SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 8, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Manzanet-Daniels, J.P., Andrias, Kapnick, Moulton, JJ.

5659 [M-5696 & M-89] — In re Cliff Jones, also known as Clifton Morris, Petitioner,

-against-

Hon. Irene Duffy, etc., et al., Respondents.

Ind. 1753/98
OP 128/17

Cliff Jones, petitioner pro se.

Angel M. Guardiola, II, New York, for Hon. Irene Duffy, Hon. Roger S. Hayes, and the Supreme Court of the State of New York, respondents.

District Attorney, Bronx (Samuel L. Yellen of counsel), for Darcel D. Clark, respondent.

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

And respondents Hon. Irene Duffy, Hon. Roger Hayes and the Supreme Court of the State of New York, Bronx County, having cross-moved to dismiss the petition,

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, the cross motion granted, and the petition dismissed, without costs or disbursements.

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

ENTERED: MARCH 8, 2018

CLERK

Friedman, J.P., Tom, Mazzarelli, Singh, JJ.

5733-
5734 Index 653382/14

Leon Pokoik, etc., et al.,
Plaintiffs-Appellants,

-against-

Norsel Realties, et al.,
Defendants-Respondents.

_____

The Law Firm of Gary N. Weintraub, LLP, Huntington (Leland S. Solon of counsel), for appellants.

Fox Rothschild LLP, New York (Daniel A. Schnapp of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Jeffrey K. Oing, J.), entered October 3, 2017, dismissing the amended complaint, unanimously modified, on the law, the dismissal of the amended complaint as against defendants Michael L. Steinberg, Alan Steinberg, Jay Lieberman, Andrew Benenson, Meredith K. Cohen, Leslie Endelson, Alison Granbery, Johanna Igel, Ronnie Igel, Carolyn A. Koslow, Peter Koslow, William Koslow, Gary Pokoik, Jonathan Pokoik, Justine Pokoik Hopkins, Meryl Sherman, Diane L. Steinberg, Francine Steinberg, Jeffrey Steinberg and Stuart L. Steinberg, vacated, and defendants' motion to dismiss denied as to the first, second, and third causes of action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered April 13, 2017, unanimously dismissed, without

costs, as subsumed in the appeal from the judgment.

Plaintiffs allege that defendants purposely undervalued Norsel Realties's (Norsel) property to advance their "personal estate tax strategies," and that the effects of the resulting decrease in the rent on the property will be felt by all partners. Moreover, any pecuniary loss plaintiffs suffer derives from harm to Norsel. Thus, plaintiffs' claims are derivative (*see Yudell v Gilbert*, 99 AD3d 108, 114-115 [1st Dept 2012]; *Ganzi v Ganzi*, 144 AD3d 510, 511 [1st Dept 2016]).

We perceive no conflict of interest that would prevent plaintiffs from fairly representing Norsel's interests. In a separate derivative action by plaintiff Leon Pokoik against other Pokoik family members, who are also defendants in this action, we found that Pokoik's relationship with defendants had not been shown to be "so acrimonious or emotional as to demonstrate that plaintiff cannot act as an adequate representative for the companies" (*Pokoik v Pokoik*, 146 AD3d 474, 475 [1st Dept 2017]). Nor is there in the present record any indication of an especially acrimonious relationship between the parties.

The factual issue whether plaintiffs' proposed appraisal is "extremely high" and will have a negative impact on Norsel's business cannot be resolved on this pre-answer motion to dismiss.

On the prior appeal, we found that plaintiffs rebutted the

presumption of the business judgment rule as to Michael L. Steinberg, Jay Lieberman, and Norsel (except with respect to the ninth cause of action, which had not yet been asserted) and that the allegations against 575 Realties, Inc., 575 Associates, LLC, and Steinberg & Pokoik Management Corp. were insufficient (*Pokoik v Norsel Realties*, 138 AD3d 493, 494-95 [1st Dept 2016]). Nothing in the amended complaint alters that conclusion. There is no allegation that the remaining partner defendants were aware of plaintiffs' competing property appraisal; therefore there is no allegation of misconduct on their part (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] [elements of breach of fiduciary duty claim]).

