish circulation in the larger blood vessels and then admitted plaintiff to ICU for 24-36 hours to determine whether the leg was viable (*see Douayi v Carissimi*, 138 AD3d 410 [1st Dept 2016]). Plaintiff's expert's testimony, based upon plaintiff's medical records, that the chance of saving the leg was 30-40%, was legally sufficient to support the verdict (*see King v St. Barnabas Hosp.*, 87 AD3d 238 [1st Dept 2011]).

Nor did the court err in denying defendants' request to place the driver of the vehicle that struck plaintiff, who settled prior to institution of the instant action, on the verdict sheet. Defendants are subsequent tortfeasors, and the jury was correctly charged that its award was to be limited to

the exacerbation of the original injury caused by malpractice (*see Bergan v Home for Incurables*, 75 AD2d 762 [1st Dept 1980]; *Cohen v New York City Health & Hosps. Corp.*, 293 AD2d 702 [2d Dept 2002]). Defendants' argument that plaintiff's original injury and subsequent amputation were indivisible is without merit, in that the experts testified as to what the condition of the leg would have been if it had been saved (*compare Taromina v Presbyterian Hosp. in City of N.Y.*, 242 AD2d 505 [1st Dept 1997]). Defendants' arguments concerning General Obligations Law § 15-108 are academic, given that the court reduced the judgment based upon the settlement received by the settling driver.

Finally, we find no basis to reduce the jury's award of damages. Contrary to the arguments put forth by the dissent, the jury's award did not deviate materially from what would be reasonable compensation (CPLR 5501). The award was in line with similar verdicts which have been upheld (*see Lopez v New York City Tr. Auth.*, 60 AD3d 529 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010]; *Hoenig v Shyed*, 284 AD2d 225 [1st Dept 2001]). The testimony was that plaintiff suffered from shrinking stump and ulcers from the prosthetic, of which he has had five. Further, the testimony was that his condition would only worsen over time, as would his ability to ambulate, and at some point he would be confined to a wheelchair. Given the testimony heard by the jury,

there is no basis to conclude, as suggested by the dissent, that the jury did not, as instructed, award damages for an exacerbation of the original injury, and not the original injury itself. While the jury's award of annual expenses was based upon sufficient evidence, the increases in cost percentages it assigned to those categories of damages were above those testified to by plaintiff's own expert, and should be reduced as indicated. Lastly, the judgment against New York City Health and Hospitals Corporation employee, Dr. Donaldson, should be amended to reflect the appropriate interest amount of 3% (*see Ebert v New York City Health & Hosps. Corp.*, 82 NY2d 863, 866-867 [1993]).

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

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

TOM, J.P. (dissenting in part)

While I agree with the majority that the jury's finding on liability was supported by sufficient evidence and was not against the weight of the evidence, and that the trial court correctly denied defendants' request to add the driver of the vehicle that struck plaintiff to the verdict sheet, I would reduce the jury's awards for past and future pain and suffering of $2 million and $4 million to $1.5 million and $3 million respectively, and reduce the overall judgment interest to 3%.

With regard to damages, the jury's award deviated materially from what would be reasonable compensation (CPLR 5501). It is true that similar verdicts have been upheld, or reduced to amounts in line with the jury's award here (*see Lopez v New York City Tr. Auth.*, 60 AD3d 529 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010]; *Hoenig v Shyed*, 284 AD2d 225 [1st Dept 2001]). In this case, however, plaintiff's injury arose out of a surgical amputation of his leg following his suffering a crush injury to his leg from being hit by a car. Accordingly, the jury was instructed that the verdict could only award damages for an exacerbation of the original injury, and not the original injury itself. Thus, the award here was not for the entire injury, but only for the exacerbation of the original injury, a serious injury in and of itself. Moreover, even assuming plaintiff's leg

was salvageable, it cannot be reasonably concluded that it would not have had deficits caused by the crush injuries from the accident. Indeed, defendants' expert testified to this likelihood. Therefore, the award should be reduced as indicated.

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

ENTERED: DECEMBER 8, 2016

CLERK

Acosta, J.P., Renwick, Feinman, Kahn, JJ.

2036-
2037-
2038

Index 650793/14

Highbridge House Ogden LLC,
Plaintiff-Respondent,

-against-

Highbridge Entities LLC,
Defendant-Appellant.

_____

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

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

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 27, 2015, to the extent it granted plaintiff's motion for summary judgment dismissing the counterclaim for specific performance of a contract for the sale of real property, and order, same court and Justice, entered on or about October 28, 2015, which denied defendant's motion to renew plaintiff's motion, unanimously affirmed, without costs. Order, same court and Justice, entered March 10, 2016, to the extent it granted plaintiff's motion for summary judgment dismissing defendant's second counterclaim for breach of contract and return of its deposit, unanimously reversed, on the law, with costs, and the motion denied.

Generally, courts in this State "may not look beyond the

agreed-upon remedies to award the buyer specific performance in circumstances other than those in which the parties agreed it would be available" (*101123 LLC v Solis Realty LLC*, 23 AD3d 107, 113 [1st Dept 2005]). Pursuant to the parties agreement in this case, defendant buyer was required to bring an action within 45 days after the plaintiff seller's alleged default. Because the defendant buyer failed to meet this requirement, the motion court correctly held that the claim for specific performance was barred. Defendant buyer's motion to renew this argument was likewise unavailing.

