SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 19, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

6325 The People of the State of New York, Respondent, Ind. 3365/02

-against-

Javier Ortiz,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered September 12, 2013, which denied defendant's CPL 440.30(1-a) motion for DNA testing, unanimously affirmed.

The court properly denied defendant's motion for DNA testing of a combined hat and wig found on the street at the scene of a shooting, for which defendant was convicted in 2005. Defendant asserts that if the murder victim's DNA were to be found on this hat, that fact would support a justification defense. Defendant's theory, as set forth in his motion, is that the victim wore the hat to disguise his identity as part of a plan to

attack defendant, and that the victim reached in his waist for a weapon as he rode past defendant on a bicycle.

In the first place, two eyewitnesses testified that the victim had nothing on his head, and the police recovered the hat at a distance from the victim's bloody clothing. Defendant's theory that DNA testing would show that the victim had been wearing the hat is speculative and does not provide a basis for DNA testing (*see People v Concepcion*, 104 AD3d 422 [1st Dept 2013], *lv denied* 21 NY3d 1003 [2013]; *People v Figueroa*, 36 AD3d 458, 459 [1st Dept 2007], *lv denied* 9 NY3d 843 [2007]). In any event, even if the victim's DNA was on the hat, defendant failed to establish that the verdict would have been more favorable to him if the DNA results had been admitted at trial (*see generally People v Pitts*, 4 NY3d 303, 311 [2005]). The claim that, assuming the victim had been wearing the hat, he had intended the hat to be a disguise is also speculative. Furthermore, defendant's version of the events does not support a justification defense, and would not have resulted in a more favorable verdict. Defendant's conduct in leaving the scene, obtaining a firearm, and returning to shoot the murder victim and that victim's wife was incompatible with a justification defense.

Finally, we note that defendant did not assert a justification defense at trial. We find unpersuasive defendant's

assertions that the presence of the murder victim's DNA on the hat would have led defendant to claim justification, or that such DNA evidence would have undermined the credibility of the eyewitnesses to the extent of affecting the verdict.

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

ENTERED: APRIL 19, 2018

CLERK

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

6326 Alberto Charles, Index 154687/14
Plaintiff-Respondent,

-against-

Brookfield Properties OLP Co. LLC,
Defendant-Appellant.

- - - - -

Brookfield Properties OLP Co. LLC,
Third-Party Plaintiff-Appellant,

-against-

Harvard Maintenance Inc.,
Third-Party Defendant-Respondent.

_____

McManus Ateshoglou Adams Aiello & Apostolakos PLLC, New York (Christopher D. Skoczen of counsel), for appellant.

Pellegrini & Associates, LLC, New York (Frank L. Pellegrini of counsel), for Alberto Charles, respondent.

Ryan, Brennan & Donnelly LLP, Floral Park (John O. Brennan of counsel), for Harvard Maintenance Inc., respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 10, 2017, which denied the motion of defendant/third-party plaintiff Brookfield Properties OLP Co. LLC (Brookfield) for summary judgment dismissing the complaint, and granted the motion of third-party defendant for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

Brookfield failed to establish that it did not have

constructive notice of the dangerous condition that caused plaintiff to slip and fall. Although Brookfield submitted testimony showing that the restroom where plaintiff's alleged accident occurred was routinely cleaned on Friday nights between 9:30 p.m. and 12:00 a.m., it failed to present evidence showing that the restroom remained in a clean condition on the following Monday morning (*see Covington v New York City Hous. Auth.*, 135 AD3d 665 [1st Dept 2016]; *Hawthorne-King v New York City Hous. Auth.*, 128 AD3d 539 [1st Dept 2015]).

Dismissal of the third party complaint was proper, as the motion was unopposed. To the extent Brookfield argues otherwise on appeal, its arguments are raised for the first time before this Court and are unpreserved (*see Gonzalez v New York City Health & Hosps. Corp.*, 29 AD3d 369, 370 [1st Dept 2006]).

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

ENTERED: APRIL 19, 2018

CLERK

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

6327 In re Nehemiah B., and Another,

Dependent Children Under
the Age of Eighteen, etc.,

Christina B.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the children.

_____

Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about March 28, 2017, which denied respondent mother's motion to vacate orders of fact-finding and disposition (one for each child), entered upon inquest following her default in appearance, terminating her parental rights to the subject children upon a finding of permanent neglect and freeing the children for adoption, unanimously affirmed, without costs.

Family Court providently exercised its discretion in denying the mother's motion to vacate her default (*see Matter of Noah Martin Benjamin L. [Frajon B.]*, 139 AD3d 593, 593 [1st Dept 2016]), since she failed to demonstrate a reasonable excuse for

her absence from the proceeding (*see Matter of Serenity Victoria M. [Allison B.]*, 150 AD3d 486 [1st Dept 2017]; *Matter of Lenea'jah F. [Makeba T.S.]*, 105 AD3d 514, 514-515 [1st Dept 2013]). The mother had been aware, well in advance, of the date scheduled for the afternoon fact-finding hearing, and the agency sent her a prepaid bus ticket scheduled to depart at 11:30 p.m. so that she could travel from Virginia the day before the hearing. The mother, however, advised the agency on that day that she had arranged a job interview in Virginia to be held at 9:00 p.m., and could not make the 11:30 p.m. bus to be in New York to attend the scheduled hearing. The mother did not indicate that she had tried to reschedule the interview for a different day or claim any physical inability or reason beyond her control that prevented her from appearing in court for the scheduled afternoon hearing.

Since the mother failed to demonstrate a reasonable excuse for her default, this Court need not reach the issue of whether she presented a meritorious defense (*see Matter of Serenity Victoria M.*, 150 AD3d at 486; *Matter of Lenea'jah F.*, 105 AD3d at 514). In any event, the mother failed to demonstrate a meritorious defense, having failed to submit an affidavit addressing the agency's showing that she had failed to visit the children consistently and to engage in mental health services, or

that she otherwise was presently and for the foreseeable future able to provide proper and adequate care for the subject children (*see* Social Services Law § 384-b[4][c]).