The ninth cause of action fails to state a claim for breach of fiduciary duty based on the transfer of the property and the rights under the lease from Norsel to defendant Norsel Realties LLC, because it does not allege damages (*see id.*).

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5915-
5916 The People of the State of New York,
Respondent,

-against-

Salvatore Rinaldi,
Defendant-Appellant.

Ind. 5582/13
SCI 3634/14

_____

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

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

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Judgments, Supreme Court, New York County (Eduardo Padró, J. at plea and initial sentencing; Edwina Richardson-Mendelson, J. at resentencing), rendered October 14, 2015, as amended May 25, 2017, convicting defendant, upon his pleas of guilty, of grand larceny in the fourth degree (four counts), criminal possession of stolen property in the fourth degree and petit larceny, and sentencing him to an aggregate term of four to eight years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be

served concurrently, resulting in a new aggregate term of two to four years, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5917- Index 101282/16
5917A In re Nikaurys Martinez, et al.,
Petitioners,

-against-

William J. Bratton, etc., et al.,
Respondents.

_____

Worth, Longworth & London, LLP, New York (Howard B. Sterinbach of counsel), for petitioners.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

_____

Determinations of respondents, dated June 23, 2016, which imposed forfeitures of 15 vacation days on petitioners based upon a finding that they improperly struck a civilian, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Arlene P. Bluth, J.], entered January 31, 2017), dismissed, without costs.

Substantial evidence supports the determination that petitioners struck a civilian while he was rear-handcuffed (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). The unequivocal eyewitness testimony of a police sergeant, which was credited by the Assistant Deputy Commissioner of Trials, and was supported by her

contemporaneous report of the incident to the Internal Affairs Bureau, established petitioners' guilt. There exists no basis to disturb the credibility determinations of the Assistant Deputy Commissioner of Trials (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]; *Matter of Kissh v Kerik*, 304 AD2d 332 [1st Dept 2003]).

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5918-
5919 In re William Maragh E., etc.,

A Child Under the Age of Eighteen Years,

Shaunette W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Leroy R.,
Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

Larry S. Bachner, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Gilbert A. Taylor, J.), entered on or about May 12, 2017, which, to the extent appealed from, granted petitioner agency's motion for summary judgment on the claim of derivative neglect as against respondent Shaunette W., unanimously affirmed, without costs.

Petitioner made a prima facie showing of derivative neglect as to the subject child through prior orders, issued just three months before this neglect proceeding was commenced, terminating respondent's parental rights to her three older children upon a

finding by clear and convincing evidence that she had permanently neglected them (*see* Family Court Act § 1046[a][i]; *Matter of Phoenix J. [Kodee J.]*, 129 AD3d 603, 604 [1st Dept 2015]; *Matter of Cruz*, 121 AD2d 901 [1st Dept 1986]). The orders underlying the termination of respondent's parental rights, issued in 2007 and 2011, found that respondent neglected two of the children by reason of her failure to treat her longstanding mental illness (*see* Social Services Law § 384-b[4][c]). In support of its motion, petitioner also submitted a caseworker's affidavit demonstrating that respondent continued to show a lack of insight into the conditions that had led to the older children's removal and that she needed direction in handling the subject child.

In opposition, respondent failed to rebut the resulting presumption that she continues to suffer from a mental illness that renders her unable to care for a child for the foreseeable future (*see Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 42 [1st Dept 2010]; *Matter of Phoenix J.*, 129 AD3d at 604; *Matter of Takia B. [Antoine N.]*, 73 AD3d 575, 576 [1st Dept 2010]). Respondent relied on the testimony of a psychologist who testified at a hearing on her application for the return of the child (*see* Family Court Act § 1028) that she was currently stable, that she reported that she was attending therapy regularly, and that she handled the infant child very well during

a 30-minute session. The psychologist also acknowledged respondent's long history of serious mental illness with violent outbursts and psychotic episodes and that respondent was not taking any medication and would not do so. Even if respondent's condition improved in the three months between the termination of her parental rights to the three older children and the commencement of this proceeding, the evidence of her long-term failure to comply with medical treatment for her mental illness demonstrates, as a matter of law, a "'fundamental defect in [her] understanding of the duties of parenthood'" that renders her unable to care for a child for the foreseeable future (*Matter of T-Shauna K.*, 63 AD3d 420, 420 [1st Dept 2009]; *see Matter of Noah Jeremiah J.*, 81 AD3d at 42; *see generally Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 182 [1994]).