However, where a seller seeks to invoke a restricted remedies clause, the seller must first acknowledge that a title defect exists (*see S.E.S. Importers, Inc. v Pappalardo*, 53 NY2d 455, 464-465 [1981]; *101123 LLC*, 23 AD3d at 111). This is not a case, as the motion court incorrectly found, where the plaintiff seller "'conceded from the outset its inability to convey clear title, and invoked from the outset the restricted remedies clause of the contract'" (*Highbridge House Ogden LLC v Highbridge Entities LLC*, 48 Misc 3d 976, 991 [Sup Ct, NY County 2015] [quoting *101123 LLC*, 23 AD3d at 111-112]). Here, it is clear from the record that plaintiff seller denied any defect in title and instead insisted that defendant buyer timely close

notwithstanding any defect.[1] Doing so was insufficient to invoke the restricted remedies clause. As a result, the motion court erred in finding that the restricted remedies clause applied in this case. Alternatively, even if the restricted remedies clause controlled the resolution of this dispute, the motion court was incorrect in finding that the defendant buyer defaulted. Under the restricted remedies clause, defendant buyer was entitled to a five-day election period upon receipt of plaintiff seller's notice invoking the restricted remedies clause, to elect either to terminate or accept "as is." Requesting an adjournment before this five-day election period expired did not constitute a default by defendant buyer. Thus, plaintiff seller's motion for summary judgment on defendant buyer's breach of contract counterclaim seeking return of its deposit should have been denied.

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

ENTERED: DECEMBER 8, 2016

CLERK

[1] In fact, seller did not acknowledge any title defect until this appeal.

Mazzarelli, J.P., Renwick, Richter, Manzanet-Daniels, Feinman, JJ.

2301 Davidoff Hutcher & Citron LLP formerly known as Davidoff Malito & Hutcher LLP, Plaintiff-Appellant, Index 156137/12

-against-

Ioori Smirnov, et al., Defendants-Respondents.

Davidoff Hutcher & Citron LLP, New York (Joseph N. Polito of counsel), for appellant.

Law Office of Mario DeMarco, P.C., Port Chester (Mario DeMarco of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Ira Gammerman, JHO), entered on or about September 10, 2015, deemed appeal from judgment, same court and JHO, entered September 16, 2015, which, to the extent appealed from, awarded plaintiff $27,291.15 in unpaid legal fees and no prejudgment interest, unanimously modified, on the law, to award plaintiff $73,477.98 in unpaid fees, plus prejudgment interest of $28,299.74, for a total award of $101,777.72, and as so modified, affirmed, without costs.

The addition of prejudgment interest to plaintiff's award for unpaid legal fees under quantum meruit was mandatory (see CPLR 5001; *Ash & Miller v Freedman*, 114 AD2d 823 [1st Dept 1985]). Moreover, where plaintiff was required to seek

permission to withdraw, it was required to continue to zealously represent defendants until the court granted its motion to withdraw (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[d], [e]). Therefore, it was incorrect for the JHO to refuse to consider any value for plaintiff's work from the time it moved by order to show cause to withdraw. This is particularly true where plaintiff sought, but was denied, an adjournment of the trial date, and the court took six months to grant the application.

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

ENTERED: DECEMBER 8, 2016

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2410 The People of the State of New York, Respondent, SCID 99059/14

-against-

Juan Rodriguez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for respondent.

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Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about November 4, 2014, which adjudicated defendant a risk level two sex offender pursuant to the Sex Offender Registration Act (SORA) (Correction Law art 6-C), unanimously affirmed, without costs.

In determining whether a departure from the presumptive risk reoffense level determined by the Board of Examiners of Sex Offenders (the Board) is warranted, the court must follow a three step process. First, it must determine "whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines" (*People v Gillotti*, 23 NY3d 841, 861 [2014]). Second, "the court must decide whether the party requesting the departure has adduced

sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in the case at hand" (*id.*). Finally, if defendant has made these showings, "the court must exercise its discretion by weighing the aggravating and mitigating factors to determine whether the totality of the circumstances warrants a departure to avoid an over- or under-assessment of the defendant's dangerousness and risk of sexual recidivism" (*id.*).

Here, although the SORA court should have made a better record, we see no reason to alter the court's determination and we therefore uphold the level two adjudication.

Defendant argues that he should be assessed no more than five points under factor 9 (prior crimes) for his 1977 felony conviction for attempted criminal possession of a weapon in the third degree (Penal Law § 70.02[1][d]) because it occurred 14 years prior to his sex offense conviction. However, it cannot be said that the timing of a prior nonviolent felony conviction is not adequately taken into account by the guidelines, since factor 10 provides for an additional 10 points where it was committed within three years of the sexual offense, and defendant was not assessed any points under factor 10.

Defendant's age is taken into account by the SORA guidelines to the extent that his age at the time of his first sex offense

is accounted for in factor 8. Defendant was not assessed any points because he was over 20 when he committed his first sex offense. Moreover, defendant failed to adduce sufficient evidence to meet his burden of proof to establish that his age makes him less likely to reoffend. While defendant cites to several research studies indicating that advanced age may correlate with decreased recidivism rates, he did not present any expert testimony or other evidence at the hearing that might have allowed the SORA court to make a finding that defendant is less likely to reoffend based on his age.

