SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 26, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Richter, Andrias, Gesmer, Singh, JJ.

4689 In re Opher Henderson, Petitioner, Index 101300/15

-against-

Vicki Been, etc., et al., Respondents.

_____

Manhattan Legal Services, New York (John Briggs of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondents.

_____

Determination of respondents Vicki Been, as Commissioner of the New York City Department of Housing Preservation and Development, and the New York City Department of Housing Preservation and Development, dated March 20, 2015, terminating petitioner's Section 8 subsidy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan B. Lobis J.], entered February 5, 2016), unanimously dismissed, without costs.

Substantial evidence supports respondents' determination that a member of petitioner's household engaged in drug-related

criminal activity from her apartment in respondents' facility, and that petitioner was aware of the drug activity (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). Police records indicated that a confidential informant bought illegal drugs from a member of petitioner's household in the apartment on four occasions during the late afternoon and evening, and police recovered drugs and drug paraphernalia, including a scale, bags, rubber bands and a coffee grinder, all with heroin residue, in the apartment.

The Hearing Officer's conclusion that petitioner was at home when the drug sales occurred was a rational, plausible conclusion to be drawn from petitioner's testimony that she was unemployed and on public assistance (*see Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 n 3 [1st Dept 2010]; *see Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239 [1997] [existence of alternative rational conclusions does not warrant annulment of the agency's conclusion]). The Hearing Officer's determination that petitioner's claim of ignorance was not credible is entitled to deference (*Matter of Satterwhite v Hernandez*, 16 AD3d 131, 132 [1st Dept 2005]; *see Matter of Walker v Franco*, 275 AD2d 627 [1st Dept 2000], *affd* 96 NY2d 891 [2001]).

The termination of petitioner's Section 8 subsidy is not so disproportionate to the offense as to be shocking to one's sense of fairness (*see Douglas v New York City Hous. Auth.*, 126 AD3d 647 [1st Dept 2015]).

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4806 The People of the State of New York, Respondent,

-against-

Bridget Best,
Defendant-Appellant.

Ind. 2600/14

Rosemary Herbert, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

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

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered July 15, 2015, convicting defendant, after a jury trial, of bail jumping in the second degree, and sentencing her, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court's *Sandoval* ruling was a proper exercise of discretion, which "weighed appropriate concerns and limited both the number of convictions and the scope of permissible cross-examination" (*People v Hayes*, 97 NY2d 203, 208 [2002]). The court permitted the prosecutor to cross-examine defendant about only one 2012 misdemeanor conviction and one 2004 felony conviction, limiting such cross-examination to the names of the offenses and the dates of conviction, and precluded any questioning about defendant's several other convictions. The

court properly permitted the prosecutor to elicit defendant's use of five aliases and six false dates of birth. This deceitful conduct was highly probative of defendant's credibility notwithstanding its remoteness in time and defendant's age when this conduct occurred (*see People v Walker*, 83 NY2d 455, 459 [1994]).

Defendant failed to preserve her constitutional challenge to the *Sandoval* ruling, her argument that the People should not have been permitted to elicit that defendant was convicted of first-degree identity theft because she absconded while a charge of the same offense was pending against her in this bail jumping case, and her contention that the prosecutor compounded the prejudicial effect of the *Sandoval* ruling on cross-examination and summation. We decline to review these arguments in the interest of justice. As an alternative holding, we find them unavailing.

We also find that any error concerning the *Sandoval* ruling was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230, 237-238 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4807 Gado Mohammed, Index 301751/13
Plaintiff, 17562/13

-against-

Slawomir Kieszowski,
Defendant.

- - - - -

Rosalyn Green,
Plaintiff-Respondent,

-against-

Boro Transit, Inc., et al.,
Defendants-Appellants,

Slawomir Kieszowski,
Defendant.

_____

Silverman Shin & Byrne PLLC, New York (Wayne S. Stanton of counsel), for appellants.