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5920 Anthony Carino, etc., et al., Index 301937/09
Plaintiffs-Appellants,

-against-

Umangi Patel, M.D.,
Defendant-Respondent,

Peter Wiernick, M.D., et al.,
Defendants.

_____

La Sorsa & Beneventano, White Plains (Gregory M. La Sorsa of counsel), for appellants.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered on or about August 27, 2015, which, insofar as appealed from as limited by the briefs, granted defendant Umangi Patel, M.D.'s motion for summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, and the motion denied.

The decedent suffered from chronic myeloid leukemia, a form of cancer characterized by overproduction of white blood cells, which can be managed by use of a tyrosine kinase inhibitor (TKI) such as Gleevec, Dasatinib, or Nilotinib. Plaintiff alleges that when the decedent's liver function was found to be abnormal, defendant Dr. Patel negligently discontinued Gleevec without

substituting Dasatinib or Nilotinib, thereby causing the worsening of decedent's condition and his eventual death. Plaintiff alleges alternatively that Dr. Patel should have instituted a concurrent corticosteroid regimen to combat liver toxicity before the decedent's liver function became severely impaired.

Defendant established prima facie that she did not depart from good and accepted medical practice (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]). Her expert opined that she appropriately discontinued Gleevec, that Nilotinib and Dasatinib were not generally available in 2006 and, at any rate, bore the same risk of liver toxicity, and that the use of corticosteroids was not generally recognized to combat liver toxicity.

In opposition, plaintiff raised an issue of fact through her expert affirmation (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]). Plaintiff's expert's opinions conflict with defendant's expert's opinions as to whether it was appropriate to discontinue TKIs completely for any period of time and whether the discontinuance could have caused the decedent's condition to worsen, whether Dasatanib could appropriately have been substituted for Gleevec (no issue of fact was raised as to Nilotinib's availability in 2006), and whether the use of

corticosteroids to combat liver toxicity was generally accepted in 2006.

In light of the foregoing, we do not reach the issue whether the materials submitted by Dr. Patel on and after reply were properly considered.

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5922-
5922A Samuel Mininni,
Plaintiff-Respondent,

-against-

Department of Housing Preservation
and Development,
Defendant-Appellant,

Hutchinson Parkway Apartment, Inc.,
Defendant.

Index 260584/13

Zachary W. Carter, Corporation Counsel, New York (Eric Lee of counsel), for appellant.

Elaine Shay, New York, for respondent.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered May 13, 2014, which granted plaintiff's motion to stay eviction proceedings and annul the determination of defendant Department of Housing Preservation and Development (HPD), dated July 1, 2002, denying him succession rights to a Mitchell-Lama apartment, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered September 24, 2015, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

This action is barred by the four-month limitations period applicable to proceedings brought pursuant to CPLR article 78

(*see* CPLR 217[1]). Plaintiff's mere assertion that he did not receive notice of HPD's July 1, 2002 denial of his claim for succession rights is insufficient to rebut the presumption of proper notice created by affidavits by two HPD employees attesting that envelopes containing copies of HPD's final determination were addressed to plaintiff's address, stamped with first-class postage, and placed in an official depository of the United States Postal Service on July 1, 2002 (*see DeLuca v Smith*, 146 AD3d 732, 732 [1st Dept 2017]).

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5923- Ind. 3734/14
5923A The People of the State of New York, 2422/16
Respondent,

-against-

Jeffrey Foster,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Roger Hayes, J.), rendered August 18, 2015 and July 22, 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: MARCH 8, 2018

CLERK

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

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5924- Index 601705/07
5925
5926 International Finance Corporation,
Plaintiff-Appellant,

-against-

Carrera Holdings Inc., et al.,
Defendants-Respondents.

