SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 15, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Sweeny, Renwick, Manzanet-Daniels, JJ.

15741 The People of the State of New York, Respondent, Ind. 1581/09

-against-

Hebert Henriquez, also known as Herbert Henriquez, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

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Appeal from judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 20, 2010, convicting defendant, upon his plea of guilty, of grand larceny in the second and third degrees, and sentencing him, as a second felony offender, to an aggregate term of four to eight years, further held in abeyance, and the matter remanded for further proceedings in accordance herewith.

We previously held this appeal in abeyance (131 AD3d 902 [1st Dept 2015]) after finding that a disposition under *People v Saunders* (52 AD2d 833 [1976]) would be inappropriate. Upon consideration of the additional briefs filed by the parties, we now conclude that defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility that his plea would lead to deportation (*People v Peque*, 22 NY3d 168, 198 [2013], 574 US __, 135 S Ct 90 [2014]). We have considered and rejected the People's preservation arguments. Accordingly, we remand for the remedy set forth in *Peque* (22 NY3d at 200-201), and we hold the appeal in abeyance for that purpose.

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

ENTERED: DECEMBER 15, 2016

CLERK

Mazzarelli, J.P., Andrias, Saxe, Feinman, Gische, JJ.

2211 ARS Investors II 2012-1 HVB, LLC, Index 380686/11
Plaintiff-Respondent,

-against-

BlackMeadow Road LLC, et al.,
Defendants-Appellants.

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Becker & Poliakoff, New York (James J. Mahon of counsel), for appellants.

Norris McLaughlin & Marcus, P.A., New York (Melissa A. Peña of counsel), for respondent.

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Deficiency judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered August 14, 2015, confirming and ratifying a referee's report of the sale of the mortgaged premises, dated March 19, 2014, and awarding plaintiff a sum of money, unanimously affirmed, with costs.

Plaintiff established prima facie through its expert's appraisal "the fair and reasonable market value of the mortgaged premises" (RPAPL 1371[2]; *see White Knight NYC Ventures, LLC v 15 W. 17th St., LLC*, 110 AD3d 576 [1st Dept 2013]). Defendants failed to establish that the highest and best use of the property was something other than the existing use, on which plaintiff's

expert based his appraisal (*see National Bank of N. Am. v Systems Home Improvement*, 69 AD2d 557, 562-563 [2d Dept 1979], *affd* 50 NY2d 814 [1980]; *BTC Mtge. Invs. Trust 1997-SI v Altamont Farms*, 284 AD2d 849 [3d Dept 2001]). Defendants' expert did not show that it was "reasonably probable that the asserted highest and best use could or would have been made of the subject property in the near future" (*see National Bank of N. Am.*, 69 AD2d at 563). The trial court appropriately rejected defendants' expert's testimony as being speculative and devoid of factual foundation support (*see BTC Mtge. Invs. Trust 1997-SI* at 850).

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2315 Thomas Britt, Index 111412/10
Plaintiff-Appellant,

-against-

Marianne Nestor, et al.,
Defendants-Respondents.

_____

Todd V. Lamb, New York, for appellant.

Reppert Kelly, LLC, New York (Christopher P. Kelly of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 23, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the First Amended Complaint's second, third, fourth, fifth and seventh causes of action, and dismissing the demand for punitive damages, unanimously modified, on the law, to the extent of denying the motion as to the second, third, fourth, fifth, and seventh causes of action, and otherwise affirmed, without costs.

CPLR 203(e), in relevant part, provides:

> "Where a defendant has served an answer containing a defense or counterclaim and the action is terminated . . . by dismissal . . . , the time which elapsed between the commencement and *termination of the action* is not a part of

> the time within which an action must be commenced to recover upon the claim in the defense or counterclaim" (emphasis added).

Resolution of this appeal turns on the meaning of "termination of the action" as used in CPLR 203(e). We hold that a prior action terminates for purposes of CPLR 203(e) when a nondiscretionary appeal, or an appeal taken as of right, is exhausted. This is consistent with how the Court of Appeals has interpreted analogous tolling statutes (*see Lehman Bros. v Hughes Hubbard & Reed*, 92 NY2d 1014, 1017 [1998] ["(T)he prior action was terminated within the meaning of CPLR 205(a) . . . the date plaintiff's sole nondiscretionary Texas appeal was exhausted."]; *Malay v City of Syracuse*, 25 NY3d 323, 325 [2015] ["(T)he prior action terminates for the purposes of CPLR 205(a) when the intermediate appellate court dismisses the appeal."]; *Joseph Francese, Inc. v Enlarged City Sch. Dist. of Troy*, 95 NY2d 59, 64 [2000] ["Practical considerations dictate that the finality rule of *Lehman Bros.* should apply equally in the context of the (CPLR) 204(b) tolling provision."]).

Here, the prior holdover proceeding was terminated within the meaning of CPLR 203(e), such that the tolling period ended, when defendants' nondiscretionary appeal was dismissed. Because plaintiff commenced this action before the Appellate Term's dismissal of the holdover proceeding, his claims are timely under CPLR 203(e). Consequently, defendants' motion for summary judgment dismissing plaintiff's second, third, fourth, fifth, and seventh causes of action should have been denied.

The court properly struck the demand for punitive damages, as this action involves a private dispute, and plaintiff has not demonstrated that defendants' conduct was aimed at the public generally (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2396 The People of the State of New York, Ind. 3226N/13
Respondent,

-against-

Paul Durham,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered March 28, 2014, as amended June 5, 2014, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of five years, unanimously affirmed.

Regardless of whether defendant validly waived his right to appeal, review of his suppression claim is independently foreclosed by the fact that he pleaded guilty before the court issued any ruling on his suppression motion (*see People v Fernandez*, 67 NY2d 686, 688 [1986]). Nothing in the record, including the clerk's worksheet, shows that the court issued

"[a]n order finally denying a motion to suppress evidence" (CPL 710.70[2]), either orally or in writing. Defendant's suggestion that the court may have rendered a decision, but that it somehow went unrecorded, is baseless. Moreover, the circumstances surrounding the plea tend to confirm that the motion remained undecided at the time the plea was taken. Accordingly, review of the claim is barred by the fact that no ruling was ever made on defendant's suppression motion.

However, there is merit to defendant's claim that the police lacked the requisite reasonable suspicion to conduct a strip search. The record showed only that defendant was arrested during a buy-and-bust operation in a drug-prone location. Defendant was not observed reaching into his pants and no drugs were found on his clothing. "The police officers' generalized knowledge that drug sellers often keep drugs in their buttocks, and the fact that no drugs were found in a search of defendant's clothing [a]re insufficient" (*People v Colon*, 80 AD3d 440, 440 [1st Dept 2011]).

There is also merit to defendant's claim that the strip and visual body cavity search were not conducted in a reasonable manner and without a warrant or exigent circumstances. The record shows that defendant had his clothing torn from his body

and was searched in the presence of four or five officers, belying the imperative to seek out "utmost privacy, and in the presence of only those members of the service reasonably necessary to conduct the search" to "achieve a balance between the privacy and personal dignity concerns of the [arrestee]," as set forth in the provisions of the NYPD Patrol Guide (Procedure No. 208.5[C][4] [2013]) concerning strip search procedures. The violence of the search – which resulted in physical injury to defendant requiring transfer to the hospital – was unnecessary particularly given that defendant was not being charged with a violent offense.

Further, the record indicates that defendant was very likely subjected to a warrantless manual cavity search of his rectum[1] (*see People v Hall*, 10 NY3d 303, 312 [2008], *cert denied* 555 US 938 [2008]). Potential dissemination or destruction of drugs was

[1]The officer maintained that the item "fell" from defendant's buttocks – after defendant purportedly shoved it further up his rectum – and was not physically removed. The credibility of this explanation was not assessed as the court did not rule on the motion prior to entry of the plea.

not a concern where defendant was already in a secure cell with five officers watching him (*see People v Nicholas*, 125 AD3d 1191, 1993 [3d Dept 2015]).

We also perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2467 The People of the State of New York, Ind. 1269/12
Respondent,

-against-

Danny Fuentes,
Defendant-Appellant.

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

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

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Order, Supreme Court, Bronx County (Denis J. Boyle, J.), entered December 16, 2014, 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 providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). We do not find that there were any overassessments of

points. Although the underlying sex crime against a child only resulted in a misdemeanor conviction, the circumstances of the crime were nevertheless serious, and they outweighed the mitigating factors defendant cites.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2468 In re William Green, Petitioner, Index 102060/15

-against-

City University of New York, Respondent.

