SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 2, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Saxe, Richter, JJ.

630-
631 Index 101559/13

In re Talib W. Abdur-Rashid,
Petitioner-Appellant,

-against-

New York City Police Department, et al.,
Respondents-Respondents.

- - - - -

In re Samir Hashmi,
Petitioner-Respondent,

-against-

New York City Police Department, et al.,
Respondents-Appellants.

- - - - -

New York Civil Liberties Union, Brennan Center for Justice, Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative Newsmedia, Association of American Publishers, Inc., Bloomberg L.P., Buzzfeed, Daily News, LP, the E.W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group, Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech,
Amici Curiae.

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Law Firm of Omar T. Mohammedi, LLC, New York (Omar T. Mohammedi of counsel), for Talib W. Adbur-Rashid and Samir Hashmi, for appellant/respondent.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for New York City Police Department and Raymond Kelly, respondents/appellants.

Mariko Hirose, New York, Jordan Wells, New York, and Christopher Dunn, New York, for New York Civil Liberties Union, amicus curiae.

Michael Price, New York, for Brennan Center for Justice, amicus curiae.

Davis Wright Tremaine LLP, New York (Alison Schary of counsel), for Reporters Committee for Freedom of the Press, Advance Publications, Inc., American Society of News Editors, AOL-Huffington Post, Association of Alternative Newsmedia, Association of American Publishers, Inc., Bloomberg L.P., Buzzfeed, Daily News, LP, the E.W. Scripps Company, First Look Media, Inc., Hearst Corporation, Investigative Reporting Workshop at American University, the National Press Club, National Press Photographers Association, the New York Times Company, North Jersey Media Group, Inc., Online News Association, the Seattle Times Company, Society for Professional Journalists and Tully Center for Free Speech, amici curiae.

Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered September 25, 2014, denying the petition brought pursuant to CPLR article 78 seeking to compel respondents New York City Police Department (NYPD) and NYPD Commissioner Raymond Kelly to disclose documents requested by petitioner Talib W. Abdur-Rashid pursuant to the Freedom of Information Law (FOIL) (Public Officers Law § 84 *et seq.*), and granting respondents'

motion to dismiss the proceeding, unanimously affirmed, without costs. Order, same court (Peter H. Moulton, J.), entered on or about November 17, 2014, which denied respondents' motion to dismiss the petition brought pursuant to CPLR article 78 seeking to compel them to disclose documents requested by petitioner Samir Hashmi pursuant to FOIL, and ordered respondents to submit an answer to the petition, unanimously reversed, on the law, without costs, the motion to dismiss granted, and the order to submit an answer vacated. The Clerk is directed to enter judgment dismissing the proceeding brought by petitioner Samir Hashmi.

FOIL does not prohibit respondents from giving a Glomar response to a FOIL request — that is, a response "refus[ing] to confirm or deny the existence of records" where, as here, respondents have shown that such confirmation or denial would cause harm cognizable under a FOIL exception (*Wilner v Natl. Sec. Agency*, 592 F3d 60, 68 [2d Cir 2009], *cert denied* 562 US 828 [2010] [interpreting the Freedom of Information Act [FOIA]). Although petitioners contend that such a response is impermissible in the absence of express statutory authorization, the Glomar doctrine is "consistent with the legislative intent and with the general purpose and manifest policy underlying FOIL"

(*Matter of Hanig v State of N.Y. Dept. of Motor Vehs.*, 79 NY2d 106, 110 [1992] [internal quotation marks omitted]), since it allows an agency to safeguard information that falls under a FOIL exemption.

Although federal case law regarding FOIA is not binding on this Court, it is "instructive" when interpreting FOIL provisions (*Matter of Lesher v Hynes*, 19 NY3d 57, 64 [2012] [internal quotation marks omitted]), and the application of the Glomar doctrine to FOIA requests has been widely approved by federal circuit courts (*see Wilner*, 592 F3d at 68 [citing decisions of four other circuit courts upholding or endorsing the Glomar doctrine as applied to FOIA requests]). We have considered the differences between the two statutes, as identified by petitioners, amici curiae, and the *Hashmi* court (46 Misc 3d 712, 722-724 [Sup Ct, NY County 2014]), but find that they do not justify rejecting the Glomar doctrine in the context of FOIL.

Respondents' invocations of the Glomar doctrine were not affected by an error of law (*see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]). Respondents met their burden to "articulate particularized and specific justification" for declining to confirm or deny the existence of the requested

records, which sought information related to NYPD investigations and surveillance activities (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] [internal quotation marks omitted]). In particular, respondents showed that answering petitioners' inquiries would cause harm cognizable under the law enforcement and public safety exemptions of Public Officers Law § 87(2) (*see* § 87(2)[e], [f]; *see generally Gould*, 89 NY2d at 274-275).

The affidavits submitted by NYPD's Chief of Intelligence establish that confirming or denying the existence of the records would reveal whether petitioners or certain locations or organizations were the targets of surveillance, and would jeopardize NYPD investigations and counterterrorism efforts. The records sought here are a subset of the records found properly exempt under FOIL in *Matter of Asian Am. Legal Defense & Educ. Fund v New York City Police Dept.* (125 AD3d 531, 532 [1st Dept 2015], *lv denied* 26 NY3d 919 [2016]). We see no reason to depart from this recent precedent.

