SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 12, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

14221 The People of the State of New York, Respondent, Ind. 823/09

-against-

Carlos Valentin,
Defendant-Appellant.

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

Anthony A. Scarpino, Jr., Special District Attorney, White Plains (Virginia A. Marciano of counsel), for respondent.

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Upon remittitur from the Court of Appeals for further consideration (29 NY3d 57 [2017]), judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered September 28, 2011, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 20 years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

In his 2015 appeal to this Court, defendant argued, among other things, that the trial court, under the facts of this case, erred by including an initial aggressor instruction in the

justification charge (*see* Penal Law § 35.15). A majority of this Court, with one Justice dissenting, agreed, holding that the jury "could not have reasonably found that defendant was the initial aggressor because the evidence does not support such a conclusion" (128 AD3d 428, 428 [1st Dept 2015]). We further held that the error was not harmless, reasoning that "[d]efendant's justification defense presented a close question of whether defendant had a reasonable basis for his use of deadly force, and the charging error could have affected the verdict because the jury might have concluded that defendant was the initial aggressor and, thus, not entitled to a justification defense" (*id.* at 429). Because we reversed the judgment of conviction and remanded the matter for a new trial, we did not address defendant's contentions that (1) the court erred by failing to instruct the jury that if it acquitted defendant of the count of murder in the second degree based on the justification defense, the jury was not to consider the lesser included offense of manslaughter in the first degree, and (2) the sentence was excessive.

The dissenting Justice granted leave to appeal (2015 NY Slip Op 87471[U]), and a majority of the Court of Appeals reversed on the ground that "[i]n the context of [the] self-defense charge, an initial aggressor charge was warranted because the charge was

requested and there was an issue of fact on that point" (29 NY3d 57, 61 [2017]). The matter was remitted to this Court for consideration of the issues raised but not determined.

Upon remittitur, we find that defendant is entitled to a new trial. As in *People v Kareem*, (148 AD3d 550 [1st Dept 2017], *lv dismissed* 29 NY3d 1033 [2017]) and *People v Velez* (131 AD3d 129 [1st Dept 2015]), "the court's jury charge failed to convey that an acquittal on the top count based on a finding of justification . . . would preclude consideration of the remaining charges" (*Kareem*, 148 AD3d at 551).

We find that this error was not harmless and warrants reversal in the interest of justice (*see id.*). Because we are ordering a new trial, we decline to reach defendant's remaining claim that his sentence was excessive.

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

ENTERED: OCTOBER 12, 2017

CLERK

Acosta, P.J., Renwick, Webber, Oing, Moulton JJ.

4597-
4598 Index 152052/13

The Board of Managers of the Warren House Condominium, etc.,
Plaintiff-Respondent-Appellant,

-against-

34th Street Associates LLC, et al.,
Defendants-Appellants-Respondents.

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Goldberg Weprin Finkel Goldstein LLP, New York (Matthew Hearle of counsel), for appellants-respondents.

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for respondent-appellant.

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Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 18, 2015, which denied defendants' motion for summary judgment and plaintiff's motion for partial summary judgment, unanimously affirmed, without costs.

Issues of fact exist as to whether defendants' ownership of more than 10% of the condominium units has rendered the condominium unviable. In particular, plaintiff submitted evidence indicating that such ownership by defendants has made lenders unwilling to provide financing or mortgages secured by the condo units, and that defendants' rental tenants have caused

increased wear and tear on the building's common areas (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152-153 [2002]; *West Gate House, Inc. v 860-870 Realty LLC*, 7 AD3d 412 [1st Dept 2004]).

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Sweeny, Manzanet-Daniels, Andrias, Moskowitz,, JJ.

4197 In re Galaxy Bar & Grill Corp., Index 100376/16
Petitioner-Respondent,

-against-

New York State Liquor Authority,
Respondent-Appellant.

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Christopher R. Riano, Albany (Anna N. LaJoie of counsel), for appellant.

Cooper Law Group, P.C., New Rochelle (Jared A. Cooper of counsel), for respondent.

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Judgment, Supreme Court, New York County (Kathryn E. Freed, J.),entered August 3, 2016, granting the amended petition brought pursuant to CPLR article 78 and annulling respondent New York State Liquor Authority's (SLA) determination, dated February 16, 2016, which denied petitioner Galaxy Bar & Grill Corp.'s (Galaxy) application for a full on-premises liquor license, and remitting the matter to SLA for reconsideration of Galaxy's application, affirmed, without costs.

The issue before us concerns SLA's denial of petitioner's third application for an "on-premises" liquor license to operate a tavern and cabaret. The proposed establishment is on the second floor of a commercial building located at 1370 Ralph Avenue in Brooklyn. The floor plan provides for 24 tables, a 20-foot bar with seating for 10 and a maximum capacity of 375

persons.

Petitioner had submitted two prior applications for a liquor license for this proposed tavern. The first was denied for failure to provide the SLA with requested information and the second was denied because petitioner's principal, Carmel Jean Loiseau, lacked experience in the management of this type of establishment. The application in question sought to remedy these defects by proposing to hire an experienced manager and submitting a security plan for the operation of the tavern.

The proposed manager, Eduardo Fontan Besey, noted his professional experience from 1999 through 2013 as a manager, consultant and principal with various hotels, restaurants and lounges in Montauk, Miami and Manhattan. The security plan was submitted by Tony Caldarola, a former commanding officer of the Brooklyn North Vice Squad and partner in Illuminus Investigative Services, Inc. The plan provided that the security team would be supervised by retired NYPD personnel, with guards at the front entrance controlling the flow of patrons and scanning their ID's via an electronic security system. Patrons would pass through a metal detector and, if approved, proceed to the second floor tavern. Security guards would be posted by the exit doors of the premises, a security camera would be installed, and a parking plan would be prepared.

After a full board hearing, the SLA denied petitioner's application. The SLA noted that Loiseau had no experience in managing or supervising a business with a liquor license, and, although Besey had considerable management experience, at least one of the businesses he managed had a history of sales to minors.

Significantly, in its decision, the SLA noted that the subject location had twice been previously licensed in the past by two entities unrelated to either each other or to Loiseau. In both cases, those entities had their licenses revoked for, among other things, assaults, shootings, stabbings, disorderly conduct, sales of alcohol to minors, lewd conduct and various other activities that became a "focal point of police attention." The SLA also noted that two prior applications by Loiseau had been denied.

Subsequently, a "Disapproval Hearing," which focused on Caldarola's security plan, was held before an Administrative Law Judge (ALJ). Mr. Caldarola testified that he spoke with community affairs personnel in the local precinct to determine the prior history of the location. The business plan envisioned serving a more mature clientele in an "event"- type setting. He testified that with these facts, along with the implementation of his security plan, the premises could be operated safely and

would avoid the past unsavory activity that took place at that location.

Besey acknowledged that he was the manager of a premises in which there were some incidents of underage serving, which he brought to the attention of the owners. When they refused to change their practices, he quit their employ.

Finally, the local Community Board was notified of the hearing and no one appeared to oppose the application. In this regard, petitioner had included with its application a letter from a City Council member urging favorable action on the application.

The ALJ recommended that the application disapproval be vacated and that the application process be reopened. Although the past history of the premises was troublesome, the ALJ found that Loiseau had no connection with those events, that the plans for security and proper management demonstrated a willingness to comply with the law and that there was no rational basis to conclude that the premises would not be properly controlled and operated.

At a second meeting of the full board, the SLA counsel criticized the ALJ's determination and gave petitioner the option of either a second disapproval hearing or a request for the SLA to reconsider its prior determination. Petitioner opted for a

second disapproval hearing, which was held before a different ALJ. That ALJ upheld the full board's disapproval of petitioner's application, finding, among other things, that the SLA had a rational basis for making its disapproval determination, given the past history of the premises and its concern that history would "repeat itself," thus putting local residents and patrons of the establishment at risk.

Petitioner commenced an article 78 proceeding. The motion court granted the amended petition, annulled the determination denying petitioner's application for a full on-premises liquor license and remitted the matter to the SLA for reconsideration of the application in accordance with the court's decision. The court found that the history of violations and reported criminal activity was not relevant here because petitioner had no ownership interest in the prior licensees and exercised no managerial responsibilities with the prior operators. The court also found community support based upon the letter from a City Council member urging the SLA to grant the license. We agree.

The SLA is given wide latitude in the exercise of its powers (*Matter of Wanetick v State Liq. Auth.*, 8 AD2d 706, 706 [1st Dept 1959], *lv denied* 6 NY2d 707 [1959]). In reviewing a determination made by the SLA, the test to be applied by the court is whether its determination has a rational basis in the

record (*see Matter of C. Schmidt & Sons v New York State Liq. Auth.*, 73 AD2d 399, 404 [1st Dept 1980], *affd* 52 NY2d 751 [1980]).

The dissent correctly notes that the prior adverse license history of the subject premises, and the sensitive area in which it is located, may be proper factors to be considered in the licensing process. However, in doing so, the dissent ignores long-standing precedent from several Judicial Departments, including our own, that such history is not relevant where, as here, the principal of the applicant "ha[s] no ownership interest in the previous licensee and there is no reasonable factual basis to support a finding that he exercised managerial responsibilities with respect to that prior operation" (*see Matter of Ha Ha Ha, Inc. v New York State Liq. Auth.*, 262 AD2d 1008, 1008 [4th Dept 1999]; *see also Matter of 135 Rest. Corp. v State Liq. Auth.*, 25 AD2d 651, 651 [1st Dept 1966]; *Matter of 512-3rd St. v New York State Liq. Auth.*, 217 AD2d 1010, 1010 [4th Dept 1995]; *Matter of Tobo Rest., Inc. v State Liq. Auth.*, 49 AD2d 766, 767 [2d Dept 1975]).