This Court has previously found that a low score on the Static-99 test, which defendant here received, is not by itself sufficient for a downward departure because, unlike the SORA Risk Assessment Instrument, the Static-99 does not take into account the nature of the sexual contact with the victim or the potential harm that could be caused in the event of reoffense (*People v Roldan*, 140 AD3d 411, 412 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]). Here, defendant's offense involved sexual contact with a 12-year-old. Accordingly, while defendant's risk of reoffense may be low, the potential for harm in the event of reoffense is high.

Defendant failed to present any expert testimony or other evidence that would have permitted the SORA court to find that

his social network decreases the likelihood that he will reoffend.

Finally, defendant's ex post facto argument relating to the more favorable sex offender conditions imposed on him in the state where he committed the underlying offense is without merit (*see People v Gravino*, 14 NY3d 546, 556-558 [2010]; *People v Parilla*, 109 AD3d 20, 29 [1st Dept 2013], *lv denied* 21 NY3d 865 [2013]; *see also People v McGarghan*, 83 AD3d 422 [1st Dept 2011]).

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2417 The People of the State of New York, Respondent, Ind. 2390/12

-against-

Twanek Cummings, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Twanek Cummings, appellant pro se.

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J. at jury selection; Bruce Allen, J. at remainder of trial and sentencing), rendered January 16, 2014, convicting defendant of assault in the first degree, two counts of attempted assault in the first degree, two counts of criminal possession of a weapon in the second degree, and two counts of assault in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 18 years, unanimously affirmed.

The court providently admitted, as an excited utterance, the statement of an unidentified bystander, audible on the 911 call made by one of the victims, that implicated defendant. All of the circumstances – most significantly that the statement was made immediately after the shooting – established a strong

likelihood that the declarant observed the shooting (*see People v Fratello*, 92 NY2d 565, 571 [1998], *cert denied* 526 US 1068 [1999]).

Although a contrary ruling on the excited utterance issue had been made by a previous judge, who presided over part of jury selection but was unable to continue because of illness, this circumstance did not foreclose the successor judge's ruling by operation of the law of the case doctrine. The ruling was evidentiary and did not fall within the ambit of that doctrine (*see People v Evans*, 94 NY2d 499 [2000]). Defendant does not dispute that this was the type of ruling that, under *Evans*, may be revisited by a successor judge in a retrial. We see no reason to apply a different rule where there are successive judges in the same trial (*see People v Johnson*, 301 AD2d 462 [1st Dept 2003], *lv denied* 99 NY2d 655 [2003]; *People v McLeod*, 279 AD2d 372 [1st Dept 2001], *lv denied* 96 NY2d 921 [2001]).

In any event, any error in admitting the declaration was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We have considered and rejected defendant's pro se challenge to the sufficiency of the evidence.

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2419-
2420 In re Yisrael R.,

A Child Under Eighteen Years of Age,
etc.,

Jocelyn R.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 8, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about November 24, 2014, which found that the respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The Family Court's finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i]

[B], 1046[b][i]). The evidence established that respondent incurred positive toxicology results for phencyclidine (PCP) on March 12 and March 31, 2013, in the last trimester of her pregnancy, just before the subject child was born on April 3, 2013, and that she has a prior history of PCP abuse (*Matter of Omarion T. [Isha M.]*, 128 AD3d 583 [1st Dept 2015]). Moreover, she previously failed to successfully complete a drug treatment program, but maintained, after twice testing positive for PCP during pregnancy, that she did not believe drug treatment would benefit her because she did not have a drug problem (*Matter of Nasiim W. [Keala M.]*, 88 AD3d 452 [1st Dept 2011]; *see also Matter of Chastity O.C. [Angie O.C.]*, 136 AD3d 407, 407-408 [1st Dept 2016]). In these circumstances, contrary to respondent's assertions, "the lack of actual harm to [the child] is irrelevant" (*id. at* 408; *see also Matter of Cruz*, 121 AD2d 901 [1st Dept 1986]).

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2421 Gabriel Netzahuall, Index 306553/09
Plaintiff,

-against-

All Will LLC,
Defendant-Respondent,

Lime Light Construction Corp.,
Defendant-Appellant.

_____

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered June 23, 2015, which, to the extent appealed from as limited by the briefs, denied defendant Lime Light's cross motion to dismiss defendant All Will's common law indemnification claims against it, unanimously affirmed, without costs.

Workers Compensation Law § 11 provides that an employer is not liable for contribution or indemnity to any third-party based on injuries sustained by its employee acting within the scope of employment unless the third-party proves that the employee sustained a "grave injury" (*see New York Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501, 510 [2014]). It is undisputed that plaintiff here did not sustain such an injury.

During a hearing before the Workers' Compensation Board (WCB), plaintiff and Lime Light stipulated that the latter employed the former, and the WCB awarded benefits. Based on that determination, plaintiff did not oppose dismissal of his direct claims against Lime Light, but All Will, the owner of the premises where plaintiff was working, seeks common law indemnification from Lime Light, its general contractor.

To successfully invoke the doctrine of collateral estoppel, which precludes a party or those in privity from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action, the issue in the second action must be identical to the issue raised, necessarily decided, and material in the first action; and the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action (*see Jeffreys v Griffin,* 1 NY3d 34, 39 [2003]).

