SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 31, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, J.P., Renwick, Andrias, Saxe, Gische, JJ.

2551 Hollye D. Powell, Index 307850/08
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Law Office of Richard E. Lerner, P.C., New York (Richard E. Lerner of counsel), for appellant.

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

_____

Appeal from judgment, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered May 1, 2015, upon reinstating a jury verdict in favor of defendant, dismissing plaintiff's complaint, unanimously dismissed, without costs.

The underlying action is for personal injury, based upon premises liability. The trial court granted plaintiff's posttrial motion pursuant to CPLR 4404(a) to set aside the jury's verdict that defendant (the City) was negligent, but that its negligence was not the proximate cause of plaintiff's injuries. In a prior appeal, this Court reversed the trial court's order

setting aside the jury verdict and reinstated the defense verdict (116 AD3d 589 [2014]). We remanded the case to Supreme Court with a direction that the Clerk enter judgment dismissing the complaint. A judgment was entered by the County Clerk, Supreme Court, Bronx County on May 1, 2015. Plaintiff's appeal presently before us is from that May 1, 2015 judgment, entered at our direction. For the reasons that follow, we dismiss this appeal because the May 1, 2015 judgment is not appealable as of right (CPLR 5701[a][1]). CPLR 5701(a)(1) specifies what appeals are appealable as of right to the Appellate Division; it provides in relevant part as follows:

> "An appeal may be taken to the appellate division as of right in an action, originating in the supreme court . . . (1) from any final . . . judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action" (CPLR 5701[a][1]).

In the prior appeal, the City appealed the trial court's order entered November 9, 2012 setting aside the defense verdict. Although plaintiff responded to the City's appeal, she did not cross-appeal. Plaintiff argues that she could not have brought a cross appeal at that time because she prevailed in obtaining a new trial and was not aggrieved by the trial court's order in her favor. She contends that because there is now a judgment reinstating the defense verdict, she can challenge the

evidentiary and other rulings that are subsumed in the May 1, 2015 judgment. The judgment that plaintiff seeks to appeal was, however, entered at our direction in connection with this Court's decision of a prior appeal and it disposed of all the issues in the action. Therefore, under CPLR 5701(a)(1), plaintiff has no right to appeal the May 1, 2015 judgment. Were we to consider this appeal on its merits, this Court would be in the untenable position of reviewing its own order from the prior appeal. In addition, since the time for reargument of the prior appeal has elapsed, plaintiff's argument that we should treat this appeal as if it were a motion to reargue, is rejected.

Although an appeal from a final order or judgment of Supreme Court brings up for review, inter alia, certain evidentiary rulings made at trial (CPLR 5501[a][3]; *see Leiner v Howard's Appliance of Commack*, 104 AD2d 634, 635 [2d Dept 1984], *lv denied* 64 NY2d 603 [1985]), once this Court decides the issues raised on appeal and directs the Clerk of the court from which the appeal originated to enter judgment, such judgment finally disposes of all the issues in the action (CPLR 5701[a][1]; *see also Rose v Bristol*, 222 NY 11, 12 [1917]; *Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2 AD3d 109 [1st Dept 2003], *lv dismissed* 1 NY3d 622 [2004]). The judgment that the Clerk entered on May 1, 2015 was entered in

accordance with and pursuant to an order of this Court (the Appellate Division) which "dispose[d] of all the issues in the action" (CPLR 5701[a][1]). Stated differently, the May 1, 2015 judgment is not a judgment of the trial court bringing up interlocutory issues for review (*compare* CPLR 5701[a][1] *with* 5501[a]).

Once the jury verdict was rendered in favor of defendant, plaintiff made a posttrial motion to set aside the verdict and prevailed. The sole basis for her motion was that the jury's finding of no proximate cause was inconsistent with its finding of negligence on defendant's part. Plaintiff did not move to set aside the verdict based upon erroneous evidentiary rulings. Although as plaintiff correctly argues, there is no interlocutory appeal as of right from an evidentiary ruling during trial (*see* CPLR 5701[a]; *Roman v City of New York*, 187 AD2d 390, 390 [1st Dept 1992]), plaintiff had the opportunity to raise legal arguments regarding the evidentiary rulings made by the trial court in support of her motion to set aside the jury's verdict.

These issues could have also been raised to support her position in the prior appeal.

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

ENTERED: JANUARY 31, 2017

CLERK

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

2588N Ronald C. Stewart, Index 151854/14
Plaintiff-Appellant,

-against-

Joseph Makhani, et al.,
Defendants-Respondents,

George Bishop, et al.,
Defendants.

Goldberg & Rimberg PLLC, New York (Steven A. Weg of counsel), for appellant.

Michael Allan Leon & Associates, New York (Michael A. Leon of counsel), for respondents.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 16, 2015, which marked plaintiff's motion seeking, inter alia, to strike defendants' answer, withdrawn, denied the parties' application for an extension of time to complete discovery, marked the case off the calendar without prejudice, and permitted either party to restore the matter, upon completion of discovery, to the trial ready calendar by notice of motion application only, unanimously reversed, without costs, and the matter remanded for further proceedings not inconsistent with this order.

A court has broad discretion in supervising disclosure (*see Matter of DataSafe, Inc. v American Express*, 2 AD3d 224, 225 [1st

Dept 2003]). Nevertheless, the court had no basis for striking this case from the calendar as a sanction for the parties' failure to timely complete discovery. CPLR 3404 does not apply to pre-note of issue cases such as this case (*see Johnson V Minskoff & Sons*, 287 AD2d 233, 235 [1st Dept 2001]). Dismissal of a pre-note of issue case may be predicated on CPLR 3216 and Uniform Rules for Trial Courts (22 NYCRR 202.27), neither of which is applicable to the facts of this case (*see Tejeda v Dyal*, 83 AD3d 539, 540 [1st Dept 2011], *lv dismissed* 17 NY3d 923 [2011]).

While delays in discovery are frustrating, a trial court has the responsibility "to fashion an order consistent with its obligation to bring discovery to an end as quickly as possible. Marking a case off or striking a case during the discovery phase does not further that obligation because it only encourages inaction by the parties and counsel in completing discovery. Ultimately, marking a case off during discovery leads to unnecessary motion practice, loss of valuable time for discovery,

and a waste of judicial resources" (*Lopez v Imperial Delivery Serv.*, 282 AD2d 190, 198-199 [2d Dept 2001, *lv dismissed* 96 NY2d 937 [2001]]; *see Johnson V Minskoff & Sons*, 287 AD2d at 235).

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

ENTERED: JANUARY 31, 2017

CLERK

Sweeny, J.P., Richter, Mazzarelli, Feinman, JJ.

2590N Darya Braverman, Index 306221/11
Plaintiff,

-against-

Eric Braverman,
Defendant.
- - - - -
David A. Mayer,
Nonparty Appellant,

-against-

Susan L. Bender,
Nonparty Repondent.

_____

David A. Mayer & Associates, PLLC, Huntington (David A. Mayer of counsel), for appellant.

Bender & Rosenthal LLP, New York (Susan L. Bender of counsel), for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered September 11, 2015, which, to the extent appealed from, granted the guardian ad litem's motion for sanctions against nonparty David A. Mayer pursuant to 22 NYCRR 130-1.1 and directed Mayer to pay $1,500 to the Lawyer's Fund for Client Protection, unanimously affirmed, without costs.

The court's imposition of sanctions pursuant to 22 NYCRR 130-1.1 did not constitute a "clear abuse of discretion" (*Pickens v Castro*, 55 AD3d 443, 444 [1st Dept 2008]). The court's resolution of the motion finds support in the totality of the

circumstances surrounding appellant's conduct, including the timing of appellant's filing of a notice of appearance so as to delay or prolong resolution of this matter. The parties in this appeal stipulated to a supplemental record that includes a subsequent decision of the motion court disqualifying appellant from serving as cocounsel for defendant. We note that the factual findings in that decision buttress the court's earlier decision to impose sanctions.

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2595 In re Denise Valette, Index 100227/15
Petitioner-Respondent,

-against-

New York City Housing Authority,
Respondent-Appellant.

_____

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

Denise Valette, respondent pro se.

_____

Order, Supreme Court, New York County (Andrea Masley, J.), entered July 8, 2015, which vacated respondent's determination, dated February 17, 2015, dismissing petitioner's remaining family member grievance to succeed to the public housing apartment formerly leased to her deceased mother, unanimously reversed, on the law, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

"The NYCHA Management Manual requires that a remaining family member grievant must remain current in use and occupancy to pursue the grievance" (*Matter of Figueroa v New York City Hous. Auth.*, 141 AD3d 468, 469 [1st Dept 2016]). This requirement has been upheld by the Court of Appeals and this Court (*see Matter of Henderson v Popolizio*, 76 NY2d 972, 974 [1990]; *Matter of Hawthorne v New York City Hous. Auth.*, 81 AD3d

420, 420-421 [1st Dept 2011]; *Garcia v Franco*, 248 AD2d 263, 264-265 [1st Dept 1998], *lv denied* 92 NY2d 813 [1998]). The facts of this case are distinguishable from *Figueroa* (141 AD3d 468) as petitioner, who was advised three times in the course of her proceedings, makes no claim that the Housing Authority refused to provide her with requested assistance.

"[N]othing in the Federal regulation requires respondent to grant a formal hearing to every person who makes a bare assertion that he or she is the remaining family member of a deceased tenant but is unable to make a preliminary showing that the claim is reasonably based" (*Henderson*, 76 NY2d at 974). Petitioner's claim that she never moved out of her deceased mother's apartment is unsubstantiated, and contradicted by her mother's removal notice, which included copies of petitioner's NYSID card and her SSI payment information, both as of March 2013, the date of petitioner's removal from the household, reflecting an address in Astoria, Queens. Petitioner's ability to prove that she remained in the home for one year prior to her mother's death appears futile (*see Torres v New York City Hous. Auth.*, 40 AD3d 328, 329-330 [1st Dept 2007]). There was no denial of due process

where the petitioner had an informal hearing at which she "had the opportunity to present [her] side of the case" (*Henderson*, 76 NY2d at 975).

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2603 In re Herbert Paul, Index 104258/12
Petitioner-Appellant,

-against-

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

_____

Daniel B. Friedman, Mineola, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

_____

Determination of respondents, dated July 23, 2012, revoking petitioner's certification as a school bus driver, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court pursuant to CPLR 7804[g] by order of Supreme Court, New York County [Geoffrey D. Wright, J.], entered July 18, 2013) dismissed, without costs.

As a threshold matter, this proceeding was transferred to this Court erroneously. Since the administrative hearing held pursuant to Chancellor's Regulation C-100 was not a hearing "pursuant to direction by law," no substantial evidence issue is raised (CPLR 7803[4]; 7804[g]; *Matter of Duncan v Klein*, 38 AD3d 380 [1st Dept 2007]). We decide the matter on the merits in the interest of judicial economy (*see Matter of Pagan v Rhea*, 122

AD3d 543, 543 [1st Dept 2014]).