The SLA maintains that the applicant has the identical business plan for a nightclub as the previous two licensees whose licenses were revoked. Thus, the SLA contends that the fear of "history . . . repeat[ing] itself," especially in light of the

proposed manager's "questionable" experience, has a rational basis and its denial should be upheld. However, its denial appears to be "based upon conclusory reasons unsupported by factual considerations of reasonable persuasiveness and should therefore . . . be set aside" (*Matter of Matty's Rest. v Mew York State Liq. Auth.*, 21 AD2d 818, 819 [2d Dept 1964], *affd* 15 NY2d 659 [1964]). Moreover, the SLA may not deny a proper license application based on the supposition that principals of the licensee would not exercise the "proper 'degree of personal supervision'" over the licensed premises to insure the premises would be operated in an orderly and lawful manner, as such denial would be based on speculative inferences (*Matter of Santini Rests. v State Liq.* Auth., 32 AD2d 514 514 [1st Dept 1969]; *see also Matter of Bonafino v Doyle*, 39 AD2d 1009 [3d Dept 1972]).

Here, Besey explained that his "questionable experience" was limited to one employer, and that his other significant experience was unblemished. The application also included an extensive security plan, submitted by a retired NYPD lieutenant who was a former commanding officer of Brooklyn North Vice Squad and a principal in a security services company. While the SLA relies on *Pastore & Assoc. v New York State Liq. Auth.* (194 AD2d 409, 410 [1st Dept 1993]) for the principle that the efficacy of a security plan is subject to the SLA's evaluation, and while the

security plan, standing alone, would not mandate the granting of this application, there is no evidence that the SLA found the security plan to be inadequate, or that it would not be properly implemented.

While the SLA referenced local residents' complaints regarding the situation created by prior licensees' activities, community opposition in and of itself cannot sustain the authority's determination to reject the application (*Matter of Circus Disco v New York State Liq. Auth.*, 51 NY2d 24, 38 [1980]). In any event, there is nothing in this record to support a finding of community opposition. While the dissent interprets the failure of petitioner to meet with the Community Board as evidence of community opposition, the record shows that the Community Board was given notification of the SLA hearing and no one appeared to either oppose or support it. This essential fact is overlooked in the SLA's determination. Additionally, as conceded by the dissent, petitioner submitted a letter of support from a City Council member. Nor is there anything in the record that the police have expressed concern about the present application. The dissent correctly notes that petitioner conceded at the SLA hearing that the police certainly had serious issues with the conduct of past licensees. However, as noted above, the security consultant, a former NYPD vice squad

commander, personally met with the local precinct community affairs officers to determine the prior history of the location and to discuss the proposed new establishment. As with the Community Board, the police had the opportunity to express reservations or concerns and failed to either appear at, or send communications to, the SLA regarding any concerns they may have had about petitioner's application.

Moreover, "[t]he likelihood of future violation can furnish a basis for denial only when there are facts in the record which rationally support doing so" (*Matter of Circus Disco*, 51 NY2d at 36, citing *Matter of Matty's Rest.*, 21 AD2d at 818).

Here, there are no such facts in the record. The concern that history would "repeat itself" is not sufficient to warrant denial since the record does not rationally support this conclusion. The SLA and residents are not without remedies "if what is feared . . . becomes fact" (*Matter of Circus Disco*, 51 NY2d at 36).

In affirming the motion court's ruling, we are not, as the dissent contends, substituting our judgment for that of the SLA. Rather, we are maintaining our "judicial responsibility to review and pass upon administrative action claimed to be arbitrary and without foundation in fact or in law" (*Matter of Matty's Rest.*, 21 AD2d at 818; *Matter of Bonafino*, 39 AD2d at 1009).

As a result, upon the entire record presented here, the inescapable conclusion is that, as a matter of law, the reasons stated by the SLA in support of its disapproval of petitioner's application, "whether considered singly or in relation to each other, d[id] not afford a rational basis for the action taken," and should therefore be set aside (*Matter of Matty's Rest.*, 21 AD2d at 818).

It bears noting that, in affirming the motion court's decision and judgment, we are not directing the SLA to issue a license. Rather, our decision confirms the motion court's direction that the SLA reconsider the application in light of the precedential principles set forth in both our and the motion court's decisions.

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

TOM, J. (dissenting)

The Liquor Authority's decision to deny petitioner's application for a full on-premises liquor license has a rational basis in the record and was not arbitrary and capricious. Accordingly, I dissent.

Petitioner's 2015 application was for a bar/tavern and cabaret, with live and recorded music, plus dancing. Carmel Jean Loiseau signed the application as petitioner's principal. Loiseau's prior experience was listed as building maintenance and maintenance manager. Loiseau also indicated that petitioner's application had been disapproved twice before. The first time was on March 12, 2013, for failure to provide the Liquor Authority with certain information, and the second time was on April 11, 2014, for lack of management experience.

Eduardo Fontan Besey was petitioner's proposed manager in the present application. Besey noted his professional experience, from 1999 through 2013, as a manager, consultant, and principal with various hotels, restaurants, and lounges in Montauk, Miami, and Manhattan. Also attached to the application was a detailed security plan for the location.

Following a full board hearing in August 2015, on September 11, 2015, the Authority denied the application. Among its many concerns, the Authority noted that this was the third time

petitioner had applied for a license at this location, that the first application was denied for failure to cooperate with the Community Board, and that the second application was denied because petitioner failed to address the Authority's concerns or provide a clear plan of supervision. The Authority remained concerned that on this third application petitioner had still failed to meet with the Community Board to resolve the objections the neighborhood had to licensing the location.

The Authority also noted that the sole principal of petitioner has never held a license to sell alcoholic beverages and did not disclose any experience working in, or supervising, a business with a liquor license. While acknowledging that Besey, who has appropriate experience, would be managing the business, the Authority noted that his experience was "questionable" because at least one of the businesses for which he worked had a history of sales to minors during the time Besey was employed as its manager.

Although petitioner did submit a security plan with this application, the Authority noted that local police had expressed reservations about having a nightclub at this location given the history of shootings, stabbings, sales to minors and other incidents. Given both this history, the lack of experience of petitioner's principal and the questionable experience of the

proposed manager and the other concerns it had about petitioner, the Authority was unconvinced that the location could be operated by petitioner as a nightclub without a reoccurrence of violence and unlawful operation. The Authority was not persuaded that petitioner's proposed changes would be possible, given the evidence presented, including the limited seating, music and dancing at the premises. Thus, concerned that history would "repeat itself" the Authority determined it could not risk the safety of the local residents or patrons of the establishment.

In articulating its reasons for denying the application, the Authority also provided a history of the location. It noted that the past two licensees had their licenses revoked following violations of building codes; allowed the premises to become disorderly, and that such disorder included assaults such as stabbings and shootings, and lewd conduct; sold alcohol to minors and after hours; and permitted other parties to use their license. The Authority also remarked that the continuing pattern of problems at the location resulted in it becoming a focal point of police attention.

Ultimately, an Administrative Law Judge determined that the Authority had a rational basis for its determination, and on February 16, 2016 the Authority adopted the recommendation and denied the application.

The Liquor Authority is given wide latitude in the exercise of its powers (*see Matter of Wanetick v State Liq. Auth.*, 8 AD2d 706, 706 [1st Dept 1959], *lv denied* 6 NY2d 707 [1959]). "[A] reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious" (*Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006]). Courts look to whether the determination "is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Here, the Authority's written statement sets forth detailed, concrete reasons for its determination, made after a hearing, that good cause had been shown to deny the application, i.e., that "public convenience and advantage and the public interest" would not be promoted by issuance of the license (Alcoholic Beverage Control Law § 64[1], [6-a]). In sum, the Authority's determination has a rational basis in the record and was not arbitrary and capricious.

The Authority rationally considered a number of relevant factors in making its determination, including the principal's

lack of experience, the questionable experience of the proposed manager, petitioner's failure to meet with the Community Board, opposition from the police and community, the history of violence and unlawful behavior at that location, the risk to the public's safety, and that petitioner had the identical business plan for a nightclub as the previous two licensees whose licenses were revoked (*see* Alcoholic Beverage Control Law § 64[6-a][f]). Further, while petitioner did submit a security plan, "[t]he efficacy of such operational plans is, of course, subject to respondent's evaluation" (*Pastore & Assoc. v New York State Liq. Auth.*, 194 AD2d 409, 410 [1st Dept 1993]). Nor does the submission of a purportedly adequate security plan require the granting of the license if there are other factors weighing against doing so.

The Authority also properly considered "[t]he history of liquor violations and reported criminal activity at the proposed premises" (Alcoholic Beverage Control Law § 64[6-a][e]) even though petitioner had no ownership interest in the previous licensees (*cf. Matter of Ha Ha Ha, Inc. v New York State Liq. Auth.*, 262 AD2d 1008 [4th Dept 1999]). Contrary to the majority's argument, the prior licensees' licensing history and the location, which reflects a potentially dangerous and troublesome locale that can affect the safety and welfare of the

patrons and employees of the establishment, were relevant to this application and served as factors, among others, that informed the Authority in making its determination. Indeed, the history and location factors are very relevant to the complete lack of experience of the sole principal applicant and the questionable qualifications of the proposed manager, and, given all the combination of these and other factors, the Authority rationally decided not to grant the application.

Further, petitioner was not unfairly prejudiced by the past licensees' failures, as the Authority's determination was not solely based on that history (*cf. Matter of 512-3rd St. v New York State Liq. Auth.*, 217 AD2d 1010, 1010 [4th Dept 1995] ["The prior history of the premises, standing alone . . . is insufficient to warrant disapproval of the application"]). Rather, in conjunction with a number of factors, including the complete lack of experience of the sole principal owner in managing or supervising a bar/tavern/cabaret with a liquor license and the questionable qualification of the proposed manager, the Authority properly considered this history as it related to the "community impact" of licensing a nightclub at that location (*see Matter of 21 Group, Inc. v New York State Liq. Auth.*, 115 AD3d 509, 509 [1st Dept 2014], *lv denied* 24 NY3d 908 [2014]).