By this decision, we do not suggest that any FOIL request for NYPD records would justify a Glomar response. "An agency resisting disclosure of the requested records has the burden of proving the applicability of [a FOIL] exemption" and must

submit "a detailed affidavit showing that the information logically falls within the claimed exemptions" and "the basis for [the agency's] claim that it can be required neither to confirm nor to deny the existence of the requested records" (*Wilner*, 592 F3d at 68 [internal quotation marks omitted]). In view of the heightened law enforcement and public safety concerns identified in the affidavits of NYPD's intelligence chief, Glomar responses were appropriate here.

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

ENTERED: JUNE 2, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1153-
1154 The People of the State of New York
Respondent,

-against-

Daniel Powell,
Defendant-Appellant.

Ind. 2680/13

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

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

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered April 30, 2014, as amended June 10, 2014, convicting defendant, upon his plea of guilty, of attempted promotion of prison contraband in the first degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The written waiver of appeal signed by defendant, insofar as it expressly "waives any and all rights to appeal *including the right to file a notice of appeal"* (emphasis added) is unenforceable (*see People v Santiago*, 119 AD3d 484 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014]). Even though the waiver permits the filing of a notice of appeal for constitutional

speedy trial claims or challenges to the legality of the sentence, it still "discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself" (*id.* at 485-486).

We find that the court properly denied, without a hearing, defendant's motion to suppress contraband found in his waistband while he was a Rikers Island inmate awaiting trial. Given the limited privacy rights of inmates, including pretrial detainees (*see Florence v Board of Chosen Freeholders of County of Burlington*, 566 US __, 132 S Ct 1510 [2012]; *Bell v Wolfish*, 441 US 520, 557 [1979]), defendant did not set forth any basis for suppression (*see People v Mendoza*, 50 AD3d 478 [1st Dept 2008], *lv denied* 11 NY3d 739 [2008]). This was the fair import of the court's decision (*see People v Nicholson*, 26 NY3d 813 [2016]), and we reject defendant's arguments concerning the scope of our review.

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

ENTERED: JUNE 2, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Manzanet-Daniels, Gesmer, JJ.

1166 The People of the State of New York, SCI 299/15
Respondent,

-against-

Jaime Cintron,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Marc J. Whiten, J.), rendered April 21, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and sentencing him as a second violent felony offender, to a term of 8 years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal (*see People v Powell*, __ AD3d __ [1st Dept 2016]), we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 2, 2016

CLERK

Tom, J.P., Saxe, Richter, Gische, Webber, JJ.

1211 Violet Idehen, Index 652469/13
Plaintiff-Appellant,

-against-

Teachers College Columbia
University, et al.,
Defendants-Respondents.

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Law Offices of K.C. Okoli, P.C., New York (Kenechukwu C. Okoli of counsel), for appellant.

Nixon Peabody LLP, Jericho (Tara E. Daub of counsel), for respondents.

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Order, Supreme Court, New York County, (Joan A. Madden, J.), entered November 8, 2014, which granted defendants' motion to dismiss the complaint, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs, for the reasons stated by Madden, J.

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1343 The People of the State of New York, Respondent, Ind. 3141/13

-against-

Suyoung Yun,
Defendant-Appellant.

_____

Gotlin & Jaffe, New York (David Delbaum of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered on or about July 2, 2014, as amended August 15, 2014, convicting defendant, after a jury trial, of predatory sexual assault, kidnapping in the second degree and burglary in the first degree, and sentencing him to an aggregate term of 15 years to life, unanimously affirmed.

Defendant was not entitled to a mistrial based on revelations during trial that, although the victim had provided the People with certain relevant messages on her cell phone, which were duly disclosed to defendant, she had deleted other allegedly relevant messages before meeting with the prosecutor, and that she subsequently sold the phone with the prosecutor's approval. The People were not obligated to acquire evidence with

potential exculpatory or impeachment value from private parties (*People v Hayes*, 17 NY3d 46, 51 [2011], *cert denied* 565 US __, 132 S Ct 844 [2011]; *People v Reedy*, 70 NY2d 826 [1987]), or to "prevent the destruction of [such] evidence" (*People v Banks*, 2 AD3d 226, 226 [1st Dept 2003], *lv denied* 2 NY3d 737 [2004]). In any event, defendant received suitable remedies by way of a stipulation that explained the circumstances to the jury, as well as the court's offer of an opportunity for further cross-examination if desired.

The court also properly exercised its discretion in denying defendant's mistrial motion based on the People's delayed disclosure of their discussion with the victim of the possibility that she could improve her immigration situation through a special visa for certain types of crime victims. Defendant received a full opportunity during trial to exploit this information for whatever impeachment value it may have had (*see People v Brown*, 67 NY2d 555, 559 [1986], *cert denied* 479 US 1093 [1987]).

The evidence established the element of serious physical injury (Penal Law § 10.00 [10]). Defendant rendered the victim unconscious by choking her, and the People's expert testified that choking capable of causing a loss of consciousness poses a

substantial risk of death (*see People v Abreu*, 283 AD2d 194, 194-195 [1st Dept 2001], *lv denied* 96 NY2d 898 [2001]).

Defendant did not preserve his contentions regarding his kidnapping conviction, his claim that the prosecutor constructively amended the indictment by arguing an improper theory of guilt, and his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1345 In re Lihanna A., etc.,

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

Marcella H.,
Respondent-Appellant,

St. Dominic's Home,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), attorney for the child.