The determination that petitioner's performance was unsatisfactory has a rational basis in the record (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]), which shows that petitioner acted recklessly, endangering his own life and the lives of his passengers. The hearing evidence shows that, while driving a school bus with five children and a school bus escort on board, petitioner came to a railroad crossing while a train was approaching. He disregarded the train's horn and the crossing signal's flashing lights, and continued onto the tracks, where the crossing gate came down upon the front of the bus (no one on the bus was injured).

The hearing officer was entitled to rely on hearsay (*see Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]), and her credibility determinations are entitled to deference (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty does not shock the judicial conscience (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232-

233 [1974]; *Matter of Robbins v Malone Cent. School Dist.*, 182 AD2d 890, 892 [3d Dept 1992], *appeal dismissed* 80 NY2d 825 [1992]).

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

ENTERED: JANUARY 31, 2017

CLERK

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

2684 In re 128 Hester LLC, Petitioner-Appellant, Index 101754/13

-against-

The New York State Division of Housing & Community Renewal, et al., Respondents-Respondents.

_____

Klein Slowik PLLC, New York (Daniel J. Schneider of counsel), for appellant.

Mark F. Palomino, New York (Robert Ambaras of counsel), for New York State Division of Housing and Community Renewal, respondent.

John D. Gorman, New York, for Hun Sui Chu, Kok Hong The, Eng Kam Li, Wang Ai Yu, Ji De Yang, Jian Qing Han, Alice Jean, John Jean, Duan Liang Chen and Chai Oi Hoy, respondents.

_____

Order and judgment (one paper) of Supreme Court, New York County (Carol E. Huff, J.), entered April 7, 2015, which granted respondent New York State Division of Housing and Community Renewal's (DHCR) motion for leave to file a surreply, denied the petition to annul DHCR's determination, dated October 17, 2013, denying the petitions for administrative review and directing petitioner to pay respondents tenants demolition stipends and relocation costs in consequence of the demolition of the subject building, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The article 78 court providently exercised its discretion in

granting DHCR leave to file a surreply to rebut averrals in petitioner's pleadings (*see Pena-Vazquez v Beharry*, 82 AD3d 649, 649 [1st Dept 2011]).

Petitioner was afforded due process at the various stages of this proceeding (*see Matter of Beck-Nichols v Bianco*, 20 NY3d 540, 559 [2013]; *Matter of Daxor Corp. v State of N.Y. Dept. of Health*, 90 NY2d 89 [1997], *cert denied* 523 US 1074 [1998]).

The agency determination has a rational basis in the record (*see Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). The record shows that, by the time petitioner purchased the building in August 2007, it was already in extremely poor physical condition, settling unevenly into its foundation and leaning six inches out of plumb, its internal steel support columns also leaning precariously, and wooden floor joists rotten and damaged by termites. Although petitioner undertook emergency shoring work, allegedly spending $100,000, the building continued to deteriorate and lean farther out of plumb, its demise hastened by vibrations from construction work on an 18-story hotel on an adjacent lot. Petitioner took no action for two years, until the building had deteriorated beyond repair, despite last-ditch efforts ordered by the Department of Buildings (DOB) in the summer of 2009.

Petitioner cannot escape responsibility for the building's precarious condition when acquired, since the condition was documented in outstanding DOB violations, and "the need to make ... repairs could have been anticipated" before the purchase (*Eyedent v Vickers Mgt.*, 150 AD2d 202, 205 [1st Dept 1989]). Similarly, to the extent the deterioration was accelerated by work on the adjacent hotel project, it was incumbent upon petitioner, as landlord, to take steps to ameliorate it, including through stop work orders. As landlord, petitioner was obligated to take reasonable steps to protect the building from the effects of the work next door, regardless of whether there was any overlap in ownership interests in the two properties (*see Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 327 [1979], *cert denied* 444 US 992 [1979]). DHCR thus rationally concluded that petitioner "allow[ed] the building to deteriorate to the point where it would fall down" (*Eyedent*, 150 AD2d at 204 [internal quotation marks omitted]), warranting the award of demolition stipends and relocation costs (*see* 9 NYCRR 2524.5[a][2][ii][a], 2524.5[ii][b][3]).

DHCR Operational Bulletin 2009-1 is not a "rule" for purposes of the State Administrative Procedure Act (*see id.* § 102[2][a][i], [b][iv]), but merely develops the parameters for calculation of the demolition stipend, as expressly provided for

in the Rent Stabilization Code (*see* 9 NYCRR 2524.5[a][2][ii][a], 2524.5[ii][b][3], 2527.11).

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: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2910 The People of the State of New York, Respondent, Ind. 6110/11

-against-

Roger Collado, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Samuel Z. Goldfine of counsel), for respondent.

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 15, 2012, convicting defendant, after a nonjury trial, of grand larceny in the fourth degree and criminal mischief in the fourth degree, and sentencing him to concurrent terms of five years' probation, unanimously modified, on the law, to the extent of reducing the sentence on the criminal mischief conviction to a term of three years' probation, and otherwise affirmed.

Defendant's challenges to the sufficiency and weight of the evidence supporting his grand larceny conviction are unavailing (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). By seizing a fellow bus passenger's phone, refusing to return it and then throwing it out of the bus window into heavy car traffic (which resulted in the phone's destruction) defendant demonstrated an

intent to permanently deprive the victim of her phone by withholding it under circumstances that would destroy its economic value, or disposing of it under circumstances rendering it unlikely that the victim would recover it (*see* Penal Law § 155.00[3]; *People v Kirnon*, 39 AD2d 666, 667 [1972], *affd* 31 NY2d 877 [1972]). The evidence supports the conclusion that defendant deliberately deprived the victim of her property, rather than that he was acting recklessly.

As the People concede, the five-year term of probation for the conviction of criminal mischief in the fourth degree, a class A misdemeanor, was unlawful, and we reduce the sentence accordingly.

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2911 Christian Varon, Index 154592/13
Plaintiff-Appellant,

-against-

Country-Wide Insurance Company,
Defendant-Respondent.

_____

Antin, Ehrlich & Epstein, LLP, New York (Jeffry Antin of counsel), for appellant.

Thomas Torto, New York, for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Peter H. Moulton, J.), entered on or about September 2, 2014, which denied plaintiff's motion for summary judgment, granted defendant's cross motion for summary judgment, and declared that defendant insurance company is not required to tender the policy it issued to Adis Reckovic (the offending driver) to trigger plaintiff's right to seek underinsured motorist benefits from nonparty insurance company High Point, unanimously affirmed, without costs.

The excess coverage clause in the offending driver's policy states, in relevant part, that the driver's coverage "shall be excess over any other collectible insurance." The motion court correctly refused to interpret the phrase "any other collectible insurance" to mean "any other collectible *primary* insurance," and

correctly determined that the driver's coverage is "excess" to plaintiff's High Point insurance.

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2912-
2913 In re Andrew R.,

A Child Under Eighteen Years of Age,
etc.,

Andrew R.,
Appellant,

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

Maurice R.,
Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for Administration for Children Services, respondent.

Larry S. Bachner, Jamaica, for Maurice R., respondent.

_____

Order of disposition, Family Court, Bronx County (Valerie Pels, J.), entered on or about August 15, 2014, which, upon a fact-finding determination that respondent father sexually abused the child Anesia and that the child Andrew was derivatively neglected, inter alia, placed Andrew in the custody of his mother, unanimously affirmed, without costs. Appeal from order of fact-finding, same court and Judge, entered on or about May 27, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The determination that respondent sexually abused the child Anesia is supported by Anesia's testimony; the absence of physical injury or other medical corroboration is not dispositive (*Matter of Tiffany H. [Mark H.]*, 117 AD3d 419 [1st Dept 2014]). Family Court credited Anesia's testimony after careful consideration of "the significant issues" raised as to Anesia's credibility. This Court is not better situated than Family Court to assess the witnesses' credibility, and there is no reason for us to depart from the general rule of giving deference to the court's credibility findings (*see e.g. Matter of Fatima M.*, 16 AD3d 263, 273 [1st Dept 2005]).

The determination that respondent derivatively neglected the child Andrew is supported by a preponderance of the evidence; respondent's long-term sexual abuse of Anesia indicates that he has a "faulty understanding of the duties of parenthood," which poses a substantial risk to Andrew (*see Matter of Tiffany H.*, 117 AD3d at 420; *Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 76 [1st Dept 2012]). Given the serious nature of respondent's actions and his continued close contact with Andrew, we find that

the aid of the court is needed to protect Andrew (*see id.*; Family Court Act § 1051[c]).

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2914 Arelie F., et al., Index 350662/09
Plaintiffs-Respondents,

-against-

Cathedral Properties, LLC, et al.,
Defendants,

Prime Realty Services, et al.,
Defendants-Appellants.

_____

Eckert Seamans Cherin & Mellott, LLC, White Plains (Michael J. Burke of counsel), for appellants.

The Frankel Law Firm, New York (Richard H. Bliss of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 2, 2015, which, to the extent appealed from as limited by the briefs, denied defendants Prime Realty Services, Prime Residential Manhattan R&R 1, LLC, Richard Aidekman, Robert Kligerman, Prime Realty Services, Inc., Arthur Green, sued incorrectly herein as Andrew Green, and Multi-Dwelling Properties IV, LLC's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action alleging injury caused by lead-paint poisoning, plaintiffs claim that infant plaintiffs were exposed

to lead-based paint in three apartments, which includes the subject unit, apartment 2E, located in a ten-unit pre-war multiple dwelling known as 171 East 102nd Street and was owned, managed and/or controlled by moving defendants between July 30, 1999 and September 30, 2003.

We find that the complaint as against defendants Prime Realty Services, Richard Aidekman, Robert Kligerman, Prime Realty Service, Inc., Arthur Green s/h/a Andrew Green and Multi-Dwelling Properties IV LLC should be dismissed, because it is undisputed that during the relevant time period (i.e., July 30, 1999 and September 30, 2003), the unit and building were owned by defendant Prime Residential Manhattan R&R 1 LLC (Prime Residential).

We also find that the complaint against defendant Prime Residential should be dismissed, because it is undisputed that none of the children were residing in the apartment when that defendant owned the unit (*see Yaniveth R. v LTD Realty* Co., 27 NY3d 186, 191-194 [2016]), and there is no evidence that Prime Residential had actual notice that a child under the age of seven was residing in the apartment. None of the documents submitted by the children's grandmother during her tenancy with this defendant indicate that such a child was living there (*see Flores v Cathedral Props. LLC*, 101 AD3d 432, 432 [1st Dept 2012]).

Lastly, we find that defendants' motion for summary judgment should not be denied in order to complete discovery, because plaintiffs have failed to show that facts essential to justify opposition to the motion may emerge upon further discovery; nor have they offered any evidentiary basis to suggest that discovery may lead to relevant evidence (*see Bailey v New York City Tr. Auth.*, 270 AD2d 156, 157 [1st Dept 2000]).