Termination of the mother's parental rights was in the children's best interests so that they may be freed to be adopted by their current, long-term foster mother, with whom they are well-cared for and have bonded.

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

ENTERED: APRIL 19, 2018

CLERK

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

6328 Margaret McGowan, Index 151958/12
Plaintiff-Respondent,

-against-

Metropolitan Transportation Authority
Bus Company, et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Michael D. Stallman, J.), entered on or about July 18, 2016,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated March 29, 2018,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

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

ENTERED: APRIL 19, 2018

CLERK

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

6330 Sagrario Lainez Andrade, Index 311383/11
Plaintiff-Appellant,

-against-

Arcadio Lugo, et al.,
Defendants-Respondents,

Jacqueline Castro,
Defendant.

_____

Gratt & Associates, P.C., Garden City (Lisa M. Comeau of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about February 7, 2017, which granted defendants' motions for summary judgment dismissing the complaint based on plaintiff's inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury to her cervical spine or lumbar spine as a result of the accident, by submitting the expert report of an orthopedic surgeon and by relying on plaintiff's own medical records. The surgeon opined that plaintiff's own MRI reports and the operative report of her right shoulder showed preexisting

degenerative conditions not causally related to the accident, including multilevel degenerative disc disease in the spine (*see Moore-Brown v Sofi Hacking Corp.*, 151 AD3d 567, 567 [1st Dept 2017]; *Fernandez v Hernandez*, 151 AD3d 581, 582 [1st Dept 2017]), and a large anterolateral spur and extensive fraying in the shoulder (*see De La Rosa v Okwan*, 146 AD3d 644, 644 [1st Dept 2017], *lv denied* 29 NY3d 908 [2017]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014], *affd* 24 NY3d 1191 [2015]).

In opposition, plaintiff failed to raise an issue of fact as to causation of any of her claimed injuries. Plaintiff's orthopedic surgeon opined that her conditions were causally related to the accident, but failed to refute or address the findings of preexisting degeneration in plaintiff's own medical records, or explain how the accident, rather than her preexisting conditions, was the cause of the alleged spinal and shoulder injuries (*see Khanfour v Nayem*, 148 AD3d 426, 427 [1st Dept 2017]; *see De La Rosa*, 146 AD3d at 644; *Alvarez*, 120 AD3d at 1044). With respect to plaintiff's claimed right shoulder injury, although her doctor's operative report recited that there were "no degenerative findings," the same report included findings of a large spur and extensive fraying. The doctor did not dispute that those conditions set forth in his operative report were degenerative or address those conditions at all in

his report. Thus, plaintiff's doctor's opinion that the shoulder condition is causally related to the accident was too conclusory to raise an issue of fact (*see Alvarez*, 120 AD3d at 1044; *Wenegieme v Harriot*, 157 AD3d 412 [1st Dept 2018]; *De La Rosa v Okwan* at 644; *Brown v Bawa*, 144 AD3d 448, 449 [1st Dept 2016], *lv denied* 29 NY3d 903 [2017]).

Defendants met their prima facie burden with respect to plaintiff's 90/180-day claim by demonstrating that plaintiff's alleged injuries were preexisting and unrelated to the accident. Plaintiff, who was already limited in her activities due to knee replacement surgery and other conditions, failed to raise an issue of fact as to whether any condition causally related to the accident rendered her incapacitated for at least 90 days of the first 180 days following the accident (*see Henchy v VAS Express Corp.*, 115 AD3d 478, 480 [1st Dept 2014]).

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

ENTERED: APRIL 19, 2018

CLERK

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

6331 The People of the State of New York, Respondent, Ind. 11722/95

-against-

Ramon Fabian-Lopez, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Cassandra A. Mullen, J.), entered on or about July 29, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed defendant 10 points under the risk factor for a living and employment situation that rendered him more difficult for law enforcement authorities to locate (*see People v Alemany*, 13 NY3d 424, 430 [2009]). The court also properly assessed points under the risk factor for the recency of a prior offense regarding a felony conviction that occurred less than three years before the present offense, even though the prior crime itself occurred earlier (*see People v Pinckney*, 129 AD3d 1048, 1048 [2015], *lv denied* 26 NY3d 908 [2015]).

Since defendant did not ask the hearing court for a downward departure, that claim is unpreserved. In any event, we find no basis for a departure (*see People v Gillotti*, 23 NY3d 841 [2014]).

We have considered and rejected the People's argument that defendant's deportation renders his request for relief academic, and defendant's argument that his deportation is a mitigating factor.

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

ENTERED: APRIL 19, 2018

CLERK

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

6332 Max Ember, Index 151379/16
Plaintiff-Appellant,

-against-

Charlene Denizard, et al.,
Defendants-Respondents.

_____

Law Offices of Jeffrey H. Roth, New York (Jeffrey H. Roth of counsel), for appellant.

Schneider Buchel LLP, Garden City (Marc H. Schneider of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered August 18, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the lung injury claim and for sanctions, unanimously reversed, on the law and the facts, without costs, and the motion denied.

Plaintiff, Max Ember, is the shareholder and proprietary lessee of an apartment in a cooperative building owned, operated, and managed by defendants (collectively, the cooperative). In this action, he claims that the cooperative wrongfully refused to repair his heating system, as a result of which he suffered a serious and debilitating lung condition.

Defendants contend that the lung injury claim is barred by the doctrine of res judicata, relying on the preclusive effect of a settlement agreement and a stipulation of discontinuance with

prejudice entered into in two prior related actions.

In July 2014, plaintiff brought a Supreme Court action alleging that defendant's failure to repair his heating and plumbing system was "dangerous, hazardous and/or detrimental to plaintiff's life, health and safety." Thereafter, in January 2015, the cooperative commenced a nonpayment action against plaintiff in Housing Court. The prior Supreme Court action and the Housing Court action were settled simultaneously before the Housing Court.

The Settlement Agreement stated, in relevant part, that it was "in full satisfaction of all parties' claims, defenses and counterclaims in the within proceeding and in the [prior Supreme Court action]," and required that a stipulation of discontinuance of the latter action be simultaneously executed. The Stipulation of Discontinuance was executed on November 2, 2015, and provided that "the above entitled action, and all claims, affirmative defenses, cross-claims and counter-claims alleged therein, ... is [sic] hereby discontinued with prejudice."