A fair reading of the Authority's determination demonstrates that community opposition to the proposed establishment was not the sole basis for the determination, and thus the majority's concern in that regard is unfounded. Further, contrary to the majority's claim that there is no evidence of community or police opposition, petitioner conceded below that the police have expressed concerns about this application, and petitioner failed to meet with the Community Board to attempt to resolve the objections the community had to licensing the location, including the objections received to petitioner's earlier applications. In fact, in its determination the Authority found the following:

> "We remain concerned with the fact that it appears that the applicant has failed to meet with the Community Board to attempt to resolve the objections that the neighborhood has to licensing this location. In addition, the applicant concedes that the local police have expressed reservations about another nightclub being opened at this location, given the incidents that have taken place here in the past."

At the Liquor Authority's August 2015 hearing, Authority Chairman Bradley stated that the Community Board had problems with petitioner's application because it was a problem location and petitioner was proposing a similar nightclub at a location that had a history of violence and safety issues. Petitioner's counsel responded that petitioner was aware that the Community Board had concerns. In addition, Chairman Bradley noted that the

location was a violent place and a "[p]olice focal point." Petitioner's counsel acknowledged that when he contacted the police regarding the application the police expressed concerns about, among other things, unruliness, the lack of control, and excessive capacity levels. Chairman Bradley also remarked that the history of violence at the location, which had a similar business model to this application, should not be minimized as it was extensive and included shootings and stabbings.

Although it is not the role of this Court, the majority appears to be challenging the fact finding of the Liquor Authority with regard to community and police opposition. Further, by stressing the fact that the police and Community Board did not appear at the SLA hearing, the majority creates a burden where none exists. "It is for the administrative agency to determine the credibility of the witnesses, to weigh the evidence and to draw inferences therefrom, and this Court cannot substitute its judgment, on conflicting evidence or on conflicting inferences for that of the Agency" (*Irvington Enters. v Duffy*, 155 AD2d 335, 336 [1st Dept 1989]; *see also Matter of Pell*, 34 NY2d at 232; *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009] [If there is rational basis for a determination, reviewing court "must sustain the determination even if the court concludes that it would have reached a different result than the

one reached by the agency"]). Moreover, it was undisputed that the police expressed concerns about the application and they were thus not required to appear at the hearing. Nor is there a basis to question the Authority's concerns about petitioner's failure to meet with the Community Board, or the Community Board's concerns about the application.

The fact that the Community Board did not attend the Liquor Authority's hearing is not germaine to the Liquor Authority's finding that the Community Board had a problem with petitioner's application. At the hearing, petitioner had acknowledged the Community Board's concern regarding the application due to safety issues at the location. The majority's purported concern that the Community Board had not attended the hearing is a nonissue and a red herring.

The Authority's determination was neither based on speculation nor on conclusory reasons, as suggested by the majority. Rather, it was based on an undisputed violent history at the premises, the established questionable experience of the proposed manager, community and police opposition, and the owner's lack of experience. While the Authority cannot see into the future with perfect accuracy, there were facts in this record to support the Authority's concerns about future violations (*see Matter of Circus Disco v New York State Liq. Auth.*, 51 NY2d 24,

36 [1980]), and the Authority and community residents should not have to wait until such violations occur.

While there may be some evidence that might support petitioner's application for a liquor license, including a supporting letter from a City Council Member, it is not our place to substitute our judgment for that of the Authority, which made a reasonable decision and did not abuse its discretion (*see Pell*, 34 NY2d at 232).

I would therefore reverse the decision of the motion court granting the amended petition brought pursuant to CPLR article 78 and annulling the Liquor Authority's determination, dated February 16, 2016, vacate the judgment, and dismiss this proceeding.

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

ENTERED: OCTOBER 12, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4475- Ind. 1375/13
4475A The People of the State of New York, 1044/13
Respondent,

-against-

Carlton Matthan,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered December 10, 2014,

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

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

ENTERED: OCTOBER 12, 2017

CLERK

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

Friedman, J.P., Richter, Moskowitz, Gesmer, JJ.

4514-
4515 The People of the State of New York,
Respondent,

-against-

Lenard Berrian,
Defendant-Appellant.

Ind. 4193/14

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at plea, sentencing and resentencing; Eduardo Padró, J. at diversion proceedings), rendered December 28, 2015, as amended May 31, 2016, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of three years, unanimously affirmed.

Defendant's challenges to the voluntariness of his plea are waived because he declined the resentencing court's offer of an opportunity to withdraw the plea, and we reject defendant's arguments to the contrary. In any event, since defendant did not raise the specific claims he raises on appeal during his initial plea withdrawal motion or at any other juncture, those claims are

unpreserved (*see People v Conceicao*, 26 NY3d 375, 381-382 [2015]), and we decline to review them in the interest of justice. As an alternative holding, we find that the record as a whole demonstrates that defendant's plea was knowing, intelligent, and voluntary. "The plea court explained to defendant that diversion [under CPL 216.05] was not guaranteed, it made no representations about the likelihood of defendant's acceptance for diversion, and it specified the sentence defendant would receive in the event of his rejection" (*People v Brown*, 127 AD3d 498, 498 [1st Dept 2015], *affd* 28 NY3d 982 [2016]).

As to defendant's requests to proceed pro se, defendant acquiesced to continued representation by counsel at subsequent proceedings (*see People v Brunner*, 151 AD3d 651 [1st Dept 2017]; *People v Little*, 151 AD3d 531 [1st Dept 2017]). Moreover, defendant's requests were made in the context of also requesting a new lawyer (*see People v LaValle*, 3 NY2d 88, 105-107 [2004]). Accordingly, under the circumstances here, the court did not commit reversible error.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of

his remaining arguments. Regardless of whether defendant validly waived his right to appeal, we find his remaining arguments unavailing.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4638 The People of the State of New York, Respondent, Ind. 4770/11

-against-

Eric Jones, Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered September 6, 2012, convicting defendant, after a nonjury trial, of criminal mischief in the third degree, aggravated cruelty to animals, aggravated harassment in the second degree, and torturing and injuring animals, and sentencing him, as a second felony offender, to concurrent terms of 20 to 40 months on the criminal mischief conviction, and one year on each of the remaining convictions, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting his aggravated cruelty to animals and criminal mischief convictions (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Initially, we find no basis for disturbing any of the court's credibility determinations.

The egregious manner in which defendant killed his former domestic partner's pet parakeet, along with the surrounding circumstances, established that he committed the crime of aggravated cruelty to animals, and specifically, that he intended to cause the bird extreme physical pain (Agriculture and Markets Law §353-a[1][i]). Contrary to defendant's contentions, the evidence does not suggest that the brutal killing of the bird at issue caused a death that was so instantaneous that it would not be extremely painful. Defendant argues that this was an "ordinary killing" of an animal that should be punished as a misdemeanor offense of overdriving, torturing, and injuring animals (Agriculture and Markets Law § 353), the crime of which defendant was convicted for killing the victim's other pet parakeet. However, defendant's conduct toward the bird at issue was extremely heinous. The court could draw a reasonable inference of extreme physical pain from the fact that the bird had been crushed flat between the bars of its cage. The time it takes to kill an animal is not dispositive under the statute (*see People v Garcia*, 29 AD3d 255, 261 [1st Dept 2006], *lv denied* 7 NY3d 789 [2006]).

Regarding the conviction of criminal mischief in the third degree, the evidence established that defendant caused damage to various items in the victim's apartment in the amount of $455,

which well exceeded the statutory threshold of $250. This was established through the testimony of the victim and that of expert witnesses (*see People v Garcia*, 29 AD3d at 263; *People v Daniels*, 180 AD2d 567 [1st Dept 1992], *lv denied* 80 NY2d 829 [1992]), whose experience and credentials rendered them competent to express opinions about the value of the property defendant destroyed.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4639 Luisa Flynn, Index 159326/14
Plaintiff-Appellant,

-against-

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

_____

Alexander J. Wulwick, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondents.

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered September 13, 2016, which, insofar as appealed from as limited by the briefs, granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Upon defendants' establishment that the City of New York had no prior written notice of the alleged depressed condition of a metal plate on the roadway (Administrative Code § 7-201[c][2]), "the burden shift[ed] to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule — that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see also Rosenblum v City of New York*, 89 AD3d

439 [1st Dept 2011]). Plaintiff's speculation that the City's repaving work in the area, three and a half years earlier, immediately caused the alleged depressed and dangerous condition, is insufficient to create a triable issue of fact (*see Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Rosenblum* at 440).

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4640 In re Richard K.,
Petitioner-Appellant,

-against-

Deborah K.,
Respondent-Respondent.

David Zaslavsky, New York, for appellant.

Deborah A. K., respondent pro se.

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about July 6, 2016, which denied petitioner's objections to a Support Magistrate's order dismissing, after a hearing, his petition for a downward modification of his child and spousal support obligations, unanimously affirmed, without costs.

The court providently exercised its discretion in determining that petitioner failed to show a substantial change in circumstances to warrant a downward modification of his child support obligation after he was convicted of a federal crime and disbarred (*see Matter of Boden v Boden*, 42 NY2d 210, 213 [1977]; *Matter of Karagiannis v Karagiannis*, 73 AD3d 1064, 1065 [2d Dept 2010]). That his income was reduced due to his incarceration was but one factor that the court, in its discretion, could consider (*see* Family Court Act § 451[3][a]). The court also properly

considered petitioner's credibility with respect to the income shown on his tax returns and his overall financial situation.