_____

White & Case LLP, New York (Francis A. Vasquez, Jr. of counsel), for appellant.

Richards Kibbe & Orbe LLP, New York (Steven Paradise of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered July 25, 2017, after a nonjury trial, dismissing the first cause of action for breach of contract, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered June 24, 2016, which, inter alia, denied plaintiff's motions to strike testimony and for an adverse inference, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff commenced this breach of contract action after defendants refused to buy out its share in Giavoni Manufacturing, a joint venture limited liability company majority-owned and -controlled by defendants that manufactured textiles in Tajikistan. The parties' Put Option Agreement allowed plaintiff

to exit the investment by requiring defendants to buy back plaintiff's share for a price determined by a formula in the agreement. However, defendants would not be obligated to pay the Put Price if there occurred an "Expropriatory Event," defined in the agreement to include governmental action that has "the effect of changing ownership or control" of Giavoni and actions that "prevent it or its officers from carrying on all or a substantial part of its business or operations."

The trial court correctly found that the expropriatory clause was ambiguous as to whether an event amounting to complete nationalization of the company was required, and, upon consideration of extrinsic evidence, correctly concluded that the parties intended the term, as defined in the Put Option Agreement, to encompass a broader range of events (*compare CT Inv. Mgt. Co., LLC v Chartis Specialty Ins. Co.*, 130 AD3d 1, 4 [1st Dept 2015] [defining "Expropriatory Act" as an "expropriation, confiscation, nationalization, requisition, or sequestration by law" that violates international law or materially alters local law]). In particular, in the exchanges of prior drafts of the expropriatory clause, the parties agreed to delete a provision that would have excluded from the definition of Expropriatory Events any conduct "not for the purpose of expropriation, requisition, confiscation,

nationalization or the like."

The court correctly found that there was sufficient evidence that an Expropriatory Event had occurred. The Expropriatory Event consisted of the Tajik government's failure to refund the value added tax, imposition of illegal customs duties, hundreds of annual tax audits and warrantless inspections, and imposition of illegal taxes, all of which prevented Giavoni "from carrying on all or a substantial part of its business or operations." Plaintiff disputes whether these events occurred or had an impact of the magnitude that defendants represent. However, defendants' claims are corroborated by the documentary evidence. Indeed, plaintiff found the issues sufficiently compelling to intervene and negotiate with the Tajik government on defendants' behalf. In addition, labor disruptions by the Tajik government, which compelled Giavoni workers to leave work and harvest cotton while Giavoni continued to pay them, exacerbated the effects of the government's conduct and amounted to an Expropriatory Event.

The court correctly applied an objective standard to the Satisfaction Clause of the Put Option Agreement, which allowed defendants to rely on the Expropriatory Event and be relieved of their obligation to pay plaintiff if, "to [plaintiff's] satisfaction," they "made all reasonable efforts to mitigate the effect of such Expropriatory Event" (*see Blask v Miller*, 186 AD2d

958, 960 [3d Dept 1992]). The court correctly found that plaintiff's dissatisfaction with defendant's efforts was unreasonable. Among other things, defendants kept Giavoni afloat by extending millions of dollars in loans and buying shares of another company that was acting adversely to Giavoni's interests. They challenged the tax fine in court and obtained a reduced fine, and sought legal assistance in dissuading the Tajik government from its conduct. Defendants also kept plaintiff apprised of the government's actions and of the fiscal impact on Giavoni, notwithstanding their failure to strictly comply with a separate provision of the Put Option Agreement regarding annual audits.

The court properly admitted the testimony of Imerio Tacchella, the president not only of defendant Carrera S.P.A. but also of Giavoni, who described his familiarity with Giavoni's books and records and with effects of the Tajik government on Giavoni's operations, and who thus had a basis of knowledge on which to testify about those topics.