_____

William Chest Green, Jr., petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondent.

_____

Determination of respondent, dated November 4, 2015, which, upon findings of misconduct, suspended petitioner from the College of Staten Island's graduate history program for one year, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court pursuant to CPLR 7804[g] by order of Supreme Court, New York County [Shlomo Hagler, J.], entered March 29, 2016) dismissed, without costs.

Respondent's determination that petitioner engaged in misconduct is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Numerous emails authored by petitioner, as well as testimony by College of Staten Island (CSI) faculty and staff, establishes

that petitioner sent CSI history department faculty members numerous emails and disregarded a school directive that he cease contact with members of the department. Documentary and testimonial evidence establishes that petitioner failed to comply with a school directive that he meet with a representative of CSI's Office of Student Affairs.

The record belies petitioner's contention that he was denied due process. The charges preferred against him were specified in a two-page letter containing sufficient factual and legal detail to apprise him of the misconduct of which he was accused and the substantive rules he was accused of violating (*see Matter of Block v Ambach*, 73 NY2d 323, 333 [1989]). The initial disciplinary determination, coupled with the hearing exhibits, with which he was supplied, provided petitioner with factual findings sufficiently detailed to apprise him of the misconduct he was found to have engaged in and to give him a meaningful opportunity to lodge an appeal (of which he availed himself twice) (*see Matter of Budd v State Univ. of N.Y. at Geneseo*, 133 AD3d 1341, 1343 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]).

While petitioner was not provided with the hearing exhibits within the time frame required by respondent's bylaws, he did not appear at the hearing or otherwise voice any objection to this omission, thereby failing to preserve the issue for our review (*see Matter of Kurtin v City of New York*, 78 AD3d 473, 474 [1st Dept 2010]; *Matter of King v New York State Dept. of Health*, 295 AD2d 743, 745 [3d Dept 2002]; *see also Matter of May v Selsky*, 291 AD2d 591, 592 [3d Dept 2002]).

Petitioner was afforded the opportunity to appear at the hearing, which he chose not to attend, detailed written determinations, an administrative appeal process, and judicial review via CPLR article 78 (*see Budd*, 133 AD3d at 1342; *Matter of Griffin v City of New York*, 127 AD3d 412 [1st Dept 2015], *appeal dismissed, lv denied* 25 NY3d 1191 [2015]; *Matter of Tully Constr. Co. v Hevesi*, 214 AD2d 465, 466 [1st Dept 1995], *appeal withdrawn* 87 NY2d 969 [1996]).

The penalty imposed does not shock the judicial conscience (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

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

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2469 In re Samuel O.M.,
Petitioner-Appellant,

-against-

Patricia Mari Daniella B.,
Respondent-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Magovern & Sclafani, Mineola (Frederick J. Magovern of counsel), for respondent.

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

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about December 11, 2015, which denied petitioner's motion for genetic testing and dismissed the paternity petitions, unanimously affirmed, without costs.

The Family Court properly found that it was in the children's best interests to equitably estop petitioner from claiming paternity (Family Court Act § 532[a]). Petitioner waited nearly four years after the birth of the older child before commencing this proceeding, and failed to communicate with the children or provide financial support (*see Matter of Cecil R. v Rachel A.*, 102 AD3d 545 [1st Dept 2013]; *Matter of David G. v Maribel G.*, 93 AD3d 526 [1st Dept 2012]). Petitioner also

indicated that he did not wish to assume a parental role in the children's lives, and declined to interfere with their adoptions. Meanwhile, the children have formed attachments with their adoptive parents, with whom they have lived for most of their lives. Given the need to "prevent unwanted intrusion by the child's former biological relatives to promote the stability of the new adoptive family" (*Matter of Elido B. v Jennie C.*, 55 AD3d 1008, 1009 [3d Dept 2008] [internal quotation marks omitted]), dismissal of the petitions was appropriate.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2470 Interaudi Bank, Index 850280/15
Plaintiff-Appellant,

-against-

Moorgate Investments Limited, et al.,
Defendants-Respondents,

Jean-Charles Lignel, et al.,
Defendants.

_____

Pearce Law Firm, New York (Donald Pearce of counsel), for appellant.

Law Offices of Bettina Schein, New York (Bettina Schein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about April 14, 2016, which denied plaintiff's motion for summary judgment on its claim for foreclosure and sale of certain commercial properties, unanimously reversed, on the law, without costs, and the motion granted.

The parties' forbearance agreement expressly conditioned plaintiff's extension of the loan maturity date on plaintiff's receipt of $1,000,000 toward reduction in the principal from the proceeds of certain art sales by the loan payment guarantor at two November 2015 auctions (*see Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992]). This express condition

rendered time of the essence (*Baiting Hollow Acquisitions v Estates of Baiting Hollow*, 266 AD2d 490 [2d Dept 1999]) and had to be complied with literally (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). Because defendants failed to comply with the terms of the condition, the loan maturity date was not extended, and plaintiff is entitled as a matter of law to foreclose on the mortgage and note.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2471 Keiko Herskovitz, Index 303093/14
Plaintiff-Appellant,

-against-

Michael Herskovitz,
Defendant-Respondent.

_____

Elliott Scheinberg, New City, for appellant.

Kanfer & Holtzer, LLP, New York (Alison M. Trainor of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered on or about July 31, 2015, which, to the extent appealed from as limited by the briefs, granted defendant husband Michael Herskovitz's motion for summary judgment, specifically finding that the parties' postnuptial agreement was determinative of all issues related to spousal maintenance, unanimously affirmed, without costs.

This appeal is based on the faulty premise that the parties' postnuptial agreement was "totally silent" on the issue of spousal maintenance. A plain reading of the agreement reveals that it was not silent on the issue at all, however, and clearly manifested the parties' intent to settle all economic affairs between them, including maintenance, in the event of divorce.

The agreement clearly stated that it was settling all maintenance issues, and it did not award any maintenance. The IAS court properly interpreted the contract "so as to give effect to the intention of the parties as expressed in the unequivocal language employed" *Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19 [1961]).

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2472 The People of the State of New York, Ind. 3117/98
Respondent,

-against-

Sylvester Hunt,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York and Simpson Thacher & Bartlett LLP, New York (David B. Rochelson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael A. Corriero, J.), rendered October 10, 2001, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reasons provided by the prosecutor for the challenges in question, including those related to employment (*see People v Wint*, 237 AD2d 195, 197-198 [1st Dept 1997], *lv denied* 89 NY2d 1103 [1997]), were not

pretextual. This finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). Defendant failed to preserve his procedural objections to the court's handling of the application with regard to one of the jurors at issue (*see People v Richardson*, 100 NY2d 847, 853 [2003]), including the court's phrasing of its ruling (*see e.g. People v Rodriguez*, 93 AD3d 595, 595 [1st Dept 2012], *lv denied* 19 NY3d 966 [2012]), and we decline to review them in the interest of justice. As an alternative holding, we find that the court implicitly made a proper step-three ruling (*see People v Pena*, 251 AD2d 26, 34 [1998], *lv denied* 92 NY2d 929 [1998]), that it did not revisit step one, and that it did not cut defendant off or stop him from making a fuller record if he chose to do so.

The People sufficiently authenticated a television cable that was alleged to have possibly been used to strangle the victim. It was unnecessary to establish a chain of custody, because witnesses identified the cable as having been in the victim's bedroom based on its distinctive paint stains, which were also visible in a crime scene photograph (*see People v McGee*, 49 NY2d 48, 59-60 [1979], *cert denied sub nom. Waters v New York*, 446 US 942 [1980]; *People v Connelly*, 35 NY2d 171, 174 [1974]). The item was nonfungible, and defendant's arguments to

the contrary are speculative and without merit. Defendant's objection was insufficient to preserve any of his other arguments regarding the cable, and we decline to review them in the interest of justice. As an alternative holding, we find them unavailing.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The record supports the jury's rejection of defendant's assertion that he was too intoxicated to form the requisite homicidal intent. Defendant engaged in purposeful activity (*see e.g. People v McCray*, 56 AD3d 359 [1st Dept 2008], *lv denied* 12 NY3d 760 [2009]), especially with regard to attempting to cover up the crime, and his claimed consumption of alcohol was not particularly extensive.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2473 New York City Industrial Development Agency, Plaintiff-Respondent, Index 450733/15

-against-

Anastasios Realty LLC, et al., Defendants-Appellants.