Petitioner further failed to demonstrate the extreme hardship necessary to obtain modification of the maintenance obligations contained in the parties' stipulation of settlement, which was incorporated but not merged into the parties' divorce judgment (*see* Domestic Relations Law § 236[B][9][b]; *Matter of Cohen v Seletsky*, 142 AD2d 111, 118-119 [2d Dept 1988]). A husband's volitional actions which result in his unemployment, including incarceration preventing any employment, do not constitute such extreme hardship (*see Fabrikant v Fabrikant*, 62 AD3d 585, 586 [1st Dept 2009]).

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4641 Jennifer Cangro, Index 100761/15
Plaintiff-Appellant,

-against-

Park South Towers Associates, et al.,
Defendants-Respondents.

_____

Jennifer Cangro, appellant pro se.

Gartner & Bloom, New York (Arthur P. Xanthos of counsel), for Park South Towers Associates, respondent.

Rose & Rose, New York (Dean Dreiblatt of counsel), for Rose & Rose, respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered August 4, 2016, which granted defendants' motion to dismiss the complaint and for monetary sanctions, unanimously affirmed, without costs. Plaintiff is enjoined from commencing any further litigation relating to this matter without permission of this Court. The Clerk of this Court is directed to accept no filings from plaintiff as to such matter without prior leave of the Court.

Although plaintiff has failed to assemble a proper record on appeal (CPLR 5526; 22 NYCRR 600.5), sufficient evidence is contained within the appendix to support affirmance of the order. The first 23 claims made by plaintiff, in this third action against these defendants, were previously raised, or could have

been raised, in the prior proceedings, and are thus barred by res judicata (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Plaintiff's defamation claims were correctly dismissed as untimely (CPLR 215[3]). In addition, the claims are not pleaded with the requisite particularity (CPLR 3016[a]), and the alleged offending statements are protected by the litigation privilege because they were made in the context of a judicial proceeding to which they were directly related (*see Front, Inc. v Khalil*, 24 NY3d 713, 718-719 [2015]). Given plaintiff's history in this, and prior litigation, sanctions were appropriate (*see Cangro v Reitano*, 130 AD3d 486 [1st Dept 2015], *appeal dismissed* 26 NY3d 1021 [2015]; *Cangro v Rosado*, 111 AD3d 422 [1st Dept 2013], *appeal dismissed* 22 NY3d 1132 [2014]).

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4642 The People of the State of New York, Respondent, Ind. 3205N/13

-against-

John Robinson, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 17, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of seven years, unanimously modified, on the law, to the extent of vacating the possession conviction and remanding for a new trial on that count if the People be so advised, and vacating the sentence on the sale conviction and remanding for resentencing on that conviction, and otherwise affirmed.

The court erred in precluding defense counsel from questioning a detective about the factual allegations in a

pending federal civil lawsuit, in which the detective was a named defendant. Specifically, counsel sought to ask the arresting detective "whether he in fact found the drugs on [the plaintiff in that case]; isn't it true that [the plaintiff] did not in fact have any drugs, nonetheless you still in fact arrested him." These allegations were relevant to the detective's credibility, and counsel laid the correct foundation for this form of impeachment (*see People v Smith*, 27 NY3d 652 [2016]).

This error was not harmless with respect to the possession conviction, because this detective was the sole witness to testify to the circumstances of that charge, in which 17 bags of cocaine were allegedly found on defendant's person during a strip search. However, the error was harmless with respect to the sale conviction (*see People v Crimmins*, 36 NY2d 230 [1975]), which was supported by overwhelming evidence, including the testimony of the primary undercover officer and evidence found on defendant's cell phone. Although the detective at issue testified to the recovery of prerecorded buy money from defendant and provided other corroborating evidence regarding the sale charge, the evidence supporting that conviction was already overwhelming without the arresting detective's testimony. Furthermore, we find no spillover effect on the sale charge from the possession charge, which involved separate facts (*see People v Doshi*, 93

NY2d 499, 505 [1999]).

Defendant's argument concerning his desire to impeach the detective regarding 11 other pending federal actions in which he was a named defendant is unreviewable for lack of a sufficient record. In any event, we find it unnecessary to reach the issue of the other 11 lawsuits.

The fact that defendant was impeached by way of the existence (but not the facts) of a prior conviction that was pending on appeal at the time of this trial and was subsequently reversed (144 AD3d 40 [1st Dept 2016]) does not entitle defendant to a new trial on the instant sale conviction. The use of a subsequently invalidated conviction for impeachment purposes compels reversal only if it "might well have influenced the outcome of the case" (*Loper v Beto*, 405 US 473, 480 [1972]). Here, we find no reasonable possibility that the jury would have acquitted if not for the impeachment with the later-reversed conviction (*see People v Hall*, 18 NY3d 122, 132 [2011]).

However, since the court expressly considered the later-reversed conviction in imposing sentence, defendant should be resentenced on the sale conviction.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4643 In re Liquidation of Midland Ins. Co. Index 41294/86

- - - - -

Northern States Power Company, etc.,
Claimant-Appellant,

-against-

Maria T. Vullo, Superintendent of Financial Services of the State of New York as Liquidator of Midland Insurance Company,
Respondent-Respondent.

_____

Michael Best & Friedrich LLP, Milwaukee, WI (Raymond R. Krueger of the bar of the State of Wisconsin, admitted pro hac vice, of counsel), and Cowan, Liebowitz & Latman, P.C., New York (Joelle A. Milov of counsel), for appellant.

Eliot J. Kirshnitz, New York, and Brown Werner LLP, Philadelphia, PA (James E. Brown of the bar of the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered July 13, 2016, which confirmed the report of a Referee, dated December 10, 2015, disallowing claimant from asserting certain excess insurance claims in the New York liquidation proceeding for Midland Insurance Company because the issues have already been fully litigated in a previous action in Minnesota, unanimously affirmed, with costs.

Supreme Court and the Referee properly found that the subject claims are barred by res judicata and collateral estoppel, based on prior rulings in Minnesota on the same claims

and issues (*see Spectris Inc. v 1997 Milton B. Hollander Family Trust*, 138 AD3d 626 [1st Dept 2016]; *Bruno v Bruno*, 83 AD3d 165 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]; *Hauschildt v Beckingham*, 686 NW2d 829, 840 [Minn 2004]).

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4646 The People of the State of New York, Respondent, Ind. 2477/14

-against-

Kenneth Genao, Defendant-Appellant.

_____

Law Offices of Patrick Joyce, New York (Patrick Joyce of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered May 8, 2015, convicting defendant, after a jury trial, of attempted assault in the first degree, assault in the second degree, criminal possession of a weapon in the fourth degree (two counts), and petit larceny (two counts) and sentencing him to an aggregate term of five years, unanimously affirmed.

We reject defendant's challenge to the sufficiency of the evidence supporting his second-degree assault conviction. The element of physical injury was established by evidence supporting an inference that the victim's injury went beyond mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that it caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). The jury

could have reasonably concluded that when defendant cut the victim's palm with a sharp object, this caused substantial pain. The victim described his level of pain and testified that the wound continued to bother him for several days.

The second-degree assault count of the indictment was not duplicitous. The trial evidence established a single, continuous fast-paced assault on a taxi driver, even if the assault began inside the taxi and quickly moved outside of it, and even if more than one weapon was used (*see e.g. People v Kelly*, 148 AD3d 585 [1st Dept 2017], *lv denied* 29 NY3d 1082 [2017]).

Defendant's further argument that the two counts alleging fourth-degree criminal possession of a weapon were multiplicitous is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing.

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4647 The People of the State of New York, Dkt. 74157/09
Respondent,

-against-

Kenneth Hickman,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J.), rendered January 13, 2011, convicting defendant, after a jury trial, of assault in the third degree, and sentencing him to a term of three years' probation, unanimously reversed, on the law, and the matter remanded for a new trial.

The court erred in denying defendant's challenge for cause to a prospective juror who twice answered that she was "not sure" when asked whether she could be impartial in light of her recent experience as a crime victim. The court was obligated to excuse the panelist in the absence of an unequivocal statement that she could be fair and impartial (*see People v Chambers*, 97 NY2d 417, 419 [2002]; *People v Blyden*, 55 NY2d 73, 78 [1982]). The record fails to support the People's assertion that the panelist's expressions of uncertainty did not cast doubt on her ability to

render an impartial verdict.

The factual allegations in the misdemeanor information were facially sufficient (*see People v Kalin*, 12 NY3d 225, 230 [2009]).

Since we are ordering a new trial, we find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4649 The People of the State of New York, Respondent, Ind. 1232N/14

-against-

Oswaldo Cuello, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered January 9, 2015, 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: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4650 In re Brighton M.,

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

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

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

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about July 24, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of attempted robbery in the second degree, menacing in the third degree (two counts), harassment in the first degree and attempted assault in the third degree, and placed him on probation for a period of two years, unanimously affirmed, without costs.

When, at the fact-finding hearing, the victim viewed a surveillance videotape depicting someone following the victim into a store, and identified that person as his assailant in the subsequent incidents, but did not identify appellant as that person, this testimony was compatible with the specific terms of

the presentment agency's agreement not to introduce certain allegedly tainted identification evidence. The victim's testimony about the videotape was not an actual identification of appellant (*see People v Lara*, 130 AD3d 463, 464 [1st Dept 2015], *lv denied* 27 NY3d 1001 [2016]), but was instead a link in a chain of circumstantial evidence establishing appellant's identity, and appellant has not established that it should have been excluded.