The Settlement Agreement also required that the parties exchange limited releases "[u]pon ... full compliance with this Stipulation." The form releases released all claims "known or unknown, which RELEASOR ever had, now has, or may have against RELEASEE" but "limited to those claims asserted and/or that could

have been asserted" in the Supreme Court action or the Housing Court action.

In April 2016, the cooperative moved to hold plaintiff in contempt based on his failure to execute the releases. Plaintiff cross-moved for contempt alleging that the cooperative breached the settlement agreement. The contempt motions are still pending in Civil Court.

The language of the settlement agreement and stipulation of discontinuance raises the inference that the documents were not intended to encompass claims not actually asserted in the prior actions (*see Frenk v Solomon*, 123 AD3d 416 [1st Dept 2014]; *cf. Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 294 [1st Dept 2005] [stipulation containing no reservation of right to pursue related claims or limitation of claims to those actually asserted in prior proceeding accorded res judicata effect]). The lung injury claim was not asserted in the prior actions.

Moreover, the language of the releases is broader. Whether or not the lung condition "could have been asserted" in the prior Supreme Court action requires fact-finding and is not appropriately determined on a motion to dismiss.

Nor is dismissal of the lung injury claim under CPLR 3211(a)(4) appropriate as there is no prior action pending on the

same claim for the same relief (*see Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]; *Montgomery Ward & Co. v Othmer*, 127 AD2d 913 [3d Dept 1987]).

Sanctions are not warranted.

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

ENTERED: APRIL 19, 2018

CLERK

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

6333 Antonie Samuels, et al., Index 154383/13
Plaintiffs-Appellants,

-against-

Spruyt E. Lee, et al.,
Defendants-Respondents.

_____

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants.

Steven F. Goldstein, L.L.P, Carle Place (Steven F. Goldstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered June 2, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Antonie Samuels (plaintiff) was injured when the front door to defendants' premises allegedly closed too fast, causing the sharp, "jagged" bottom of the door to strike and cut her heel.

Defendants established prima facie that they neither created nor had notice of the defect in the door (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]; *Harrison v New York City Tr. Auth.*, 113 AD3d 472 [1st Dept 2014]). They submitted evidence that an outside contractor installed the door in 2008, that defendant Art Farm's manager inspected it at that time and

saw no jagged edge or other visible defect, and tested it to ensure that it opened and closed properly, and that, before plaintiff's accident, there had been no reports of difficulties with the door or complaints of injuries.

In opposition, plaintiffs failed to raise an issue of fact as to defendants' creation or notice of the defect. There is no evidence that anyone ever saw or reported the door's sharp, jagged bottom edge until after plaintiff's accident, and therefore no evidence that the defect existed long enough for defendants to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 475 [2d Dept 2004]). Nor does the affidavit by plaintiff's expert engineer raise any issues of fact. The engineer offered no opinion about the alleged jagged edge, which did not exist at the time of his inspection of the door nearly three years after the accident.

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

ENTERED: APRIL 19, 2018

CLERK

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

6334- Index 311503/07
6335 Ira Schacter,
Plaintiff-Appellant,

-against-

Janice Schacter,
Defendant-Respondent.

_____

Ira J. Schacter, appellant pro se.

Janice Schacter Lintz, respondent pro se.

_____

Orders, Supreme Court, New York County (Laura E. Drager, J.), entered October 7, 2016 and October 18, 2016, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to hold defendant responsible for the cost of repairs and maintenance to the parties' Manhattan residence, and, in granting plaintiff's motion to appoint a receiver, declined to impose certain conditions requested by plaintiff, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in declining to impose plaintiff's proposed limitations on the receiver's authority (*see* CPLR 5106 [court "may appoint a receiver of property ... to dispose of the property according to its directions"]). In a fine balancing of the equities, the court authorized the receiver to select a broker, to ensure that

the listing price of the parties' Bridgehampton house was within the range of the prices of comparable properties sold in the previous six months, and to ensure that any repairs deemed necessary by the broker were completed. Plaintiff's insistence on including a so-called "sunset" provision to effectuate distribution within 270 days was based largely on his concerns about defendant's alleged obstruction of the sale of the parties' Manhattan residence, to which she had exclusive access. As the Manhattan residence is now under contract, and plaintiff has exclusive occupancy of the Bridgehampton house, these concerns are no longer relevant.

We reject plaintiff's argument that defendant should be responsible for repairs and maintenance of the Manhattan residence. The parties' judgment of divorce explicitly provides that plaintiff "shall bear responsibility for 100% of all [] post-commencement costs incurred to maintain and repair" both properties.

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

ENTERED: APRIL 19, 2018

CLERK

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

6336 In re Cerenity F.,

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

Jennifer W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

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

Dawne A. Mitchell, The Legal Aid Society, New York (Marianne Allegro of counsel), attorney for the child.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about November 9, 2016, to the extent it found that respondent neglected the subject child, unanimously affirmed, without costs.

Respondent, who represented that he was married to the child's mother and living in the home, was a person legally responsible for the child. A preponderance of the evidence supports the court's finding that the child's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of respondent and the mother's frequently exposing the child to adult sexual activity and pornography (see

Matter of Janiyah T. [Nyree T.], 110 AD3d 416 [1st Dept 2013]; *Matter of Khadryah H.*, 295 AD2d 607 [2d Dept 2002]). The then seven-year-old child's out-of-court statements about her personal observations of adult sexual activity were corroborated by the fact that she had "age-inappropriate knowledge of sexual behavior," which "demonstrated specific knowledge of sexual activity" (*Matter of Nicole V.*, 71 NY2d 112, 121, 122 [1987]; *see Matter of Selena R. [Joseph L.]*, 81 AD3d 449 [1st Dept 2011], *lv denied* 16 NY3d 714 [2011]).