_____

Tartar Krinsky & Drogin LLP, New York (Linda Singer Roth of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 5, 2016 which granted plaintiff's motion for summary judgment, unanimously affirmed, with costs, for the reasons stated by Kotler, J.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2474-
2475 In re Unique T.,

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

Jenevia T.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

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

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

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 30, 2015, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about September 2, 2015, which found that respondent mother neglected the subject child, unanimously affirmed, without costs. Appeal from the fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

A preponderance of the evidence in the record demonstrates that the mother posed an imminent danger of harm to the subject

child because the mother suffers from mental illness, misuses drugs and alcohol, and has a prior neglect finding.

The mother has been diagnosed with antisocial personality disorder with borderline traits, a cluster B personality disorder, bipolar 1 disorder, and substance induced mood disorder. She has also demonstrated aggressive, violent behavior on numerous occasions, and has refused to accept mental health treatment (*Matter of Liarah H. [Dora S.]*, 111 AD3d 514 [1st Dept 2013]; *Matter of Cerenithy Ecksthine B. [Christian B.]*, 92 AD3d 417 [1st Dept 2012]).

In addition, the mother has admitted to using "Molly," Ecstasy, marijuana and alcohol, has been hospitalized on at least one occasion for using drugs (*Matter of Liarah H.* at 515), and refuses to participate in a drug treatment program (*see Matter of Chastity O.C. [Angie O.C.]*, 136 AD3d 407, 408 [1st Dept 2016]).

Moreover, the mother was found to have neglected an older child, and her rights to that child have been permanently terminated. The condition which led to the termination of her

parental rights, her failure to comply with necessary mental health and drug treatment services, still existed as of the petition date, as she continued to refuse such services, warranting a finding of neglect.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2476 The People of the State of New York, Ind. 137N/13
Respondent,

-against-

Gregory Moore,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered July 31, 2014, as amended September 16, 2014, 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 and fifth degrees, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of 15 years, unanimously reversed, on the law, and the matter remanded for a new trial.

Defendant's family members were improperly excluded from the closed courtroom during the testimony of an undercover officer. It is undisputed that the evidence presented at a *Hinton* hearing did not demonstrate that the "exclusion of [defendant's family

members was] necessary to protect the interest advanced by the People in support of closure" (*People v Nieves*, 90 NY2d 426, 430 [1997]; *see also Waller v Georgia*, 467 US 39 [1984]). The People ask us to interpret the record as indicating that the court did not, in fact, exclude defendant's relatives. While the record arguably presents a degree of ambiguity in this regard, in that both the prosecutor, in the course of his argument about the officer's efforts to conceal his identity, and the court, in discussing its decision, mentioned "the general public," these ambiguous and equivocal indications are insufficient to persuade us that defendant's family members were in fact allowed to be present.

The prosecutor requested that the courtroom be closed "entirely," without making any specific provision for family members, and asserted that the closure requested was not "overly broad." Defense counsel specifically asserted the right of the family members to be present. The court then granted the People's application, making no specific allowance or arrangements for the family members to attend. Under these circumstances, we cannot fairly read the record to indicate that the presence of family members was permitted.

Furthermore, since the court granted the prosecutor's

application for an unlimited closure almost immediately after counsel stated that defendant's relatives wished to attend and had the right to do so, this was not a situation where counsel was obligated to remind the court that it had left an issue unresolved (*see e.g. People v Graves*, 85 NY2d 1024, 1027 [1995]; *People v Brimage*, 214 AD2d 454 [1995], *lv denied* 86 NY2d 732 [1995]). Accordingly, we are constrained to reverse the conviction. 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: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2477 Duvar Ayers, et al., Index 23311/13E
Plaintiffs-Appellants,

-against-

Avinash Mohan, M.D., et al.,
Defendants-Respondents,

Bruce Zablow, M.D., et al.,
Defendants.

_____

Wolf & Fuhrman, LLP, Bronx (Carole R. Moskowitz of counsel), for appellants.

Brown, Gruttadaro, Gaujean & Prato, PLLC, White Plains (Bridget K. Dahle of counsel), for respondents.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered June 16, 2015, which granted defendants Avinash Mohan, M.D. and Robert Fekete, M.D.'s motion to dismiss the complaint as against them for failure to serve a notice of claim upon nonparty Westchester County Health Care Corporation, unanimously reversed, on the law, without costs, and the motion denied.

Defendants Mohan and Fekete are physicians employed by New York Medical College who provided medical treatment to plaintiff Duvar Ayers at nonparty Westchester County Medical Center (the medical center). The medical center is maintained by nonparty Westchester County Health Care Corporation (the corporation), a

public benefit corporation established by Public Authorities Law (PAL) § 3301 (*see also* PAL § 3302[3]).

Defendants failed to demonstrate that plaintiffs were required to serve notice of claim upon the corporation. PAL § 3316(1) provides that notice of claim against the corporation's employees shall be served upon the corporation "within the time limit set by and in compliance with" General Municipal Law § 50-e. "[G]iving effect to the plain meaning [of this statutory language]" (*see Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 60 [2013]), we conclude, contrary to the motion court, that section 3316(1) incorporates all the provisions of General Municipal Law § 50-e, not solely those governing the timing and method of service. General Municipal Law § 50-e(1)(b) provides that, "if an action or special proceeding is commenced against [an employee], but not against the public corporation, service of the notice of claim upon the public corporation shall be required *only if* the corporation has a statutory obligation to indemnify [the employee]" (emphasis added).

By statute, the corporation is obligated to defend and indemnify an employee in an action arising out of any alleged act or omission that occurred while the employee was acting within

the scope of his public employment, "conditioned upon" the employee's delivery to it of a written request for a defense with a copy of the summons and complaint within 10 days after he is served with the complaint (Public Authorities Law § 3318; Public Officers Law § 18[3], [4], [5]).

Defendants failed to establish prima facie that they were employees entitled to indemnification by the corporation, rather than independent contractors, who are excluded from the statutory definition of "employees" (Public Officers Law § 18[1][b]; *see Smith v Das*, 126 AD3d 462 [1st Dept 2015]). Moreover, they failed to show that they delivered to the corporation a written request for indemnification so as to trigger the corporation's statutory obligation (Public Officers Law § 18[5]; General Municipal Law § 50-e[1][b]; *see Chambliss v University Med. Assoc.*, 137 AD3d 1183 [2d Dept 2016]; *Hassan v Woodhull Hosp. & Med. Ctr.*, 282 AD2d 709, 710-711 [2d Dept 2001]; *cf. Villar v Howard*, ___ NY3d ___, 2016 NY Slip Op 06944, *3 [2016] [notice of claim requirement not triggered by non-statutory obligation to indemnify]).

Our conclusion in this case is consistent with the "important public purpose [of the notice of claim], enabling authorities to promptly investigate the site of an alleged

accident and assess municipal exposure to liability" (*Brown v City of New York*, 95 NY2d 389, 394 [2000]). If the corporation has no potential statutory liability as a result of this action, there is no reason for plaintiffs to serve it with notice of claim.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2479 The People of the State of New York, Ind. 1162/13
Respondent,

-against-

Vicki A. Taylor,
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 (Jeffrey A. Wojcik of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Thomas Farber, J.), rendered October 29, 2013, convicting defendant, upon her plea of guilty, of grand larceny in the third degree, and sentencing her to a conditional discharge for a period of three years, held in abeyance, and the matter remitted to Supreme Court for a *Huntley* hearing.

As the People concede, defendant's allegation that her statements to an investigator were involuntarily made was sufficient to require a hearing on her motion to suppress those

statements (*see* CPL 710.60[3][b]). However, to the extent defendant characterizes the relief she requests as a "*Dunaway/Huntley*" hearing, we find that her factual allegations were insufficient to raise any Fourth Amendment issue.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, JJ.

2480 The People of the State of New York, Ind. 464/10
Respondent,

-against-

Kurt Scott,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Charity L. Brady of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Matthew B. White of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered February 28, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree and resisting arrest, and sentencing him to an aggregate term of nine years, unanimously affirmed.

The court did not err by instructing the jury that the lawfulness of the police stop of defendant was not a question for the jury to decide (*see e.g. People v Murphy*, 284 AD2d 120 [1st Dept 2001], *lv denied* 97 NY2d 685 [2001]). The court's brief and neutral instruction, which was more limited than the version requested by the People, was suitably balanced by other instructions relating to credibility. Nothing in the instruction suggested that the jury should credit the police testimony, or

that the court had made a finding in that regard. In any event, any error in this instruction was harmless in light of the overwhelming proof of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

Defendant's Confrontation Clause claim regarding the testimony of a DNA expert is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2481 Tower Insurance Company of New York, Index 155524/15
Plaintiff-Appellant,

-against-

Avner Zaroom, et al.,
Defendants-Respondents.