The fact-finding determination was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Appellant's conduct in the principal incident had no reasonable explanation other than that he was attempting to forcibly take a cell phone or other property from the victim, but lost interest in doing so.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4651 The People of the State of New York, Respondent,

Ind. 3602/12

-against-

Giovanni White,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Matthew A. Wasserman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J. at suppression hearing; Daniel P. FitzGerald, J. at plea and sentencing), rendered November 21, 2014, convicting defendant, upon his plea of guilty, of burglary in the third degree and possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

Defendant asserts that his plea should be vacated because the attorney who represented him at the suppression hearing failed to effectuate defendant's desire to testify at that proceeding. On this appeal, we need not decide whether defendant had a right to testify at a suppression hearing because defendant

failed to preserve the issue and we decline to review it in the interest of justice. In any event, we find that the record as a whole demonstrates that defendant's plea was knowing, intelligent, and voluntary.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4652 Michele Schindler, Index 153291/16
Plaintiff-Respondent,

-against-

Plaza Construction LLC,
Defendant-Appellant,

Plaza Construction Group, Inc., et al.,
Defendants.

_____

Kauff McGuire & Margolis LLP, New York (Aislinn S. McGuire of counsel), for appellant.

Michael G. O'Neill, New York, for respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 10, 2017, which denied defendant Plaza Construction LLC's (Plaza) motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, a woman and licensed crane operator, alleges that she was wrongfully terminated from a construction job on the basis of her gender in violation of the New York City Human Rights Law (the City HRL). Plaza, the general contractor on the job, moved to dismiss the complaint. The motion court correctly denied the motion.

Even if Plaza is not plaintiff's employer or joint employer within the meaning of the City HRL, it may be held liable to the

extent it "aid[ed], abet[ted], incite[d], compel[led] or coerce[d]" the alleged discrimination (Administrative Code of City of NY § 8-107[6]). Plaza's objection that plaintiff failed to allege the requisite "community of purpose" is unavailing (*see Estatico v Department of Educ. of City of N.Y.*, 2014 NY Slip Op 33611[U], *10 [Sup Ct, NY County 2014]; *Tate v Rocketball, Ltd.*, 45 F Supp 3d 268, 273 [ED NY 2014]). Plaintiff has clearly pleaded facts suggesting that Plaza bore the requisite discriminatory intent, and that it "compel[led] or coerce[d]" the alleged discriminatory employment decisions (Administrative Code § 8-107[6]; *cf. Estatico*, 2014 NY Slip Op 33611[U], *11 [motion to dismiss granted where the plaintiff failed to allege discriminatory intent]; *see Tate*, 45 F Supp 3d at 273). The nature of plaintiff's employer's intent and involvement may be inferred from the fact that plaintiff's employer was the entity ultimately responsible for the allegedly discriminatory employment decisions.

Plaintiff also sufficiently alleged the necessary elements of a gender discrimination claim, including that she was terminated "under circumstances giving rise to an inference of discrimination" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]). Specifically, plaintiff alleged that a Plaza employee complained that she was "inadequate" before he had any

opportunity to observe her work, when all he knew about her was that she was a woman, and thereafter continually harassed and insulted her. Although the alleged ensuing harassment and insults did not explicitly reference plaintiff's gender, the inference of gender-based discrimination is supported by the allegation that plaintiff was almost immediately replaced by a man (*see Commodari v Long Is. Univ.*, 89 F Supp 2d 353, 375 [ED NY 2000], *affd* 62 Fed Appx 28 [2d Cir 2003]; *Krebaum v Capital One, N.A.*, 138 AD3d 528, 528 [1st Dept 2016]), as well as by the allegation that she was given a false reason for her termination - i.e., that her crane was being taken out of operation when in fact it continued to operate but with a new, male operator (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 41-44 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4653 The People of the State of New York, Respondent, Ind. 4728/12

-against-

Michael Williams, 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 (Hilary Hassler of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered November 5, 2014, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of 9 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The element of physical injury was established by evidence supporting an inference that the victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that they caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). The evidence showed that in the course of the robbery, in which the chain of the victim's

stolen purse wrapped around her finger and she was dragged across a street by defendant, the victim sustained a painfully swollen middle finger on her dominant hand, cuts to her knees, and bruising on her knees, arm, and finger; that she continued to feel pain in her right middle finger for three weeks and in her right knee for three or four weeks; and that the finger needed to be taped to another one, preventing her from typing or handwriting for one or two weeks and from lifting items as light as one gallon for two or three weeks (*see e.g. People v Harvey*, 309 AD2d 713 [1st Dept 2003], *lv denied* 1 NY3d 573 [2003]). The fact that the victim treated her own her injuries, such as applying ice and taking over-the-counter pain medication, without seeking professional medical assistance, does not negate a finding of physical injury (*see People v Guidice*, 83 NY2d 630, 636 [1994]). There is no basis for disturbing the jury's credibility determinations, including its finding that the victim testified credibly despite her admission that when she spoke to EMTs she minimized her level of pain. The jury could credit the victim's explanation that she minimized her pain to the EMT's because she was away from home and preferred to stay with the friends that she was visiting in New York, rather than go to the hospital, and felt that she "had been through enough."

The court properly responded (*see generally People v*

Almodovar, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 302 [1982], *cert denied* 459 US 847 [1982]) to a note asking if it "matter[ed]" or was "relevant" whether the victim voluntarily held onto her purse while defendant used the purse to drag her across the street, or whether the victim became entangled in the purse chain. The court's response that this distinction did not matter "as to proving the elements of the crime" could not have led the jury to believe that it could not consider this factual question in assessing the victim's credibility. To the extent that defendant is raising a constitutional claim, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they generally involve matters not reflected in, or fully explained by, the record, regarding counsel's strategy in preparing the jury panel on voir dire for defendant's then-anticipated testimony (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Therefore, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Alternatively, to the extent the record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v*

Washington, 466 US 668 [1984]; *see also People v Hendricks*, 243 AD2d 396 [1st Dept 1997], *lv denied* 91 NY2d 941 [1998]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4654 Evgeny Freidman, et al., Index 652828/15
Plaintiffs-Appellants,

-against-

Capital One Taxi Medallion Finance, etc.,
Defendant-Respondent.

_____

Fox Rothschild, LLP, New York (Brett A. Berman of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (George A. Zimmerman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered June 9, 2016, which granted defendant's motion to dismiss the amended complaint, unanimously affirmed, with costs.

The releases in the agreements signed by plaintiffs in August, October, and November 2014 bar this action, despite plaintiffs' claim that the releases were fraudulently induced (*see e.g. Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]). Plaintiffs' allegation that defendant failed to provide them with payoff amounts is refuted by the documentary evidence. "While the allegations in a pleading must be taken as true and viewed in a light most favorable to the pleader, the loan agreement, note and other instruments. . .establish the rights of the parties and prevail over conclusory allegations of the complaint" (*Bank Leumi Trust*

Co. of N.Y. v D'Evori Intl., 163 AD2d 26, 29 [1st Dept 1990] [internal quotation marks omitted]).

Sterling Natl. Bank & Trust Co. of N.Y. v Giannetti (53 AD2d 533 [1st Dept 1976]), on which plaintiffs rely, did not involve a release. Furthermore, it was decided long before *Centro Empresarial.*

Contrary to plaintiffs' contention, the releases covered unaccrued claims. The release in the forbearance agreement included "any and all. . .claims, demands, liabilities,. . .damages, actions, [and] causes of action. . .of every nature whatsoever (whether liquidated or unliquidated, known or unknown, . . .foreseen or unforeseen, matured or unmatured. . .)." Such language is sufficient (*see Centro Empresarial,* 17 NY3d at 276-277).

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4655 The People of the State of New York, Ind. 2749/11
Respondent,

-against-

Lamont Brunson,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Jill Konviser, J.), entered on or about April 6, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points under the risk factor relating to defendant's relationship with a sex trafficking victim, because the evidence clearly established that defendant at least promoted the relationship for the purpose of such victimization, regardless of whether the victim had initiated conduct with defendant (*see People v Cook*, 29 NY3d 121, 126 [2017]). The court also properly assessed points under the risk factor for victimization of three or more persons, based upon clear and convincing evidence, contained in the case summary and

the testifying victim's grand jury testimony (*see People v Mingo*, 12 NY3d 563, 572-573 [2009]), that numerous women worked as prostitutes for defendant while under the threat of force.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, or were outweighed by the egregiousness of the underlying crime.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4656 The People of the State of New York, Respondent, Ind. 3724/14

-against-

Sidney Robinson, Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Abraham Clott, J.), rendered July 2, 2015, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of eight years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including counsel's strategic decisions (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]), and we reject defendant's argument that the unexpanded record is sufficient to review these claims. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent

the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies regarding his cross-examination of a police witness and various other matters fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4657N Jose Narvaez, as Administrator of the Estate of Rosa Maria Sinchi, etc.,
Plaintiff-Respondent,

-against-

Thomas M. Sammartino, et al.,
Defendants-Appellants.

Index 20632/16E

_____

Picciano & Scahill, P.C., Bethpage (Andrea E. Ferrucci of counsel), for appellants.

Omrani & Taub, P.C., New York (Anne Marie Caradonna of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth González, J.), entered December 23, 2016, which, upon renewal, reversed a prior order, entered on default, granting defendants' motion to change venue from Bronx County to Suffolk County, and denied defendants' motion, unanimously affirmed, without costs.

The motion court properly exercised its discretion under CPLR 2001 in granting plaintiff's motion to renew, as the record shows that on the prior motion, plaintiff's opposition was not considered due to counsel's inadvertent failure to comply with the court's part rules. Counsel's error did not cause significant prejudice, and plaintiff has been ordered to reimburse defendants for any resulting costs and fees incurred (*see* CPLR 2001; *DePompo-Seff v Genovese Drug Stores, Inc.*, 13

AD3d 109 [1st Dept 2004]).