It is undisputed that All Will was not a party to the Workers' Compensation proceeding and did not have a full and fair opportunity to litigate the issue of whether Lime Light was plaintiff's employer at the time of the accident. The motion court properly found that All Will was not precluded from presenting evidence challenging this finding (*see Vera v NYC*

Partnership Hous. Dev. Fund Co., Inc., 40 AD3d 472 [1st Dept 2007]). There is no basis to adopt Lime Light's assertions, the effect of which would be that WCB determinations are automatically entitled to collateral estoppel effect, without the need to meet the elements of the doctrine.

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2424 In re Rosemarie Sylvester, Index 400421/14
Petitioner-Appellant,

-against-

The New York City Board of Education,
Respondent-Respondent.

_____

Rosemarie Sylvester, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered December 18, 2014, which denied the petition to vacate an arbitration award finding, inter alia, that petitioner inflicted corporal punishment on a special education student and imposing a $10,000 fine, and dismissed the proceeding brought pursuant to CPLR article 75 and Education Law § 3020-a, unanimously affirmed, without costs.

The Hearing Officer's determination was supported by adequate evidence, was rational, and was not arbitrary and capricious (*see generally Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [1st Dept 2008]). The sustained specifications were supported by the testimony and written statements from four school employees who testified to the injured student's account of the incident, and that a red

mark was observed on the student's cheek. The record also showed that petitioner, during a formal classroom observation, exhibited poor planning and ineffective teaching. Petitioner was also habitually late, and admittedly used inappropriate language.

Petitioner's due process rights were not violated because she was provided with notice, an appropriate hearing, and the opportunity to present evidence and cross-examine witnesses (*see Matter of Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425 [1st Dept 2013]). Nor did petitioner sustain her burden of demonstrating bias or misconduct by the Hearing Officer (*see Batyreva v N.Y.C. Dept. of Educ.*, 95 AD3d 792 [1st Dept 2012]).

The arbitration award, which imposed a $10,000 fine upon petitioner, does not shock our sense of fairness (*see e.g. Stoyer-Rivera v New York City Bd./Dept. of Educ.*, 101 AD3d 584 [1st Dept 2012]]).

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

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2425 RXR WWP Owner LLC, Index 653553/13
Plaintiff-Appellant,

-against-

WWP Sponsor, LLC, et al.,
Defendants,

American Realty Capital Properties, Inc.
doing business as American Realty Capital,
et al.,
Defendants-Respondents.

_____

Herrick Feinstein LLP, New York (John R. Goldman of counsel), for appellant.

Morrison Cohen LLP, New York (Mary E. Flynn of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about March 25, 2016, which, inter alia, granted defendants American Realty Capital Properties, Inc. and American Realty Capital New York Recovery REIT, Inc.'s motion for partial summary judgment and denied plaintiff RXR WWP Owner LLC's cross motion to vacate the stay on discovery, unanimously affirmed, with costs.

On a prior appeal (132 AD3d 467 [1st Dept 2015]) (*RXR I*), we held:

> "ARC's [American Realty Capital Properties, Inc. and American Realty Capital New York Recovery REIT, Inc.] arguments regarding plaintiff's ability to prove lost profits

> 'are more appropriately addressed on a motion for summary judgment' and are 'premature' on a motion to dismiss. In addition, . . . plaintiff plausibly alleges that ARC's breach of the confidentiality agreement caused plaintiff to lose its deal with WWP. Therefore, we delete the limitation on damages on the breach of the confidentiality agreement cause of action, without prejudice to limiting such damages on summary judgment" (*id.* at 468-469 [citations omitted]).

Our earlier holding, on a motion to dismiss, brought pursuant to CPLR 3211, that plaintiff plausibly pled a claim for lost profits, does not constitute "law of the case" barring ARC from moving for summary judgment, which is subject to a different standard of review (*see Friedman v Connecticut Gen. Life Ins. Co.*, 30 AD3d 349, 349-350 [1st Dept 2006], *mod on other grounds* 9 NY3d 105 [2007]). Unlike in *Friedman v Connecticut Gen. Life Ins. Co.* (9 NY3d 105, 116 [2007]), the attack on the lost profits claim here does not go to the sufficiency of the pleadings, something determined on the motion to dismiss. Rather, ARC challenges the factual predicate for plaintiff's claimed entitlement to lost profits, something which is appropriately addressed on summary judgment and was not determined on the earlier appeal.

The motion court properly found that plaintiff failed to establish that lost profits are recoverable here. There is nothing in the Confidentiality Agreement which would support a

finding that the parties contemplated lost profits as an element of damages in the event of breach (*see Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). To the contrary, the agreement states that neither party "will have any rights or obligations . . . with respect to the Transaction . . . other than matters specifically agreed to herein," and plaintiff's underlying agreement with WWP Sponsor, LLC (WWP) did not even provide for plaintiff to obtain lost profits in the event that WWP cancelled the deal. Even if the parties had contemplated lost profits, as an element of damages, the same would not be recoverable here, as plaintiff's lost profits are attributable to its own termination of the underlying agreement, after failing to satisfy a condition of closing (*see RXR I*, 132 AD3d at 468).

Plaintiff's claimed need for discovery, unsupported by any evidentiary basis to suggest that the same may lead to relevant evidence, is insufficient to deny summary judgment (CPLR 3212[f]; *Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]).