Friedman & Simon, Jericho (Roger L. Simon of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 13, 2016, which denied defendants Boro Transit, Inc., Gado Mohammed, and Logistic Associates, Inc.'s motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff Rosalyn Green, a school bus matron employed by nonparty ANJ Service, Inc., alleges that she suffered injuries in an accident that occurred while she was working on a school bus

registered to defendant Boro Transit and driven by defendant Mohammed, an employee of Boro Transit. Defendants failed to make a prima facie showing that plaintiff was a "special employee" of Boro Transit, so that her claims against Boro Transit and Mohammed would be barred by the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29(6) (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991]; *Bostick v Penske Truck Leasing Co., L.P.*, 140 AD3d 999 [2d Dept 2016]). They did not demonstrate that Boro Transit assumed exclusive control over plaintiff's work. Indeed, their witnesses testified that ANJ matrons were supervised by management employees of another company, not by any employee of Boro Transit. Defendants offered no evidence to support a finding that defendant Logistic Associates, allegedly liable as the owner of the school bus (Vehicle and Traffic Law § 388), was entitled to rely on the exclusivity bar of the Workers' Compensation Law.

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4808 In re Jayvon Jose R., etc.,

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

Francisco S.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

_____

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

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about January 28, 2016, insofar as it found, after a hearing, that respondent's consent was not required for the subject child's adoption, and, in the alternative, that he abandoned the child, and terminated his parental rights, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that respondent's consent for the child's adoption was not required (*Matter of Jamize G.*, 40 AD3d 543, 544 [1st Dept 2007], *lv denied* 9 NY3d 808 [2007]). Respondent's testimony that he paid child support between July 11, 2007 and 2010 pursuant to an order was

insufficient to show that he was a source of consistent support for the child, because he also testified that he did not pay support between 2012 and the June 18, 2014 petition (*see Matter of Javon Reginald G. [Everton Reginald G.]*, 89 AD3d 456, 457 [1st Dept 2011]; *Matter of Tyshawn Jaraind C.*, 33 AD3d 488 [1st Dept 2006]).

We also find that clear and convincing evidence supports the Family Court's alternative finding that even if respondent was found to be a consent father, he abandoned the child because the foster mother's testimony, as well as his own, established that he did not attempt to contact the child or the agency during the relevant statutory period (*see Matter of Asia Sabrina N. [Olu N.]*, 117 AD3d 543, 544 [1st Dept 2014]; *Matter of Nevaha J.*, 56 AD3d 989, 990 [3d Dept 2008], *lv denied* 11 NY3d 716 [2009]; *Matter of Shalena Lee C.*, 197 AD2d 404 [1st Dept 1993]). Moreover, respondent did not establish that the agency discouraged or prevented him from having contact with the child or that he suffered from a severe hardship that so permeated his life that attempts at communication were not feasible (*see* Social Services Law § 384-b[5][a]; *Matter of Isaiah Johnathan S.*, 33 AD3d 459 [1st Dept 2006]).

The Family Court was not required to hold a dispositional hearing to determine the child's best interests after it entered

an alternate finding of abandonment against appellant (*see Matter of "Male" G.*, 30 AD3d 337, 338 [1st Dept 2006], *lv denied* 7 NY3d 711 [2006]). Given the fact that respondent had not seen the child in several years, the court providently exercised its discretion in declining to conduct such hearing (*see Matter of Anthony M.*, 29 AD3d 404, 405 [1st Dept 2006]). Respondent's contention that the agency should have contacted him before the petition was filed is unavailing because the agency had no obligation to make diligent efforts in the case of abandonment (*see Matter of Andre W.*, 298 AD2d 206 [1st Dept 2002]).

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4809 Pinnacle Sports Media & Entertainment, LLC,
Plaintiff-Appellant,

-against-

Leslie Kai Greene also know as Kai L. Greene,
Defendant-Respondent,

Adam Paz,
Defendant.

- - - - -

[And a Third-Party Action]

- - - - -

Kai L. Greene,
Second Third-Party Plaintiff-Respondent,

-against-

Peter Anske,
Second Third-Party Defendant-Appellant,

Victor Muro, et al.,
Second Third-Party Defendants.

Index 650046/15

_____

Ropers Majeski Kohn & Bentley P.C., New York (Elana T. Henderson of counsel), for appellants.

Law Office of Carlene Jadusingh, New York (Carlene Jadusingh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered March 10, 2017, which, to the extent appealed from, granted so much of defendant/second third-party plaintiff Kai L. Greene's motion as sought production of plaintiff Pinnacle Sports Media & Entertainment, LLC's tax returns from 2013 to 2015, with

all information other than Pinnacle's revenue to be redacted, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, and the motion denied.