The finding of neglect is also supported by the evidence of unsanitary conditions in the home (*see Matter of Josee Louise L.H. [DeCarla L.]*, 121 AD3d 492 [1st Dept 2014], *lv denied* 24 NY3d 913 [2015]; *see also Matter of Danaryee B. [Erica T.]*, 145 AD3d 1568 [4th Dept 2016]). The child's out-of-court statements describing the home as very dirty, and covered in cat urine and feces were corroborated by respondent's admissions and the caseworker's observations that respondent smelled of cat urine and that the child was unkempt and wore dirty, stained clothes

(*see Matter of Naqi T. [Marlena S.]*, 129 AD3d 444 [1st Dept 2015]; *Matter of Joshua UU. [Jessica XX.-Eugene LL.]*, 81 AD3d 1096, 1099 [3rd Dept 2011]).

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

ENTERED: APRIL 19, 2018

CLERK

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

6337 The People of the State of New York, Respondent, Ind. 3524/13

-against-

Gerald Kimbrough, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 23, 2015, convicting defendant, after a nonjury trial, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). In this robbery of a store, the evidence amply supported a finding that the testifying employee perceived what appeared to be a firearm when defendant placed his hand under his shirt at his waist and threatened to shoot everyone in the store (*see People v Baskerville*, 60 NY2d 374, 381 [1983]). The record fails to support defendant's assertion that, before any property was taken, the employee "realized" that

defendant did not have a firearm. Instead, the employee merely testified that during the incident there came a time when he became unsure whether defendant actually had a firearm. However, a victim need not be certain that a robber was armed to satisfy the display element (*see People v Brown*, 119 AD3d 953, 954 [2d Dept 2014], *lv denied* 24 NY3d 1118 [2015]; *People v Bynum*, 125 AD2d 207, 209 [1st Dept 1986], *affd* 70 NY2d 858 [1987]). Moreover, it can be reasonably inferred from the evidence that even after he developed this uncertainty, the employee was still in fear of possibly being shot at the time defendant stole money from the cash register.

Defendant did not preserve his additional argument regarding an alleged variance between the indictment and the trial evidence regarding the identity of the person actually robbed, 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: APRIL 19, 2018

CLERK

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

6338 Joedean Vanderhall, Index 158798/15
Plaintiff-Appellant,

-against-

MTA Bus Company, et al.,
Defendants-Respondents.

_____

Alexander J. Wulwick, New York, for appellant.

Armienti, DeBellis, Guglielmo & Rhoden, New York (Vanessa M. Corchia of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about April 10, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the cross motion denied.

Defendants failed to establish prima facie that they are entitled to summary dismissal of the complaint on the basis of the emergency doctrine (*see Caristo v Sanzone*, 96 NY2d 172, 174 [2001]; *Weston v Castro*, 138 AD3d 517 [1st Dept 2016]). Defendants contend that the driver of the bus on which plaintiff was a passenger was not negligent in braking to a sudden, hard stop that allegedly caused plaintiff to be injured, but reacted reasonably to the sudden stop of a car in front of the bus. However, the emergency doctrine is typically not available to the

rear driver in a rear-end collision, who is responsible for maintaining a safe distance (*Jacobellis v New York State Thruway Auth.*, 51 AD3d 976, 977 [2d Dept 2008]). The bus driver's affidavit demonstrates that he was confronted with a "common traffic occurrence" when the vehicle in front of the bus stopped short (*Lowhar-Lewis v Metropolitan Transp. Auth.*, 97 AD3d 728, 729 [2d Dept 2012]). A factfinder could reasonably conclude that the bus driver was negligent in failing to maintain a safe distance between the bus and the car in front of it (*see* Vehicle and Traffic Law § 1129[a]) and that his own conduct caused or contributed to the emergency situation (*see Caristo*, 96 NY2d at 174). Contrary to defendants' contention, a violation of Vehicle and Traffic Law § 1129(a) may be found even where there was no collision (*Darmento v Pacific Molasses Co.*, 81 NY2d 985 [1993]; *see e.g. Lowhar-Lewis*, 97 AD3d 728).

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

ENTERED: APRIL 19, 2018

CLERK

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

6339 The People of the State of New York, Ind. 2885/15
Respondent,

-against-

Danny Torres,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Albert Lorenzo, J. at plea; Margaret Clancy, J. at sentencing), rendered October 12, 2016,

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

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

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

ENTERED: APRIL 19, 2018

CLERK

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

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

6340 Estate of Renate Smulewicz, et al., Index 152264/16
Plaintiffs-Appellants,

-against-

Meltzer, Lippe, Goldstein & Breitstone, LLP,
Defendant-Respondent.

_____

Peyrot & Associates, P.C., New York (David C. Van Leeuwen of counsel), for appellants.

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City (Noah Nunberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered March 16, 2017, which granted defendant's motion to dismiss the complaint as time-barred, unanimously affirmed, without costs.

Defendant established its entitlement to dismissal on statute of limitation grounds by submitting evidence that the malpractice occurred in 2008, but plaintiff did not commence this action until March 2016, well beyond the three-year limitation period for legal malpractice (CPLR 214[6]; *see McCoy v* Feinman, 99 NY2d 295, 301 [2002]; *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994]; *Glamm v Allen*, 57 NY2d 87, 93 [1982]). Even accepting plaintiffs' continuous-representation argument, there is no evidence that such continued representation went beyond, at

most, July 16, 2012, which still renders plaintiffs' action untimely. Plaintiffs' argument that the limitation period was tolled by the decedent's alleged dementia is also unavailing, as there is no evidence that the decedent suffered from such disability at the time the claim accrued (CPLR 208), or that it rendered her "unable to protect [her] legal rights because of an over-all inability to function in society" (*McCarthy v Volkswagen of Am.*, 55 NY2d 543, 548 [1982]; *see Burgos v City of New York*, 294 AD2d 177 [1st Dept 2002]).

Furthermore, the court properly rejected plaintiffs' argument for further discovery, as plaintiffs offer no basis to conclude that additional discovery would lead to evidence of additional continuous representation by defendant or of the decedent's mental condition at the time the claim accrued. "The mere hope that discovery may reveal a course of continuous treatment. . ., does not warrant denial of the motion [to dismiss]" (*Cracolici v Shah*, 127 AD3d 413, 413 [1st Dept 2015]).