Finally, plaintiff failed to raise "a reasonable concern

about the appearance of impartiality," such as would warrant the need for reassignment to another Justice (*cf. Crawford v Liz Claiborne, Inc.*, 45 AD3d 284, 287 [1st Dept 2007], *revd on other grounds* 11 NY3d 810 [2008].

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2426 The People of the State of New York, Ind. 1050/91
Respondent,

-against-

Kelvin Haywood,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., Distrit Attorney, New York (Kelly L. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Neil E. Ross, J.), entered March 31, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Even assuming that defendant's correct point score is 95 rather than 105, he remains a level two offender, and we find no

basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or outweighed by the seriousness of the underlying offense.

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2427 In re Joe J. R. L.,

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

Erica Maria L.,
Respondent-Appellant,

Jewish Child Care Association of New York,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn Marie Orsatti of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), and Freshfields Bruckhaus Deringer US LLP, New York, (Vincent Sherman of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about August 11, 2015, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to the Commissioner of Social Services of the City of New York and petitioner agency for purposes of adoption, unanimously affirmed, without costs.

The findings of permanent neglect are supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]). The record demonstrates that the agency made diligent efforts to

strengthen the parental relationship, which included providing the mother with referrals to mental health services and parenting skills classes, offering to escort her to a required mental health examination, and scheduling regular visitation (*see Matter of Alani G. [Angelica G.]*, 116 AD3d 629 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]). However, the mother failed, during the statutorily relevant time period, to plan for the child's return by failing to complete a mental health evaluation, which was necessary to tailor services to her needs. She also refused to permit case planners to visit her home, which had been found to be in an extremely unsanitary condition, to determine whether it would be safe and adequate for the child.

The mother's contention that the record is inadequate for review because it does not include orders issued in the neglect proceeding, or any mental health evaluation that may have been prepared, is without merit. She failed to offer those documents into evidence during the hearing, and has never asked the court to take judicial notice of the orders.

A preponderance of the evidence supports the determination that termination of the mother's parental rights is in the best interests of the child, who has been in foster care since the first week of his life (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child is well cared for by his foster

mother, who meets his special needs and hopes to adopt him. As the mother has no realistic or feasible plan to provide an adequate and stable home for the child, a suspended judgment is not in the child's best interests (*see Matter of Zhane A.F. [Andrea V.F.]*, 139 AD3d 458 [1st Dept 2016], *lv denied* 27 NY3d 1187 [2016]; *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 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2428 Deutsche Bank National Trust Company, etc., Plaintiff-Respondent, Index 381221/13

-against-

Micah Umeh, Defendant-Appellant,

Mortgage Electronic Registration Systems, Inc., etc., et al., Defendants.

_____

Micah Umeh, appellant pro se.

Leopold & Associates, PLLC, Armonk (Richard P. O'Brien of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about September 22, 2015, which denied the motion of defendant Micah Umeh to dismiss the complaint as against him, unanimously affirmed, without costs.

Once defendant placed plaintiff's standing into issue, it was plaintiff's burden to establish its standing by showing physical possession of the note prior to commencement of the action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). Here, plaintiff attached the note, which was annexed to the certificate of merit, to its complaint. While the averments in the certificate of merit were insufficient to establish

delivery and possession, the fact that the note was in plaintiff's possession at the time of commencement, as evidenced by its attachment to the complaint, was sufficient (*see Nationstar Mtge., LLC v Catizone*, 127 AD3d 1151 [2nd Dept 2015]).

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2429-
2429A Index 650285/14

StormHarbour Securities LP,
Plaintiff-Respondent,

-against-

IIG Trade Opportunities Fund N.V.,
Defendant-Appellant.

_____

Ford O'Brien LLP, New York (Robert S. Landy of counsel), for appellant.

Slarskey LLC, New York (David Slarskey of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered October 7, 2015, in favor of plaintiff, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered September 29, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff established prima facie that the transaction that closed within the one-year (tail) period following the termination of the parties' letter agreement (Engagement Letter) was "a substantially similar transaction to the Transaction" as defined in the letter. Both the closed transaction and the defined "Transaction" consisted of more than $200 million of first-lien and second-lien financing placed with institutional investors and secured by trade finance instruments. That broad

definition contemplated that the precise structure of the deal was to be determined. Indeed, after defining "Transaction," the Engagement Letter provides that plaintiff "shall . . . provide feedback and advice to [defendant] on . . . the most appropriate features of the instruments and the structure of the Transaction."

In opposition, defendant failed to raise an issue of fact. Nothing in the Engagement Letter excludes the application of the tail fee provision to Deutsche Bank simply because Deutsche Bank purchased the instruments initially as an underwriter for later sale to end investors (*see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 403-404 [2009]). Moreover, the record demonstrates that the instruments were sold to Deutsche Bank and that Deutsche Bank, BlueMountain Capital

Management, LLC, and KKR & Co. L.P. were "Prospective Investors" under the Engagement Letter.

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

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2431 The People of the State of New York, Ind. 4833/13
Respondent,

-against-

Angel Crispin,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered April 1, 2014,

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

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

ENTERED: DECEMBER 8, 2016

CLERK

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

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2432 The People of the State of New York, Ind. 554/06
Respondent,

-against-

Roland Nelson,
Defendant-Appellant.