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about March 23, 2015, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent's contention that the proceeding to terminate her parental rights on the ground of permanent neglect could not be maintained, since the child had been directly placed in a

custodial home, rather than with an authorized agency, is unpreserved, as it is raised for the first time on appeal (*see e.g Matter of Seth Jacob S. [Vincent S.]*, 134 AD3d 636 [1st Dept 2015]). In any event, the argument is unavailing (*see Matter of Dale P.*, 84 NY2d 72 [1994]; *Matter of Anthony Julius A.*, 231 AD2d 462 [1st Dept 1996]; *Matter of Hannah D.*, 292 AD2d 867 [4th Dept 2002]).

The finding of permanent neglect was supported by clear and convincing evidence. The record demonstrates that the agency exercised diligent efforts to encourage and strengthen respondent's relationship with the child by referring her to drug treatment programs and by scheduling regular supervised visitation (*see Matter of Senaya Simone J. [Andrea J.]*, 136 AD3d 434 [1st Dept 2016]; *Matter of Alexis Alexandria G. [Brandy H.]*, 134 AD3d 547, 548 [1st Dept 2015]). Despite these diligent efforts, respondent failed to meaningfully address the problems that led to the child's placement by failing to complete a drug treatment program and by relapsing on multiple occasions. She also failed to visit the child regularly (*see Matter of Jayden S. [Kim C.]*, 124 AD3d 488 [1st Dept 2015]; *Matter of Alford Isaiah B. [Alford B.]*, 107 AD3d 562 [1st Dept 2013]; *Matter of Jonathan M.*, 19 AD3d 197 [1st Dept 2005] *lv denied* 5 NY3d 798 [2005]).

The court's finding that it was in the child's best interest to be freed for adoption is supported by a preponderance of the evidence (*see generally Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has been living in the custodial home since she was nine months old, is thriving in the home, and there is no evidence that respondent has planned for the child's future (*see Matter of Jaylin Elia G. [Jessica Enid G.]*, 115 AD3d 452 [1st Dept 2014]).

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1346 Board of Managers of the South Star, Plaintiff-Respondent, Index 159128/12

-against-

WSA Equities, LLC, et al., Defendants-Appellants,

Corcoran Group Marketing, etc., et al., Defendants.

Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, Uniondale (Philip J. Campisi, Jr. of counsel), for appellants.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Jared E. Paioff and Steven D. Sladkus of counsel), for respondent.

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered October 23, 2014, which, to the extent appealed from, denied defendants WSA Equities, LLC, 80 John Condominium, LLC, Fredric Oliver, Carol Achenbaum, William Achenbaum, and Michael Achenbaum (the sponsor defendants) and WSA Management, Ltd.'s motion to dismiss the first cause of action (breach of contract) as against WSA Equities and 80 John, the second cause of action (fraud) as against the sponsor defendants, and the eighth cause of action (breach of contract) as against WSA Management, unanimously modified, on the law, to grant the motion

as to so much of the second cause of action as is based on omissions (as opposed to affirmative misrepresentations), and otherwise affirmed, without costs.

The Martin Act (General Business Law § 352-c) does not bar a common-law breach of contract claim (*885 W.E. Residents Corp. v Coronet Props. Co.*, 220 AD2d 305 [1st Dept 1995]).

To the extent the fraud claim is based on omissions in the offering plan (e.g. paragraph 121 of the complaint), it is barred by the Martin Act (*see e.g. Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236 [2009]). However, to the extent it is based on defendants' affirmative misrepresentations (e.g. paragraphs 122 and 125 of the complaint), it is not so barred (*see e.g. Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]).

The fraud claim is not duplicative of the first cause of action (*see e.g. Wyle Inc. v ITT Corp.*, 130 AD3d 438, 440 [1st Dept 2015]).

The motion court correctly sustained the fraud claim as against the individual defendants. "[A] corporate officer who participates in the commission of a tort may be held individually liable ... regardless of whether the corporate veil is pierced" (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 558 [1st Dept 2009]

[internal quotation marks omitted]).

The eighth cause of action sufficiently pleads breach of contract (*see Mee Direct, LLC v Automatic Data Processing, Inc.*, 102 AD3d 569 [1st Dept 2013]).

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

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1347 Yefim Vaynshelbaum, et al., Index 153759/12
Plaintiffs-Appellants,

-against-

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

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered June 5, 2014, which granted defendants' motion for a directed verdict on opening statements, denied their motion in limine as moot, and dismissed the complaint, unanimously modified, on the law, to deny the motions as to the causes of action alleging intentional battery, vicarious liability, and loss of services, and otherwise affirmed, without costs.

On the morning that trial was to begin, defendants submitted a motion in limine seeking, inter alia, "preclusion" of five of the eight causes of action and a motion for a directed verdict on opening statements. The next day, after plaintiffs had submitted written opposition and opening statements were made, the court granted the motion for a directed verdict.

Plaintiffs' opening statement warranted dismissal of the negligence and negligent battery claims, because the claim that defendant Shepard used excessive force in handcuffing plaintiff Vaynshelbaum is fatally inconsistent with the negligence claims (*see Oteri v Village of Pelham*, 100 AD3d 725 [2d Dept 2012]; *Wertzberger v City of New York*, 254 AD2d 352, 352 [2d Dept 1998]).