_____

Brown & Associates, New York (James J. Croteau of counsel), for appellant.

Erica T. Yitzhak, Great Neck, for Avner Zaroom and Gila Zaroom, respondents.

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for Yaakov Wise, respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 3, 2016, which denied as premature plaintiff's motion for summary judgment declaring that it has no duty to defend or indemnify defendants Avner Zaroom and Gila Zaroom in the underlying personal injury action brought against them by defendant Yaakov Wise, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment declaring that plaintiff has no duty to defend or indemnify the Zaroom defendants in the underlying personal injury action.

Plaintiff established its entitlement to judgment as a matter of law by submitting the affidavit of its investigator stating that she met with Mrs. Zaroom, who admitted that she and her husband did not reside at the insured premises as of the date of Wise's accident (*see Tower Ins. Co. of N.Y. v Hossain*, 134 AD3d 644 [1st Dept 2015]; *Tower Ins. Co. of N.Y. v Brown*, 130 AD3d 545, 545-546 [1st Dept 2015]).

In opposition to plaintiff's motion, the Zarooms admitted that they did not so reside. The Zarooms' attorney claimed that plaintiff was aware that they did not reside at the insured premises but nevertheless continued to accept premiums. However, the affirmation of an attorney who has no personal knowledge lacks evidentiary value (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Defendant Wise contends that the word "reside" is ambiguous. Although the argument was not raised below, purely legal issues, such as the interpretation of a contract, may be raised for the first time on appeal (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408-409 [1st Dept 2009]; *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 323 n 2 [1st Dept 2006], *affd* 8 NY3d 931 [2007]). On the merits, under

the circumstances of this action, as opposed to the circumstances in *Dean v Tower Ins. Co. of N.Y.* (19 NY3d 704 [2012]), "reside" is not ambiguous.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2483 In re Monique Elizabeth J.,
Petitioner-Respondent,

-against-

Orlandro D.,
Respondent-Appellant.

_____

Larry S. Bachner, Jamaica, for appellant.

Steven N. Feinman, White Plains, for respondent.

_____

Order, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about September 25, 2015, which, after a fact-finding hearing, found that respondent committed the family offense of disorderly conduct, and issued an 18-month order of protection in favor of petitioner and her two children, unanimously affirmed, without costs.

A fair preponderance of the evidence supports the finding that respondent committed the family offense of disorderly conduct (Family Ct Act § 812). Such evidence included petitioner's testimony that while they were in the courthouse, respondent attempted to take their child, who was securely strapped to the chest of petitioner's fiancé in a carrier, out of the carrier. In the process, he pushed petitioner and her four-year-old daughter. Petitioner screamed at respondent to stop,

but they got into an altercation, which court officers had to defuse (*see Matter of Banks v Opoku*, 109 AD3d 470 [2d Dept 2013]; Penal Law § 240.20[1], [7]).

There exists no basis to disturb the Family Court's credibility determinations (*see Matter of Marcela H-A. v Azouhouni A.*, 132 AD3d 566, 567 [1st Dept 2015]).

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2485 The People of the State of New York, Ind. 2933/14
Respondent,

-against-

Isaac Colon,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 11, 2015, as amended April 6, 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: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2486 Zeng Ji Liu, et al., Index 150340/12
Plaintiffs-Respondents,

-against-

Djibril Bathily, et al.,
Defendants,

All Taxi Management, Inc.,
Defendant-Appellant.

_____

Cobert, Haber & Haber, LLP, Garden City (David C. Haber of counsel), for appellant.

Kenneth J. Gorman, Esq. PC, New York (Kenneth J. Gorman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered June 3, 2016, which, to the extent appealed from, in this action for personal injuries sustained by plaintiff when he was struck by a vehicle operated by defendant Djibril Bathily, denied the motion of defendant All Taxi Management, Inc. (All Taxi) for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

All Taxi's management of the taxicab medallion, without more, is insufficient to raise triable issues of fact regarding

an employment relationship with Bathily. The record shows, inter alia, that All Taxi leased the medallion to Bathily and that the lease agreement expressly disclaims the existence an employer-employee relationship. Moreover, Bathily was not guaranteed compensation, worked without a fixed schedule, and was free from All Taxi's direction and control (*see Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]*; Piaseczny v Bartolo*, 271 AD2d 267 [1st Dept 2000]). All Taxi's background check of Bathily, its weekly inspections of the vehicle, and acceptance of credit card payments on Bathily's behalf are all "indicative of mere incidental or general supervisory control that does not rise to the level of an employer-employee relationship" (*Chaouni v Ali*, 105 AD3d 424, 425 [1st Dept 2013] [internal quotation marks omitted]).

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

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2487 The People of the State of New York, Respondent, Ind. 1978/10 5371/10

-against-

Ben Sidibe, Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Daniel P. Conviser, J.), rendered June 16, 2015, resentencing defendant to an aggregate term of six years, unanimously affirmed.

Following a remand from this court (127 AD3d 572 [1st Dept 2015), for a youthful offender determination (*see People v Rudolph*, 21 NY3d 497 [2013]), the resentencing court denied defendant youthful offender treatment and reimposed its original sentence. Defendant made a valid waiver of his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]), which precludes review of those determinations. Regardless of whether defendant validly waived his right to appeal, we find that the court properly exercised its discretion in denying youthful offender

treatment (*see People v Drayton*, 39 NY2d 580 [1976]), given the seriousness of the underlying crimes and defendant's continuing pattern of violent conduct during his incarceration, and we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2489N Margaret Perkins, Index 151935/13
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants,

John Doe,
Defendant.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellants.

David A. Kapelman, P.C., New York (David A. Kapelman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered on or about March 14, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to compel production of postaccident repair and maintenance records for a three-month period, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in directing defendants to produce postaccident repairs for the limited purpose sought, to ascertain whether the wheelchair ramp on the bus to be inspected is the same one that

was involved in plaintiff's accident (*see Francklin v New York El. Co., Inc.*, 38 AD3d 329 [1st Dept 2007]), *Kaplan v Einy*, 209 AD2d 248, 252 [1st Dept 1994]; *cf. Steinel v 131/93 Owners Corp.*, 240 AD2d 301, 302 [1st Dept 1997]). If defendants are so inclined, as an alternative to the directed production, they may submit an affidavit confirming that the wheelchair ramp on the subject bus is the same one that was on the bus at the time of the accident, except for wear and tear.

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2490N- Index 3360/11
2490NA-
2490NB In re Joseph Motta,
Plaintiff-Respondent,

-against-

Jacquelin Motta,
Defendant-Appellant.

_____

Jacquelin Motta, appellant pro se.

Taylor Walker, Westbury, for respondent.

_____

Judgment of divorce, Supreme Court, Bronx County, Integrated Domestic Violence Part (Diane R. Kiesel, J.), entered April 20, 2016, which, inter alia, granted plaintiff a divorce on the ground of irreconcilable differences, pursuant to Domestic Relations Law § 170(7), and directed the listing and sale of the former marital residence with net proceeds to be divided equally between the parties, unanimously affirmed, without costs. Appeals from orders, same court and Justice, entered on or about June 25, 2015, which, inter alia, precluded defendant from introducing evidence in response to discovery demands and purportedly directed her to pay legal fees of $39,000 to plaintiff Joseph Motta's counsel; and on or about December 16, 2015, which determined equitable distribution of the marital

assets, unanimously dismissed, without costs, as subsumed in the appeal from the judgment of divorce.

There is no basis for disturbing the distribution of marital assets, since the court, after a trial, properly considered the circumstances of the case and of the respective parties (Domestic Relations Law § 236[B][5][c]). "The trial court has great flexibility in fashioning an equitable distribution of marital assets, and equitable distribution does not necessarily mean equal distribution (*Coburn v Coburn*, 300 AD2d 212, 213 [1st Dept 2012]; *see Greenwald v Greenwald*, 164 AD2d 706, 713 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]), and thus, the court's determination that the former marital home be sold with the net proceeds equally distributed between the parties is amply supported.

Contrary to defendant's contention, the court was not obligated to grant a judgment of divorce on the ground of cruel and inhuman treatment, and properly granted plaintiff a judgment of divorce on the ground of irreconcilable differences, pursuant to Domestic Relations Law § 170(7), since his statement under oath that the marriage was irretrievably broken for a period of six months was sufficient to establish his cause of action as a

matter of law (*see Hoffer-Adou v Adou*, 121 AD3d 618, 619 [1st Dept 2014]).