The court erred in concluding that Carrera S.P.A.'s principal Vivek Jacob's deposition testimony was admissible under CPLR 3117(a)(2), which permits deposition testimony of an officer of a party for use "by any party who was adversely interested when the deposition testimony was given or who is adversely

interested when the deposition testimony is offered in evidence." Carrera, which offered the testimony in evidence, was not a party adverse to Jacob at the time when he was deposed or at trial. Nevertheless, the court correctly concluded that Jacob's testimony was admissible under CPLR 3117(a)(3)(I) because he was deceased by the time of trial. To the extent portions of Jacob's testimony were not based on his personal knowledge of the Tajik government's interference with operations at Giavoni (*see Wathne Imports, Ltd. v PRL USA, Inc.*, 125 AD3d 434 [1st Dept 2015]; *Eustaquio v 860 Cortlandt Holdings, Inc.*, 95 AD3d 548 [1st Dept 2012]), there is other evidence to support those facts, and plaintiff was not prejudiced by any error in admitting that testimony (*see* CPLR 2002).

Plaintiff waived any objection to defendants' failure to produce relevant financial documents, the existence of which it was aware of as early as 2009 (well before trial in 2015), by

filing its note of issue and certificate of readiness (*see* *Fernandez v City of New York*, 84 AD3d 595 [1st Dept 2011]).

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5927 In re Free Market Environmental Law Clinic, et al., Petitioners-Appellants, Index 101759/16

-against-

The Attorney General of New York, Respondent-Respondent.

_____

Law Office of Francis Menton, New York (Francis Menton of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Linda Fang of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Manuel J. Mendez, J.), entered May 22, 2017, denying the petition to, inter alia, compel respondent, pursuant to the Freedom of Information Law, to produce all records pertaining to a February 2015 meeting between respondent and representatives of nonparty Eco-Accountability and October and November 2015 meetings between respondent and representatives of nonparty Fahr LLC, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent met its burden of showing that the records withheld were compiled for law-enforcement purposes (*see Matter of Lesher v Hynes*, 19 NY3d 57, 67 [2012]; *Matter of Loevy & Loevy v New York City Police Dept.*, 139 AD3d 598, 599 [1st Dept 2016];

Public Officers Law § 87[2][e][I]). Given respondent's broad investigatory powers (*see People v Grasso*, 54 AD3d 180, 204 [1st Dept 2008]), we decline to question to what extent, if any, respondent's decision to initiate the investigation to which the subject meetings were related was motivated by political considerations (*see People v Bunge Corp.*, 25 NY2d 91, 97-98 [1969]; *Salnikova v Cuomo*, 93 AD3d 445 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]).

Supreme Court did not abuse its discretion in declining to consider petitioners' postargument submissions (*see* e.g. *Foitl v G.A.F. Corp.*, 64 NY2d 911, 913 [1985]).

In view of the foregoing, we need not consider whether some of the documents were also exempt from production as intra-agency materials (Public Officers Law § 87[2][g]).

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5928 The People of the State of New York, Respondent, Ind. 3555/14

-against-

Samuel Rojas, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael J. Yetter of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered February 11, 2015, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him to a term of six months, unanimously affirmed.

Defendant's challenge to his plea is unpreserved, and we decline to review it in the interest of justice. The narrow exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666 [1988]) does not apply, because "[d]efendant said nothing during the plea colloquy or the sentencing proceeding that negated an element of the crime or raised the possibility of a . . . defense" (*People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]). Defendant asserts that he made an exculpatory statement when he was interviewed in connection with a presentence report.

While such an interview may be conducted in anticipation of sentencing, it is not part of the actual sentencing proceeding, which occurs in open court. We have repeatedly held that the *Lopez* exception does not apply to statements in presentence reports. We so held in *Pastor* (136 AD3d 493, 493 [1st Dept 2016]), which the Court of Appeals affirmed.

As an alternative holding, we find no basis on which to vacate the plea. As noted, the sentencing court had no obligation to conduct a sua sponte inquiry into defendant's out-of-court statement. Moreover, the allegedly exculpatory statement about how defendant acquired the drugs at issue did not directly negate the element of intent to sell.

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5929 Federal Insurance Company as subrogee of Engel Burman Senior Housing at East Northport LLC, Plaintiff-Respondent, Index 158256/14E

-against-

Lakeville Pace Mechanical Inc., Defendant-Appellant.

_____

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for appellant.