However, plaintiffs' opening statement did not make any factual admissions that were fatal to their intentional battery claim based on Officer Shepard's alleged use of excessive force (*see Echavarria v Cromwell Assoc.*, 232 AD2d 347, 347 [1st Dept 1996]). To the extent defendants' eve-of-trial motion actually sought to dismiss the claims pursuant to CPLR 3211(a)(1) based on the inadequacy of plaintiffs' notice of claim, we note that defendants did not provide plaintiffs with notice and a fair opportunity to respond (CPLR 2214[b]).

In any event, the notice of claim provided sufficiently specific notice of the time, place and nature of the intentional battery claim to enable the City defendants to investigate (*see Brown v City of New York*, 95 NY2d 389, 393-394 [2000]; *Rivera v City of New York*, 169 AD2d 387 [1st Dept 1991]). Plaintiffs were not required to use the word "intentional" to give notice of

their legal theory of recovery, since the facts alleged provided notice of the excessive force theory (*see Miller v City of New York*, 89 AD3d 612 [1st Dept 2011]).

The notice of claim did not, however, provide adequate notice of the claims for false imprisonment, negligent hiring, retention and training, and intentional infliction of emotional distress (*see Scott v City of New York*, 40 AD3d 408, 409-410 [1st Dept 2007]). As plaintiffs do not address those claims in their appellate papers, and the claims would be subject to dismissal upon a proper motion to dismiss, we deem them abandoned.

Since the intentional battery claim is reinstated, the related vicarious liability and loss of services claims are also reinstated.

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1348 Roberto Rodriguez, Index 110422/10
Plaintiff-Appellant,

-against-

Jessica L. Baranek, et al.,
Defendants-Respondents.
- - - - -
[And Another Action]

_____

Cannon & Acosta, LLP, Huntington Station (Gary R. Small of counsel), for appellant.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for Jessica L. Baranek, respondent.

Russo, Apoznanski & Tambasco, Melville (Susan J. Mitola of counsel), for Hawel Santana Montero, respondent.

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Appeal from order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 30, 2014, and from order, same court and Justice, entered on or about January 15, 2015, which, following a summary jury trial, denied plaintiff's motion for a mistrial and dismissed the case, unanimously dismissed, without costs.

Plaintiff's posttrial motion, although framed as a motion for a mistrial based on an inconsistent verdict, in essence sought to set aside the jury's verdict as against the weight of the evidence, and is therefore prohibited by the summary jury

trial rules, which the parties agreed to follow. Moreover, those rules prohibit appeals, and therefore plaintiff's appeal should be dismissed (*Conrad v Alicea*, 117 AD3d 560 [1st Dept 2014], *lv dismissed* 24 NY3d 946 [2014]).

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1349-
1350 The People of the State of New York, Respondent,

Ind. 2478/12
2303/13

-against-

Wanel Gutierrez,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered February 26, 2014, convicting defendant, upon his pleas of guilty, of burglary in the third degree and grand larceny in the fourth degree, and sentencing him to concurrent terms of one year, unanimously modified, on the law, to the extent of vacating the larceny sentence and remanding for a youthful offender determination on that conviction only, and otherwise affirmed.

The court sufficiently advised defendant of the rights he was giving up by pleading guilty, "notwithstanding that it omitted the word 'jury' from its reference[s] to giving up the right to a trial" (*People v Williams*, 137 AD3d 706, 706 [1st

Dept 2016]).

Defendant was ineligible to be considered for youthful offender treatment in connection with his burglary conviction because he was 19 years old when the offense was committed. However, although it is clear from the discussion of YO treatment during plea proceedings that the court was not inclined to grant such treatment on the larceny conviction, the court did not make the requisite explicit determination on the record at the sentencing proceeding, requiring that the matter be remanded for that purpose (see *People v Rudolph*, 21 NY3d 497 [2013]; *People v Basono*, 122 AD3d 553 [1st Dept 2014], *lv denied* 25 NY3d 1069 [2015]; *People v Smith*, 113 AD3d 453 [1st Dept 2014]).

We perceive no basis for reducing the sentences.

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1351 Carolina Del Carmen Diaz, as Administratrix of the Goods, Chattels and Credits of Angel Quito, Deceased,
Plaintiff-Respondent,

-against-

Elyvan Vasquez Bocheciamp, et al.,
Defendants-Appellants,

Rana Waterproofing & Construction Co., et al.,
Defendants.

Index 302931/07

Mauro Lilling NaParty LLP, Woodbury (Seth M. Weinberg of counsel), for appellants.

Marc A. Seedorf, Bronx, for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about November 6, 2015, which, among other things, denied defendants Elyvan Vasquez Bocheciamp and Esther Vasquez's posttrial motion to set aside the verdict and direct that judgment be entered in their favor or, alternatively, that a new trial be ordered, unanimously reversed, on the law, without costs, and the motion to set aside the verdict granted. The Clerk is directed to enter judgment dismissing the complaint against said defendants.