Defendant's argument that the court improperly directed her to pay legal fees of $39,000 to plaintiff's counsel merely reflects her misunderstanding of the June 25, 2015 order, in which the court denied that branch of the husband's motion that sought attorneys' fees, finding, inter alia, that plaintiff was the "monied spouse." No judgment in the amount of $39,000 was entered against defendant for plaintiff's legal fees; the judgment she referenced is a confession of judgment executed by plaintiff in favor of his own counsel.

To the extent defendant argues that the court improperly precluded her from providing responses to plaintiff's second discovery requests, we reject such argument. Defendant failed to timely comply with the court's discovery deadlines, and neither sought an extension of time to reply nor objected to any of the demands. When she finally did comply, she failed to address her tardiness, let alone proffer any reason for it, and thus, the court found that without an excuse for her delay, the reasonable

inference was that her conduct was willful (*see Siegman v Rosen*, 270 AD2d 14, 15 [1st Dept 2000]).

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

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

ENTERED: DECEMBER 15, 2016

CLERK

Acosta, J.P., Andrias, Moskowitz, Gische, Webber, JJ.

2491 In re Kibwe Watson,
[M-5636] Petitioner,

-against-

Hon. David Kaplan, etc., et al.,
Respondents.

_____

Kibwe Watson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondents.

_____

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.

ENTERED: DECEMBER 15, 2016

CLERK

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

2492 The People of the State of New York, Ind. 5674/12
Respondent,

-against-

Jose Colon,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered April 16, 2014, convicting defendant, upon his plea of guilty, of 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 a term of six years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations.

The court properly exercised its discretion in denying defendant's request for new counsel, made before the suppression hearing. The court gave defendant ample opportunity to air his grievances against counsel, and this constituted a suitable

inquiry, given the lack of substance of those complaints (*see People v Porto*, 16 NY3d 93, 100-101 [2010]). Defendant only expressed disagreements about trial strategy, misunderstandings of law, and a generalized complaint about the quality of the representation (*see e.g. People v Hopkins*, 67 AD3d 471, 472 [1st Dept 2009], *lv denied* 14 NY3d 771 [2010]). Counsel's comments did not create a conflict or have any adverse impact on defendant (*see People v Nelson*, 27 AD3d 287 [1st Dept 2006], *affd* 7 NY3d 883 [2006]).

Defendant's challenge to the legality of the use of his third-degree weapon possession conviction as a violent predicate felony is unavailing (*see People v Smith [McGhee]*, 27 NY3d 652, 670 [2016]). We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2493 Thomas Barakos, Index 153532/13
Plaintiff-Respondent,

-against-

Old Heidelberg Corp., etc., et al.,
Defendants-Appellants.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Burns & Harris, Esqs., New York (Blake G. Goldfarb of counsel), for respondent.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about June 24, 2016, which, insofar as appealed from as limited by the briefs, upon renewal, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that he tripped over a step covered in dark carpet, while exiting defendants' restaurant. Defendants submitted deposition testimony and photographs showing that, if such a step existed, it was an open and obvious condition and not inherently dangerous (*see Burke v Canyon Rd. Rest.*, 60 AD3d 558 [1st Dept 2009]). Plaintiff

testified that he was aware that the step was there from his prior visits, and that he tripped because he was raising his right foot to the top part of the step, but his foot was not raised high enough. Plaintiff also acknowledged that he was looking outside as he walked toward the step, that there was a recessed light in the step area, and that he could see where he was going as he left the dining area.

In opposition, plaintiff failed to raise an issue of fact. Furthermore, plaintiff did not allege, and offered no evidence to show, that the step or lighting violated applicable Building Code provisions or accepted standards, or that handrails were required (*compare Auliano v 145 E. 15th St. Tenants Corp.*, 129 AD3d 469 [1st Dept 2015]).

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2494 In re Pedro H.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Michelle R. Duprey of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 9, 2015, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a firearm, and committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion when it adjudicated appellant a juvenile delinquent and imposed a period of enhanced supervision probation, which was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of*

Katherine W., 62 NY2d 947 [1984]). A six-month adjournment in contemplation of dismissal would not have provided a long enough period of supervision, given the seriousness of the offense, which involved possession of a revolver under suspicious surrounding circumstances indicating that appellant may have been involved in additional criminal activity while acting in concert with others, and given appellant's poor record in school and while in custody.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2495- Ind. 1842/14
2496 The People of the State of New York,
Respondent,

-against-

Mark McClennon,
Defendant-Appellant.

_____

Galluzzo & Johnson LLP, New York (Zachary H. Johnson of counsel), for appellant.

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

_____

Judgments, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 14, 2015, convicting defendant, upon his pleas of guilty, of perjury in the first degree and assault in the third degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

Defendant's challenges to his plea do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]), and we decline to review these unpreserved claims in the interest of justice. As an alternative holding, we find that the record establishes that the

plea was knowingly, intelligently and voluntarily made. Defendant waived his rights under *Boykin v Alabama* (395 US 238 [1969]), and nothing in the allocution casts any doubt on the plea's voluntariness.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2497 Ndeye Ndiaye, Index 154600/13
Plaintiff-Respondent-Appellant,

-against-

NEP West 119th Street L.P., et al.,
Defendants-Appellants-Respondents.

_____

Carol R. Finocchio, New York (Marie R. Hodukavich of counsel), for appellants-respondents.

John O'Gara, P.C., New York (John O'Gara of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 5, 2016, which denied defendants' motion for summary judgment dismissing the complaint and plaintiff's cross motion for an order concluding as a matter of law that defendants' staircase violated the 1916 Building Code requiring an interior staircase to have two handrails, unanimously modified, on the law, defendants' motion granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that she lost her balance while attempting to descend interior stairs in defendants' building with a heavy shopping cart, and that the absence of a second handrail on her

right side proximately caused her to fall down the steps. She alleged that the stairs were maintained in violation of the 1916 Building Code of the City of New York, which required handrails on both sides of interior stairs.

Defendants established their entitlement to judgment as a matter of law by submitting evidence that there was no defective condition on the stairs (*see Egan v Emerson Assoc., LLC*, 127 AD3d 806 [2d Dept 2015]), and that the building was constructed before 1916 and complied with the requirements of the applicable Tenement House Law, which only required one handrail on staircases like the one at issue (*see Rivera v Bilynn Realty Corp.*, 85 AD3d 518 [1st Dept 2011]; *see also Hotaling v City of New York*, 55 AD3d 396, 397 [1st Dept 2008], *affd* 12 NY3d 862 [2009]).

In opposition, plaintiff submitted evidence that the building underwent alterations in 1931, and argued that as a result, the building was required to comply with the 1916 Code. However, even assuming the alterations would have required the owner to bring the building into compliance with current codes, the 1916 Building Code, by its terms, did not apply to buildings

"coming under the provisions of the Tenement House Law" (*Hunter v G.W.H.W. Realty Co., Inc.*, 247 App Div 385, 386 [1st Dept 1936]; *see Erlicht v Boser*, 259 App Div 269, 270 [1st Dept 1940]). The applicable building code in effect at the time of the renovations was New York Multiple Dwelling Law § 52, which superseded the Tenement House Law and also did not require two handrails (*see Adler v Deegan*, 251 NY 467, 470-471 [1929]; *Erlicht v Boser*, 259 App Div at 270). Plaintiff's submission of the certificate of occupancy issued after the 1931 alterations supports defendants' position that the stairs complied with all applicable regulations (*see Hyman v Queens County Bancorp*, 307 AD2d 984, 986 [2d Dept 2003], *affd* 3 NY3d 743 [2004]).

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2498 Ramon Cruz, doing business as Ray's Flat Fix, etc., Plaintiff-Respondent, Index 303405/13

-against-

Western Heritage Insurance Company, Defendant-Appellant.

_____

Carroll, McNulty & Kull LLC, New York (Ann Odelson of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about June 28, 2016, which granted plaintiff's motion for summary judgment declaring that defendant must defend plaintiff in an underlying personal injury action, and denied defendant's motion for summary judgment declaring in its favor and dismissing the complaint, unanimously modified, on the law, to deny plaintiff's motion, and to grant the part of defendant's motion that seeks a declaration, and otherwise affirmed, without costs. The Clerk is directed to enter judgment declaring that defendant has no duty to defend or indemnify plaintiff in the underlying personal injury action.