Venue was properly laid in Bronx County, as plaintiff resided there when the complaint was filed (see CPLR 503[a]; *Cardona v Aggressive Heating*, 180 AD2d 572, 573 [1st Dept 1992]). Defendants failed to show that a change of venue was warranted, as they failed to identify any material witnesses residing in Suffolk County, explain how they will be inconvenienced without a change of venue, or disclose the substance and materiality of their testimony (*see Jacobs v Banks Shapiro Gettinger Waldinger & Brennan, LLP*, 9 AD3d 299, 299-300 [1st Dept 2004]).

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

ENTERED: OCTOBER 12, 2017

CLERK

Tom, J.P., Renwick, Andrias, Singh, Moulton, JJ.

4658 Ind. 4128/16
[M-4279] In re Shakur Young, 97/17
Petitioner, 1631/17
OP 113/17

-against-

Justice Patricia Nuñez, etc.,
Respondent.

_____

Shakur Young, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for 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: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4660 Linea Aerea Cuencana, Index 450897/16
Plaintiff-Respondent,

-against-

ECC Leasing Company Limited,
Defendant-Appellant.

_____

Condon & Forsyth LLP, New York (Stephen R. Stegich of counsel), for appellant.

Law Office of Steven Cohn, P.C., Carle Place (Steven Cohn of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 13, 2017, which denied defendant's motion to dismiss the complaint in its entirety, unanimously reversed, on the law, without costs, and the complaint dismissed without prejudice. The Clerk is directed to enter judgment accordingly.

This case arises primarily from defendant's retention of a $2.18 million, "non-refundable" deposit given to it by plaintiff Linea Aerea Cuencana (LAC) toward the purchase of aircraft that did not materialize. Defendant ECC Leasing Company Limited (ECC) is in the business of selling and leasing pre-owned aircraft to buyers all over the world. LAC is an Ecuadoran airline. The transaction has a long and complicated history, memorialized by a series of proposals and extensions, that ultimately resulted in a purchase agreement. The complaint, however, does not identify

the large majority of the parties' agreements, as LAC premises its breach of contract claim on the first "proposal agreement" the parties entered into in July of 2011, entitled "Proposal 130." Proposal 130 is the only agreement that was attached to the complaint.

LAC alleges that ECC breached Proposal 130 because it failed to produce a purchase agreement for two aircraft within 60 days of entering into the proposal, which, in its view, triggered a return of the deposit. No deposit was paid pursuant to Proposal 130, however. Proposal 130 had been superseded by a later proposal, Proposal 165, at the time the deposit was paid. A review of Proposal 130 also reveals that, even if it were enforceable, it was not breached. Proposal 130 provides that the "initial Deposit will be kept by ECC as liquidated damages" in the event that a purchase agreement was not entered into, and refers to the $2.18 million deposit as being "non-refundable."

LAC's claim for breach of the implied covenant of good faith and fair dealing fails for similar reasons. There can be no recovery flowing from Proposal 130 or its implied covenants (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]).

The unjust enrichment claim must fail, as the documents submitted with the dismissal motion demonstrate the existence of a valid agreement between the parties, and the plain terms of the

complaint – which alleges that ECC "breached [the] Agreement" by refusing to return the deposit – confirm that its claim is based on the parties' actual agreements as opposed to a quasi-contract (*Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004]). LAC's claims for consequential damages are barred by the plain terms of the Purchase Agreement.

While the complaint is facially deficient and must be dismissed, we note that the court below identified that there are factual issues surrounding whether the $2.18 million, "non-refundable" deposit was a valid liquidated damages provision or an unenforceable penalty (*Truck Rent-a-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 424 [1977]). As LAC may have a claim for at least a partial return of its deposit based on this theory, the complaint is dismissed without prejudice so as to allow for it to make the proper allegations.

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4661-
4662-
4663-
4664 In re Kenneth M.,
Petitioner-Appellant,

-against-

Catherine T.,
Respondent-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Steven Gildin, Garden City, for respondent.

_____

Order, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about June 30, 2016, which, to the extent appealed from as limited by the briefs, denied petitioner's pro se objections to an order of support, unanimously affirmed, without costs.

Petitioner failed to show a substantial change in circumstances to warrant a downward modification of his child support obligation. Petitioner's income slightly increased

between entry of the support order and the petition, and he did not show that his expenses had significantly increased during that period (*see Bores v Bores*, 134 AD3d 527, 528 [1st Dept 2015]).

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4665 Stan Pappas, et al., Index 150295/13
Plaintiffs-Respondents,

-against-

AT&T Inc., et al.,
Defendants-Appellants,

Johnson Controls, Inc.,
Defendant.

_____

Lavin, O'Neil, Cedrone & DiSipio, New York (Francis F. Quinn of counsel), for appellants.

Silberstein, Awad & Miklos, P.C., Garden City (James E. Baker of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered January 10, 2017, which, to the extent appealed from, denied defendants AT&T Inc. and AT&T Corp.'s motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against them, unanimously affirmed, with costs.

Plaintiff Stan Pappas, an experienced electrician, was injured at defendants' premises when he attempted to perform work on electrical equipment that had not been de-energized. Defendants contend that plaintiff, who was responsible for checking for voltage on any equipment or component before working on it, failed to properly perform a voltage test with a tic tracer and that that failure was the sole proximate cause of the

accident.

In opposition, plaintiff raised an issue of fact whether the electrical prints or drawings supplied by defendants failed to show the locations of potential transformers that may have been the source of the voltage that injured him. Contrary to defendants' argument that the accident would not have happened but for plaintiff's failure to perform the voltage test properly, plaintiff's expert said that a tic tracer test performed without knowledge of where a potential transformer was connected was inconclusive. Defendants' failure to show that potential transformers not shown on the drawings were not the source of the voltage renders the doctrine of res ipsa loquitur, on which they rely, inapplicable (*see generally James v Wormuth*, 21 NY3d 540, 546 [2013]).

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4666 Sally Keech, Index 155081/13
Plaintiff,

-against-

30 East 85th Street Company, LLC, et al.,
Defendants-Respondents,

30 East 85th Street Condominium Associates,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (John B. Martin of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for 30 East 85th Street Company, LLC, respondent.

Biedermann Hoenig Semprevivo, P.C., New York (Megan R. Siniscalchi of counsel), for Lululemon USA, Inc., respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 29, 2016, which, upon renewal, granted the motions of defendants 30 East 85th Street Company, LLC (Company) and Lululemon USA, Inc. for summary judgment dismissing the complaint as to them, unanimously affirmed, without costs.

Defendant 30 East 85th Street Condominium Associates' (Condominium) argument that the renewal motion papers were inadequate because Company failed to submit the pleadings and because both Company and Lululemon failed to provide the condominium documents, is unpreserved and unavailing. CPLR

2214(c) provides that a party filing a motion in an e-filed action, such as this, need not include copies of papers that were previously filed electronically. Here, the pleadings were filed by Lululemon in connection with its renewed motion for summary judgment; thus, Company had no obligation to file them in support of its renewed motion. Moreover, although the condominium documents were not submitted, the record was sufficient for the motion court to determine whether movants were entitled to the relief they sought (*see Chan v Garcia*, 24 AD3d 197, 198 [1st Dept 2005]).

Upon renewal, the motion court correctly granted Company's motion for summary judgment. Company, an owner of commercial units in the condominium at issue, is not an owner for the purposes of Administrative Code of the City of New York § 7-210, and thus had no duty to maintain and repair the public sidewalk in front of the condominium (*Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624, 624 [1st Dept 2012]; *see Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 48 [1st Dept 2016]).

Similarly, the motion court correctly concluded that Lululemon, a tenant of a commercial unit in the condominium, had no obligation to maintain the sidewalk, even if its employees had cleared the sidewalk of snow and debris. Further, there is no evidence that Lululemon created the alleged defect in the

sidewalk (*see Rodriguez v City of New York*, 48 AD3d 298 [1st Dept 2008]). Moreover, its receipt of deliveries on trolleys transported over the sidewalk to its store did not constitute a special use of the sidewalk (*see id.*).

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4667 The People of the State of New York, Respondent, Ind. 778/12 1404/13

-against-

Tremaine Cosby, Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.) rendered November 19, 2013 convicting defendant, upon his pleas of guilty, of attempted murder in the second degree (two counts) and conspiracy in the second degree, and purportedly imposing sentence, unanimously modified, on the law, to the extent of remanding for pronouncement of sentence on each count of both indictments on the record, and otherwise affirmed.

As the People concede, although there was discussion on the record of the sentences the court intended to impose, the court

never formally imposed sentence in accordance with CPL 380.20. Accordingly, the matter is remanded for the sole purpose of pronouncing defendant's sentence on the record (*see e.g. People v Espinal*, 234 AD2d 84 [1996], *lv denied* 89 NY2d 1092 [1997]).

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4668 XL Insurance America, Inc., Index 155680/14
Plaintiff-Respondent,

-against-

The Howard Hughes Corporation,
Defendant-Appellant.

_____

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Lea Haber Kuck of counsel), for appellant.

Mound Cotton Wollan & Greengrass LLP, New York (Costantino P. Suriano of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered July 20, 2016, which, among other things, granted plaintiff insurer's motion for summary judgment declaring in its favor, unanimously reversed, on the law, without costs, plaintiff's motion denied, and it is declared that plaintiff is obligated to pay defendant its proportionate share of the actual loss falling within its layer of coverage, up to a $50 million sublimit.