Plaintiff's decedent died after falling to the ground while working on the roof of a house owned by defendants. The sole issue at trial was whether defendants' house was a one- or two-family dwelling subject to the homeowner exemption from liability under Labor Law §§ 240(1) and 241(6). We find that the evidence established, as a matter of law, that the house was, at most, a two-family dwelling. Accordingly, defendants are entitled to judgment in their favor (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

The applicability of the homeowner exemption is determined by a "site and purpose" test (*Bartoo v Buell*, 87 NY2d 362, 367-368 [1996]), which "hinges upon the site and the purpose of the work" and "must be employed on the basis of the homeowners' intentions at the time of the injury" (*Farias v Simon*, 122 AD3d 466, 467 [1st Dept 2014] [internal quotation marks omitted]). Here, the evidence established that, at the time of the accident, defendants' house was a two-family residential home with a basement apartment, where a family friend lived, and three upper floors, which defendants shared with an adult child and two grandchildren. Defendants did not receive any rental income. That three families, two of which are related, lived in the home is insufficient to raise an issue of fact as to whether the home

was a three-family dwelling (*see Patino v Drexler*, 116 AD3d 534, 535 [1st Dept 2014]). Nor do the notices of property value from the New York City Department of Finance raise an issue as to whether defendants intended to use the home as a three-family dwelling (*see Farias*, 122 AD3d at 467), particularly given defendant Elyvan Vasquez Bocheciamp's uncontradicted testimony regarding the use and layout of the home. Although plaintiff refers to the top floor of the home as an "apartment," she points to no evidence that it contained anything other than two bedrooms, which were occupied by defendants' grandchildren. Accordingly, there was no basis for the jury to conclude that the home was a three-family dwelling (*Cohen*, 45 NY2d at 499).

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1354 In re Livan F.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about August 6, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a controlled substance in the seventh degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress a bag containing drugs, which he discarded while fleeing from the police. The recovery of the drugs was not the product of any unlawful police conduct.

Once the police arrived at the location specified in a radio report of a fight among about 20 youths involving sticks and other weapons, a security guard informed the police that three male youths, who seemed to have initiated the fight, had fled east. The guard described one of them as having a "medium" complexion and wearing a white shirt. Contrary to appellant's contention, the face-to-face encounter with the security guard was significantly more reliable than an anonymous tip (*see People v Wallace*, 89 AD3d 559, 560 [1st Dept 2011], *lv denied* 18 NY3d 963 [2012]; *People v Herold*, 282 AD2d 1, 6 [2001], *lv denied* 97 NY2d 682 [2001]). Just a few minutes after the police had received the radio report, they found three youths about one and a half blocks east of where they had encountered the security guard, and the testifying officer noticed that appellant's shirt and skin tone matched the description provided by the guard.

Although that description was fairly generic, once appellant made eye contact with the two uniformed police officers and then immediately grabbed the right side of his waistband, turned around, and started running away from the police, the totality of the circumstances gave rise to reasonable suspicion justifying the police pursuit of appellant (*see People v Pitman*, 102 AD3d 595, 596 [1st Dept 2013], *lv denied* 21 NY3d 1018 [2013]). The

testifying officer convincingly explained that he recognized appellant's act of touching his waistband as a sign that he had a handgun, based on the officer's training and experience, confirming his suspicion that appellant might be armed based on his match with a description of a youth who had initiated a large, armed and possibly gang-related fight (*see People v White*, 117 AD3d 425 [1st Dept 2014], *lv denied* 23 NY3d 1044 [2014]).

Appellant's argument that the testifying officer failed to identify him in court, and that the presentment agency failed to present any witness who could testify that appellant was the person who was chased and arrested by the police, is unavailing. The testifying officer described the relevant facts leading up to and including his own recovery of the bag, based on his firsthand observations. Accordingly, his testimony established all the facts necessary to establish the legality of the police conduct, which was the only issue to be decided at the suppression hearing.

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1355 In re Dawn Webb, Index 654123/13
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel),for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max McCann of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Frank P. Nervo, J.), entered September 10, 2014, which, insofar as appealed from as limited by the briefs, denied the petition seeking to vacate the penalty of termination imposed on petitioner after an arbitration hearing, and dismissed the proceeding brought pursuant to CPLR article 75, unanimously affirmed, without costs.

A court must uphold a sanction imposed unless it is so disproportionate to the offense that it shocks the conscience and therefore, constitutes an abuse of discretion (*see Matter of Featherstone v Franco,* 95 NY2d 550, 554 [2000]; *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222, 233 [1974]).

Petitioner, a tenured teacher with a 15 year career, does not challenge the findings that over a two-year time period at numerous different schools she committed forty acts of misconduct, including insubordination, dereliction of duty, and incompetence. She also does not deny that she ignored the efforts of numerous supervisors and administrators to remedy her pedagogical deficiencies, contending that she became demoralized when she was assigned to the absent teacher reserve pool and did not have permanent assignment at one school.

The penalty of termination of employment was not unduly harsh or excessive given petitioner's failure to conform her behavior to the requirements of the job and her unwillingness to accept assistance or improve her performance. Respondents were not required to assign petitioner to the position she desired, and the record reflects that she was warned many times that her

conduct would result in disciplinary action. Despite these warnings, petitioner failed to take steps to correct the deficiencies noted by numerous supervisors and administrators.

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1356 The People of the State of New York, Ind. 6360/03
Respondent,

-against-

Luis Roldan,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about July 25, 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]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument. The egregiousness of the underlying crime indicated a danger that a reoffense by defendant would cause a high degree of harm. Defendant has not shown that his low-moderate Static-99 score, or any of the other factors he cites, warrants a downward departure.