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

ENTERED: APRIL 19, 2018

CLERK

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

6341 Sobeida Socorro, Index 154285/12
Plaintiff-Respondent,

-against-

New York Presbyterian Weill
Cornell Medical Center,
Defendant-Appellant.

_____

Keller, O'Reilly & Watson, P.C., Woodbury (Patrick J. Engle of counsel), for appellant.

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Michael J. Fitzpatrick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered April 7, 2017, which, in this action for personal injuries sustained when plaintiff slipped and fell on a puddle of water in defendant's emergency room, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to sustain its prima facie burden of showing that it did not create or have notice of the puddle of water in front of a nurses' station in the emergency room. Although its operations manager testified to general cleaning and inspection procedures, he did not state that they were followed on the day of the accident, did not know if he worked that day, and did not know when the area was last inspected (*see Sada v*

August Wilson Theater, 140 AD3d 574 [1st Dept 2016]; *Dylan P. v Webster Place Assoc., L.P.*, 132 AD3d 537 [1st Dept 2015], *affd* 27 NY3d 1055 [2016]).

Defendant's argument that plaintiff's negligence was the sole proximate cause of the accident in that she admitted that she saw the puddle several times before she fell, is unavailing. Plaintiff testified that she did not see the water immediately prior to the fall as she was looking straight ahead. Plaintiff did not deliberately undertake a course of action severing the nexus between defendant's alleged negligence and her injury (*Abreu v New York City Hous. Auth.*, 104 AD3d 522 [1st Dept 2013]). Plaintiff's prior awareness of the water condition does not require dismissal of the complaint because it is relevant only to the issue of her comparative negligence (*see Johnson-Glover v Fu Jun Hao Inc.*, 138 AD3d 499 [1st Dept 2016]).

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

ENTERED: APRIL 19, 2018

CLERK

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

6342 The People of the State of New York, Respondent, Ind. 3287/13

-against-

Richard Porrazzo, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Steven Barrett, J.), rendered October 26, 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: APRIL 19, 2018

CLERK

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

6343 Eddie Rosario, Index 301461/13
Plaintiff-Appellant,

-against-

Cablevision Systems, et al.,
Defendants-Respondents.

_____

Subin Associates, LLP, New York (Robert J. Eisen of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ruben Franco, J.), entered August 23, 2016, which granted defendants' motion for summary judgment dismissing the complaint based on plaintiff's inability to meet the serious injury threshold of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion as to plaintiff's claim of right shoulder injury, and otherwise affirmed, without costs.

Plaintiff alleges that he suffered serious injuries to his spine and right shoulder as the result of a motor vehicle accident. Defendants established that plaintiff did not suffer serious injuries to his cervical or lumbar spine through the reports of a neurologist and orthopedist who found full range of motion in those allegedly injured body parts and no objective evidence of injury. In addition, after review of a pre-accident

MRI report of plaintiff's lumbar spine, the orthopedist opined that the lumbar spine injuries were the result of a prior work injury (*see Lazu v Harlem Group, Inc.*, 89 AD3d 435, 436 [1st Dept 2011]).

However, as to plaintiff's right shoulder, defendants' orthopedist found limitations in two planes of range of motion, and thus they failed to meet their burden of showing that plaintiff did not suffer a serious injury involving significant or permanent limitations in use of his right shoulder (*see Pineda v Moore*, 111 AD3d 577 [1st Dept 2013]). Although the orthopedist alluded to medical records showing that plaintiff's shoulder condition was chronic, he did not clearly or unequivocally opine as to lack of causation (*see Karounos v Doulalas*, 153 AD3d 1166 [1st Dept 2017]). Accordingly, since defendants did not meet their prima facie burden, the burden of proof never shifted to plaintiff on this injury.

In opposition, plaintiff failed to raise an issue of fact as to whether his lumbar spine injuries were causally related to the accident, since his examining physician failed to address the degenerative findings in his own medical reports or the evidence of a preexisting injury (*Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 510 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]; *Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044 [1st Dept 2014],

affd 24 NY3d 1191 [2015]). Plaintiff also failed to raise an issue of fact as to whether he sustained a serious injury to his cervical spine. Although his physician found deficits in range of motion in these body parts, plaintiff failed to demonstrate that these deficits were related to any objective medical evidence of injury, such as an MRI (*see Figueroa v Ortiz*, 125 AD3d 491, 492 [1st Dept 2015]).

Since plaintiff failed to raise an issue of fact as to whether his spinal injuries were caused by the accident, he cannot recover for such injuries (*see Fathi v Sodhi*, 146 AD3d 445, 446 [1st Dept 2017]*; Hojun Hwang v Doe*, 144 AD3d 507 [1st Dept 2016]; *see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Although defendants' expert did not examine plaintiff until more than two years after the accident, defendants established that plaintiff did not suffer a 90/180-day claim by relying on his deposition testimony that he was not confined to either his bed or home after the accident, and was confined to bed and home

for less than 90 days following his shoulder surgery (*see Brownie v Redman*, 145 AD3d 636, 637 [1st Dept 2016]).

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

ENTERED: APRIL 19, 2018

CLERK

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

6344 The People of the State of New York, Respondent, SCI 1999N/13

-against-

Pierre Dor, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. 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 (Richard M. Weinberg, J.), rendered October 24, 2013, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him to a term of five years' probation, unanimously affirmed.

Defendant's challenges to his plea are unpreserved, and they do not come within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 382 [2015]). We decline to review these claims in the interest of justice. As an alternative holding, we find that the record as a whole establishes that the plea was knowingly, intelligently and voluntarily made (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). The circumstances under which the plea was taken were not coercive. The court's advice to defendant that probation

might not remain available if he did not accept the offer promptly did not render the plea involuntary. Moreover, defendant declined the court's suggestion that he take more time to consult with counsel before accepting the offer. Furthermore, during the allocution defendant freely admitted his guilt.

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6305 The People of the State of New York, Respondent, Ind. 3673/13

-against-

Andre Taylor, Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered July 29, 2014, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim's testimony was corroborated by, among other things, a 911 call and

a surveillance video, and defendant's suggestion that the encounter was something other than a robbery is speculative.