The Policy Revision Endorsement (endorsement) in the insurance policy plaintiff issued to defendant provides that, with respect to loss or damage caused by a flood in "High Hazards Flood Zones" (where defendant's properties are located), plaintiff "shall not be liable . . . for more than its proportion of $50,000,000" (emphasis omitted). The endorsement defines

"Flood" to include, among other things, a "storm surge" and a "Named Storm." However, paragraph 13 of the policy provides as follows:

> "With respect to the peril Flood, any and all losses from this cause within a 72-hour period shall be deemed to be one loss insofar as the Limit of Liability and Deductible provisions of this policy are concerned. . . . The term "flood", as used herein, shall mean surface water, waves, tide, or tidal water and the rising (including overflowing or breaking of boundaries) of lakes, ponds, reservoirs, rivers, streams, harbors and similar bodies of water. . . ." (emphasis added).
>
> "Flood does not mean Flood and Storm Surge as a result of a named storm."

Because Superstorm Sandy is a "Named Storm," the endorsement's $50 million limit unambiguously applies to the actual losses defendant sustained in that storm. Although paragraph 13 of the policy provides that "Flood does not mean Flood and Storm Surge as a result of a named storm," that exclusion applies only to that paragraph and not elsewhere in the policy. It is clear from the paragraph's phrase "'flood', as used herein" that the "named storm" exclusion applies only to the 72-hour limitation period set forth in that paragraph (*see Howard Hughes Corp. v Ace American Ins. Co.*, 2015 WL 6437580, *7 [Sup Ct, NY County, Oct. 22, 2015, No. 650308/15]). To find otherwise would render other policy provisions, such as the endorsement,

superfluous (*see generally Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 50 [1st Dept 1985], *affd* 66 NY2d 1020 [1985]).

The endorsement's $50 million limit should not be read as an exclusion, but rather as a sublimit within plaintiff's $150 million layer of coverage. An exclusion "must be specific and clear in order to be enforced" (*Heartland Brewery, Inc. v Nova Cas. Co.*, 149 AD3d 522, 523 [1st Dept 2017] [internal quotation marks omitted]). The endorsement states that it "amend[s]" the limits of liability, and does not indicate that it is an exclusion. Moreover, plaintiff's and the motion's court's interpretation — that there is no coverage for defendant's High Hazards Flood Zone properties — renders superfluous the endorsement's phrase "for more than its proportion of $50,000,000" (emphasis added) (*see Bretton*, 110 AD2d at 50).

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4669 Property Clerk, New York City Police Department,
Plaintiff-Respondent,

-against-

Torin Hylor,
Defendant-Appellant.

Index 450175/15

_____

The Legal Aid Society, New York (Thomas M. O'Brien of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Martin Shulman, J.), entered August 9, 2016, which, in this civil forfeiture action, granted plaintiff's motion for summary judgment, denied defendant's cross motion for summary judgment, and declared that defendant's vehicle be forfeited, unanimously affirmed, without costs.

By notice received by plaintiff on January 22, 2015, defendant requested a hearing pursuant to *Krimstock v Kelly* (306 F3d 40 [2d Cir 2002], *cert denied* 539 US 969 [2002]), seeking a temporary return of his 2002 BMW. The police had seized the car as an alleged instrumentality of a crime during defendant's arrest for criminal possession of marijuana and other violations, as they found over three pounds of marijuana in the car. On the

same day plaintiff received defendant's request, it served a Petition and Notice of Hearing on him, notifying him the requested hearing had been scheduled, indicating its intent to retain the car and to commence forfeiture proceedings, and explaining the car had been seized pursuant to his arrest for violation of, among other charges, Penal Law § 221.55, as the alleged instrumentality of a crime. The notice further advised defendant of his right to appear at the hearing in person, and to be represented by an attorney.

Plaintiff, 18 days later on February 9, 2015, then served and filed a summons with notice commencing the forfeiture action. Although plaintiff's commencement of the action was within the 25-day statute of limitations set forth in 38 RCNY 12-36 (*see Property Clerk, N.Y. City Police Dept. v Ford*, 92 AD3d 401 [1st Dept 2012]), as measured from the date of defendant's *Krimstock* hearing request, defendant contends the summons with notice was a nullity because it failed to meet the requirements of CPLR 305(b) and of 38 RCNY 12-36(b).

CPLR 305(b) provides, in relevant part, that when a summons with notice is served without a complaint, the summons shall contain "a notice stating the nature of the action and the relief sought, and . . . the sum of money for which judgment may be taken in case of default." In this case, plaintiff's summons

notified defendant that plaintiff had commenced an action for forfeiture seeking a 2002 BMW, which plaintiff identified by its vehicle identification number, and further warned defendant that, if he failed to answer, a default judgment would be entered against him for the vehicle.

We hold that the "broadly descriptive" words of the summons with notice of this forfeiture action (*Scarinigi v Broome Realty Corp.*, 154 Misc 2d 786, 789 [Sup Ct, NY County 1991], *affd* 191 AD2d 223 [1st Dept 1993]) complied with the notice requirements of CPLR 305(b). This is particularly so given that the vehicle was identified in the summons with notice by its vehicle identification number, that no other vehicle or other property of defendant's is at issue in this case, that the car was seized at the time of defendant's arrest, that it was seized as an instrumentality of the crime because it contained over three pounds of marijuana, and, further, given that defendant has since pleaded guilty to two of the four criminal possession charges brought against him and, in the course of his guilty plea, admitted that he possessed the marijuana taken from his car.

Furthermore, the summons with notice, particularly when read together with the Petition and Notice of Hearing served by plaintiff, satisfied the notice requirements of 38 RCNY 12-36(b), as these documents "include[d] a statement of the grounds upon

which the property clerk seeks to justify the continued retention of the property" as that rule requires and, moreover, provided defendant with an adequate opportunity to be heard, which defendant was, with the assistance of counsel.

Given the adequacy of the notice of the forfeiture proceedings that were commenced within the requisite 25-day period, defendant's cross motion for summary judgment dismissing the forfeiture action as untimely was properly denied.

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4670 The People of the State of New York, Ind. 2797/13
Respondent,

-against-

Harold Paulino,
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 (Oliver McDonald 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 (Patricia Nuñez, J.), rendered May 28, 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: OCTOBER 12, 2017

CLERK

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

CORRECTED ORDER - OCTOBER 24, 2017

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4671-
4672 The People of the State of New York,
Respondent,

Ind. 1438/11

-against-

Argelis Alcantara,
Defendant-Appellant.

_____

Goldstein & Weinstein, Bronx (David J. Goldstein of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (**Gregory Carro**, J.), rendered April 8, 2014, convicting defendant, after a jury trial, of vehicular manslaughter in the second degree (two counts), criminally negligent homicide, leaving the scene of an incident without reporting and resulting in death, and operating a motor vehicle while under the influence of alcohol (two counts), and sentencing him to an aggregate term of three to nine years, and order, same court and Justice, entered September 16, 2015, which denied defendant's CPL 440.10 motion to vacate judgment, unanimously affirmed.

The court properly exercised its discretion in denying defendant's CPL 440.10 motion without holding a hearing (see People v Samandarov, 13 NY3d 433, 439-440 [2009]). Based on the

submissions on the motion, as well as the trial record, we conclude that defendant received effective assistance under the state and federal standards (see People v Benevento, 91 NY2d 708, 713–714 [1998]; Strickland v Washington, 466 US 668 [1984]). With regard to plea negotiations, defendant did not substantiate his claim that alleged misadvice by counsel led him to turn down a favorable plea offer, particularly since defendant rejected the same offer before the attorney in question entered the case. With regard to representation at trial, defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived him of a fair trial or affected the outcome of the case.

The court properly denied defendant's suppression motion. The police had probable cause to stop defendant's car and arrest him for, at least, leaving the scene of an incident, based on the report of an eyewitness that defendant had hit a pedestrian, along with corroborating evidence including a radio run about a nearby accident. The hearing evidence, including the testimony of an officer who was fully knowledgeable about the pertinent facts, met the People's burden of proving that defendant gave voluntary, written consent for a blood test (see generally People v Gonzalez, 39 NY2d 122, 128 [1976]).

Defendant's legal insufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (see People v Danielson, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The element of causation was amply established, particularly when viewed in light of the presumption contained in Penal Law § 125.12. We have considered and rejected defendant's remaining arguments regarding the sufficiency and weight of the evidence.

Defendant's challenges to the prosecutor's summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we conclude that the remarks at issue generally constituted fair comment on the evidence and were responsive to the defense summations. To the extent that there were any improprieties, they did not deprive defendant of a

fair trial (see People v Overlee, 236 AD2d 133 [1st Dept 1997], lv denied 91 NY2d 976 [1992]; People v D'Alessandro, 184 AD2d 114, 118-119 [1st Dept 1992], lv denied 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4673-
4674 The People of the State of New York,
Respondent,

-against-

Ulysses Tompkins,
Defendant-Appellant.

Ind. 345/13

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 14, 2014, as amended October 17, 2014, convicting defendant, upon his plea of guilty, of burglary in the first degree and robbery in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 10 years, unanimously affirmed. Order, same court and Justice, entered on or about May 25, 2016, which denied defendant's CPL 440.20 motion to set aside the sentence, seeking, among other things, a new determination of the length of the final order of protection, unanimously modified, on the law, the matter remanded for a new determination of the duration of the order, and otherwise affirmed.

The court properly denied defendant's motion to withdraw his

guilty plea. The record as a whole establishes that the plea was knowingly, intelligently and voluntarily made. The circumstances of the plea were not coercive (*see People v Fiumefreddo*, 82 NY2d 536, 544 [1993]), notwithstanding the fact that the court warned defendant that the plea offer would be revoked if not accepted within the 24-hour period given to defendant to consider it, "because defendant had already received an extensive opportunity to consider the strength of the People's case and confer with counsel about the advisability of pleading guilty" (*see People v Luckey*, 149 AD3d 414, 415 [1st Dept], *lv denied* 29 NY3d 1082 [2017]). The court's discussion of defendant's possible sentencing exposure was not coercive (*see People v Pagan*, 297 AD2d 582 [1st Dept 2002], *lv denied* 99 NY2d 562 [2002]). Defendant received a reasonable opportunity to present all of his claims, and any claim of innocence was contradicted by his admissions during the plea. We have considered and rejected defendant's remaining claims regarding the plea.