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2915 Barbara Buonchristiano, Index 20989/11E
Plaintiff-Appellant,

-against-

Fordham University,
Defendant-Respondent.

_____

Gentile & Associates, New York (Laura Gentile of counsel), for appellant.

Harrington Ocko & Monk, LLP, White Plains (Dawn M. Foster of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered June 30, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff tripped and fell on a step on a walkway on defendant's premises while crossing the campus during her lunch break. Assuming that defendant established prima facie that the step was open and obvious and not inherently dangerous (*see Philips v Paco Lafayette LLC*, 106 AD3d 631 [1st Dept 2013]), plaintiff raised a triable issue of fact whether the condition was open and obvious by demonstrating through an expert's affidavit and photographs that the color and position of the step created optical confusion, i.e., "the illusion of a flat surface, visually obscuring ... [the] step[]" (*Saretsky v 85 Kenmare*

Realty Corp., 85 AD3d 89, 92 n [1st Dept 2011]; *and see Thornhill v Toys "R" Us NYTEX*, 183 AD2d 1071, 1073 [3rd Dept 1992]). Plaintiff's deposition testimony, that she was looking around at trees and flowers as she walked and that the step was invisible, was not inconsistent with her affidavit, in which she explained that she was also looking ahead as she walked down the path, and did not see the step (*see Chafoulias v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 211 [1st Dept 1988]; *Saretsky*, 85 AD3d at 92).

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

ENTERED: JANUARY 31, 2017

CLERK

CORRECTED ORDER - FEBRUARY 6, 2017

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2916 The People of the State of New York, Respondent, Ind. 6519/09

-against-

Anonymous,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Katherine **Kulkarni** of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 3, 2011, convicting defendant, upon his plea of guilty, of two counts of burglary in the third degree and two counts of attempted assault in the second degree, and sentencing him to an aggregate term of 10 to 20 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences on the burglary convictions to 2 to 4 years each, resulting in a new aggregate term of 7 to 14 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2917-
2918 Index 653591/14

In re Tracy Tyler,
Petitioner-Respondent,

-against-

The Motor Vehicle Accident
Indemnification Corporation,
Respondent-Appellant.

_____

Kornfeld, Rew, Newman & Simeone, Suffern (William S. Badura of counsel), for appellant.

Law Offices of Brian J. Elbaum, New York (Brian J. Elbaum of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered November 16, 2015, which confirmed the report of the special referee and granted the petition for leave to commence an action against respondent (MVAIC) pursuant to Insurance Law § 5218, unanimously affirmed, without costs. Order, same court and Justice, entered February 22, 2016, which denied MVAIC's motion to reject the report of the special referee, unanimously affirmed, without costs.

By failing to object to the scope of the reference ordered by the motion court or at the hearing, MVAIC waived its claim that the issue before the special referee was incorrectly limited and that the motion court should have broadened the issue (*see Adelaide Prods., Inc. v BKN Intl. AG*, 51 AD3d 598 [1st Dept

2008]; *Hexcel Corp. v Hercules Inc.*, 291 AD2d 222, 223 [1st Dept 2002], *lv denied* 98 NY2d 607 [2002]). The motion court providently exercised its discretion in denying MVAIC's motion to reject the referee's report on the ground of newly discovered evidence.

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2919 The People of the State of New York, Respondent, Ind. 6431/07

-against-

Rafael Irizzary, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 24, 2012 , 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: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2920 The People of the State of New York, Respondent, SCI 2810/10

-against-

Rafael Irizarry, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Neil Ross, J.), rendered July 14, 2010, 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: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2921 Little Cherry, LLC, 653817/14
Plaintiff-Respondent-Appellant,

-against-

Two Bridgeset Housing Development Fund Company, et al.
Defendants-Appellants-Respondents.

_____

Katsky Korins LLP, New York (Mark Walfish of counsel), for appellants-respondents.

Moritt Hock & Hamroff LLP, Garden City (Robert M. Tils of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 17, 2016, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the third and fifth causes of action and for cancellation of the notice of pendency, and granted their motion for summary judgment dismissing the sixth cause of action, unanimously modified, on the law, to grant defendants' motion as to the third and fifth causes of action and for cancellation of the notice of pendency, and otherwise affirmed, with costs to be paid by plaintiff. The Clerk is directed to enter judgment dismissing the complaint and canceling the notice of pendency.

The contract between plaintiff Little Cherry, LLC and defendant Two Bridgeset Housing Development Fund Company (owner)

clearly and unambiguously provided that it would terminate if plaintiff or its designee failed to obtain approval from the New York City Department of City Planning (DCP) for a minor modification of a special permit regarding the proximity of the existing building and a neighboring building and consent from all property owners within the Large Scale Development Plan in which the property was located within a specified time. Defendants established their prima facie entitlement to summary judgment dismissing the complaint by showing that such approvals were not obtained within the specified time (*see Sohayegh v Oberlander*, 155 AD2d 436, 438 [2d Dept 1989]; *and see M Squared New Rochelle, LLC v G&G Props., LLC*, 65 AD3d 1090, 1093 [2d Dept 2009]).

In opposition, plaintiff failed to raise a triable issue of fact. Specifically, plaintiff's argument, asserted in the affidavit of its managing member, that defendants took responsibility for, frustrated, or otherwise failed to cooperate with efforts to obtain the necessary approvals, contradicted his prior affidavit submitted in support of a preliminary injunction,

and presented only feigned factual issues (*Hossain v Selechnik*, 107 AD3d 549 [1st Dept 2013]; *Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327 [1st Dept 2006]).

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2922 The People of the State of New York, Ind. 664/13
Respondent,

-against-

Randolph Cord,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Juan Merchan, J.), rendered July 24, 2015,

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: JANUARY 31, 2017

CLERK

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

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2923 In re Take Two Outdoor Media LLC, Index 100334/13
Petitioner-Appellant,

-against-

Board of Standards and Appeals of the City of New York,
Respondent-Respondent.

_____

Akerman LLP, New York (Richard G. Leland of counsel), for appellant.

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

_____

Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered July 20, 2015, denying the petition to annul a determination of respondent, dated January 15, 2013, which denied the appeal from the Department of Buildings' denial of registration for petitioner's outdoor advertising sign, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent rationally determined that the United States Bulkhead Line running along the Bronx shoreline of the Harlem River does not constitute a "boundary of the City of New York" within the meaning of New York City Zoning Resolution § 42-55(d) and therefore that petitioner's outdoor advertising sign does not fall within the exception to the Zoning Resolution set forth in

that provision.

The determination was not arbitrary and capricious. While the Department of Buildings had previously granted a permit based on a finding that the sign fell within the above exception to the Zoning Resolution, it was entitled to correct the mistake that led to its approval of the permit (*Matter of Parkview Assoc. v City of New York*, 71 NY2d 274 [1988], *cert denied* 488 US 801 [1988]), and the record adequately reflects the reasons for the change in course so as to allow for meaningful appellate review (*see Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 520 [1985]).

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2924 In re Terrilee 97th Street LLC, Petitioner, Index 101551/13

-against-

New York City Environmental Control Board, Respondent.

_____

Rosenberg Calica & Birney LLP, Garden City (Ronald J. Rosenberg of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Michael Pastor of counsel), for respondent.

_____

Determination of respondent New York City Environmental Control Board (ECB), dated July 25, 2013, which, insofar as challenged, imposed civil penalties totaling $5,200 for violations of the New York City Administrative Code, New York City Building Code, and New York City Zoning Resolution, unanimously modified, on the law, to dismiss Notice of Violation (NOV) 349-803-06K (NOV 6K) and vacate the corresponding penalty of $2,000, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Sholomo Hagler, J.], entered July 15, 2014), otherwise disposed of by confirming the remainder of the determination challenged, without costs.

Under the Multiple Dwelling Law (MDL), as amended effective

May 1, 2011 (*see* L 2010, Ch 225; L 2010, Ch 566 [the 2010 amendments]), none of the units in petitioner's Class A multiple dwelling may be used for occupancy periods shorter than 30 days (*see* MDL §§ 4[8][a], 248[1]; *Matter of Grand Imperial, LLC v New York City Bd. of Stds. & Appeals*, 137 AD3d 579, 579 [1st Dept 2016], *lv denied* 28 NY3d 907 [2016]). Petitioner's suggestion that the 1947 I-card (which recorded use of the subject building for "Class B sleeping rooms"), and not the most recent 1964 certificate of occupancy (CO), controls the building's lawful occupancy is meritless (*see Matter of 345 W. 70th Tenants Corp. v New York City Envtl. Control Bd.*, 143 AD3d 654, 654 [1st Dept 2016]). Petitioner's contention that it has, in effect, grandfathered rights to continue its preexisting legal use of the premises also lacks merit. The 2010 amendments extinguished the accrued rights which petitioner otherwise would have enjoyed under MDL § 366(1) (*see Grand Imperial*, 137 AD3d at 579). Hence, ECB properly reinstated NOV 349-803-05Z, stating that the building's use "in part as a transient hotel" violated the CO (*see* Administrative Code of City of NY § 28-118.3.2).

The 2010 amendments likewise supplanted the New York City Zoning Resolution's nonconforming use regime (*see* MDL § 120[1]; ZR § 52-61; Bill Jacket, L 2010, Ch 225 at 11). Since petitioner makes no claim that it attempted to comply with MDL § 120's

conversion regime (and indeed asserts that it is impossible for it to meet Section 120's requirements), and there is no dispute that the building's transient use violates applicable residential zoning, ECB properly reinstated NOV 349-803-07M.

Petitioner has failed to preserve its constitutional challenges to the foregoing violations (*see Melahn v Hearn*, 60 NY2d 944, 945 [1983]; *Matter of Bauer v New York State Off. of Children & Family Servs., Bur. Of Early Childhood Servs.*, 55 AD3d 421, 421 [1st Dept 2008]).

ECB failed to substantiate NOV 6K, however, and that violation should be dismissed. NOV 6K asserted that the Building's front lobby exit doors, as well as "doors leading to an exit stair," violated 2008 Building Code (BC) § 1008.1.2.2, by "swinging against the flow of egress." As pertinent here, Section 1008.1.2.2 requires exit doors to swing in the direction of egress for "spaces with an occupant load of 50 or more persons" (2008 BC § 1008.1.2.2[2]). There is an exception for "exit doors from lobbies serving only Group R-2 or R-3 occupancies" (2008 BC § 1008.1.2.2). The building's transient use constitutes Group R-1 occupancy.