We perceive no abuse of sentencing discretion.

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6306 Coldwell Banker Commercial Hunter Realty,
Plaintiff-Respondent,

-against-

Rainbow Holding Company, LLC,
Defendant-Appellant,

Edward Penson,
Defendant.

Index 654393/12

_____

Law Office of Allison M. Furman, P.C., New York (Allison M. Furman of counsel), for appellant.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Nancy E. Ahern of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 20, 2016, which denied defendant Rainbow Holding Company, LLC's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendant's motion was properly denied in this action where plaintiff asserts that it is entitled to a commission after presenting ready, willing, and able buyers to defendant for the sale of its property. The parties assert sharply conflicting accounts of the events leading up to the sale of the property; hence defendant failed to establish entitlement to judgment as a matter of law. The issues of fact involve resolution of

credibility issues that cannot be resolved through summary disposition (*see Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 493 [1st Dept 2012]).

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6307 In re AnnMarie S. W., and Another,

Children Under Eighteen Years of Age, etc.,

Raheem Sandford W.
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent,

_____

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Carolyn Walther of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about March 27, 2017, which, inter alia, after a hearing, found that respondent father neglected the subject children, unanimously affirmed, without costs.

A preponderance of the evidence establishes that respondent neglected the children by engaging in acts of domestic violence against the mother while in the children's presence (*see* Family Ct Act §§ 1012[f][i][B]; 1046[b][i]; *Matter of Jeremiah M.*, 290 AD2d 450 [2d Dept 2002]). Respondent does not dispute that the children witnessed an incident in which he struck and choked the mother, and she stabbed him in the shoulder. There exists no

basis to disturb the court's credibility determinations, including its rejection of respondent's claim that he was acting in self-defense (*see e.g. Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

The record shows that the children were subject to actual or imminent danger of injury or impairment of their emotional and mental condition from exposure to domestic violence (*see Matter of Serenity H. [Tasha S.]*, 132 AD3d 508, 509 [1st Dept 2015]). The older child's out-of-court statement that she felt bad during the altercation was corroborated by the mother's testimony that during the incident, the child screamed and the younger child cried (*see Matter of Krystopher D'A. [Amakoe D'A.]*, 121 AD3d 484, 485 [1st Dept 2014]). The record further shows that the children were placed in imminent danger of physical harm due to their close proximity to the potentially deadly violence (*see Matter of Isabella S. [Robert T.]*, 154 AD3d 606, 607 [1st Dept 2017]).

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6308 Selnick Harwood Consulting Engineers, P.C., Plaintiff-Respondent, Index 100332/12

-against-

Atlantic Development Group, LLC, Defendant-Appellant.

_____

The Stolper Group, LLP, New York (Michael Stolper of counsel), for appellant.

Goetz FitzPatrick LLP, New York (John B. Simoni, Jr. of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered October 19, 2016, awarding plaintiff the aggregate amount of $75,432.56, and bringing up for review an order, same court and Justice, entered June 21, 2016, which denied defendant's application for an adjournment of the bench trial, unanimously affirmed, without costs.

The court providently exercised its discretion when it denied defendant's motion for an adjournment of the trial date which had been set seven months earlier, and of which defendant's counsel had ample notice from the court and plaintiff's counsel

(*see Headley v Noto*, 22 NY2d 1, 4 [1968]; *Matter of Grisi v Shainswit*, 119 AD2d 418, 421 [1st Dept 1986]).

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6309 Helena Wong, Index 104404/09
Plaintiff-Respondent, 590758/09

-against-

Hsia Chao Yu,
Defendant-Appellant.
- - - - -
[And a Third-Party Action]

Law Offices of Michael Rohde, P.C., New York (Michael A. Rohde of counsel), for appellant.

Bedford Soumas LLP, New York (Cyril K. Bedford of counsel), for respondent.

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered October 12, 2016, which, after a nonjury trial, made findings of fact and awarded judgment for declaratory and injunctive relief in favor of plaintiff Helena Wong and against defendant Hsai Chao Yu, unanimously affirmed, without costs.

"In reviewing a judgment from a bench trial, especially where credibility played an important role, the judgment should only be set aside where it is not supported by any fair interpretation of the evidence" (*Abreu v Barkin & Assoc. Realty, Inc.*, 115 AD3d 624, 624 [1st Dept 2014], citing *Nightingale Rest. Corp. v Shak Food Corp.*, 155 AD2d 297 [1st Dept 1989], *lv denied* 76 NY2d 702 [1990]). Because the trial court was in the best position to evaluate the credibility of the witnesses, its

determination is entitled to great deference (*see People v Mcmillian*, __AD3d__, 2018 NY Slip Op 00649 [4th Dept Feb. 2, 2018]; *see also People v Whatts*, 116 AD3d 456, 461 [1st Dept 2014]).

In this family dispute regarding leasehold succession rights to a rent-stabilized apartment, defendant stepmother Hsai Chao Yu asserted that Supreme Court erred in its determination because her stepdaughter, plaintiff Helena Wong, did not satisfy the two-year residency requirement under Rent Stabilization Code section 2523.5(b)(1).

Supreme Court found that plaintiff credibly testified to numerous facts showing that the apartment was continuously her primary residence for the two years prior to the death of her father (the tenant of record) in satisfaction of section 2523.5(b)(1). This testimony was corroborated by third-party defendants.

Moreover, after the husband/father's death in December 2004, the lease to the apartment came up for renewal in November 2005. Supreme Court found that plaintiff testified credibly that defendant was aware that the lease was up for renewal in November 2005 and explicitly consented to the fact that plaintiff would be taking over the lease as the tenant of record. This testimony was again corroborated by Anna Wong, and Supreme Court found

defendant's version of the facts surrounding the lease renewal to lack credibility. The fact that the landlord demanded a vacancy rent increase does not negate the trial court's finding that defendant waived her right to succeed the lease.

Further, Supreme Court properly found that because plaintiff validly renewed the lease for a term starting January 1, 2008 to December 31, 2009 and there was no basis for the landlord to terminate that lease renewal, defendant's May 1, 2008 lease was null and void.