Mischel & Horn, P.C., New York (Lauren E. Bryant of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about July 26, 2017, which denied defendant's motion to amend its answer to include the affirmative defense of statute of limitations, and, upon such amendment, to dismiss the complaint on statute of limitations grounds, unanimously affirmed, with costs.

Defendant waited more than two years to move to amend its answer to include the statute of limitations defense, arguing that plaintiff's construction negligence claim, with a three-year statute of limitations (CPLR 214[4]), was untimely.

Moreover, defendant made its motion almost immediately after the expiration of the six-year limitations period (by defendant's calculation) in which plaintiff could have brought the same

action as a breach of contract, even though all of the facts relied upon by defendant were known to it at the time it filed its original answer. Plaintiff, relying on defendant's waiver of any statute of limitations defense (CPLR 3211[e]), was prejudiced by the loss of the opportunity to interpose a timely breach of contract claim, which it could have done "had the original pleading contained what the [proposed] amended one wants to add" *Armstrong v Peat, Marwick, Mitchell & Co.*, 150 AD2d 189, 190 [1st Dept 1989]).

The motion court properly concluded that these circumstances warranted denial of defendant's motion (*see* CPLR 3025[b]).

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5930 The People of the State of New York, Respondent, Ind. 3065/11

-against-

Keon Smith, 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 (Christopher P. Marinelli of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered July 26, 2012 convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree and unlawful possession of marijuana, and sentencing him to a term of six years and a $25 fine, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]. There is no basis for disturbing the jury's credibility determinations. The police account of the incident was not so implausible as to require a different conclusion (*see e.g. People v Lewis*, 136 AD3d 468 [1st Dept 2016], *lv denied* 27 NY3d 1001 [2016]), and the

absence of any DNA from defendant on the pistol at issue was sufficiently explained.

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5931 In re Mary Ann Nicole Le Monda, Petitioner-Appellant, Index 108161/10

against

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

Rutkin & Wolf PLLC, White Plains (Carmine Lippolis of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Melanie T. West of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 2, 2016, which denied petitioner's motion to vacate the January 15, 2013 dismissal of the proceeding brought pursuant to CPLR article 78 and restore the matter to the calendar, unanimously affirmed, without costs.

The motion, belatedly made more than three years after the pre-note of issue action had been dismissed after both petitioner and her counsel failed to appear at a status conference, was properly denied.

Petitioner's bare and unsubstantiated assertion of law office failure by her prior counsel is insufficient to establish a reasonable excuse for the default (*see Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [1st Dept 2010], *lv*

dismissed 15 NY3d 863 [2010]; *Perez v New York City Hous. Auth.*, 47 AD3d 505 [1st Dept 2008]). Because petitioner failed to proffer an acceptable excuse for the default, it is not necessary to determine whether there is any merit to the petition (*see Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]).

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

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5932 The People of the State of New York, Ind. 2066/75
Respondent,

-against-

Arsenio Santiago,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kristian D. Amundsen of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about March 3, 2017, which adjudicated defendant a risk level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately accounted for by the risk assessment instrument, or

were outweighed by the seriousness of the underlying offenses, in which defendant brutally attacked and raped two women.

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5933 The People of the State of New York, Respondent, Ind. 3136/14

-against-

Carl Davis, Defendant-Appellant.

_____

Stanley Neustader, Cardozo Appeals Clinic, New York (Jonathan Oberman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Larry R.C. Stephen, J. at suppression hearing; Thomas Farber, J. at jury trial and sentencing), rendered May 26, 2015, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of eight years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Here, the officers knew that both the location and this particular defendant were associated with gang activity and violent crime. The police had, at least, reasonable suspicion to stop and frisk defendant, where defendant repeatedly adjusted an apparent object in his waistband, the

officers saw an actual bulge in the waistband, and defendant made a "shooting" hand gesture to his companions. "Each of these circumstances, when viewed in isolation, might be considered innocuous, but when viewed in totality they provided reasonable suspicion of criminality" (*People v Rodriguez*, 71 AD3d 436, 437 [1st Dept 2010], *lv denied* 15 NY3d 756 [2010]).