The governing 1964 CO limits occupancy of each of the building's seven floors to 28 persons, fewer than the 50-person trigger for the egress-door-swing provision. The Department of

Buildings' theory in issuing NOV 6K appears to have been to add the occupancies of the upper floors (multiples of 28) in finding that the stair-top exit door and the lobby exit doors served cumulative totals of far more than 50 persons on the floor above. This stacking theory runs counter to 2008 BC § 1004.4, however, which provides that, "[w]here exits serve more than one floor, only the occupant load of each floor considered individually shall be used in computing the required capacity of the exits at that floor" (2008 BC § 1004.4). Hence, in its amended answer to the petition, ECB conceded that, "pursuant to the 2008 Building Code, the doors that lead to the exit stairs above the lobby level do not need to swing in the direction of egress travel because each of those stories above the lobby [has] occupancies of fewer than 50 people."

This concession expressly eliminated the basis for NOV 6K insofar as it claimed that the upstairs exit doors violated the 2008 Building Code. It also eliminated any basis for the remainder of the violation, relating to the lobby exit doors. 2008 BC § 1004.4 does not distinguish between ground-floor and upper-floor exits, and ECB does not explain why the lobby exits should be treated differently from upper-floor stair exits.

ECB's alternative theory, that the building's transient use constitutes Group R-1 occupancy, mandating egress-swinging exit

doors, regardless of the number of persons per floor, is meritless, as it would turn the exception into the rule. In other words, 2008 BC § 1008.1.2.2 specifies an "[e]xception" to its door-swing provisions, excluding Group R-2 and Group R-3 occupancies from having outward-swinging lobby exit doors. The exception only applies, however, if one of the four bases for door-swing egress first applies (in this case, the 50-person-per floor provision). As discussed, that provision does not apply here. Hence, there is no need to reach the door-swing exception, since the rule does not apply.

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2925 In re Commissioner of Social Services,
on behalf of Michelle W.,
Petitioner-Respondent,

-against-

Dwayne W.,
Respondent-Appellant.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondent.

Law offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about August 21, 2015, which adjudged and declared that respondent is the father of the subject child, unanimously affirmed, without costs.

Family Court properly determined that it is in the child's best interest to equitably estop respondent from having a DNA test to establish paternity (*see* Family Ct Act § 532[a]). Clear and convincing evidence demonstrates that respondent held himself out as the father of the child and that the now 10-year-old child considers respondent to be his father (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326-327 [2006]; *Matter of Kerry Ann P. v Dane S.*, 121 AD3d 470, 471 [1st Dept 2014]). The child lived

with respondent, his mother and siblings for about two years, calls respondent "dad" and spends time with him on birthdays and holidays, including Father's Day. Respondent introduced the child to his family and friends as his son, and allowed the child to spend time and develop relationships with his family. Issues of credibility were for Family Court to resolve and its determination to credit the testimony of the mother and the child and to reject that of respondent is supported by the record (*see Matter of Kerry Ann P.*, 121 AD3d at 471).

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Kahn, JJ.

2926-
2927-
2928-
2929-
2930 Tonya Muro Phillips, Index 307883/12
Plaintiff-Respondent,

-against-

Roger Phillips,
Defendant-Appellant.

_____

Law Office of Neal Futerfas, White Plains (Neal D. Futerfas of counsel), for appellant.

Jane B. Freidson Family Law and Mediation, New York (Jane B. Freidson of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Lori S. Sattler, J.), entered June 19, 2015, which, among other things, awarded plaintiff mother sole physical and legal custody of the parties' children, delineated the vacation and holiday periods awarded to each parent, and directed defendant father to pay legal fees to the mother's trial counsel in the amount of $35,000, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 15, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the aforementioned order and judgment. Appeal from order, same court and Justice, entered June 29, 2015, which, among other things, referred the parties' financial issues to a special

referee to hear and determine, and appeal from order, same court and Justice, entered November 10, 2015, which expanded the financial issues referred to the Special Referee, unanimously dismissed, without costs, as abandoned. Order, same court and Justice, entered February 5, 2016, which, among other things, directed the consolidation of the Supreme Court action with the Family Court actions presently pending between the parties, unanimously affirmed, without costs.

Supreme Court considered the totality of the evidence and properly determined that an award of sole legal and physical custody to the mother was in the best interests of the children (*see Eschbach v Eschbach*, 56 NY2d 167, 171, 174 [1982]). The evidence supports the court's view of the mother's superior ability to meet the emotional and intellectual needs of the children. Specifically, the record reflects the father's palpable animosity toward the mother, as well as his contempt and disdain for her, his critical remarks and hostile emails to her, and his attempts to exclude her from important events in the children's lives. The record further demonstrates that the father's conduct was undertaken without any thought on his part as to the potential impact on the children, and that he repeatedly failed to foster the children's relationship with the mother (*see Matter of Celina S. v Donald S.*, 133 AD3d 471, 471

[1st Dept 2015]; *Sendor v Sendor*, 93 AD3d 586, 587 [1st Dept 2012]). The record also reflects the father's pattern of aggressive behavior toward the mother (Domestic Relations Law § 240[1][a]; *Matter of Celina S.*, 133 AD3d at 471). On the other hand, the record shows that, notwithstanding the father's conduct and lack of reciprocal courtesy, the mother has attempted to be civil and recognizes the value of maintaining the children's relationship with the father. There is no basis for disturbing the court's credibility findings (*Eschbach*, 56 NY2d at 173; *Victor L. v Darlene L.*, 251 AD2d 178, 178 [1st Dept 1998], *lv denied* 92 NY2d 816 [1998]).

While Supreme Court considered the testimony and recommendation of the forensic evaluator, it was not bound by the evaluator's recommendation (*Tatum v Simmons*, 133 AD3d 550, 551 [1st Dept 2015]). Nor was an appointment of an attorney for the children necessary for the court to resolve the custody issue (*Richard D. v Wendy P.*, 47 NY2d 943, 944-945 [1979]; *see Sendor*, 93 AD3d at 587).

The parenting schedule set forth in the order and judgment entered June 19, 2015 provides ample visitation to the father, is not unduly disruptive to the children's school and social schedule, and is consistent with the children's best interests (*see Matter of Arelis Carmen S. v Daniel H.*, 78 AD3d 504 [1st

Dept 2010], *lv denied* 16 NY3d 707 [2011]).

Supreme Court providently exercised its discretion in awarding counsel fees to the mother in the amount of $35,000 (Domestic Relations Law § 237[a]), based on, among other things, $200,000 of annual income imputed to the father (*see e.g. Osha v Osha*, 101 AD3d 481, 481 [1st Dept 2012]).

Supreme Court providently exercised its discretion in consolidating the Family Court actions with the Supreme Court action (*see e.g. Paul B.S. v Pamela J.S.*, 70 NY2d 739, 741-742 [1987]; *Kosovsky v Zahl*, 52 AD3d 305, 305 [1st Dept 2008]).

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2931 Matthew Burke, Index 21487/12E
Plaintiff-Respondent,

-against-

Yankee Stadium, LLC, et al.,
Defendants,

Cassone Leasing, Inc.,
Defendant-Appellant.

_____

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for appellant.

Hoberman & Trepp, P.C., Bronx (Adam F. Raclaw of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered December 21, 2015, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Cassone Leasing, Inc. (Cassone) to dismiss the complaint pursuant to CPLR 3211(a)(7) or for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was allegedly injured when he stepped out of a trailer owned by Cassone and into a hole in the sidewalk. Plaintiff claims that the trailer was defective insofar as the exit was not equipped with stairs or handrails.

Cassone's motion was properly denied since Cassone failed to establish that it did not owe plaintiff any duty. As the owner

of the trailer, Cassone had a duty to maintain it in reasonably safe condition (*see Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]), and contrary to Cassone's suggestion, this principle of premises liability is equally applicable to the owner of a trailer.

Cassone also failed to prima facie establish that it did not breach its duty because it did not offer any evidence, expert or otherwise, of applicable industry standards. This case is thus distinguishable from *Dimino v Efficiency Enters., Inc.* (41 AD3d 421 [2d Dept 2007]) and *Merritt v Raven Co.* (271 AD2d 859 [3d Dept 2000]), in which the defendants submitted evidence that the trucks at issue were reasonably safe for their intended uses even without steps or handholds (*Dimino* at 422; *Merritt* at 861). Since Cassone failed to meet its prima facie burden, plaintiff was not required to submit evidence that the trailer was not safe (*see generally William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

Cassone also failed to prima facie establish that the lack of steps or handrails was not a proximate cause of plaintiff's injuries, especially in light of the alleged two-foot gap between the trailer and the ground. Contrary to Cassone's assertion, it is not pure speculation that, had stairs or a handrail been in place, plaintiff may have avoided the hole or at least stepped

into it with less force (*see Schneider v Kings Hwy. Hosp. Ctr., Inc.*, 67 NY2d 743, 744-745 [1986]). Nor was the hole in the sidewalk an intervening cause sufficient to break the causal chain, as it was foreseeable that a person exiting the trailer might encounter a defect in the sidewalk below (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]).

Furthermore, Cassone's motion was premature to the extent it was premised on CPLR 3212. At the time of Cassone's motion, no depositions had taken place and such additional discovery is necessary to shed light on the outstanding issues of fact noted above (*see* CPLR 3212[f]; *Ali v Effron*, 106 AD3d 560 [1st Dept 2013]).

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

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2933 Shaya Narvaez, Index 304096/13
Plaintiff-Appellant,

-against-

River View Redevelopment Co., LP,
Defendant-Respondent.

_____

Mirman, Markovits & Landau, P.C., New York (Ephrem J. Wertenteil of counsel), for appellant.

Brody & Branch LLP, New York (Tanya Branch of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered November 9, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Triable issues of fact exist in this action where plaintiff was injured when she slipped on a wet condition and fell as she descended the stairs in defendant's building. Plaintiff testified that the source of the wet condition that caused her fall was a leaky pipe on the fifth-floor stairwell that she had previously observed and lodged complaints about to defendant's personnel. Such testimony raises triable issues as to whether a recurring condition existed that was left unaddressed by defendant (*see Cignarella v Anjoe-A.J. Mkt., Inc.*, 68 AD3d 560, 561 [1st Dept 2009]; *O'Connor-Miele v Barhite & Holzinger*, 234

AD2d 106 [1st Dept 1996]). Although the superintendent of defendant's building denied that the condition ever existed, credibility issues are properly reserved for the trier of fact.

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2934- Index 309093/10
2935 Jessica Cozier,
Plaintiff-Appellant,

-against-

Kwame Baah, et al.,
Defendants-Respondents.

_____

Sullivan Papain Block McGrath & Cannavo P.C., New York (Gabriel Arce-Yee of counsel), for appellant.

Philip J. Rizzuto, P.C., Uniondale (Kristen Reed of counsel), for Kwame Baah and B&M Hacking Corp., respondents.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for Ali Ijaz and Geyr Taxi, Inc., respondents.