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6310 The People of the State of New York, Ind. 3088/15
Respondent,

-against-

Jaylene Nieves,
Defendant-Appellant.

_____

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered September 8, 2016,

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

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

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

ENTERED: APRIL 19, 2018

CLERK

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

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6311 In re James Pettus, et al., Index 250720/15
Petitioners-Appellants,

-against-

Board of Directors, et al.,
Respondents-Respondents.

_____

James Pettus, appellant pro se.

Charlene Thompson, appellant pro se.

Boyd Richards Parker & Colonnelli, P.L., New York (Brett L. Carrick of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered June 21, 2016, which, insofar as appealed from as limited by the briefs, granted respondents' motion to vacate a judgment, same court (Alison Y. Tuitt, J.), entered August 7, 2015, granting the article 78 petition on default, and upon vacatur, granted respondents' CPLR 3211 motion to dismiss the petition, unanimously affirmed, with costs.

The Supreme Court providently exercised its discretion in granting respondents' motion to vacate the default judgment (*see Xiao Jia Lin v Engleton*, 121 AD3d 483, 483 [1st Dept 2014]; *Crespo v A.D.A. Mgt.*, 292 AD2d 5, 9 [1st Dept 2002]). We note that, in light of the recusal of the Justice who presided over the entry of the default judgment, the vacatur motion was

properly entertained and decided by the Justice to whom the matter was reassigned (*see Matter of Pettus v Board of Directors*, 155 AD3d 485, 486 [1st Dept 2017]).

The Supreme Court likewise properly dismissed the petition pursuant to CPLR 3211(a)(1) and (7), based on documentary evidence and for failure to state a claim, as the record establishes that the co-op acted pursuant to a long-standing policy by withholding a garage key from petitioners, and its determination was protected by the business judgment rule (*see 40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]; *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005]).

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6313 The People of the State of New York, Ind. 3480/15
Respondent,

-against-

Nicholas Durant,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered March 15, 2016,

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

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

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

ENTERED: APRIL 19, 2018

CLERK

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

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6314 In re Joane H.,
Petitioner-Respondent,

-against-

Felix P., Jr.,
Respondent-Appellant.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Neal D. Futerfas, White Plains, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), and Simpson Thacher & Barrlett LLP, New York (Michael S. Carnevale of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Rosanna Mazzotta, Referee), entered on or about July 14, 2017, which, after a hearing, awarded sole legal and primary physical custody of the subject children to petitioner mother, unanimously affirmed, without costs.

The determination that it was in the children's best interests to be in the sole legal and primary physical custody of petitioner has a sound and substantial basis in the record, which reflects that the children are thriving in petitioner's stable home environment and that petitioner is better equipped than respondent to address their educational, emotional, and material needs (*see Matter of David H. v Khalima H.*, 111 AD3d 544 [1st

Dept 2013], *lv dismissed* 22 NY3d 1149 [2014]). While respondent contends that petitioner failed to inform him about the children's progress and schooling, it is apparent from his testimony that he did not take an active interest in the children's education. The record also shows that petitioner was more willing and likely than respondent to facilitate the noncustodial parent's relationship with the children (*see Matter of Damien P.C. v Jennifer H.S.*, 57 AD3d 295 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]). The testimony about respondent's violent behavior is an additional factor in favor of granting custody to petitioner (*see Matter of Kougne T. v Mamadou D.*, 133 AD3d 455 [1st Dept 2015]).

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

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6317 Kerry Mangum, Index 310472/08
Plaintiff-Appellant,

-against-

500 Brush LLC,
Defendant-Respondent.

_____

Steve Anduze, Yonkers, for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered March 14, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates that defendant, an out-of-possession landlord, neither created nor had actual knowledge of the alleged hazardous condition of the step on which plaintiff fell, which had chewed-up duct tape on its tread. Plaintiff testified that he had used the stairs and not noticed the condition approximately 20 minutes before he fell and that he did not notice the condition in the moment immediately preceding his fall on the wet step. As to constructive notice, a witness testified that, during a heavy rainfall, water fell in drips onto the floor at the foot of the stairs, but there is no evidence in the record

that any alleged leak in the roof resulted from "a significant structural or design defect that is contrary to a specific safety provision" (*see Torres v West St. Realty Co.*, 21 AD3d 718 [1st Dept 2005] [internal quotation marks omitted], *lv denied* 7 NY3d 703 [2006]).

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6318- Ind. 2924/15
6318A- 731/16
6318B The People of the State of New York, 732/16
Respondent,
-against-

Thomas Ellis,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Waleska Suero Garcia of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (George Villegas, J.), rendered August 8, 2016,

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

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

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

ENTERED: APRIL 19, 2018

CLERK

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

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6319 The People of the State of New York, Respondent, Ind. 4635/14

-against-

Tavil Archer, Defendant-Appellant.

_____

Friedman Kaplan Seiler & Adelman LLP, New York (Priyanka Wityk of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Gregory Carro, J. at jury trial and sentencing), rendered June 8, 2016, as amended July 29, 2016, convicting defendant of criminal possession of stolen property in the fourth degree (two counts) and tampering with physical evidence, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

We reject defendant's arguments concerning the sufficiency and weight of the evidence supporting his conviction of possession of stolen property under a count relating to two stolen money orders. There is no basis for disturbing the jury's credibility determinations. There was circumstantial evidence that defendant knew the money orders were stolen. Defendant's attempt to cash them the day after they were reported stolen

established recent exclusive possession. The jury was entitled to reject defendant's explanation of his possession of the property, and to draw the inference that he knew it was stolen (*see People v Cintron*, 95 NY2d 329, 332 [2000]; *People v Starks*, 70 AD3d 585, 586 [1st Dept 2010] *lv denied* 15 NY3d 757 [2010]). That inference was also supported by defendant's flight when the police arrived (*see Cintron*, 95 NY2d at 332).