_____

Seymour W. James, The Legal Aid Society, New York (Andrea L. Bible 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 (Renee A. White, J.), entered October 29, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently assessed 15 points under the risk factor for drug abuse, because defendant was found to have possessed drugs while in prison and admitted that he had previously used cocaine and marijuana (*see People v Palmer*, 20 NY3d 373 [2013]). Furthermore, regardless of whether his correct point score is 85 or 100, he remains a level two offender, and there is no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]) in light of the seriousness of the underlying offense, which involved repeated sex acts against a

vulnerable child.

Defendant's procedural claims regarding the court's denial of a downward departure are unpreserved, and in any event do not warrant a remand for further proceedings.

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2433 Yoav Stein, et al., Index 110599/10
Plaintiffs-Appellants,

-against-

Gavriel Reisner,
Defendant-Respondent.

_____

Wimpfheimer & Wimpfheimer, New York (Michael C. Wimpfheimer of counsel), for appellants.

Kearse Law LLP, New York (Brendan P. Kearse of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 11, 2015, as amended by order, same court and Justice, entered June 16, 2015, which, inter alia, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

We do not reach the breach of contract claim, since plaintiffs make no argument in support of reinstating it (*see Carey & Assoc. LLC v 521 Fifth Ave. Partners, LLC*, 130 AD3d 469, 470 [1st Dept 2015]). Were we to address plaintiffs' argument, raised for the first time in opposition to defendants' motion (*see People v Grasso*, 50 AD3d 535, 571 [1st Dept 2008]), that the contested document was not a contract but a written assignment exempt from the requirement of consideration (*see* General Obligations Law § 5-1107), we would reject it. The documentary

evidence demonstrates that defendant intended not to transfer ownership of the property in the present but to "make a testamentary disposition effective only after [his] death, [which] is invalid unless made by will" (*Gruen v Gruen*, 68 NY2d 48, 53 [1986]).

The promissory estoppel claim was correctly dismissed, because in any event plaintiffs failed to show that they reasonably relied in May 2010 on a promise that defendant had unambiguously revoked in April 2010 (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011], *lv denied* 21 NY3d 853 [2013]). Plaintiffs also failed even to allege, let alone show, injury, since one of them never claimed to have sustained a loss, the second received a full refund of the down payment she had made, and the third testified that the closing on the property she was purchasing was still in "process." Although plaintiffs now claim that they "los[t] time and money in searching for new apartments," that

loss does not constitute the requisite "unconscionable injury" (*see Melwani v Jain*, 281 AD2d 276 [1st Dept 2001]; *see also Darby Trading Inc. v Shell Intl. Trading & Shipping Co. Ltd.*, 568 F Supp 2d 329, 341-342 [SD NY 2008]).

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2434 Andrew Bendel, Index 114112/11
Plaintiff-Appellant-Respondent,

-against-

Ramsey Winch Company,
Defendant-Appellant,

Automobile Club of New York, Inc., et al.,
Defendants-Respondents,

DG Towing Equipment & Service, et al.,
Defendants.

_____

Strongin Rothman & Abrams, LLP, New York (Howard F. Strongin of counsel), for appellant.

Weitz & Luxenberg, PC, New York (David Green of counsel), for appellant-respondent.

Law Offices of James J. Toomey, New York (Robert Varga of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered October 15, 2015, which, to the extent appealed from as limited by the briefs, denied in part the motion of defendant Ramsey Winch Company (Ramsey Winch) for summary judgment dismissing the complaint and all cross claims as against it, and denied plaintiff's motion for summary judgment on the issue of liability on his claims against defendants Automobile Club of New York, Inc., AAA of New York, Inc. (collectively AAA) and Quan Li, unanimously reversed, on the law, without costs, and the motions

granted. The Clerk is directed to enter judgment in favor of Ramsey Winch dismissing the complaint and all cross claims against it.

Plaintiff was injured when his car, which was being lifted by a winch onto a flatbed tow truck owned by AAA and operated by its employee, Quan Li, slid off the back of the truck, pinning plaintiff's leg between the car and a parking meter. The truck was manufactured by defendant Dynamic Towing Equipment & Manufacturing and contained a winch designed, manufactured, and sold by Ramsey Winch.

Ramsey Winch moved for summary for summary judgment which the court partially granted, leaving claims for nuisance and a design defect in the winch. There is no basis in the record to maintain any public or private nuisance claims. Moreover, there was no design defect claim in the pleadings, including the cross claims asserted by AAA against Ramsey Winch. While AAA has asked this Court to deem the pleadings conformed to the proof, we decline to do so for the first time on appeal (*see M Entertainment, Inc. v Leydier*, 71 AD3d 517, 520 [1st Dept 2010]) and, in any event, the proof is absent here. Maintaining a design defect claim requires a showing that the design defect was a substantial factor in plaintiff's accident and that it was possible for the product, here, the winch, to be designed in a

safer manner (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983]). There is also no evidence in the record showing that the winch, at the time it was manufactured, could have been designed differently. Rather, the evidence suggests that all winches, at that time, were designed in the same manner. Also, the evidence shows that AAA's tow operator, Quan Li, was not properly trained on the winch or provided with a copy of the winch's operating manual.