Plaintiff's unexplained delay of at least two months in notifying defendant of the underlying personal injury action against him constitutes late notice as a matter of law (*see Juvenex Ltd. v Burlington Ins. Co.*, 63 AD3d 554 [1st Dept 2009]). Since the insurance policy imposed on plaintiff the separate duties of providing timely notice of an occurrence or accident and providing timely notice of the commencement of an action, it is immaterial whether plaintiff had a good faith belief in nonliability at the time of the accident, in March 2009, so as to excuse late notice of occurrence (*see e.g. Kambousi Rest., Inc. v Burlington Ins. Co.*, 58 AD3d 513 [1st Dept 2009]), whether he ever received the June 2010 correspondence from the injured person's attorney, or whether he first received notice of the personal injury claim or lawsuit on March 25, 2011, when he

allegedly received the summons and complaint in that action (*see American Tr. Ins. Co. v Sartor*, 3 NY3d 71, 75 [2004]; *City of New York v Investors Ins. Co. of Am.*, 89 AD3d 489, 489 [1st Dept 2011]).

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2499 The People of the State of New York, Ind. 1483/12
Respondent,

-against-

Shao Delin, also known as De Lin Shao,
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 (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered April 4, 2013, convicting defendant, after a jury trial, of assault in the first and second degrees, and sentencing him to an aggregate term of 10 years, unanimously reversed, as a matter of discretion in the interest of justice, and the matter remanded for a new trial.

As in cases such as *People v Velez* (131 AD3d 129 [1st Dept 2015]), the court's charge did not convey to the jury that an acquittal on the top count of attempted murder based on a finding of justification would preclude consideration of the other charges.

In addition, the court's charge on the use of excessive force contained a significant omission. Even if a defendant is

initially justified in using deadly physical force in self-defense, he or she may not continue to use deadly physical force after the assailant no longer poses a threat (*People v Del-Debbio*, 244 AD2d 195, 195 [1st Dept 1997], *lv denied* 91 NY2d 925 [1998]). However, in such a situation the People must prove that it was the unnecessary additional force that caused the alleged harm (*People v Hill*, 226 AD2d 309, 310 [1st Dept 1996], *lv denied* 88 NY2d 937 [1996]), which in this case was serious physical injury. The court's charge on excessive force omitted the latter principle and thus impermissibly permitted the jury to convict defendant based upon a finding that although he was justified when he initially stabbed the complainant in the abdomen, defendant was not justified in inflicting subsequent wounds on the fleeing complainant, even if these additional wounds did not constitute serious physical injury. Although the parties dispute whether the additional wounds were serious, the jury could reasonably have concluded that they were not. It cannot be determined whether the jury found that defendant's conduct was not justified because he was the initial aggressor or because,

although not the initial aggressor, he subsequently used unnecessary physical force.

We find that the two errors in the charge were not harmless, and that they warrant reversal in the interest of justice.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2500 Henry T. Lau, Index 103807/10
Plaintiff-Appellant,

-against-

Margaret E. Pescatore Parking, Inc., et al.,
Defendants-Respondents.

_____

Kenneth J. Gorman, Esq., P.C., New York (Kenneth J. Gorman of counsel), for appellant.

Law Offices of James J. Toomey, New York (Eric P. Tosca of counsel), for Margaret E. Pescatore Parking, Inc., respondent.

Debra J. Millman, P.C., New York (Norman Landres of counsel), for Tai Ming Development Corp., respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered December 26, 2014, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law in this action where plaintiff alleges that he was injured when he tripped over a cord that was tied from a street sign to a parking barrel located in the street in front of a parking garage owned by defendant Tai Ming Development Corp., and managed by defendant Margaret E. Pescatore Parking, Inc. Defendants submitted evidence showing that they did not own,

control, or have notice of the barrel or the cord (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). In opposition, plaintiff failed to raise a triable issue of fact, as he proffered no evidence linking defendants to either the barrel or the decision to tie it to the street sign.

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

ENTERED: DECEMBER 15, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

2501 In re Dr. Marie Monaco, et al., Petitioners-Appellants, Index 100738/14

-against-

New York University and New York University School of Medicine, Respondents-Respondents.

Gladstein, Reif & Meginniss, LLP, New York (Beth M. Margolis of counsel), for appellants.

Bond, Schoeneck & King PLLC, New York (Louis P. DiLorenzo of counsel), for respondents.

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 17, 2015, which, to the extent appealed from, granted respondents' cross motion to dismiss petitioners' breach of contract and promissory estoppel claims, unanimously reversed, on the law, with costs, the cross motion denied, the plenary claims reinstated, and the matter remanded for further proceedings.

A university's academic and administrative decisions require professional judgment and may only be reviewed by way of an article 78 proceeding to ensure that such decisions are not violative of the institution's own rules and neither arbitrary

nor irrational (*Maas v Cornell Univ.*, 94 NY2d 87, 92 [1999]; *Gertler v Goodgold*, 107 AD2d 481, 485-486 [1st Dept 1985], *affd* 66 NY2d 946 [1985]; *Matter of Bennett v Wells Coll.*, 219 AD2d 352, 356 [4th Dept 1996]). However, "[i]f the claim involves a matter of contractual right it may, of course, be vindicated in an action [at] law" (*Gertler*, 107 AD2d at 486).

For the purpose of surviving respondents' cross motion to dismiss, petitioners, tenured faculty members of respondent New York University's School of Medicine, have sufficiently alleged that the policies contained in respondent's Faculty Handbook, which "form part of the essential employment understandings between a member of the Faculty and the University," have the force of contract (*see O'Neill v New York Univ.*, 97 AD3d 199, 208-210 [1st Dept 2012]). Further, for the purposes of surviving respondents' cross motion to dismiss, petitioners have sufficiently alleged that they had a mutual understanding with respondent that tenured faculty members' salaries may not be

involuntarily reduced. Additionally, petitioners have sufficiently alleged that they reasonably relied on oral representations by respondents that their salaries would not be involuntarily reduced.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2502 The People of the State of New York, Ind. 4233/12
Respondent,

-against-

Jose Flores,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered July 9, 2014, convicting defendant, after a jury trial, of manslaughter in the first degree and gang assault in the first degree, and sentencing him to an aggregate term of 15 years, unanimously reversed, as a matter of discretion in the interest of justice, the murder count dismissed with leave to re-present any appropriate charges to the grand jury, and the matter otherwise remanded for a new trial on the gang assault count.

As in cases such as *People v Velez* (131 AD3d 129 [1st Dept 2015]), the court's charge did not convey to the jury that an acquittal on the top count of murder in the second degree based on a finding of justification would preclude consideration of the

other charges. We note that the People did not object to giving a justification charge. We find that the error in the wording of the charge was not harmless, and that it warrants reversal in the interest of justice for the reasons stated in *Velez*.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2503 In re Deavan W.,

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

_____

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

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

_____

Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about August 10, 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 and assault in the second degree, and placed him on probation for a period of 18 months, unanimously reversed, on the law, without costs, appellant's motion to preclude identification testimony granted, and the petition dismissed.

In a voluntary disclosure form, the presentment agency informed appellant that the complainant identified him inside a restaurant. Consistent with this notice, the arresting detective testified at the suppression hearing that he saw appellant and

two companions, whom he had been following, enter the restaurant, that the complainant arrived at the scene, and that despite the officer's instruction for the complainant to wait outside, the complainant entered the restaurant shortly after the detective did and there identified appellant. Based on this testimony, the court denied suppression, finding that the identification was a "spontaneous or un-arranged identification." However, when the complainant ultimately testified at the fact-finding hearing, he testified that he never entered the restaurant, but rather that he identified appellant after the detective brought the three boys out of the restaurant and lined them up against a wall.

Although an inconsequential defect in a notice may be excused (*see e.g. People v Perilla*, 247 AD2d 326 [1st Dept 1998], *lv denied* 91 NY2d 1011 [1998] [involving analogous CPL provision]), here the discrepancy between the two accounts of the identification was not inconsequential, but rather reflected that the VDF provided inadequate notice of the evidence the presentment agency intended to present at the fact-finding hearing (*see Matter of Courtney C.*, 114 AD3d 938 [2d Dept 2014]). Accordingly, the court should have granted appellant's Family Ct Act § 330.2(2) motion to preclude identification evidence, which was made after the complainant testified regarding the

identification procedure outside the restaurant. Our conclusion is not altered by the fact that the presentment agency orally disclosed to appellant's counsel on the day of the suppression hearing that the arresting detective's partner "recalled the identification occurring outside of the restaurant." Not only was the disclosure untimely under Family Ct Act § 330.2(2), in light of the suppression hearing testimony it did not change what the presentment agency was representing regarding the "evidence intended to be offered" at the fact-finding hearing (CPL 710.30[1]). Further, because the suppression hearing did not address the factual scenario that emerged at the fact-finding hearing, the mere fact that the court conducted a hearing and rendered a decision did not render appellant's preclusion motion "irrelevant" (*People v Kirkland*, 89 NY2d 903, 905 [1996]).