_____

Judgment, Supreme Court, Bronx County (Faviola A. Soto, J.), entered July 13, 2015, after a jury trial, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 27, 2015, which denied plaintiff's motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's finding that plaintiff did not sustain a serious injury to her cervical or lumbar spine within the meaning of Insurance Law § 5102(d) as a result of the motor vehicle accident was based upon a fair interpretation of the evidence (*see Spagnoli-Scheman v Bellew*, 91 AD3d 414 [1st Dept 2012]). There

was conflicting expert testimony as to whether plaintiff's injuries resulted from the accident or were preexisting chronic or congenital conditions unrelated to the accident, and the jury was "entitled to accept or reject the testimony of plaintiff's experts in whole or in part" (*see id.* at 414 [internal quotation marks omitted]).

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

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2936N MIP 145 East 57th Street, LLC, Index 156209/12
Plaintiff-Respondent,

-against-

Art Capital Group, LLC also known as
Art Capital Group, Inc.,
Defendant-Appellant,

Ian Peck,
Defendant.

_____

Jack L. Lester, New York, for appellant.

Gallet Dreyer & Berkey, LLP, New York (Pamela Gallagher of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about October 29, 2015, which denied defendant Art Capital Group's motion to vacate a default judgment entered against it, unanimously dismissed, without costs.

The right to directly appeal from the intermediate order terminated upon entry of the final judgment (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Dietz Intl. Pub. Adjusters v Frankart Distribs.*, 157 AD2d 625 [1st Dept 1990]).

Were we to consider defendant's arguments on appeal, we would find them unavailing. Defendant offered no excuse, let alone a reasonable one, for its default on the underlying motion to strike its answer (*see* CPLR 5015[a][1]). This alone warranted

denial of its motion to vacate (*see generally Rodgers v 66 E. Tremont Hgts. Hous. Dev. Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010]).

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2937N Springut Law PC, Index 156233/14
Plaintiff-Appellant,

-against-

Rates Technology Inc., et al.,
Defendants-Respondents.

_____

Springut Law P.C., New York (Tal S. Benschar of counsel), for appellant.

Clarick Gueron Reisbaum LLP, New York (Isaac B. Zaur of counsel),for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered June 1, 2015, which granted defendants' motion to vacate a default judgment entered March 20, 2015 on the condition that defendants serve and file an answer within 20 days of service of a copy of the order with notice of entry, and denied plaintiff's request for discovery in connection with defendants' motion, unanimously affirmed, without costs.

Defendants demonstrated a reasonable excuse for their default in serving a timely answer to the complaint (*see Imovegreen, LLC v Frantic, LLC*, 139 AD3d 539 [1st Dept 2016]; *Meredith v City of New York*, 61 AD3d 522 [1st Dept 2009])). The motion court correctly found that the lack of communication between decedent and his former counsel, the decedent's myriad medical conditions at the time of the hearing on the motion and

defense counsel's failure to timely withdraw constituted a reasonable excuse for the default and that defendant had valid defenses.

The motion court providently exercised its discretion in denying defendants' request for discovery on the vacatur motion.

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

ENTERED: JANUARY 31, 2017

CLERK

Mazzarelli, J.P., Manzanet-Daniels, Feinman, Webber, Gesmer, JJ.

2938 In re Daquan Coles, Ind. 3145/16
[M-6187] Petitioner,

-against-

Hon. Jill Konviser, etc., et al.,
Respondents.

_____

Daquan Coles, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Jill Konviser, respondent.

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

_____

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

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

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

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2939 The People of the State of New York, Respondent,

Ind. 2883/13

-against-

Elizabeth Fagiolo,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered July 21, 2014, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing her, as a second felony offender, to concurrent terms of six years, unanimously reversed, on the law, and the indictment dismissed.

The verdict was not supported by legally sufficient evidence. Even when viewed most favorably to the People, the evidence was insufficient to establish accessorial liability beyond a reasonable doubt (*see generally* Penal Law § 20.00).

With defendant sitting in the passenger seat of the car her boyfriend was driving, the car followed a van being driven by the shooting victim, a man who had recently fired the friend of defendant and her boyfriend. The friend, defendant, and her

boyfriend used heroin together. When the van parked, the boyfriend parked the car nearby and then approached the van and shot the driver.

In her statement to police, defendant admitted that she knew the boyfriend was carrying a handgun that day, as he habitually did, and that she had assisted the boyfriend in following the van, by keeping track of it and giving him directions. She also told the police that "[s]he assumed [that the boyfriend and the friend] were going to shoot someone."

Notwithstanding these statements, we find that the evidence was legally insufficient to support an inference, beyond a reasonable doubt, that defendant shared the specific intent of the boyfriend to use the firearm unlawfully against another (*compare Matter of Tatiana N.*, 73 AD3d 186 [1st Dept 2010] [active participation in attack while accomplice wielded weapon]). There was no evidence that defendant participated in the attack, for which she was not present, or that anyone ever communicated to her an intent to use the firearm. Although defendant helped her boyfriend follow the van, the evidence does not establish that she did so with the intent to assist him in shooting the van's driver. At most, the evidence indicates a mere possibility that this was her intent.

We also note that defendant was acquitted of all charges

that she acted in concert to commit attempted murder and assault-related crimes against the shooting victim. Although "an acquittal is not a preclusive finding of any fact, in the same trial, that could have underlain the jury's determination" (*People v Abraham*, 22 NY3d 140, 147 [2013]), and the acquittals do not obligate us to disregard any of the trial evidence, they underscore the weakness of the inference that defendant shared her boyfriend's intent to shoot the victim.

We find it unnecessary to address defendant's other arguments.

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2941-
2942 In re Felicia Malon Rogue J., also known as Felicia J., and Another,

Children under Fourteen Years of Age, etc.,

Lena J.,
Respondent-Appellant,

Little Flower Children and Family Services of New York,
Petitioner-Respondent.

_____

Douglas H. Reiniger, New York, for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

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

_____

Orders of disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about May 29, 2015, which, upon a finding, upon respondent's default, of permanent neglect, terminated her parental rights, and committed the custody of the children to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Respondent may not challenge the fact-finding determination of permanent neglect, including whether the agency expended diligent efforts to strengthen the parental relationship between

her and the children, because it was entered upon her default and she has not moved for vacatur (*see* CPLR 5511; *Matter of Aliyah Julia N. [Cecelia Lee N.]*, 81 AD3d 519, 519-520 [1st Dept 2011]; *Matter of Natalie Maria D. [Miguel D.]*, 73 AD3d 536, 536 [1st Dept 2010]).

Even if the Family Court's fact-finding determination were properly before this Court, the finding of permanent neglect was supported by clear and convincing evidence because the record shows that the agency expended diligent efforts by meeting with respondent and discussing with her the necessity of completing her service plan, scheduling visitation, providing reimbursement for respondent's traveling expenses and attempting to contact respondent's upstate service providers to monitor her progress with her mental health treatment, parenting skills training program and anger management class (*see Matter of Isaac A.F. [Crystal F.]*, 133 AD3d 515, 515 [1st Dept 2015], *lv denied* 27 NY3d 901 [2016]). The record also shows that respondent permanently neglected the children despite the agency's diligent efforts, because she only visited them five times between April 2010 and April 2011, never provided a certificate of completion for parenting or anger management classes and refused to sign releases to allow the agency to verify her compliance with her service plan within the scheduled time frame, or to plan for the

children's return (*see Matter of Aisha C.*, 58 AD3d 471 [1st Dept 2009], *lv denied* 12 NY3d 706 [2009]; *Matter of Rueben Doulphus R.*, 11 AD3d 398, 398-399 [1st Dept 2004], *lv denied, dismissed* 4 NY3d 759 [2005]).

A preponderance of the evidence supports the Family Court's determination that it was in the children's best interest to terminate respondent's parental rights and free them for adoption (*see Matter of Mykle Andrew P.*, 55 AD3d 305, 306 [1st Dept 2008]). The children have lived most of their lives with the foster father with whom they maintained a positive relationship, and who has provided for their special needs and wants to adopt them (*see Matter of Jada Serenity H.*, 60 AD3d 469 [1st Dept 2009]).

A suspended judgment was not appropriate here, because there was no evidence that respondent had a realistic and feasible plan to provide an adequate and stable home for the children (*see Matter of Dominique Leonard P.*, 33 AD3d 359 [1st Dept 2006], *lv denied* 8 NY3d 803 [2007]). The record also shows that respondent significantly delayed in addressing her mental health treatment,

which remained unresolved at the time of disposition (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698, 699 [1st Dept 2012]).

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2943-
2943A Manhattan Sports Restaurants of America, LLC,
Plaintiff-Appellant,

-against-

Susanne Lieu,
Defendant-Respondent.

- - - - -

Susanne Lieu,
Third-Party Plaintiff-Respondent,

-against-

Keith Kantrowitz,
Third-Party Defendant-Appellant.

Index 654076/13
595458/14

_____

Jaroslawicz & Jaros PLLC, New York (David Tolchin of counsel), for appellants.

Dechert LLP, New York (Kathleen N. Massey of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Jennifer G. Schecter, J.), entered November 19, 2015, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to dismiss the defamation counterclaim and denied third-party defendant's motion to dismiss the third-party defamation claim, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the third-party complaint.

The alleged defamatory statements made in the complaint by

plaintiff at the direction of third-party defendant (its managing member) are absolutely privileged, because they were made in the course of a judicial proceeding (*see Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209 [1983]).

There are no facts alleged supporting a conclusion that the instant litigation is "a sham action brought solely to defame" (*see Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]). Plaintiff has diligently prosecuted its claims, inter alia, filing an amended complaint and vigorously opposing defendant's prior motion to dismiss, both at the motion court and on appeal (*see id.* at 638; *Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917 [1st Dept 2010]; *Lacher v Engel*, 33 AD3d 10, 13-14 [1st Dept 2006]). The fact that several of plaintiff's claims were sustained on the prior motion to dismiss further undercuts defendant's contention that this litigation is a sham (*see Manhattan Sports Rests. of Am., LLC v Lieu*, 137 AD3d 504 [1st Dept 2016]; *but see Lacher*, 33 AD3d at 14 ["If the privilege existed only in cases that were ultimately sustained, none of the persons whose candor is protected by the rule ... would feel free to express themselves"]).

Nor are any of the alleged defamatory statements not "pertinent" to the litigation (*see Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365 [2007] [internal quotation marks omitted]; *Park*

Knoll Assoc., 59 NY2d at 209). The allegations in the complaint that defendant contends are not pertinent are not "so outrageously out of context" as to permit the conclusion that they were intended solely to defame and are thus not actionable (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 173 [1st Dept 2007] [internal quotation marks omitted]).

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2946 In re Withinvestors St. Marks, LLC, Index 161536/13
Petitioner-Appellant,

-against-

KJY Investment LLC,
Respondent-Appellant.

_____

Beattie Padovano, LLC, Nyack (Arthur M. Neiss of counsel), for appellant.