As the People concede, the expiration date of the order of protection is erroneous because it was calculated without taking jail time credit into account (*see People v Jackson*, 121 AD3d 434 [1st Dept 2014]).

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4675 The People of the State of New York, Respondent,

-against-

Dameon Jones,
Defendant-Appellant.

Ind. 4091/13

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered September 9, 2014, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The court properly declined to charge petit larceny as a lesser included offense of fourth-degree grand larceny, because it was not supported by a reasonable view of the evidence, viewed most favorably to defendant. Defendant's theory that he took the victim's phone from an otherwise-empty subway seat was speculative, unsupported by any trial evidence, and contrary to a police officer's testimony that defendant took the phone from the victim's pocket (*see People v Vataj*, 107 AD3d 610 [1st Dept

2013], *lv denied* 21 NY3d 1077 [2013]; *People v Holloway*, 45 AD3d 477 [1st Dept 2007], *lv denied* 10 NY3d 766 [2008]). Furthermore, a finding that defendant committed petit larceny would have necessarily depended on that officer's testimony, and a reasonable view of the evidence cannot be based on "selective dissection" of a witness's "integrated testimony" (*People v Rivera*, 23 NY3d 112, 121 [2014]).

Defendant's remaining claims are unpreserved (*see People v Parker*, 63 AD3d 537, 538 [1st Dept 2009]), and we decline to review them in the interest of justice. As an alternative holding, we find that the prosecutor properly elicited testimony from the arresting officers about "lush workers" who steal from sleeping subway passengers (*People v Linton*, 139 AD3d 416 [1st Dept 2016], *lv denied* 28 NY3d 933 [2016]; *People v Bright*, 111 AD3d 575 [1st Dept 2013], *lv denied* 22 NY3d 1137 [2014]), and that the challenged portions of the prosecutor's opening

statement and summation, while inappropriate, present no basis for reversal (*see People v D'Alessandro*, 184 AD2d 114 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]; *People v Black*, 110 AD3d 569 [1st Dept 2013], *lv denied* 23 NY3d 1059 [2014]).

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4676 Anna Gleyzerman, et al., Index 159593/15
Plaintiffs-Appellants,

-against-

The Law Offices of Arthur Gershfeld & Associates, PLLC, et al.,
Defendants-Respondents.

_____

O'Rourke & Degen, PLLC, New York (Gulnora Tali of counsel), for appellants.

Furman Kornfeld & Brennan LLP, New York (Izabell Lemkhen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about August 8, 2016, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, unanimously modified, on the law, to deny the motion as to the cause of action for breach of contract to the extent it relates to the first and third retainer agreements, and otherwise affirmed, without costs.

In March 2013, plaintiff Anna Gleyzerman was arrested on drug and drug-related charges. She entered into a retainer agreement with defendants to cover certain legal services for a flat fee (the first retainer). The following month, the District Attorney's Office filed an indictment against Anna, and in July 2013, following a nine-month-long wiretap investigation, it filed

a superseding indictment against her. Anna's mother, plaintiff Tatyana Gleyzerman, then entered into a retainer agreement with defendants to secure defendant Gershfeld's appearance at Anna's arraignment on the superseding indictment for a flat fee (the second retainer). Tatyana subsequently entered into another retainer agreement with defendants to secure certain services in connection with the superseding indictment for an additional flat fee (the third retainer). In or about October 2013, after defendants had performed a substantial amount of work on Anna's behalf and had negotiated a favorable plea deal for her (albeit not as favorable as the one she ultimately accepted), plaintiffs terminated defendants' services and demanded a refund of unearned fees.

Defendants failed to demonstrate conclusively that the value of the services they rendered in connection with the first and third retainers equals or exceeds the fees that plaintiffs paid. Their self-serving accounting, which identified the number of hours spent on tasks but not the dates on which the work was done and the time spent on each of those dates, does not constitute irrefutable, documentary evidence that no unearned fees remain. However, defendants demonstrated that no unearned fees remain under the second retainer, which provided that the flat fee would cover "only the superseding arraignment appearance" (caps and

boldface deleted); Gershfeld appeared with Anna on that arraignment.

The conversion cause of action alleges no facts independent of those underlying the breach of contract cause of action and was therefore correctly dismissed as duplicative (*see Jeffers v American Univ. of Antigua*, 125 AD3d 440, 443 [1st Dept 2015]). The unjust enrichment cause of action is precluded by the existence of the retainer agreements (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Anna's cause of action for fraudulent inducement fails to allege the requisite "knowing misrepresentation of material present fact" intended to deceive her and induce her to enter into the first retainer (*GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv denied* 17 NY3d 782 [2011]). Defendants' alleged assurance that her case would not go to trial is at odds with the clear language of the first retainer and, at most, represents a promise about the future (*see Eastman Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1st Dept 1994]) – which in any event was kept. As the superseding indictment had yet to be filed when the first retainer was entered into, no material fact then existed as to that indictment.

Tatyana's cause of action for fraudulent inducement alleges that defendants made several misrepresentations of present fact

intended to induce her into entering into the second and third retainers, but fails to allege with particularity the distinct damages resulting from that inducement (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954 [1986]; CPLR 3016[b]).

The causes of action alleging violations of General Business Law § 349(a) were correctly dismissed because the alleged misconduct is related to private agreements between the parties and is not consumer-oriented (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]).

The allegations in the complaint fail to establish the existence of a chronic and/or extreme pattern of legal delinquency that caused damages in support of the cause of action under Judiciary Law § 487 (*see Chowaiki & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 601 [1st Dept 2014]).

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4677 In re Nakelia T.,

A Child Under Eighteen Years
of Age, etc.,

Ihesiah M.,
Respondent-Appellant,

Commissioner of the Administration for
Children's Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the child.

_____

Appeal from order, Family Court, New York County (Jane Pearl, J.), entered on or about June 8, 2016, which, after a hearing, denied the motion of respondent mother for an order declaring that the Administration for Children's Services (ACS) was in violation of the terms of the court's April 19, 2016 order of disposition, unanimously dismissed, without costs, as moot.

Respondent moved for a declaration that ACS exceeded its authority under the original dispositional order. Her appeal from the order denying relief was rendered moot by a subsequent modified order of disposition entered on or about September 1, 2016, removing the child from her care and placing the child with

ACS, as well as by an order entered on or about September 15, 2016, discharging the child to the mother and providing for ACS supervision and household monitoring, the very actions which the mother complained of in her motion (*see e.g. Matter of Breeyanna S.*, 52 AD3d 342 [1st Dept 2008], *lv denied* 11 NY3d 711 [2008]).

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4680 The People of the State of New York, Ind. 2687/10
Respondent,

-against-

Franklin Perez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert C. Mciver of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Stephen Barrett, J.), rendered September 5, 2014,

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

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

ENTERED: OCTOBER 12, 2017

CLERK

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

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4681 The People of the State of New York, Ind. 2792/14
Respondent,

-against-

Anthony Lugo,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered June 2, 2016, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of imprisonment of three years, to be followed by two years of post-release supervision, unanimously affirmed.

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4682 The People of the State of New York, Respondent, Ind. 4050/14

-against-

David Casilla, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at plea; Daniel P. FitzGerald, J. at sentencing), rendered December 18, 2014, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4683-
4684N La Magica LLC,
Plaintiff-Appellant,

-against-

145 Atlantic LLC,
Defendant-Respondent.

Index 654010/15

Ellenoff Grossman & Schole LLP, New York (James K. Landau of counsel), for appellant.

Forcina Law, Middle Village (Elio Forcina of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about March 9, 2016, which denied plaintiff's motion for a preliminary injunction, and order, same court and Justice, entered on or about July 20, 2016, which, to the extent appealed from, denied plaintiff's motion to renew, unanimously affirmed, without costs.

The motion court properly determined that plaintiff had failed to show a likelihood of success on the merits, thus requiring denial of the motion for a preliminary injunction (*see Gama Aviation Inc. v Sandton Capital Partners, L.P.*, 93 AD3d 570 [1st Dept 2012]). The authenticity of plaintiff's claimed 2009 agreement acquiring the right to use the trade name allegedly used by defendant was undermined by evidence that plaintiff had

sought to acquire the right to use the trade name after 2009. Even if some evidence of such later attempts constituted hearsay, the other evidence submitted by defendant was sufficient to undermine the authenticity of the purported agreement.

Plaintiff's renewal motion was properly denied because, even if there was a reasonable excuse for the failure to submit the new evidence on the original motion, it would not have altered the outcome (*see* CPLR 2221[e]). Although the new evidence purported to show the authenticity of the 2009 agreement, the original ruling hinged not on direct evidence of forgery of the agreement, but on the inference arising from plaintiff's principal's post-2009 conduct.

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

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

ENTERED: OCTOBER 12, 2017

CLERK

Manzanet-Daniels, J.P., Mazzarelli, Webber, Oing, JJ.

4685 In re Judith Weil, Ind. 156186/12
[M-4655] Petitioner, OP 117/17

-against-

Hon. W. Franc Perry,
etc., et al.,
Respondents.

_____

Epstein & Weil LLC, New York (Judith Weil of counsel), and Eric Nelson, Staten Island, for petitioner.

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., New York (Karen M. Lager of counsel), for Law Office of Jeffrey Samel & Partners, 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.

Justice W. Franc Perry has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.

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

ENTERED: OCTOBER 12, 2017

CLERK