The hearing court properly denied defendant's suppression motion. The court correctly found that the police pursuit of defendant was based on reasonable suspicion of criminality. The officers received a report that an undescribed man had been attempting to cash stolen money orders. When the uniformed officers arrived at the scene, and defendant fled immediately upon making eye contact, the officers reasonably inferred that defendant was the suspect (*see People v Woods*, 98 NY2d 627, 628 [2002]). The record also supports the court's alternative finding that, irrespective of the legality of the pursuit, defendant's independent abandonment of contraband as he fled was an intentional relinquishment of any privacy interest, and was a strategic and calculated decision rather than a spontaneous

reaction to the police activity (*see People v Boodle*, 47 NY2d 398, 402-404 [1979], *cert denied* 444 US 969 [1979]).

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6320 Oumar Doumbia, Index 302911/14
Plaintiff-Respondent,

-against-

Moonlight Towing, Inc.,
Defendant-Appellant,

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

_____

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

Bernstone & Grieco, LLP, New York (Peter B. Croly of counsel), for Oumar Doumbia, respondent.

White Fleischner & Fino, LLP, New York (Matthew I. Toker of counsel), for John Doe and USA Limousine Service Corp., respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 8, 2017, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Moonlight Towing, Inc. (Moonlight) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff alleges that he was injured when a vehicle owned by defendant USA Limousine Service Corp. (USA Limousine) came loose from a tow truck and rolled into his vehicle. Although Moonlight maintains that the subject tow truck was not its tow

truck, USA Limousine's employee testified that after the vehicle he was driving broke down, a coworker provided him with contact information for Moonlight, which he called, and a tow truck that arrived and left with the vehicle said Moonlight on it. He also identified photographs of the tow truck. Such evidence presents clear credibility issues as to whether the tow truck involved belonged to Moonlight that cannot be resolved on this motion for summary judgment (*see e.g. S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *DeSario v SL Green Mgt. LLC*, 105 AD3d 421 [1st Dept 2013]).

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6321 Allen C. Dawson, Index 162361/15
Plaintiff-Appellant,

-against-

New York University,
Defendant-Respondent.

_____

Stewart Lee Karlin Law Group, PC, New York (Daniel E. Dugan of counsel), for appellant.

William Miller, New York, for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 20, 2017, which granted defendant's motion to dismiss the complaint as time-barred, and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

Although plaintiff alleges that he was subjected to unlawful discrimination, the complaint is actually "a challenge to a university's academic and administrative decision[]" (*Padiyar v Albert Einstein Coll. of Medicine of Yeshiva Univ.*, 73 AD3d 634, 635 [1st Dept 2010], *lv denied* 15 NY3d 708 [2010]). Accordingly, it is barred by the four-month statute of limitations for a CPLR article 78 proceeding, which is the appropriate vehicle for such

a challenge (*see Alrqiq v New York Univ.*, 127 AD3d 674 [1st Dept 2015], *lv denied* 27 NY3d 910 [2016]).

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6322 Jahangir Ahmed, etc., Index 15384/15
Plaintiff-Appellant,

-against-

Morgan's Hotel Group
Management, LLC, et al.,
Defendants-Respondents.

_____

Leeds Brown Law, P.C., Carle Place (Brett R. Cohen of counsel), for appellant.

Fox Rothschild LLP, New York (Francis V. Cook of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about February 28, 2017, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's motions for summary judgment, class action certification, and leave to amend the complaint, unanimously affirmed, without costs.

Plaintiff, a banquet server's assistant at a hotel, claims that defendants wrongly withheld gratuities from him (*see* Labor Law § 196-d), because they kept administrative charges to which he was entitled. 12 NYCRR 146-2.18(b) provides, "There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging ... is a charge purported to be a gratuity." However, defendants' Banquet Event Order (BEO), which

served as the detailed contract and bill for catered events, satisfied the statutory requirement that the "administrative charge" for events not be a charge purported to be a "gratuity" and that it be clearly identified so that "a reasonable customer would understand that such charge was not purported to be a gratuity" (*see id.* 146-2.19). The BEO reflected two separate charges in addition to food and beverage charges and notified customers that the gratuity would be distributed to the staff and that the administrative charge was not a gratuity but the property of the hotel. No reasonable customer would have been confused (*see Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]). That other documents generated in connection with the event, such as proposals, did not include the explanatory language does not render the BEO language ineffective.

Plaintiff also claims that defendants' notice to him that they intended to take a credit toward the basic minimum hourly rate if he received enough tips (12 NYCRR 146-1.3; *see also* Labor Law 195[3]) did not fully comply with 12 NYCRR 146-2.2, because it did not state that, in the event plaintiff did not earn enough tips to meet the minimum, they would be responsible for paying him the difference. However, Labor Law § 198(1-d) provides that "it shall be an affirmative defense that ... the employer made complete and timely payment of all wages due pursuant to this

article," and the record demonstrates that plaintiff was always paid more than minimum wage.

In view of the foregoing, we do not reach plaintiff's remaining arguments.

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

ENTERED: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6323 The People of the State of New York, Respondent, Ind. 5341/12

-against-

Luis Castillo, Defendant-Appellant.

Christina Swarns, Office of The Appellate Defender, New York (Kami Lizarraga of counsel), for appellant.

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered November 4, 2013, 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: APRIL 19, 2018

CLERK

Friedman, J.P., Richter, Andrias, Kapnick, Webber, JJ.

6324N Bethany Elmaleh, Index 159272/13ECF
Plaintiff-Respondent,

-against-

Edwin G. Vroom,
Defendant-Appellant,

Brady Willis,
Defendant.

_____

Law Office of James J. Toomey, New York (Kevin J. Philbin of counsel), for appellant.

Gersowitz Libo & Korek, P.C., New York (Daniel B. Linson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered November 8, 2017, which granted plaintiff's motion for spoliation sanctions to the extent of precluding defendant Edwin G. Vroom from "testifying at trial or offering evidence in an affidavit in substantive motion practice," unanimously reversed, on the law, without costs, and the motion denied.

As defendant was not on notice that the Electronic Data Recorder (EDR) in his car would be needed for future litigation, his failure to preserve the car or EDR did not constitute negligent spoliation of evidence (*cf. Strong v City of New York*,

112 AD3d 15, 21 [1st Dept 2013]). Moreover, plaintiff did not promptly request either the EDR or an opportunity to inspect the car.

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

ENTERED: APRIL 19, 2018

CLERK