This error rendered inadmissible the only identification evidence presented at the fact-finding hearing.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2504-
2505-
2506 Index 651472/12

American Stevedoring, Inc.,
Plaintiff-Respondent,

-against-

Red Hook Container Terminal, LLC,
Defendant-Appellant,

Seneca Insurance Company, Inc. doing business as the Seneca Companies, et al.,
Defendants,

The Alex N. Sill Company,
Nominal Defendant.

_____

Kelley Drye & Warren LLP, New York (Eugene T. D'Ablemont of counsel), for appellant.

Gabor & Marotta, LLC, Staten Island (Daniel C. Marotta of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about January 15, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on its first cause of action and for legal fees and costs, and denied defendant Red Hook Container Terminal, LLC's motion for summary judgment dismissing the first and tenth causes of action and dismissed its first

counterclaim, unanimously modified, on the law, to deny plaintiff's motion as to the first cause of action, to vacate the determination of attorney's fees and costs for plaintiff, and to reinstate defendant's first counterclaim, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 15, 2015, which denied defendant's motion for leave to reargue, unanimously dismissed, without costs, as taken from a nonappealable order. Appeal from order, same court and Justice, entered October 15, 2015, which denied defendant's motion for leave to renew, unanimously dismissed, without costs, as academic.

Plaintiff failed to demonstrate that it had the legal right to use any of the three locations owned by others that it designated for defendant's delivery, via numerous wide-body trucks weighing many tons each, of the 130 pieces of heavy stevedoring equipment defendant had leased from it. Although the equipment lease did not give defendant discretion to refuse to return the equipment to a designated location within 20 miles of the Red Hook Container Terminal, defendant need not comply with contract provisions that require a violation of law, such as

trespass (*see Prote Contr. Co. v Board of Educ. of City of N.Y.*, 230 AD2d 32, 40 [1st Dept 1997]; *see also Spivak v Sachs*, 16 NY2d 163, 167 [1965]). There are issues of fact as to the first cause of action and neither party is entitled to summary judgment. Further, because no breach has yet been established, neither party at this juncture is entitled to its reasonable attorneys' fees and costs pursuant to the lease.

Contrary to the motion court's conclusion, defendant did not waive the illegality defense by not raising it in its pleadings. On prior motions defendant had raised the argument that it should not be forced to commit trespass, and plaintiff had responded to the argument. Because plaintiff therefore was not surprised or prejudiced by its assertion, the defense may be entertained (*see Spiegel v 1065 Park Ave. Corp.*, 305 AD2d 204, 205 [1st Dept 2003]).

Summary judgment dismissing the tenth cause of action is precluded by issues of fact whether defendant properly stored the equipment and whether it improperly used the equipment.

Defendant's first counterclaim is reinstated. In light of our conclusion that neither party is entitled to summary judgment on the first cause of action, we need not decide whether

defendant is entitled to storage fees as a measure of damages for plaintiff's breach of the lease agreement.

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

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2507 The People of the State of New York, Ind. 1850/09
Respondent,

-against-

Lawrence Perez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 8, 2011, convicting defendant, after a jury trial, of murder in the second degree (two counts) and kidnapping in the first degree, and sentencing him to an aggregate term of 25 years to life, unanimously reversed, on the law, and the matter remanded for a new trial.

As this Court determined on a jointly tried codefendant's appeal (*People v Franqui*, 123 AD3d 512 [1st Dept 2014], *lv denied* 25 NY3d 1163 [2015]), and as the People concede, reversal is

required because of the absence of an inquiry into whether, and to what extent, a juror slept during the trial.

We decline to revisit this Court's prior order, which granted the People's motion for a protective order sealing, and prohibiting the dissemination of, certain materials.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2509 The People of the State of New York, Ind. 1859N/14
Respondent,

-against-

Constantin Hernandezgonza,
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 (Frank Glaser of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered August 18, 2014, convicting defendant, upon his plea of guilty, of attempted unlawful surveillance in the second degree, and sentencing him to a term of four months, unanimously affirmed.

Defendant argues that his guilty plea was involuntary because the court failed to advise him of the possibility of deportation as a result of the plea (*see People v Peque*, 22 NY3d 168 [2013], *cert denied* 574 US __, 135 S Ct 90 [2014]). However, defendant has not established that the exception to the preservation rule applies, and we decline to review his claim in the interest of justice. The record demonstrates that defendant was made aware of the potential for deportation both before the

plea and sentencing proceeding, and during that proceeding but before taking the plea. He thus had a practical ability to raise his claim (*see id.* at 182–183; *People v Diakite*, 135 AD3d 533 [1st Dept 2016], *lv denied* 27 NY3d 1131 [2016]). As an alternative holding, we find that the court adequately warned defendant of the possibility of deportation before he took his plea (*see Peque*, 22 NY3d at 197).

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2510 The People of the State of New York, Ind. 843/13
Respondent,

-against-

Anthony Moody,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered February 20, 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 six 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]). There is no basis for disturbing the jury's credibility determinations, including its assessment of any discrepancies between the victim's trial testimony and prior statements about his level of pain.

The evidence established that defendant caused physical injury to the victim by punching him and throwing him down to the

sidewalk, causing him to experience substantial pain and sustain a black eye and abrasions, scratch marks, and bruising to his neck, lip, and torso. Moreover, the victim was treated at a hospital and prescribed pain medication (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Stapleton*, 33 AD3d 464, 465 [1st Dept 2006], *lv denied* 7 NY3d 904 [2006]). The victim was also unable to complete his shift later on the same day, and he testified that his pain was at its worst the next day, when he was already scheduled to be off work. The evidence established that defendant did not merely inflict "petty slaps, shoves, kicks and the like . . . out of hostility, meanness and similar motives" (*Chiddick*, 8 NY3d at 448), since he repeatedly punched a store's loss-prevention agent in the eye and neck when the agent confronted him as he attempted to leave with stolen merchandise.

The evidence also supported the inference that defendant did not merely intend to escape, but used force for the purpose of retaining stolen merchandise (*see e.g. People v Barnes*, 90 AD3d 476 [1st Dept 2011], *lv denied* 18 NY3d 991 [2012]). When confronted by the loss-prevention agent, defendant removed only one stolen item from his duffel bag, dropped the heavy bag containing the rest of the stolen items, assumed a fighting stance, asked the victim if he wanted to fight, and then started

punching the victim. These facts, viewed collectively, support the inference that defendant used force for the purpose of escaping with the bag of stolen merchandise, and they fail to support an inference that he intended to relinquish the bag and depart (*see People v Moore*, 166 AD2d 246 [1st Dept 1990], *lv denied* 76 NY2d 1023 [1990]; *see also People v Furino*, 142 AD3d 871 [1st Dept 2016]).

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2511 Enrico Mezzone, Index 302667/11
Plaintiff-Respondent,

-against-

Emilio Goetz, D.P.M.,
Defendant,

Debbie Bautista, D.P.M., et al.,
Defendants-Appellants.

_____

Feldman Kieffer, LLP, Buffalo (Stephen M. Sorrels of counsel), for Debbie Bautista, D.P.M., appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for Chidi Ogbonna, D.P.M. and St. Barnabas Hospital, appellants.

Kaufman Borgeest & Ryan LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for David Gordon, D.P.M., appellant.

James W. Tuffin, Islandia, for Doctors United Clinic, appellant.

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 4, 2015, which denied the motions of defendants Debbie Bautista, D.P.M., Chidi Ogbonna, D.P.M., St. Barnabas Hospital, Davis Gordon, D.P.M., and Doctors United Clinic, for summary judgment dismissing the complaint as against them, unanimously modified, on the law, to the extent of dismissing all claims as against Chidi Ogbonna, D.P.M., and otherwise affirmed,

without costs. The Clerk is directed to enter judgment accordingly.

Defendants Debbie Bautista, D.P.M.,, Davis Gordon, D.P.M., and Doctors United Clinic failed to make a prima facie showing of entitlement to summary judgment. In reaching the conclusion that no infection was present at the time defendants treated plaintiff, their respective experts relied in part upon notations in plaintiff's record with St. Barnabas stating that on June 22, 2010, the surgical wound site was clean and free from drainage. However, plaintiff testified that his left foot wound did have pus emanating from the wound site, plaintiff's expert opined that Dr. Ogbonna had switched his notes for the left and right foot, and the expert for St. Barnabas conceded that the notation was likely an error. Since defendants' experts relied upon incorrect records, their opinions are insufficient to set forth entitlement to judgment as a matter of law (*see Fleming v Pedinol Pharmacal, Inc.*, 70 AD3d 422 [1st Dept 2010]).