Cole Schotz, PC, New York (Nolan E. Shanahan of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered April 22, 2015, which, to the extent appealed from as limited by the briefs, denied the petition, granted the counterclaims to the extent of finding that respondent was entitled to a prepayment penalty in the amount of $197,803.98, and declined to award respondent attorneys' fees and costs of collection, unanimously modified, on the law, to grant the petition, declare that petitioner does not owe a prepayment penalty, and deny the counterclaims, and otherwise affirmed, without costs.

Contrary to the IAS court's (Milton A. Tingling, J.), decision, upon which the order appealed from was based, we find that paragraph 3(5) of the December 19, 2012 debt modification agreement replaced only the table in the January 7, 2009 mortgage

note, not the entire section captioned "Refinance and Prepayment Penalties if Mortgage Amount is paid before Amortization Period." Therefore, the sentence in the original note that states, "Notwithstanding anything to the contrary, no prepayment penalty shall apply if the payoff occurs as a result of a bona fide sale to a third party" is saved by paragraph 4 of the modification, which states, "Except as specifically amended by this Modification, all of the terms of the Prior Obligation shall remain in full force and effect."

Respondent contends that if the prepayment penalty exception is eliminated, there is no consideration for the modification. This argument ignores the affidavit submitted by petitioner's managing member, who said that, in order for petitioner to obtain the modification, he – or, more precisely, JSC Financial Investment, LLC – had to make an unsecured loan in the amount of $500,000 to respondent. Indeed, the debt modification agreement states, "Lender [i.e., respondent] acknowledges that it is the borrower under the Promissory Note with JSC ... dated as of the date hereof."

Under New Jersey law, which governs the debt modification agreement, "[a]s long as a contract is bargained for by the promisee, it is immaterial that the benefit of the exchange runs to a designated third party beneficiary" (*Continental Bank of Pa.*

v Barclay Riding Academy, Inc., 93 NJ 153, 171, 459 A2d 1163, 1172 [1983], *cert denied* 464 US 994 [1983]). By analogy, it is immaterial that respondent received consideration from JSC instead of from petitioner.

Respondent quotes *Novack v Cities Serv. Oil Co.* (149 NJ Super 542, 549, 374 A2d 89, 92 [Law Div 1977], *affd* 159 NJ Super 400, 388 A2d 264 [App Div 1978], *certif denied* 78 NJ 396, 396 A2d 583 [1978]) for the proposition that "[c]onsideration involves a detriment incurred by the promisee or a benefit received by the promisor, at the promisor's request" (149 NJ Sup at 549, 374 A2d at 92). However, the New Jersey Supreme Court has more recently stated, "The essential requirement of consideration is a bargained-for exchange of promises or performance ... If the consideration requirement is met, *there is no additional requirement of gain or benefit to the promisor, loss or detriment to the promisee,* equivalence in the values exchanged, or mutuality of obligation" (*Martindale v Sandvik, Inc.*, 173 NJ 76, 87, 800 A2d 872, 878 [2000] [emphasis added]).

Since petitioner was not required to pay a prepayment penalty, it did not "fail[] to make any payment required by th[e] Note within thirty ... days after its due date." In addition,

respondent points to no evidence that it declared petitioner in default. Thus, respondent is not entitled to attorneys' fees or costs of collection.

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2949 Tomohiko Shimuro, Index 153877/15
Plaintiff-Respondent,

-against-

Preston Taylor Products, LLC,
Defendant-Appellant.

_____

C. Robinson & Associates, LLC, New York (W. Charles Robinson of counsel), for appellant.

Ginsburg & Misk LLP, Queens Village (Eric R. McAvey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered February 16, 2016, which denied defendant's motion for summary judgment, and granted plaintiff's motion for summary judgment seeking the return of a $180,000 deposit on the purchase of a commercial condominium unit, unanimously affirmed, with costs.

Reading the sale agreement according to its plain language (*see Regal Realty Servs., LLC v 2590 Frisby, LLC*, 62 AD3d 498, 501 [1st Dept 2009]), defendant was required to deliver title to plaintiff at closing "free and clear of all liens and encumbrances," in addition to a "statement by the Condominium or its managing agent that the common charges and any assessments then due and payable the Condominium have been paid to the date of the Closing," and a "waiver of right of first refusal of the

board of managers of the Condominium." Defendant failed to fully comply with these requirements, as, inter alia, the pending assessment action between defendant and the condominium board, which did not settle until seven months after the time of the essence law date of January 19, 2015, rendered defendant unable to close in accordance with the terms of the sale agreement.

Plaintiff's December 19, 2014 letter stating that defendant was in default, that plaintiff was "ready, willing and able" to close in accordance with the sale agreement, that plaintiff was setting a new closing date of January 19, 2015, "time being of the essence," and that failure to close would result in a breach of the contract, and reserving the right to terminate the contract, was sufficient to make the closing date time of the essence *(Westreich v Bosler*, 106 AD3d 569, 569 [1st Dept 2013]). Defendant's failure to object prior to the closing date rendered the time reasonable as a matter of law (*id.*). Defendant cites no law in support of the assertion that the time of the essence letter was defective, or that plaintiff's response to defendant's bankruptcy filing, "that with the automatic stay in place, there is nothing further we can do with our proposed transaction at this time," was an "unequivocal" waiver of the closing date (*see Stefanelli v Vitale*, 223 AD2d 361, 362 [1st Dept 1996]).

Defendant fails to explain what evidence is within

plaintiff's exclusive control so as to necessitate the need for further discovery to stave off summary judgment (*DaSilva v Haks Engrs., Architects & Land Surveyors, P.C.*, 125 AD3d 480, 482 [1st Dept 2015]).

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2951-
2952 In re Shyann Jael S., and Another,

Dependent Children Under Eighteen
Years of Age, etc.,

Nicole Jael L.,
Respondent-Appellant,

-against-

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

John R. Eyerman, New York, for respondent.

Kenneth M. Tuccillo, Hasting on Hudson, attorney for the children.

_____

Orders of fact-finding and disposition (one paper for each subject child), Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about January 6, 2016, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing, determined that respondent mother had permanently neglected the subject children, terminated the mother's parental rights, and transferred custody and guardianship of the children to petitioner agency and the Commissioner for the Administration of Children's Services for purposes of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]; [3][g][i]). The agency exerted diligent efforts to reunite the mother with the children by, among other things, permitting two trial discharges, formulating service plans, scheduling visitation, and assisting with housing (Social Services Law §384-b[7][f]; *Matter of Jayden Isaiah O. [Rossely R.-O.]*, 144 AD3d 465, 465 [1st Dept 2016]). The mother does not indicate how the agency's efforts on her behalf were deficient or suggest alternatives that would have better addressed her needs. Despite the agency's efforts, the mother failed to plan for the children's future; in particular, the mother permitted the father, a fugitive who physically abused her, to stay in the home, exhibited poor judgment that endangered the children, used marijuana, failed to complete a drug treatment program, visited inconsistently, and neglected to focus attention on the children's needs (*see Matter of S. Children*, 210 AD2d 175, 176 [1st Dept 1994], *lv denied* 85 NY2d 807 [1995]).

Family Court properly concluded that it was in the best interests of the children to terminate the mother's parental rights to free the children for adoption by the foster mother, with whom the children had lived for more than four years and in whose home they were thriving (*see Matter of Star Leslie W.*, 63

NY2d 136, 147-148 [1984]).

We have considered the mother's remaining arguments, including her due process claims, and find them unavailing.

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2953 The People of the State of New York, Respondent, Ind. 1142/14

-against-

Rodney Spencer, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J., at suppression hearing; Michael Sonberg, at plea and sentencing), rendered June 23, 2015, convicting defendant, upon his plea of guilty, of tampering with physical evidence, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence, identification testimony and one of his statements to the police. An officer with extensive experience in narcotics arrests observed defendant, a known drug dealer, conduct a hand-to-hand exchange of an unidentified object in exchange for currency in a drug-prone location. The officer had also learned from an officer in an observation post that defendant had met with the buyer in a nearby park and directed

the buyer to the parking garage where the sale was consummated. Based on the officer's training and experience, he recognized the overall pattern of behavior as characteristic of a drug transaction, regardless of whether the object was specifically recognizable as drugs or drug packaging (*see People v Jones*, 90 NY2d 835, 837 [1997]; *People v Selby*, 82 AD3d 433, 434 [1st Dept 2011], *lv denied* 17 NY3d 801 [2011]).

Additionally, there is no basis for disturbing the credibility determinations of the hearing court, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2956 The People of the State of New York, Ind. 5527N/13
Respondent,

-against-

Jorge Lozano,
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 (Jessica Olive 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 (Michael Sonberg, J.), rendered February 3, 2015,

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: JANUARY 31, 2017

CLERK

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

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2957-
2958 Index 154517/14

Evelyn DeLuca,
Plaintiff-Respondent,

-against-

James Smith,
Defendant-Appellant.

_____

Bernard G. Post LLP, New York (Bernard G. Post of counsel), for appellant.

Lynch Daskal Emery LLP, New York (Bernard Daskal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 29, 2015, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint and to disqualify plaintiff's counsel, and order, same court and Justice, entered July 29, 2016, which denied defendant's motion to renew, unanimously affirmed, without costs, as to the summary judgment issues, and appeals therefrom otherwise dismissed, without costs, as moot.

Issues of fact preclude summary judgment dismissing the fraud claim (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The statement by defendant's attorney that he provided an employment agreement to plaintiff's attorney does not give rise

to a presumption of proper mailing or receipt, since defendant's counsel does not provide an affidavit of service, actual proof of mailing, or a description of his "standard office practice or procedure designed to ensure that items are properly addressed and mailed" (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *American Tr. Ins. Co. v Lucas*, 111 AD3d 423, 424 [1st Dept 2013]).

Plaintiff's trial counsel should have been disqualified under the advocate-witness rule (22 NYCRR 1200.0, 3.7[a]), the purpose of which is "to avoid the unseemly situation where an attorney must both testify on behalf of a client and argue the credibility of his or her testimony at trial" (*Weksler v Weksler*, 81 AD3d 401, 403 [1st Dept 2011]). However, as plaintiff now asserts that counsel no longer represents her in this matter, the issue is moot.

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: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2959 In re Daniel Madera, Index 151257/15
Petitioner,

-against-

The New York City Housing Authority,
Respondent.

_____

Kousoulas & Associates, P.C., New York (Antonia Kousoulas of counsel), for petitioner.

David Farber, New York (Nabiha Rahman of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated October 9, 2014, which, after a hearing, terminated petitioner's employment on specified grounds of incompetency and misconduct, 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 [Manuel J. Mendez, J.], entered May 15, 2015), dismissed, without costs.

The determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180–181 [1978]), and the penalty does not shock our sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). The record demonstrates that petitioner directed abusive and offensive

language at coworkers and that he was insubordinate. His relatively unblemished work history does not warrant a different determination.