Disclosure of tax returns is generally disfavored due to their confidential and private nature (*see Lee v Chun Ka Luk*, 132 AD3d 515, 516 [1st Dept 2015], *lv dismissed* 27 NY3d 975 [2016]), and Greene has not made a sufficiently particularized showing that the information contained in Pinnacle's tax returns, even if redacted to only reveal Pinnacle's revenue, is necessary to prove his claims (*see id.*). Moreover, he does not address why other sources are inadequate, inaccessible, or unlikely to be productive (*see id.*).

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Oing, Singh, JJ.

4810 Mark Perez, Index 158373/13
Plaintiff-Respondent, 595009/16

-against-

Beach Concerts, Inc., et al.,
Defendants,

Live Nation Worldwide, Inc., et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

_____

Hannum Feretic Prendergast & Merlino, LLC, New York (Kerri M. Hoffman of counsel), for appellants.

Morelli Law Firm PLLC, New York (David Sirotkin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered July 1, 2016, which, insofar as appealed from, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim as against defendant Live Nation Worldwide, Inc. (Live Nation), unanimously affirmed, without costs.

The court properly granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim because Live Nation was the "owner" of the accident site in its role as licensee of Jones Beach Marine Theatre. The record demonstrates that as licensee, Live Nation had the sole authority to operate

and maintain the premises, including the right to insist that workers on the site follow proper safety practices (*see Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340 [1st Dept 2005]; *Bart v Universal Pictures*, 277 AD2d 4, 5 [1st Dept 2000]*; Seferovic v Atlantic Real Estate Holdings, LLC*, 127 AD3d 1058, 1060 [2d Dept 2015]). The court did not err in considering the merger agreement showing that Live Nation was the licensee of the premises for the first time in reply, because plaintiff submitted that document in response to an argument made in opposition to the motion (*see Rodriguez v Weinstein Enters., Inc.*, 113 AD3d 483, 484 [1st Dept 2014]).

The court also properly found that plaintiff was engaged in the alteration of a structure at the time of the accident. When he fell, plaintiff was helping set up the second tier truss system of a sponsorship booth. This truss system constituted a "structure" because, viewed as a whole, it extended the height of the booth from 10 feet to 16 feet, was comprised of several interlocking parts that were connected in a specific way, and required the use of a forklift and several people to construct it (*see Lewis Moors v Contel of N.Y.*, 78 NY2d 942, 943 [1991]; *McCoy v Kirsch*, 99 AD3d 13, 16-17 [2d Dept 2012]). Although this truss system was being set up to allow for the display of branding, it was not a "'decorative modification' because the work. . .

entail[ed] far more than a mere change[] [to] the outward appearance of" the booth and, instead, constituted an alteration to the preexisting structure (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 126 [2015] [internal quotation marks omitted]).

We have considered appellants' remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4811 The People of the State of New York, SCI 3303/13
Respondent,

-against-

Emmanuel Vargas,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Samuel J. Mendez of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Peter D. Coddington 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 (John Moore, J.), rendered November 25, 2013,

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

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

ENTERED: OCTOBER 26, 2017

CLERK

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

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4812 JP Morgan Chase Bank, N.A., Index 380838/11
Plaintiff-Appellant,

-against-

Winston Salmon,
Defendant-Respondent,

Rohan Salmon, et al.,
Defendants.

_____

Fein, Such & Crane, LLP, Syracuse (John A. Cirando of counsel), for appellant.

Adam Seiden, Mount Vernon, for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered November 18, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to renew its motion for summary judgment, unanimously affirmed, with costs.

Even if the reason that the affidavit submitted by plaintiff's servicing agent was not offered on the original motion was sufficient (*see Mattis v Keen, Zhao*, 54 AD3d 610, 612 [1st Dept 2008]), plaintiff did not establish its prima facie entitlement to judgment as a matter of law since it failed to demonstrate proof of mailing and, therefore, strict compliance with RPAPL 1304 (*see Aames Capital Corp. v Ford*, 294 AD2d 134, 134 [1st Dept 2002]); *Bank of N.Y. Melton v Aquino*, 131 AD3d

1186, 1186-1187 [2d Dept 2015]).