The Static-99R does not take into account the nature of the sexual contact with the victim or the degree of harm that would potentially be caused in the event of reoffense. In any event, the low-moderate score appears to be consistent with the risk assessment instrument, which scored defendant at the low end of level two.

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1357 CB Richard Ellis, Inc., Index 101259/12
Plaintiff-Respondent,

-against-

Harleysville Insurance Company
of New Jersey,
Defendant-Appellant,

Wade Ray & Associates Construction,
Inc., etc.,
Defendant.

_____

O'Connor Redd LLP, Port Chester (Amy L. Fenno of counsel), for appellant.

Fixler & LaGattuta, LLP, New York (Jason Fixler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered February 3, 2015, which, insofar as appealed from, denied the cross motion of defendant Harleysville Insurance Company of New Jersey (Harleysville) for summary judgment and granted the motion of plaintiff, CB Richard Ellis, Inc. (CBRE), for summary judgment declaring that Harleysville must defend it in the underlying personal injury action, unanimously affirmed, with costs.

Under New Jersey law, "[a]n insurer's duty to defend an action brought against its insured depends upon a comparison

between the allegations set forth in the complainant's pleading and the language of the insurance policy" (*Flomerfelt v Cardiello*, 202 NJ 432, 444, 997 A2d 991, 998 [2010]). Although the basis of the complaint in the underlying personal injury action alleged a sidewalk fall due to ice and snow, the removal of which is excluded from coverage under the Harleysville policy issued to defendant Wade Ray & Associates Construction, Inc. (Wade Ray), the underlying complaint further alleged the underlying defendants' general negligence in the ownership, operation, management, maintenance and control of the premises and/or sidewalk where the accident occurred. As amplified by the bill of particulars (*see Tierney v Tierney*, 13 NJ Misc 654, 656, 179 A 314, 315 [NJ Ch 1935]), the underlying defendants were also allegedly negligent in failing to safeguard, cordon off or provide warning signs in the unsafe, slippery area. Since the allegations in the underlying complaint, as amplified by the bill of particulars, do not all arise out of ice and snow removal,

Harleyville's duty to defend CBRE as an additional insured under the policy issued to Wade Ray was properly triggered (*see Flomerfelt v Cardiello*, 202 NJ at 444, 997 A2d at 998).

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1358 Darya Braverman, Index 306221/11
Plaintiff-Respondent,

-against-

Eric Braverman,
Defendant-Appellant.

_____

Law Office of Frank Taddeo, Jr., New York (Frank Taddeo, Jr. of counsel), for appellant.

Hindin Deutsch P.C., New York (Bettina D. Hindin of counsel), for respondent.

Bender & Rosenthal, LLP, New York (Susan L. Bender of counsel), attorney for the children.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about November 6, 2014, which awarded plaintiff primary physical and legal custody of the parties' children, and ordered, inter alia, defendant to have supervised therapeutic access time with the children, unanimously affirmed, without costs.

There is a sound and substantial evidentiary basis for the court's custody determination (*see Matter of Frank M. v Donna W.*, 44 AD3d 495 [1st Dept 2007]; *see also Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). Sufficient evidence supports the court's determination that defendant, a physician, committed medical

child abuse by exaggerating the children's symptoms and repeatedly subjecting them to unnecessary and at times invasive medical treatment (*see Matter of Andrew B.*, 49 AD3d 638 [2d Dept 2008], *lv denied* 10 NY3d 714 [2008]; *Matter of Patrick GG.*, 286 AD2d 540, 544 [3d Dept 2001]). The court-appointed psychiatrist, specialists in medical child abuse, and the children's pediatrician testified that defendant relentlessly pursued diagnostic medical treatments, took the children to unnecessary specialists, and took them for appointments against the advice of and without telling the pediatrician. The court's determination is further supported by reports from Comprehensive Family Services of his supervised visits with the children, which describe his fixation with their health, his desire to photograph their numerous purported injuries during his visits, and his desire to seek medical treatment during the visits.

As the court noted, even if defendant's conduct fell short of medical child abuse, other factors warranted awarding custody to plaintiff, including defendant's impaired mental health, his false accusations of abuse, neglect and alienation against plaintiff, and his inferior parenting capabilities. There is support in the record for the court-appointed expert's findings regarding the father's mental health, including the opinions of

several other experts, and the court's observations of the father's demeanor during the trial (*Rentschler v Rentschler*, 204 AD2d 60 [1st Dept 1994], *lv dismissed* 84 NY2d 1027 [1995]).

For the same reasons, and due to defendant's conduct during visits, the court properly concluded that supervised visitation is in the children's best interests (*see Ronald S. v Lucille Diamond S.*, 45 AD3d 295 [1st Dept 2007]; *Matter of Gabriel J. [Dainee A.]*, 100 AD3d 572, 573 [1st Dept 2012]; *see also Arelis Carmen S. v Daniel H.*, 78 AD3d 504 [1st Dept 2010], *lv denied* 16 NY3d 707 [2011]).

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

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1359 Colleen Holahan, Index 650875/14
Plaintiff-Appellant,

-against-

488 Performance Group, Inc., doing business as Madison Performance Group, et al.,
Defendants-Respondents.

_____

Moritt Hock & Hamroff LLP, New York (Bruce Schoenberg of counsel), for appellant.