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5934-
5934A Index 158411/12

Pedro Merino,
Plaintiff-Appellant-Respondent,

Marcissa Artiaga,
Plaintiff,

-against-

Continental Towers Condominium,
et al.,
Defendants-Respondents-Appellants.

_____

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellant-respondent.

Vigorito, Barker, Porter & Patterson, LLP, Valhalla (Adonaid C. Medina of counsel), for respondents-appellants.

_____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered November 7, 2016, to the extent appealed from as limited by the briefs, dismissing plaintiff Pedro Merino's Labor Law § 240(1) claim against defendant Rose Associates, Inc., dismissing plaintiff's Labor Law § 241(6) claim against both defendants, and bringing up for review an order, same court and Justice, entered October 28, 2016, which denied defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim as against defendant Continental Towers Condominium, granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim and denied plaintiff's cross

motion for summary judgment as to liability on his Labor Law § 240(1) claim, unanimously modified, on the law, to vacate the dismissal of plaintiff's Labor Law § 240(1) claim against Rose Associates, reinstate the claim, and grant plaintiff's cross motion for summary judgment as to liability on his Labor Law § 240(1) claim, and otherwise affirmed, without costs. Appeal from the foregoing order, unanimously dismissed, without costs.

The motion court erred in determining that Rose Associates is not an agent of defendant owner Continental Towers Condominium. Labor Law §§ 240(1) and 241(6) impose absolute liability on owners, contractors, and their agents for a statutory violation resulting in injury, regardless of whether they directed or controlled the work (*Ragubir v Gibraltar Mgt. Co., Inc.*, 146 AD3d 563, 564 [1st Dept 2017]). Thus, the test of whether a defendant is a statutory agent subject to liability under those sections is not whether it actually supervised the work, but whether it had the authority to do so (*Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 525 [1st Dept 2009]). While Continental's resident manager may have been unaware of what tasks Rose Associates performed as Continental's managing agent, defendants point to no evidence in the record that Rose Associates lacked such authority.

Nevertheless, the motion court correctly dismissed the Labor

Law § 241(6) claim insofar as it was predicated on Industrial Code (12 NYCRR) § 23-1.21(b)(4)(ii) and (e)(3). Plaintiff's testimony established that there was no violation of either provision of the Industrial Code.

The motion court properly considered plaintiff's cross motion on the merits (*Brill & Meisel v Brown*, 113 AD3d 435, 435 [1st Dept 2014]; *see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]). However, the court should have granted plaintiff's cross motion, as the evidence establishes that plaintiff slipped or fell from an unsecured ladder upon which he was working because it moved (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [1st Dept 2002]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271, 271-272 [1st Dept 1999]). The testimony of plaintiff's coworker that plaintiff stated he slipped was "not inconsistent with plaintiff's version that he slipped after the

ladder moved" (*Wasilewski*, 260 AD2d at 272). Moreover, defendants' expert affidavits asserting that no force acted upon the ladder that could have caused it to move were speculative.

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5935 The People of the State of New York, Ind. 2802/13
Respondent,

-against-

Norberto Torres,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered December 17, 2014, as amended January 21, 2015, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree, attempted criminal sexual act in the first degree and sexual abuse in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

The court was not obligated to appoint new counsel for defendant at sentencing in connection with his motion to withdraw his guilty plea. The remarks by defense counsel, which preceded defendant's oral motion, that defendant contends were adverse to his motion did not reach the level of creating a conflict of interest. When counsel's conduct is challenged in a plea withdrawal motion, "defense counsel should be afforded the

opportunity to explain his performance with respect to the plea, but may not take a position on the motion that is adverse to the defendant" (*People v Mitchell*, 21 NY3d 964, 967 [2013] [citation omitted]). Furthermore, through its own familiarity with the case, the court readily recognized the motions's lack of merit, independently of anything said by counsel.

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

ENTERED: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5936 The People of the State of New York, Ind. 3400/15
Respondent,

-against-

Julio Garcia,
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 (Larry Stephen, J.), rendered November 24, 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: MARCH 8, 2018

CLERK

Renwick, J.P., Richter, Andrias, Kapnick, Kahn, JJ.