The motion court also determined that defendant's production of payment receipts raised issues of fact in this foreclosure action. Defendant's failure to plead these affirmative defenses in his answer does not preclude raising these issues in response to the summary judgment motion (*see Rivera v New York City Tr. Auth.*, 11 AD3d 333 [1st Dept 2004]; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829, 830 [2d Dept 2016]).

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4813 ZMoore, Ltd., doing business as, Commerce Restaurant,
Plaintiff-Appellant,

-against-

Kingman Management LLC, et al.,
Defendants-Respondents.

Index 113772/11

Hinckley & Heisenberg LLP, New York (Christoph C. Heisenberg of counsel), for appellant.

Smith & Krantz LLP, New York (Jeremy J. Krantz of counsel), for respondents.

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered October 19, 2016, dismissing the complaint and awarding defendants attorneys' fees, unanimously affirmed, without costs.

Plaintiff leased the ground floor and basement from defendants for the operation of its restaurant. In the basement, plaintiff had the exclusive use of approximately 500 square feet of space and a delivery hatch onto the sidewalk; the two areas were connected by a shared common hallway, at the end of which was an elevator designated for defendants' exclusive use. When defendants undertook work to replace the antiquated elevator, they erected a barrier wall in the hallway, about four feet from the elevator, to address plaintiff's concerns about the

construction's impact on its food preparation. This wall did not obstruct the delivery hatch.

Article 4 of the lease permits the landlord to make repairs in certain areas of the building with "no allowance to the Tenant for the diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business" arising from the repairs. Article 13 provides that the landlord is entitled to make changes to elevators or other public parts of the building without incurring liability to plaintiff or giving rise to an eviction. Article 43 of the lease expressly provides that it is subject to the terms and conditions contained elsewhere in the lease, including the foregoing exculpatory clauses.

The trial court properly precluded evidence of the presence of construction dust in the basement space. Although the complaint contains general allegations about dust, the cause of action for breach of the lease is not premised on the presence of dust.

Plaintiff failed to establish that, by taking the four-foot, walled-in common area immediately outside the elevator in the basement, defendants breached Article 43 of the lease, which provides that "Landlord's use of the basement space shall not interfere with Tenant's use and enjoyment of the basement" (*see*

Cut-Outs, Inc. v Man Yun Real Estate Corp., 286 AD2d 258 [1st Dept 2001], *lv denied* 100 NY2d 507 [2003]; *see also Jackson v Westminster House Owners Inc.*, 24 AD3d 249 [1st Dept 2005], *lv denied* 7 NY3d 704 [2006]).

Plaintiff also failed to establish damages resulting from the placement of the barrier wall in the common hallway. The record shows that plaintiff had free and unobstructed use of the delivery hatch at all times when the barrier wall was in place, as well as unfettered ingress and egress to and from its exclusive demised space through the common hallway leading from the hatch. Plaintiff's owner testified that the restaurant was very busy and lucrative during the relevant period, and did not suffer any reduction in gross sales as a result of the containment wall in the basement or the construction generally.

Plaintiff cannot prevail on its cause of action for partial actual eviction, because the hallway was a common area not demised to plaintiff, and defendants' intrusion into it was "merely a trivial interference with the tenant's use and enjoyment of the premises" (*Eastside Exhibition Corp. v 210 E. 86th St. Corp.*, 18 NY3d 617, 624 [2012], *cert denied* 568 US 1028 [2012]; *see also Pacific Coast Silks, LLC v 247 Realty, LLC*, 76

AD3d 167, 173 [1st Dept 2010]; *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 240 AD2d 161 [1st Dept 1997]).

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

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4814 Deutsche Bank National Trust Company, Solely in its Capacity as Trustee of the Equifirst Loan Securitization Trust 2007-1,
Plaintiff-Appellant,

-against-

EquiFirst Corporation, et al.,
Defendants-Respondents,

EquiFirst Mortgage Corporation of Minnesota,
Defendant.

Index 651957/13

_____

Lowenstein Sandler LLP, New York (Zachary D. Rosenbaum of counsel), for appellant.