Farrell Fritz, P.C., Uniondale (Franklin C. McRoberts of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 22, 2015, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's breach of contract claim, which alleged that the corporate defendant breached the parties' employment agreement by failing to pay her certain compensation and benefits upon the termination of her employment in 2013, was correctly dismissed. The employment agreement expired in December 2007, and it unambiguously provided that any extension of the agreement needed to be in writing. Because there was no writing extending the agreement, her breach of contract claim fails as a matter of law

(*Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 178 [2008]).

Plaintiff's unjust enrichment claim, which seeks posttermination commissions, also fails as a matter of law. Upon the expiration of her employment agreement, plaintiff became an "at-will" employee (*id.*), and such employees are not entitled to posttermination commissions (*Mackie v La Salle Indus.*, 92 AD2d 821, 822 [1st Dept 1983]).

The motion court correctly dismissed plaintiff's claims for promissory estoppel, fraud, and negligent misrepresentation, since, in the absence of a signed employment agreement, she could not have reasonably relied upon defendants' alleged oral representations regarding the terms of her employment (*Meyercord v Curry*, 38 AD3d 315, 316 [1st Dept 2007]; *Arias v Women in Need*, 274 AD2d 353, 354 [1st Dept 2000]).

Plaintiff's Labor Law claim was correctly dismissed, because it is undisputed that her earnings were in excess of $900 a week (*see* Labor Law § 198-c[3]; *Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 615 [1st Dept 2012]).

We reject plaintiff's assertion that the motion court should have allowed her to conduct further discovery under CPLR 3211(d) so that she could obtain documents confirming that her

employment was renewed after the expiration of her employment agreement in December 2007. As noted, any renewal was required to be in writing, and plaintiff alleged in her complaint that the parties did not execute any further written amendments to the employment terms after the expiration of the December 2007 agreement. Accordingly, there was no basis for further discovery.

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

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1360 In re Cheryl McBride, Index 101033/14
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Cravath, Swaine & Moore LLP, New York (Christopher J. Gessner of counsel), for petitioner.

David I. Farber, New York (Seth E. Kramer of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated July 14, 2014, which, after a hearing, denied petitioner's grievance seeking succession rights, as a remaining family member, to the tenancy of her late uncle, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Andrea Masley, J.], entered April 1, 2015), dismissed, without costs.

Substantial evidence supports respondent's determination that petitioner is not entitled to succession rights as a remaining family member (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). The hearing officer's failure to credit petitioner's family's

testimony as to the submission of written requests that she be allowed to join the household is entitled to great weight (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Even if we were to credit this testimony, it would not establish entitlement to succession rights. Petitioner acknowledges that these requests were never granted and her residency and income were not reflected on the affidavits of income for the apartment (*see Matter of Ponton v Rhea*, 104 AD3d 476 [1st Dept 2013]*; Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694, 695 [1st Dept 2012], *lv dismissed* 20 NY3d 1053 [2013]).

Petitioner may not invoke estoppel against a governmental agency, such as respondent (*see Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008]; *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 [1988], *cert denied, appeal dismissed*, 488 US 801 [1988]; *Adler* at 695) and the record affords no basis upon which to relieve petitioner of the written consent requirement (*see Matter of McFarlane v New York City Hous. Auth.,* 9 AD3d 289 [1st Dept 2004]; *cf. Matter of Gutierrez v Rhea*, 105 AD3d 481 [1st Dept 2013], *lv denied* 21 NY3d 861 [2013]).

Petitioner's mitigating circumstances do not provide a basis for annulling NYCHA's determination (*see Matter of Firpi v New*

York City Hous. Auth., 107 AD3d 523, 524 [1st Dept 2013]; *Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [1st Dept 2011]).

Finally, we find NYCHA's submission of correspondence, not before the hearing officer, to be improper, and have not considered it in reaching our decision (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1361 The People of the State of New York, Ind. 4121/14
Respondent,

-against-

Clements Wendell,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about October 23, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1362N Suarna Mehulic, Index 103297/08
Plaintiff-Appellant,

-against-

New York Downtown Hospital,
Defendant-Respondent.

_____

Suarna Mehulic, appellant pro se.

Epstein Becker & Green, P.C., New York (Victoria Sloan Lin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered June 9, 2015, which, insofar as appealed from, denied plaintiff's motion for recusal, unanimously affirmed, without costs.

The court's denial of recusal was an appropriate exercise of discretion (*see generally People v Grasso*, 49 AD3d 303, 306-307 [1st Dept 2008]). Pro se plaintiff has not shown that the Justice is "interested" in the action (Judiciary Law § 14), or that the Justice's "impartiality might reasonably be questioned"

(Rules of Chief Admin of Cts [22 NYCRR] § 100.3[E][1]). Nor has she shown that the trial court, as sole arbiter of the issue, abused its discretion.

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1363N Artcorp Inc., Index 653878/13
Plaintiff-Appellant,

-against-

Citirich Realty Corp.,
Defendant-Respondent.

_____

Moulinos & Associates LLC, New York (Peter Moulinos of counsel), for appellant.

Todd Rothenberg, New Rochelle, for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered October 7, 2015, which denied plaintiff's motion for a default judgment and granted defendant's cross motion to, among other things, compel plaintiff to accept its late answer, unanimously affirmed, with costs.