In any event, plaintiff's expert raised questions of fact barring summary resolution of plaintiffs' claims against those defendants (*see Cregan v Sachs*, 65 AD3d 101, 108-109 [1st Dept 2009]). Defendants' argument that plaintiff's expert, an infectious disease specialist but not a podiatrist, was

incompetent to offer an opinion on the care of plaintiff, who suffered an infection stemming from podiatric surgery, is unpersuasive (*see Rojas v Palese*, 94 AD3d 557 [1st Dept 2012]; *Williams-Simmons v Golden*, 71 AD3d 413 [1st Dept 2010]).

Summary judgment should have been granted to defendant Dr. Ogbonna, a resident whose care of plaintiff was at all times under the supervision of attending physicians (*see Boston v Weissbart*, 62 AD3d 517 [1st Dept 2009]). Dismissal of the case as against Dr. Ogbonna, however, does not necessitate dismissal as to St. Barnabas. Evidence exists that plaintiff was referred to the podiatry clinic generally, and not to any specific doctor, and thus questions of ostensible agency with regard to Dr. Bautista and Dr. Emilio Goetz bar dismissal of the claims against St. Barnabas (*see Welch v Scheinfeld*, 21 AD3d 802, 808-809 [1st Dept 2005]; *see also Sarivola v Brookdale Hosp. & Med. Ctr.*, 204 AD2d 245 [1st Dept 1994], *lv denied* 85 NY2d 805 [1995]).

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2512 The People of the State of New York, Ind. 5550/13
Respondent,

-against-

Melissa Goncalves,
Defendant-Appellant.

_____

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

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

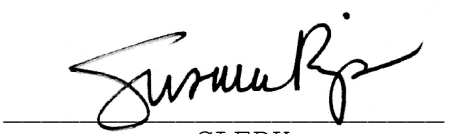
_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered June 4, 2015, 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: DECEMBER 15, 2016



CLERK

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

2513-
2514 Index 650634/15

Estate of Charlotte Sherman,
Plaintiff-Appellant,

-against-

Southbridge Towers, Inc.,
Defendant-Respondent.

_____

Herrera Law Firm, New York (Nicomedes Sy Herrera of counsel), for appellant.

White Fleischner & Fino, LLP, New York (Evan A. Richman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered November 25, 2015, which granted defendant's motion to dismiss the complaint, and order, same court (Gerald Lebovits, J.), entered March 10, 2016, which denied plaintiff's motion to vacate the November 25, 2015 order, unanimously affirmed.

Contrary to its contention, plaintiff is not the shareholder of record with respect to the deceased tenant/cooperator's apartment. Stock certificates issued to the decedent were not automatically transferred to plaintiff upon the decedent's death (*see Matter of Levin v Department of Hous. Preserv. & Dev. of City of N.Y.*, 140 Misc 2d 110 [Sup Ct, NY County 1988], *mod on other grounds* 151 AD2d 264 [1st Dept 1989]; 9 NYCRR 1727-8.3).

Nor has any family member of the decedent satisfied the requirements for succession rights (*see* 9 NYCRR 1727-8.2[a]).

In plain and unambiguous language, the offering plan not only stated that no vote would be counted from apartments of which the shareholder of record was deceased and apartments as to which there were unresolved succession claims, and that "[e]states will be excluded from the vote," but also defined "Shareholders" as "those persons who are Shareholders of record of Sponsor as of the Filing Date" (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). The decedent, not plaintiff, was the shareholder of record on the filing date.

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

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2515-
2516 Elizabeth Kay, as Executor of the Estate of Sylvia Kay,
Plaintiff-Appellant,

-against-

Southbridge Towers, Inc., et al.,
Defendants-Respondents.

- - - - -

Kevin James Barth, as Executor of the Estate of Joan Mary Barth,
Plaintiff-Appellant,

-against-

Southbridge Towers, Inc., et al.,
Defendants-Respondents.

Index 650465/15E
160803/14E

_____

Randall T. Sims, New York, for appellants.

White Fleischner & Fino, LLP, New York (Evan A. Richman of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 9, 2015, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint in index 160803/14E and to dismiss the complaint pursuant to CPLR 3211(a)(7) in index 650465/15E, unanimously affirmed, without costs.

Contrary to their contention, plaintiffs are not the shareholders of record with respect to the deceased tenant/cooperators' apartments. Stock certificates issued to the decedents were not automatically transferred to plaintiffs upon the decedents' deaths (*see Matter of Levin v Department of Hous. Preserv. & Dev. of City of N.Y.*, 140 Misc 2d 110 [Sup Ct, NY County 1988], *mod on other grounds* 151 AD2d 264 [1st Dept 1989]; 9 NYCRR 1727-8.3). Nor have any family members of the decedents satisfied the requirements for succession rights (*see* 9 NYCRR 1727-8.2[a]).

In plain and unambiguous language, the Offering Plan not only stated that no vote would be counted from apartments of which the shareholder of record was deceased and apartments as to which there were unresolved succession claims, and that "[e]states will be excluded from the vote," but also defined "Shareholders" as "those persons who are Shareholders of record of Sponsor as of the Filing Date" (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). The decedents,

not plaintiffs, were the shareholders of record on the filing date.

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

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2517N Michael Doino, Index 157452/13
Plaintiff-Appellant,

-against-

RPS Corp.,
Defendant-Respondent,

Three Boroughs LLC, et al.,
Defendants.

_____

Gregory J. Cannata & Associates, LLP, New York (Gregory J. Cannata of counsel), for appellant.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for respondent.

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Order, Supreme Court, New York County (Robert D. Kalish, J.), entered on or about March 24, 2016, which denied plaintiff's motion to strike defendant RPS Corp.'s answer pursuant to CPLR 3126(3) or, in the alternative, to resolve all issues of liability in his favor pursuant to CPLR 3126(1), unanimously affirmed, without costs.

We agree with the motion court that the drastic remedy of striking defendant's answer, pursuant to CPLR 3126, was not warranted.

Plaintiff failed to show that he has been unduly prejudiced by the delay, and concedes that defendant was in compliance with

the prior court orders as of January 2016. Moreover, defendant has been penalized for its belated responses and disclosure; pursuant to a conditional self-executing order issued by the motion court in May 2015, defendant RPS Corp. is "precluded from offering evidence at trial on the issue of liability." We see no basis for imposing any additional penalty.

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

ENTERED: DECEMBER 15, 2016

CLERK

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

2518N Liu Yu, et al., Index 651546/12
Plaintiffs-Appellants,

-against-

Stella Ma,
Defendant-Respondent,

Devis Daluvoy, et al.
Defendants.

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Certilman Balin Adler & Hyman, LLP, East Meadow (Anthony W. Cummings of counsel), for appellants.

Stanley C. Liu, Esq., Law Office, New York (Stanley C. Liu of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 3, 2016, which granted defendant Stella Ma's motion to vacate the default judgment against her and dismiss the complaint on the ground that she was a non-domiciliary over whom the court lacked personal jurisdiction, unanimously affirmed, without costs.

Although the motion court's decision cites CPLR 317, defendant Ma moved pursuant to CPLR 5015(a)(4) to vacate the default judgment against her on the ground that the court "lack[ed] jurisdiction to render the judgment or order." Under CPLR 5015(a)(4), the need to assert a reasonable excuse is

obviated (*see Wells Fargo Bank, N.A. v Jones*, 139 AD3d 520, 523 [1st Dept 2016]). Defendant, a California resident, averred that she never lived in New York State; never conducted any business in the state; never owned any real property in the state; and never visited the state, except for vacation purposes.

In opposition, plaintiffs do not allege a single contact with New York, nor cite any connection defendant had to New York. On appeal, plaintiffs make only conclusory assertions that defendant transacts business in New York or made misrepresentations within the state, without reference to a single specific act (*see* CPLR 302[a][1],[2]). Plaintiffs also contend, again in entirely conclusory fashion, that defendant committed a tort outside New York causing injury to them in New York, but, even if true, plaintiffs cite no instances of defendant doing regular business in New York, deriving substantial revenue in the state, or deriving substantial revenue from interstate or international commerce (CPLR 302[a][3]).

Based on the foregoing, the court properly granted the motion to vacate the default judgment and dismiss the complaint as against this defendant.

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

ENTERED: DECEMBER 15, 2016

CLERK