Sullivan & Cromwell LLP, New York (Jeffrey T. Scott of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy Friedman, J.), entered May 26, 2016, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiff's breach of contract claim against defendant Barclays Bank PLC insofar as it was based on Barclays' obligation to cure or repurchase loans affected by EquiFirst's breaches of representations and warranties and to dismiss plaintiff's claim seeking indemnification, including attorneys' fees, unanimously reversed, on the law, with costs, and the motion denied.

Plaintiff trustee sufficiently alleged a claim for

indemnification. The indemnification provisions of the Mortgage Loan Purchase Agreement and the Pooling and Servicing Agreement reflect the unmistakable intent that plaintiff may recover its legal expenses incurred in enforcing the representations and warranties at issue (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]; *see also Wilmington Trust Co. v Morgan Stanley Mtge. Capital Holdings LLC*, 152 AD3d 421 [1st Dept 2017]; *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 140 AD3d 518 [1st Dept 2016]).

We find that the Representations and Warranties Agreement is ambiguous as to whether Barclays agreed to repurchase mortgage loans containing breaches of representations and warranties by EquiFirst, the originator of the loans. Therefore, dismissal of that portion of plaintiff's breach of contract claim based on Barclays' obligation to cure or repurchase loans affected by EquiFirst's breaches of representations should have been denied (*see e.g. Telerep, LLC v U.S. Intl. Media, LLC*, 74 AD3d 401, 402 [1st Dept 2010]).

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4815 In re Isabella S., and Another,

Children under Eighteen
Years of Age,

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

Robert T.,
Respondent-Respondent.

_____

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for appellant.

Law Office of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), for appellant.

_____

Order, Family Court, Bronx County (Alma M. Gomez, J.), entered on or about May 31, 2016, which, insofar as appealed from as limited by the briefs, dismissed the neglect petition as to Jace T., unanimously reversed, on the law and the facts, without costs, to enter a finding that respondent neglected Jace T. and remand the matter for a dispositional hearing.

Respondent is the father of Jace T. and a person legally responsible for the care of Isabella S. The mother testified that the father choked her in the presence of six-year-old Isabella and only a couple of feet away from where then four-

month-old Jace was sleeping in his crib. The mother's testimony was supported by shelter records; the father did not testify. Family Court found the mother's testimony was credible and supported a finding that the father neglected Isabella. The same evidence also supports a finding that the father neglected Jace.

Even a single instance of domestic violence may be a proper basis for a finding of neglect, so long as it "occurred in the child's presence and resulted in physical, mental or emotional impairment or imminent danger thereof" (*Matter of Emily S. [Jorge S.]*, 146 AD3d 599, 600 [1st Dept 2017]*; Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). Jace was in imminent danger of physical impairment due to his close proximity to the violence (*see Matter of Kelly A. [Ghyslaine G.]*, 95 AD3d 784, 784 [1st Dept 2012]; *Matter of Gianna C.-E. [Alonso E.]*, 77 AD3d 408, 408 [1st Dept 2010]). The father's assertion that Jace was in "another part of" or

"somewhere else in" the one-room residence at the time of the attack is unsupported by the record.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4816 The People of the State of New York, Respondent,

-against-

Julio Pizarro, Defendant-Appellant.

Ind. 2538/10

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

Darcel D. Clark, District Attorney, Bronx (Shannon Henderson of counsel), for respondent.

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about September 24, 2014, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although defendant casts his argument for a modification of his risk level in terms of whether the override for a prior felony sex crime conviction should be "applied," the override applies automatically, except that the court may grant a downward departure (*see People v Howard*, 27 NY3d 337, 342 [2016]). In any event, there is no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]), because there are no mitigating

factors that were not adequately taken into account by the risk assessment instrument or outweighed by the seriousness of defendant's current and prior sex offenses against children.

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4817 The People of the State of New York, Dkt. 19837C/10
Respondent,

-against-

Louis Gonzalez,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered July 28, 2011, convicting defendant, after a jury trial, of two counts of operating a motor vehicle under the influence of alcohol or drugs, and sentencing him to an aggregate fine of $1000 and a conditional discharge, 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, 348-349 [2007]). There is no basis for disturbing the

jury's credibility determinations. The evidence, viewed as a whole, establishes that defendant was operating a car at a time when he was undisputedly intoxicated.

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4818 Larry Keene, as Administrator of the Estate of Jennifer Baez,
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

Index 105592/11

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Jason M. Rubin of counsel), for appellant.