In this action seeking to prevent the termination of a commercial lease, the motion court providently exercised its discretion in denying plaintiff's motion, made more than a year after defendant's purported default, and in granting defendant's cross motion (*see Guzetti v City of New York*, 32 AD3d 234, 238 [1st Dept 2006]). Defendant provided a reasonable excuse for the delay in answering the complaint (*see* CPLR 2005, 3012[d]; *Marine v Montefiore Health Sys., Inc.*, 129 AD3d 428, 429 [1st Dept

2015]), and the record clearly demonstrates that defendant did not intend to abandon the case, since it appeared in opposition to plaintiff's motion for a *Yellowstone* injunction and in opposition to plaintiff's appeal from the order denying that motion (124 AD3d 545 [1st Dept 2015]). Plaintiff failed to show that it suffered any prejudice as a result of defendant's delay, and the strong public policy in favor of resolving cases on the merits warranted denial of plaintiff's motion (*see Marine*, 129 AD3d at 429). Although it was not "essential[,]" defendant also showed a meritorious defense (*Jones v 414 Equities LLC*, 57 AD3d 65, 81 [1st Dept 2008]; *Guzetti*, 32 AD3d at 238).

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1364-
1365N Index 159079/14

Gail Gantt,
Plaintiff-Appellant,

-against-

North Shore-LIJ Health System,
et al.,
Defendants-Respondents.

_____

Brisette Lucas, New York, for appellant.

Venable LLP, New York (Benjamin E. Stockman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about January 23, 2015, which, to the extent appealed from, denied plaintiff's motion for a default judgment against defendants, and order, same court and Justice, entered April 21, 2015, which, to the extent appealed from, denied plaintiff's motion to renew, and deemed defendants' answer served, unanimously affirmed, with costs.

Plaintiff satisfied the requirements of CPLR 3215(f) for a default judgment by providing proof of service of the summons and complaint and proof of the facts constituting the claim, the default and the amount due. However, we decline to disturb the motion court's exercise of its broad discretion in finding

sufficient defendants' excuse for their delay in answering the complaint (*Cirillo v Macy's, Inc.*, 61 AD3d 538, 450 [1st Dept 2009]), i.e., the parties' settlement discussions (*see Polanco v Scott*, 41 AD3d 182 [1st Dept 2007]; *Finkelstein v East 65th St. Laundromat*, 215 AD2d 178 [1st Dept 1995]).

We note, contrary to the motion court, that any irregularity in the affidavit of nonmilitary service submitted on plaintiff's motion for a default judgment did not rise to the level of a jurisdictional defect, since defendant Hilerio never made any pretense of either being on active military duty or being a military dependent at the time of her default (*see Department of Hous. Preserv. & Dev. of City of N.Y. v West 129th St. Realty Corp.*, 9 Misc 3d 61 [App Term, 1st Dept 2005]).

The motion court properly deemed defendants' answer served, in light of defendants' reasonable excuse for the delay, the relatively short delay, plaintiff's failure to demonstrate

prejudice, and the strong preference in this State for deciding matters on the merits.

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

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

ENTERED: JUNE 2, 2016

CLERK

Acosta, J.P., Saxe, Gische, Webber, Kahn, JJ.

1366N Dalia J. Siderias, Index 310314/13
Plaintiff-Respondent,

-against-

Nicholas K. Siderias,
Defendant-Appellant.

_____

Paul P. De Fiore, Long Island City, for appellant.

Robert W. Hiatt, Staten Island, for respondent.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about April 6, 2015, which denied defendant's motion to vacate the default judgment entered against him, unanimously affirmed, without costs.

Defendant, who did not appear in this action to annul the parties' marriage, concedes that he was served with the summons and notice, and did not object to the annulment. He contends, however, that a statement in the summons that "[t]he parties have divided up the marital property, and no claim will be made by either party under equitable distribution," is false. He also argued to the motion court that he did not understand the consequences of the statement, and did not realize that he should have retained an attorney. Under the circumstances presented, defendant has failed to establish a reasonable excuse to justify

vacatur of the judgment of annulment pursuant to CPLR 5015(a) (*see Washington v Janati*, 118 AD3d 603 [1st Dept 2014]).

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

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

ENTERED: JUNE 2, 2016

CLERK

Renwick, J.P., Andrias, Saxe, Richter, JJ.

269 New York State Association for Affordable Housing, et al., Plaintiffs-Appellants, Index 158093/13

-against-

Council of the City of New York, Defendant-Respondent,

City of New York, et al., Defendants-Appellants.

- - - - -

The Laborers Eastern Region Organization Fund in Support of Local Law 44 of 2012, Amicus Curiae.

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Law Office of Kenneth G. Roberts, P.C., Larchmont (Kenneth G. Roberts of counsel), for New York State Association for Affordable Housing, Sterling Floor Designs, Ltd., Brooklyn West Supply Corp., Smedco Inc., Deutscher & Daughter, Inc., LIS Construction, Inc., PPEE Construction, Inc., ANR Construction & MGMT Corp. and Mastercraft Multicolor Inc., appellants.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for City of New York and New York City Department of Housing Preservation and Development, appellants.

Emery Celli Brinckerhoff & Abady LLP, New York (Andrew G. Celli, Jr. of counsel), for respondent.

Archer, Byington, Glennon & Levine LLP, Melville (James W. Versocki of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered on or about September 29, 2014, modified, on the law, to declare Local Law 44 constitutional, and, as so modified, affirmed, without costs.

Opinion by Andrias, J. All concur except Saxe, J. who dissents in an Opinion.

Order filed.