Petitioner failed to demonstrate that he was denied due process. His argument that the charges lacked specificity was not raised at the administrative level and therefore was not preserved for review (*see Green v New York City Police Dept.*, 34 AD3d 262, 263 [1st Dept 2006]). The trial officer did not abuse his discretion in declining to adjourn the hearing after petitioner's counsel withdrew from the proceeding due to his inability to contact petitioner despite repeated efforts (*see Matter of Dennelly v County Attorney of Nassau County*, 88 AD2d 912, 913 [2d Dept 1982] ["a person cannot employ delaying tactics to indefinitely defer a disciplinary hearing"]).

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2960 Jeffrey Bell, Index 151981/15
Plaintiff-Appellant,

-against-

Kwadwo Angah, et al.,
Defendants-Respondents.

_____

Berson & Budasewitz, LLP, New York (Jeffrey A. Berson of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Marjorie E. Bornes of counsel), for respondents.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about October 13, 2016, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff, a cyclist, made a prima facie showing of his entitlement to partial summary judgment based on his evidence, including averments of a nonparty witness, that he was lawfully traveling in a designated bicycle lane, with a yield sign in his favor, when defendant taxi driver attempted to make a left turn and, in the process, crossed over the bicycle lane just moments before plaintiff arrived at the same spot, causing plaintiff to brake sharply and be pitched over his handlebars in order to avoid a collision with the taxi (*see* 34 RCNY 4-12[p][2]; Vehicle and Traffic Law §§ 1142[b]; 1172[b]; *Murchison v Incognoli*, 5

AD3d 271 [1st Dept 2004]).

In opposition, defendant taxi driver's observations that plaintiff was riding his bicycle very fast raised factual issues as to plaintiff's potential comparative negligence (*Cicalese v Burier*, 123 AD3d 1078, 1079 [2d Dept 2014]; *cf. Guerrero v Milla*, 135 AD3d 635, 636 [1st Dept 2016] [the defendant's assertion that she "believe[d]" a fast-moving vehicle was plaintiff's vehicle amounted to speculation and failed to raise an issue of fact]). An accident may have more than one proximate cause (*see Gutierrez Bautista v Grand Ambulette Serv., Inc.*, 140 AD3d 639, 640 [1st Dept 2016]; *Cicalese*, 123 AD3d at 1078).

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

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2961 The Board of Managers of the Divine Grace Condominium, Plaintiff-Respondent, Index 152625/13

-against-

Ti Ying Yan also known as Ti Yang Yan, et al., Defendants-Appellants,

"John Doe", etc., et al., Defendants.

Dorf & Nelson LLP, Rye (Jonathan B. Nelson of counsel), for appellants.

Hagan, Coury & Associates, Brooklyn (Paul Golden of counsel), for respondent.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 14, 2015, which denied defendants-appellants' (defendants) motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion to the extent of granting summary judgment on liability against defendants and directing the parties to proceed to trial on damages, unanimously modified, on the law, to deny plaintiff's cross motion for summary judgment on liability as against defendant Golden Key Management Corp., and otherwise affirmed, without costs.

Plaintiff, a condominium's board of managers, commenced this action to recover unpaid common charges applicable to a unit in a

building owned by defendant Ti Ying Yan. The check eventually tendered to plaintiff with instructions stating that it was to be applied to common charges for the unit did not clearly inform plaintiff that accepting the amount offered would settle or discharge the total amount allegedly due so as to constitute an accord and satisfaction (*see Merrill Lynch Realty/Carll Burr, Inc. v Skinner*, 63 NY2d 590, 596 [1984]). Because there was no accord and satisfaction; because defendants acknowledged that Yan failed to pay common charges for four years; and because Yan's eventual tender was only for base common charges without payment for interest, late fees, or attorneys' fees that plaintiff was entitled to pursuant to the condominium's bylaws, Supreme Court correctly granted plaintiff summary judgment on liability as against Yan. However, plaintiff was not entitled to summary judgment on liability as against Golden Key, Yan's managing agent, because Golden Key's interest in the unit is unclear.

Defendants' arguments regarding damages are premature, given that a trial on damages has not yet occurred.

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2963N Mt. Hawley Insurance Company, et al., Plaintiffs-Respondents, Index 156663/14

-against-

American States Insurance Company, Defendant-Appellant,

J&R Glassworks, Inc., Defendant.

_____

Jaffe & Asher LLP, New York (Marshall T. Potashner of counsel), for appellant.

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about September 14, 2015, which, to the extent appealed from as limited by the briefs, denied defendant American States Insurance Company's cross motion for summary judgment declaring in its favor, unanimously affirmed, with costs.

Although this Court, on a prior appeal, upheld the default judgment against defendant J&R Glassworks, Inc. (139 AD3d 497, 498 [1st Dept 2016]), American States is not entitled to declaratory relief in its favor on its cross motion for summary judgment. In the event of a default by a defendant, that defendant admits to the allegations against it in the complaint (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]). Here,

the amended complaint states that "if" plaintiffs 537 West 27th Street Owners, LLC and Chatsworth Builders, LLC are not covered by the insurance policy issued by American States, "then" J&R breached its agreement with plaintiffs. That is the claim that has been defaulted on. Accordingly, should it be determined that coverage does not exist, then J&R cannot challenge whether that amounts to a breach of the agreement, since it has admitted that breach through its default. However, the question of whether coverage exists must be resolved first.

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2964N Dylan M., an Infant, by His Mother and Natural Guardian Tali T.B., Plaintiffs-Respondents, Index 161689/14

-against-

Sameh S. Serour, et al., Defendants.

- - - - -

Katsandonis, P.C., Nonparty Appellant.

_____

Katsandonis, P.C., New York (Paul Catsandonis of counsel), for appellant.

Halperin & Halpern, P.C., New York (Jeffrey Weiskopf of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered December 14, 2015, which, to the extent appealed from as limited by the briefs, granted nonparty law firm's motion for a charging lien to the extent of awarding it quantum meruit compensation limited to prelitigation work, unanimously reversed, on the law, without costs, and the matter remanded to determine whether the firm's discharge was for cause.

Plaintiff mother, who had joint legal custody of the infant plaintiff pursuant to a judgment of divorce, had standing to retain counsel to bring the action on the infant's behalf (CPLR 1201; *Mullins v Saul*, 130 AD2d 634, 636 [2d Dept 1987]). However, based on the conflicting affidavits and lack of

contemporaneous documentary evidence, issues of fact exist concerning the firm's discharge. Accordingly, there is an issue whether the firm is entitled to quantum meruit compensation for litigation work, in whole or in part (*see Nabi v Sells*, 70 AD3d 252 [1st Dept 2009]).

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

ENTERED: JANUARY 31, 2017

CLERK

Friedman, J.P., Renwick, Saxe, Gische, JJ.

2947-
2948 The People of the State of New York
Respondent,

-against-

Diann Grohoske,
Defendant-Appellant.

- - - - -

The People of the State of New York
Respondent,

-against-

Calvin Grohoske,
Defendant-Appellant.

Ind. 1580/14

_____

Tesser, Ryan & Rochman, LLP, New York (Irwin Rochman of counsel), for appellants.

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

_____

Judgments, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 14, 2015, affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5) as to Diann Grohoske.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Dianne T. Renwick
David B. Saxe
Judith J, Gische, JJ.

2947-
2948
Index 1580/14

_____x

The People of the State of New York,
Respondent,

-against-

Diann Grohoske,
Defendants-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Calvin Grohoske,
Defendant-Appellant.

_____x

Defendant Diann Grohoske appeals from the judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 14, 2015, convicting her of kidnapping in the second degree and robbery in the second degree, and imposing sentence. Defendant Calvin Grohoske appeals from the judgment of the same court and Justice, rendered August 14, 2015, convicting him of kidnapping in the second degree and two counts of robbery in the second degree, and imposing sentence.

Tesser, Ryan & Rochman, LLP, New York (Irwin Rochman of coumnsel), for appellants.

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

SAXE, J.

This unusual kidnapping case raises interesting issues regarding the related crimes of unlawful imprisonment and kidnapping and the elements of each, and whether the evidence presented here satisfactorily established those elements. It also provides a lesson to those who believe that the summary proceedings available under the Real Property Actions and Proceedings Law to lawfully evict tenants are not summary enough.

In September 2013, Daniel Lawson, a 25 year old student at the Fashion Institute of Technology, prompted by a listing on Craigslist, agreed to sublet a bedroom in a four-bedroom West Harlem apartment from defendant Calvin Grohoske ("Calvin"), who, along with another person, had leased the apartment from the building's owner. Calvin and his co-lessee made a practice of subletting some of the individual bedrooms in their apartment to various people. Calvin, who had lived in one of the rooms, sublet his room because in August 2013 he moved back to Texas, where his elderly parents owned a cattle ranch, so he could take care of them.

The agreement was that Lawson would pay Calvin a $1,000 security deposit and $1,000 per month for the room. Lawson apparently paid the security deposit, and $864 of his $1,000 rent due for October, by the time he moved into the sublet room on

October 1, 2013. However, Lawson experienced difficulties in the apartment from the outset, when he learned that a man identified as the drug dealer for one of his roommates had forced his way into the apartment and confronted another of his roommates. By the middle of October 2013, Lawson had announced that he would not make any more payments for the apartment, and that "the deal was off."

A flurry of text messages from Calvin were sent to Lawson, threatening him and telling him to vacate the apartment. On October 24, 2013, Lawson sent Calvin a Facebook message telling him to count the $1,000 security deposit toward his rent, which he said would cover the rest of October and the first half of November, and that he would be vacating by the end of that period. After noting that he had heard that Calvin might come to New York, Lawson wrote, "[I]f you cross into my personal space, which I have paid and paid for at a premium, touch or mess with any of my belongings or my animal, or to try to engage with me in the state that I am in right now, I would rather fling open the gates of hell if I were you."

Calvin replied quickly, advising Lawson that his failure to pay the rent resulted in a termination of the agreement. He advised Lawson to be out of the apartment by the end of October and said that he was going to submit a wage garnishment for

Lawson's unpaid rent. Calvin said he arranged with another person to rent the room as of the end of October.

According to Calvin, to clean and prepare the apartment for the new tenant's occupancy at the end of October, Calvin and his mother (both then in Texas) decided to come to New York. On October 29, 2013, the two of them flew from Texas to New York. Upon arrival, they purchased a new door lock at a Home Depot for the room that he had rented to Lawson, with the hope of changing the lock while Lawson was out of the apartment.

At about 10:30 p.m. that day, Calvin and his mother, defendant Diann Grohoske (Diann), arrived at the apartment. Lawson testified that he was in bed, naked, with the lights off, watching Downton Abbey on his computer, when Calvin charged into the room, straddled Lawson on the bed and began punching him in the face; there was also testimony that Calvin "kneed" Lawson in the face. Lawson testified that Diann walked into the room carrying a gun; Diann denied having a gun at any time. According to Lawson, Diann instructed Lawson to get dressed and then to get down on the floor on his knees where Calvin applied duct tape to his wrists so that they would be bound behind his back like handcuffs. Duct tape was also placed around his chest so that his arms were held to his side. Calvin secured Lawson's cat Pookie in a cardboard box, securing it with duct tape. Lawson

said that they also took his cell phone and wallet, which assertion Calvin and Diann denied. Lawson protested to these events by stating to Calvin and Diann that he had "squatter's rights" to the room, and that Calvin had to proceed to landlord-tenant court to obtain an order of eviction before throwing him out. To this, Lawson asserts that Calvin responded, "That's not how we do it in Texas."