Herzfeld Rubin, P.C., New York (Sharyn Rootenberg of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 8, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law in this wrongful death action arising from a fire that occurred in an apartment occupied by plaintiff's decedent, and owned and maintained by defendant. Defendant submitted evidence showing that there was an operable smoke detector in decedent's apartment three months prior to the fire, and that it had not received any complaints about the smoke detector (*see* Administrative Code of City of NY § 27-2045[a][1]; *Vanderlinde v 600 W. 183rd St. Realty Corp.*, 101 AD3 583 [1st Dept 2012]).

In opposition, plaintiff failed to raise an issue of fact as to whether the smoke detector was inoperable at the time of the fire, or defendant had actual or constructive notice that it was not operable.

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4819-
4820-
4821 The People of the State of New York,
Respondent,

-against-

Jason Morales,
Defendant-Appellant.

Ind. 1173/10

Rosemary Herbert, Office of the Appellate Defender, New York (Charity L. Brady of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Beth Kublin of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered January 25, 2013,

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

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

ENTERED: OCTOBER 26, 2017

CLERK

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

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4822-
4823 Index 109903/11

Country-Wide Insurance Company, et al.,
Plaintiffs-Respondents,

-against-

Gotham Medical, P.C.,
Defendant-Appellant.

_____

The Russell Friedman Law Group, Lake Success (Charles Horn of counsel), for appellant.

Thomas Torto, New York, respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 25, 2015, which, inter alia, granted plaintiffs' motion for summary judgment declaring that defendant is not entitled to no-fault insurance benefits from them with respect to the 31 claims at issue, unanimously affirmed, with costs.

The refusal by defendant's principal, Dr. Alexandre Scheer, to answer questions at an examination under oath (EUO) about his compliance with a consent agreement and order he had entered into with the Office of Professional Medical Conduct (OPMC) constituted a failure to comply with the request for an EUO, a condition precedent to coverage under the insurance policy (*see Hertz Corp. v Active Care Med. Supply Corp.*, 124 AD3d 411 [1st

Dept 2015]).

Defendant argues that plaintiffs' questions about Scheer's compliance with the OPMC order were improper because the order is confidential. Defendant relies on Public Health Law § 230(17), which provides that where an investigation of suspected professional misconduct by a physician reveals evidence insufficient to constitute misconduct but reasonable cause exists to believe the physician is unable to practice medicine with reasonable skill and safety, the physician may be ordered to have his or her practice monitored by another physician approved by OPMC, and any such order shall be kept confidential. However, this provision is inapplicable. Scheer entered into a consent agreement and order in which he did not contest the charge of fraudulent practice of medicine brought against him and he agreed to a penalty of a 12-month suspension of his license to practice medicine, a stay of the suspension, and, pursuant to Public Health Law § 230-a (penalties for professional misconduct), a 60-month term of probation, of which a monitor of his practice was only one condition. Moreover, the consent agreement and order states expressly that it shall be a public document.

Defendant also argues that plaintiffs had no independent right to determine whether Scheer was in compliance with the consent agreement and order and that any determination by them of

noncompliance would not render him "unlicensed" to practice medicine. This argument is unavailing. The consent agreement and order provides that any medical practice in violation of the term permitting Scheer to practice only when monitored "shall constitute the unauthorized practice of medicine." An unlicensed health care provider is ineligible to receive no-fault reimbursement (11 NYCRR 65-3.16[a][12]), and an insurer may make a good faith determination that a medical provider assignee seeking no-fault benefits is ineligible to receive such benefits (*State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313, 322 [2005]).

Defendant waived the defenses of res judicata and award and arbitration (CPLR 3211[e]; *see Mayers v D'Agostino*, 58 NY2d 696 [1982]). While the arbitral awards in its favor were not issued until after it had filed its answer in this action, there is no indication on the record before us that defendant ever moved to amend its answer to assert either of those defenses.