In view of the dismissal of the complaint in its entirety as against Ramsey Winch, the cross claims as against it are also dismissed.

Furthermore, since the evidence showed that AAA's inadequate training of Quan Li and his operation of the winch were the proximate causes of the accident, and that plaintiff was not in any way culpable, plaintiff is entitled to summary judgment on the issue of liability on his claims against AAA and Quan Li.

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2435 The People of the State of New York, Respondent, Ind. 131/14

-against-

Torain Simmons, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered March 12, 2015, convicting defendant, after a jury trial, of burglary in the second degree and petit larceny, and sentencing him to an aggregate term of five years, unanimously affirmed.

The court properly denied defendant's request for a voluntariness charge regarding recorded phone calls he made while incarcerated pending trial. Defendant introduced no evidence that created a factual dispute for the jury to resolve regarding the voluntariness of these calls (*see People v Cefaro*, 23 NY2d 283, 286 [1968]). CPL 60.45 is inapplicable because no public servant, or anyone else, did anything to *obtain* statements from defendant; the role of the Department of Correction was limited to recording the calls and making them available to the

prosecutor. Defendant argues that although he received notice that his calls were being recorded, he was not warned that the recorded conversations could be turned over to the prosecution. However, the lack of such a warning does not constitute coercion, go to the voluntariness of the making of the calls, or warrant the application of doctrines relating to interrogation, which obviously did not occur here. As the Court of Appeals observed in resolving a related right-to-counsel issue, "Defendant was not induced by any promise, or coerced by the Department, to call friends and family and make statements detrimental to his defense" (*People v Johnson*, 27 NY3d 199, 206 [2016]).

After an inquiry that was sufficient under the circumstances, the court properly exercised its discretion in denying defendant's eve-of-trial request for new counsel. The court had granted defendant's similar request to replace his first counsel when the trial was about to begin. When, after working with his second counsel for about three months without complaint, defendant repeated the same request, as the parties were waiting for the prospective jurors to enter the courtroom, the court had a basis to view that request as a delaying tactic rather than a legitimate complaint about counsel (*see People v Linares*, 2 NY3d 507, 511 [2004]). Defendant's argument that the court failed to conduct a minimal inquiry before denying his

request is unsupported by the record. The court provided defendant with a full opportunity to air his grievances against counsel, and it specifically asked defendant if he wished to add anything. Defendant's generalized complaints, which were suspiciously similar to his attacks on his first counsel, did not establish good cause for a substitution or require further inquiry (*see e.g. People v Agola*, 139 AD3d 584, 587 [1st Dept 2016]).

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2436 The People of the State of New York, Ind. 7529/02
Respondent,

-against-

Adonai Laureano,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about September 26, 2014, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841

[2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument or outweighed by aggravating factors, including the seriousness of the underlying offense.

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2437 Zurich American Insurance Company, Index 159837/14
Plaintiff-Respondent,

-against-

Endurance American Speciality
Insurance Company,
Defendant-Appellant.

_____

Melito & Adolfsen P.C., New York (S. Dwight Stephens of counsel), for appellant.

Coughlin Duffy LLP, New York (Gabriel E. Darwick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 25, 2016, which denied defendant's motion for summary judgment, unanimously affirmed, with costs.

Plaintiff seeks a declaration that Newmark Knight Frank (and certain other entities) are additional insureds under a policy that defendant issued to Kras Interior Contracting Corp. Defendant's policy says, "The following are included as additional insureds: Any entity required by *written* contract . . . to be named as an insured" (emphasis added). On October 11, 2012, Newmark sent a purchase order/agreement to Kras. It said, "THIS PURCHASE ORDER AND AGREEMENT IS A LEGAL AGREEMENT BETWEEN CONTRACTOR [i.e., Kras] AND NEWMARK . . ., AS AGENT FOR OWNER [41 West 34th Street, LLC, and/or 34th Street Commercial

Properties, LLC]. BY ACCEPTING THE ORDER, VENDOR [*i.e.*, Kras] HEREBY AGREES TO BECOME BOUND BY THE TERMS OF THIS AGREEMENT." This purchase order/agreement required Kras to obtain a policy naming the owner and the owner's property manager (i.e., Newmark) as additional insureds. The purchase order/agreement contained no signature lines and, accordingly, remained unsigned. Kras accepted Newmark's purchase order/agreement by beginning to perform the ordered work.

On November 12, 2012, a Kras employee was injured on the job; he eventually sued the owner. Plaintiff in the case at bar (Newmark's insurer) sought additional insured coverage for Newmark and the owner from defendant. When defendant refused, this action ensued.

Defendant contends that Newmark and the owner are not additional insureds because the purchase order/agreement was unsigned. However, defendant's policy merely requires a "written" contract, not a "signed" one. By contrast, in *Cusumano v Extell Rock, LLC* (86 AD3d 448 [1st Dept 2011]), the policy said, "The following are also an insured when you [Regions, the contractor in Kras' position] have agreed, in writing, in a contract or agreement that another person or organization be added as an additional insured on your policy, provided the injury or damage occurs subsequent to the *execution* of the

contract or agreement" (*Cusumano v Extell Rock, LLC,* 2010 NY Slip Op 30898(U), *14 [Sup Ct, NY County 2010] [some italics deleted], *mod* 86 AD3d 448 [1st Dept 2011]). As the motion court in *Cusumano* found, the insurer analogous to defendant in the case at bar "expressly included the word 'executed' in[] its Policy, thereby requiring that any agreement by Regions to add a person/organization as an additional insured be memorialized in a signed contract" (*id.* at *16).