Calvin and Diann led Lawson downstairs. He was placed in the front passenger seat of Calvin's rental car, with Diann sitting behind him and Calvin in the driver's seat. Calvin put the duct-taped box containing the cat into the trunk of the car. According to Calvin, he had offered to drop Lawson at a shelter, but Lawson refused because a shelter would not be able to accommodate both him and Pookie the cat. According to Lawson, they proceeded onto the New Jersey Turnpike with Calvin driving and Diann sitting behind him with a gun to the back of his head. At about 12:50 a.m. the car left the New Jersey Turnpike and traveled across the Betsy Ross Bridge into Philadelphia. They eventually arrived at a deserted area in Philadelphia, where Calvin pulled over, and together Calvin and Diann forced Lawson out of the car and threw the cat box out on the street from the trunk. According to Lawson, he was shoved against a fence, and Diann cut some of the duct tape off him and told him, "[I]f you

ever come back you are dead." Calvin and his mother then drove away.

Lawson was able to free himself of the remaining duct tape and began to open the cat box. Apparently Pookie the cat was frightened by the experience of being boxed in an automobile trunk, because as Lawson tried to open the box, the cat jumped out and ran off, never to be seen again.

Ultimately, Lawson located a police station, and reported the unusual events. It was then about 1:20 a.m. The right side of Lawson's face was red and the right front of his glasses were broken and the right lens of his glasses had popped out. A residue of duct tape was found in the area where he had been dropped off.

Defendant Calvin Grohoske was convicted at trial of kidnapping in the second degree and two counts of robbery in the second degree, but acquitted of robbery in the first degree and one count of torturing and injuring animals. He was sentenced to a prison term of nine years for the kidnapping count and eight years for each of the robbery counts, all to run concurrently, plus five years of post release supervision. Defendant Diann Grohoske, was convicted of the second degree kidnapping count and one count of robbery in the second degree, and sentenced to a five year prison term plus five years of post release

supervision.

On appeal, defendants contend that their convictions must be reversed because the trial court failed to charge a lesser included offense, and, in the alternative, that their convictions for kidnapping in the second degree must be reversed because the evidence failed to establish all of the elements of the crime. Diann Grohoske further contends that there was insufficient evidence of her participation in the robbery.

In determining whether a verdict is supported by legally sufficient evidence, the reviewing court must decide "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial," and as a matter of law satisfy the proof and burden requirements for every element of the crime charged (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v Danielson*, 9 NY3d 342, 349 [2007]).

A person commits second-degree kidnapping "when he abducts another person" (Penal Law § 135.20). "Abduct" means "to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly physical force" (Penal Law § 135.00[2]). "Restrain" means:

"to restrict a person's movements intentionally and

> unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful. A person is so moved or confined 'without consent' when such is accomplished by (a) physical force, intimidation or deception..."

(Penal Law § 135.00[1]). As the Court of Appeals has explained, an "abduction is either restraint in a place where the victim is unlikely to be found or restraint through the actual or threatened use of deadly physical force" (*People v Gonzalez*, 80 NY2d 146, 150 [1992] [internal citations omitted]).

Defendants contend that neither statutory meaning of the word "restrain" was established by the evidence, since (1) a car on a public thoroughfare does not constitute a place where the victim was not likely to be found under Penal Law § 135.00(2), and (2) the jury's acquittal of them for the charge of first degree robbery precludes a finding that they used or threatened to use deadly physical force. Defendants employ too narrow a construction of the term "restrain."

Even assuming that the jury's acquittal on the first-degree robbery charge warrants the conclusion that defendants did not use or threaten to use a gun, the evidence that defendants made Lawson put his hands behind his back, bound him with duct tape, took his cell phone and wallet from him, forced him into a car,

drove him from Manhattan to Philadelphia and abandoned him on an empty street shortly after midnight, satisfies the definition of abduction based on secreting or holding the victim in a place where he was not likely to be found (*see* Penal Law § 135.00[2][a]).

We reject defendants' argument that a car on a public thoroughfare may not, as a matter of law, be considered "a place where [the victim] is not likely to be found" (Penal Law § 135.00[2]). The question of whether the car was a place where Lawson was unlikely to be found was properly submitted to the jury, and the evidence was legally sufficient to support the jury's finding. As was the case in *People v Salimi* (159 AD2d 658 [2d Dept 1990], *lv denied* 76 NY2d 742 [1990]), a car traveling through public streets in the middle of the night may be found to be a place where the victim was not likely to be found, particularly where the victim lacked any means of calling for help while held there. This situation is a far cry from cases where the victim is in the presence of third parties and in a location where she was known, as was the case in *Matter of Luis V.* (216 AD2d 15, 15-16 [1st Dept 1995], *lv dismissed* 86 NY2d 838 [1995], *lv denied* 87 NY2d 803 [1995]).

Since defendants took Lawson and stranded him in a deserted location far from home, it was appropriate to infer that it was

their intent to prevent him from being found as they made their way by car to Philadelphia. The alternative intent defendants posit, that they could have sought merely to get Lawson away from the apartment so they could prepare the room for the new renter, but could have been indifferent about whether Lawson could be found while in their car, not only verges on the nonsensical given how and where they transported him, but in any event, is merely an alternative proposal to submit to the finder of fact; it does not provide grounds for reversal of defendants' kidnapping convictions.

Defendants suggest that a car may only be treated as a place where the victim is "not likely to be found" if (1) the defendant used or threatened to use a weapon to put or keep the victim in the vehicle, (2) the defendant used the vehicle to take the victim to a secluded place, or (3) the victim was not visible to the public within the car. However, neither Penal Law § 135.00(2) nor any case law imposes such requirements of proof. Even if there was a requirement that the victim not be visible to the public, it was satisfied since no one else had any way of knowing that Lawson was being conveyed in defendants' car to Philadelphia, since defendants prevented Lawson from calling for help, and since the car was driving down the New Jersey Turnpike late on a Tuesday night, making Lawson unlikely to be found or

observed by any interested individuals during that time. Moreover, while there is no requirement that the victim have been brought to a secluded or isolated place, a deserted street corner in a city where he knew no one would qualify in any event.

Finally, there is no basis for applying the merger doctrine here. The doctrine only requires overturning kidnapping convictions where the "kidnapping [was] based on acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts" (*People v Stuckey*, 56 AD2d 898, 898 [2d Dept 1977] [internal quotation marks and emphasis omitted]; *see also People v Palmer*, 50 AD2d 839 [2d Dept 1975]). This is not such a case.

The court correctly declined to submit second-degree unlawful imprisonment to the jury as a lesser included offense of second-degree kidnapping. A defendant is entitled to a charge on a lesser included offense only if he meets the two-pronged test set forth in *People v Glover* (57 NY2d 61, 64 [1982]; *see People v Rivera*, 23 NY3d 112, 120 [2014]). First, it must be theoretically impossible to commit the greater crime without at the same time committing the lesser (*see* CPL 1.20[37]; *Glover*, 57 NY2d at 63-64). Second, there must be a "reasonable view of the evidence," viewed in the light most favorable to the defendant, upon which a jury could find that the defendant committed the

lesser offense but not the greater (*see Glover*, 57 NY2d at 63). In assessing the second prong, there must be "some identifiable, rational basis on which the jury could reject a portion of the [evidence] which is indispensable to establishment of the higher crime and yet accept so much of the proof as would establish the lesser crime" (*People v Scarborough*, 49 NY2d 364, 369-370 [1980]).

With respect to the charges at issue here, a person is guilty of second-degree unlawful imprisonment "when he restrains another person" (Penal Law § 135.05). Thus, for unlawful imprisonment to be a viable lesser included offense, the victim must have been "restrained" as defined in Penal Law § 135.00(1), without having been "abducted" as defined in Penal Law § 135.00(2). Defendants maintain that there was a reasonable view of the evidence that they restrained Lawson as required to establish unlawful imprisonment, but did not abduct him, in that no gun was used, they did not hold or secrete Lawson in a place where he was not likely to be found, and although they interfered substantially with his liberty they did not intend to prevent his liberation.

Unlawful imprisonment does not qualify here as a lesser included offense of the kidnapping charge, because there was no reasonable view of the evidence that defendants unlawfully

imprisoned Lawson but did not kidnap him. In particular, there was no reasonable view of the evidence that defendants moved Lawson from one place to another without restraining him in a place where he was unlikely to be found, or that defendants held him in the car without intending to prevent his liberation. Defendants *necessarily* intended to prevent Lawson's liberation while they drove on the New Jersey Turnpike, since his liberation would have interfered with their plan to get him out of the apartment and move a new tenant in.

It is noteworthy that defendants did not argue in summation that the People failed to establish these elements of kidnapping, and they did not present evidence in support of any such theory. Instead, defendants claimed that no restraint had occurred at all and that Lawson had asked them to drive him to Philadelphia. Both Calvin and Diann testified that Calvin promised to drive Lawson there as a ploy to get him out of the apartment, and that Lawson then talked Calvin into following through on that promise. Defendants did not argue to the jury that even if Lawson was forced into the car, some of the elements of second-degree kidnapping had not been established.

As to Diann's robbery conviction, there was ample evidence to permit the finding of her accessorial liability for second-degree robbery. Both Diann and Calvin were convicted of second-

degree robbery under Penal Law § 160.10(1), for forcibly stealing property while "aided by another person actually present." When one person engages in conduct that constitutes an offense, another person is criminally liable for such conduct "when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct" (Penal Law § 20.00).

Lawson testified that both Calvin and Diann bound him with duct tape, so although it was only Calvin who physically took his cell phone and wallet, the evidence permitted the inference that it was both defendants' purpose to steal Lawson's cell phone and wallet as part of their joint plan to leave him stranded and unable to quickly obtain help. The role that Diann played in the execution of their plan provided sufficient evidence of a common purpose and a collective objective with Calvin (*see People v Cabey*, 85 NY2d 417, 422 [1995]).

Accordingly, the judgments of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 14, 2015, convicting defendant Diann Grohoske of kidnapping in the second degree and robbery in the second degree, and sentencing her to an aggregate term of five years, and convicting defendant Calvin Grohoske of kidnapping in the second degree and two counts of

robbery in the second degree, and sentencing him to an aggregate term of nine years, should be affirmed, and the matter remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5) as to Diann Grohoske.

All concur.

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

ENTERED: JANUARY 31, 2017

CLERK