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4824 The People of the State of New York, Respondent, Ind. 2067/10

-against-

Kenny Cruz, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

_____

Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about April 21, 2016, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The probative value of defendant's Static-99 score is limited because that assessment inadequately considers the underlying sex crime and the potential for harm in the event of reoffense (*see People v Rodriguez*, 145 AD3d 489, 490 [2016], *lv denied* 28 NY3d 916 [2017]; *People v Roldan*, 140 AD3d 411, 412 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]). The other mitigating factors cited by defendant were adequately taken into

account by the risk assessment instrument, and were outweighed by the seriousness of the underlying crime (*see People v McNeely*, 124 AD3d 433 [1st Dept 2015], *lv denied* 25 NY3d 908 [2015]).

The hearing court's incorrect reference to the clear and convincing evidence standard does not require a new hearing, because use of the correct preponderance of the evidence standard would not have affected the result (*see People v Corn*, 128 AD3d 436 [1st Dept 2015]).

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

ENTERED: OCTOBER 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4825 The People of the State of New York, Ind. 3446/15
Respondent,

-against-

Claribel Santos,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James J. Wen 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 (George Villegas, J.), rendered January 21, 2016,

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 26, 2017

CLERK

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

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4826 The People of the State of New York, Respondent,

-against-

Sharif Latouche, Defendant-Appellant.

Ind. 44148/13

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

Judgment, Supreme Court, New York County (Diane Kiesel, J.), rendered October 7, 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 26, 2017

CLERK

Tom, J.P., Manzanet-Daniels, Mazzarelli, Oing, Singh, JJ.

4827N Y.A., an Infant Under the Age of Fourteen Years, by G.A., as Parent and Natural Guardian, Plaintiff-Respondent, Index 152719/12

-against-

Conair Corporation doing business as Cuisinart, et al., Defendants-Appellants.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for appellants.

Law Office of Certain & Zilberg, PLLC, New York (Michael Zilberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered July 7, 2016, which denied defendants' CPLR 3025(b) motion to amend their answers to add a counterclaim for negligence, contribution, and/or common law indemnity, unanimously affirmed, without costs.

In 2010, G.A.'s (plaintiff) then 2½ year-old son, the infant plaintiff Y.A., was allegedly injured when his hand came into contact with the blades of a hand-held stick blender manufactured by defendant Conair and sold by defendant Bed Bath & Beyond. According to plaintiff's deposition testimony, after purchasing the blender, she opened the box and then left the blender, in its box, on the dining room table while she went to the kitchen to

prepare dinner. Meanwhile, Y.A. and G.A.'s four-year-old son, I.A, played in the den, which opened into the dining room. At some point, plaintiff heard a scream and, when she came running into the den, she saw Y.A. holding up his hand, bloodied, with his fingers having been severely cut. Plaintiff saw that the blender was plugged into an outlet and I.A. was holding it, and he eventually admitted that he had taken the blender, plugged it in and pressed the button.

Plaintiff commenced this action, individually and on behalf of her injured son, to recover damages for strict products liability and related claims against defendants. After plaintiff's deposition revealed the circumstances of the accident, defendants moved for leave to amend their answers to assert a counterclaim against her for contribution and indemnification. They argued that the general rule of intrafamilial immunity (*Holodook v Spencer*, 36 NY2d 35 [1974]), does not apply when a parent, like plaintiff here, negligently entrusts an instrumentality, which she alleged was unreasonably defective, to a child, thereby creating a risk to third parties (*see Nolechek v Gesuale*, 46 NY2d 332 [1978]; *see also Alessi v Alessi*, 103 AD2d 1023 [4th Dept 1984]; *Acquaviva v Piazzola*, 100 AD2d 502 [2d Dept 1984], *lv dismissed* 62 NY2d 604, 942 [1984]). Supreme Court denied the motion and we affirm.

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Here the proposed counterclaims, as pleaded, state nothing other than a claim that plaintiff negligently supervised her own children with respect to a "common, daily household hazard[]" (*Zikely v Zikely*, 98 AD2d 815, 816 [2d Dept 1983], *affd* 62 NY2d 907 [1984]), which, as the Second Department has held in very similar circumstances, does not implicate any duty owed to the public at large, and is insufficient to state a cognizable claim under *Holodook* (*Siragusa v Conair*, __ AD3d __, 2017 NY Slip Op 06564 [2d Dept 2017]; *see Wheeler v Sears Roebuck & Co.*, 37 AD3d 710, 711-712 [2d Dept 2007]).

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

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

ENTERED: OCTOBER 26, 2017

CLERK