Defendant also relies on *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.* (33 AD3d 570 [1st Dept 2006]). The policy in that case, like the subject policy, merely required a "written contract." However, the issue in *National Abatement* was whether a written contract existed at the time of the accident (*see National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.,* 2006 NY Slip Op 30315[U], *10 [Sup Ct, NY County 2006], *affd* 33 AD3d 570 [1st Dept 2006]), not whether the written contract also had to be signed.

In the case at bar, unlike *National Abatement,* there is no doubt that a written contract – *viz.,* the purchase order/agreement that Newmark sent to Kras – existed at the time of the accident. Moreover, the contract in *National Abatement* contained signature lines, but Newmark's purchase order/agreement did not; instead, it said, "BY ACCEPTING THE ORDER, VENDOR HEREBY

AGREES TO BECOME BOUND BY THE TERMS OF THIS AGREEMENT." Under the circumstances, the court did not err by finding that the unsigned purchase order constituted a written contract for purposes of the additional insured endorsement (*see e.g. LMIII Realty, LLC v Gemini Ins. Co.*, 90 AD3d 1520, 1521 [4th Dept 2011]).

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2438 The People of the State of New York, Ind. 2593/02
Respondent,

-against-

L.A. Lewis,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about April 16, 2015, which adjudicated defendant a level two sexually violent predicate offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant defendant's request for a downward departure (*see People*

v Gillotti, 23 NY3d 841 [2014]). The mitigating factors defendant relied upon were adequately taken into account in the risk assessment instrument, and were, in any event, outweighed by the egregiousness of defendant's underlying conduct.

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

ENTERED: DECEMBER 8, 2016

CLERK

CORRECTED ORDER - JANUARY 17, 2017

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2439N Robin B. Vaca, Index 114747/09
Plaintiff-Appellant,

-against-

Village View Housing Corporation, et al.,
Defendants-Respondents-Appellants.
- - - - -
[And a Third-Party Action]

_____

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

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Joseph A.H. McGovern of counsel), for Village View Housing Corporation and Metro Management & Development, Inc., respondents-appellants.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for Fowler Equipment Company, respondent-appellant.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 16, 2015, which granted plaintiff's motion to strike defendants' answers, and directed that the answers not be reinstated unless defendants respond to plaintiff's discovery demands, unanimously modified, on the facts, to grant plaintiff's motion unless, within 45 days after notice of entry of this order, defendants provide responsive discovery or an affidavit stating that a search has been conducted and the documents do not

exist, and, as so modified, affirmed, without costs.

The motion court providently exercised its discretion in issuing a conditional order striking the answer after defendants failed to comply with numerous orders directing them to provide discovery or an affidavit stating that a search had been conducted and the documents did not exist (*see Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]). An order striking the answer without giving defendants another opportunity to "cure" their discovery deficiencies would have been inappropriate in light of plaintiff's own discovery deficiencies and failure to provide a proper good-faith affirmation in compliance with 22 NYCRR 202.7 (*see DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581 [1st Dept 2011]; *see also Jackson v Hunter Roberts Constr. Group, L.L.C.*, 139 AD3d 429, 430 [1st Dept 2016]). However, the conditional order should provide that the motion is granted "'unless' within a specified time the resisting party submits to the disclosure,'" and we modify solely to that effect (*Gibbs v St. Barnabus Hosp.*, 16 NY3d 74, 79 [2010] [CPLR 3126]; *see also Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532 [1st Dept 2013]).

We have considered the parties' other arguments for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 8, 2016

CLERK

Mazzarelli, J.P., Friedman, Acosta, Andrias, Moskowitz, JJ.

2440N In re Marianne Spiegel, Index 114420/11
Plaintiff-Appellant,

-against-

Carl Kempner,
Defendant-Respondent,

John Doe Nos. 1 through 5,
Defendants.

_____

Rea & Associates, LLC, New York (Edward M. Shapiro of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered June 10, 2015, which denied plaintiff's motion to remove the case from Civil Court to Supreme Court and, upon removal, to amend the complaint, unanimously affirmed, without costs.

This is plaintiff's second motion to remove the action from Civil Court to Supreme Court. Her first was denied in January 2012, on the ground that she had not made a sufficient showing on the merits of her case to warrant the relief requested. On this second motion, plaintiff again failed to show that there was "some reasonable basis" for her claim for increased damages or indeed that the damages can be attributed to negligence on defendant's part (*Matter of Victor v de Maziroff*, 275 App Div 69,

75 [1st Dept 1949], *affd* 300 NY 686 [1950]; *see Platt v Flesher*, 115 AD3d 468 [1st Dept 2014]).

Nor did plaintiff establish her right to amend the complaint, since she did not proffer a reasonable excuse for her failure to make her second motion until more than three years after the first one was denied and nearly nine years after the flooding incident in question (*see Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 293-294 [1st Dept 2004]). Contrary to plaintiff's contention, defendant has been hindered in the preparation of his case as a result of her delay (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23-24 [1981]).

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

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

ENTERED: DECEMBER 8, 2016

CLERK