5937N John Whitfield, Index 400242/11
Plaintiff-Appellant,

-against-

Q-Boro Books, et al.,
Defendants.
- - - - -
Paul A. Chin, Esq.
Nonparty Respondent.

_____

John Whitfield, appellant pro se.

Paul A. Chin, New York, respondent pro se.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 10, 2017, which denied plaintiff's motion to hold nonparty witness Paul A. Chin in civil contempt of court for disobeying a trial subpoena, unanimously affirmed, without costs.

CPLR 2303(a) provides, in relevant part, that "a subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons." Here, plaintiff admitted that he did not properly serve Chin with the trial subpoena. Because

service was improper, there was no lawful judicial order in effect for Chin to disobey (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]).

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

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5938 The People of the State of New York, Ind. 4442/13
Respondent,

-against-

Eric Johnson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Ronald A. Zweibel, J. at jury trial and sentencing), rendered September 3, 2015, as amended November 18, 2015, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a second violent felony offender, to a term of 13 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Any illegality in the police officer's initial approach was attenuated by defendant's sudden and aggressive acts of charging at and attacking the officer (*see People v Wesley*, 290 AD2d 244 [1st Dept 2002], *lv denied* 98 NY2d 703 [2002]).

The verdict 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 resolution of minor inconsistencies in the arresting officers' testimony.

The court provided a meaningful response to the jury's request for clarification of the possession element (*see People v Steinberg*, 79 NY2d 673, 684 [1992]). To the extent there was any error, it was harmless (*see People v Badalamenti*, 27 NY3d 423, 439 [2016]).

The portions of the prosecutor's summation that defendant characterizes as speculative and burden-shifting constituted proper commentary on the evidence and a fair response to defense counsel's summation (*see e.g. People v Kowlessar*, 82 AD3d 417 [1st Dept 2011]; *People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]).

Defendant did not preserve his other challenges to the prosecutor's summation, his claim – which is also unreviewable for lack of a sufficient record - that the court unduly restricted his impeachment of police witnesses by (unspecified) allegations contained in lawsuits against them, and his complaint about the procedure employed when the trial justice became medically unavailable to preside over the end of jury

deliberations. Each of these claims requires preservation, and we decline to review any of them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5939 James P. McGinnis, Jr., Index 350117/12
Plaintiff-Respondent,

-against-

Jodi A. McGinnis,
Defendant-Appellant.

_____

Henry James Joseph, Brooklyn, for appellant.

Jo Ann Douglas Family Law, PLLC, New York (Jo Ann Douglas of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ellen F. Gesmer, J.), entered March 7, 2016, bringing up for review two orders, same court and Justice, entered July 17, 2015 and February 1, 2016, which, following two hearings, and to the extent appealed from as limited by the briefs, (1) transferred custody of the parties' child to plaintiff father, (2) limited defendant mother's contact with the child to twelve hours of supervised visits per week, at defendant's sole expense, and (3) awarded counsel fees and expenses to plaintiff in the amount of $132,030.60, unanimously affirmed, without costs.

The father established that there has been a sufficient change of circumstances such that a modification of the custody arrangement was in the child's best interests (*Matter of Luis F. v Dayhana D.*, 109 AD3d 731 [1st Dept 2013]). The mother's lack

of insight, poor judgment, efforts to minimize the father's relationship with the child and multiple, unsubstantiated claims of abuse – as well as her refusal to return to New York in violation of the parties' settlement agreement until compelled to do so by the court – all support the IAS court's findings.

A parent's repeated allegations of abuse are acts of interference with the parental relationship "so inconsistent with the best interests of the child[]" that it raises a strong probability of unfitness (*Matter of Abramson v Shaw*, 154 AD3d 744, 745 [2d Dept 2017]). It is also apparent that the mother is unwilling to ensure meaningful contact between the child and her father (*see Bliss v Ach*, 56 NY2d 995 [1982]). Where "sharp differences" between the parties exist, as they do here, an award of joint custody is inappropriate (*id.* at 998).

We reject the mother's argument that the father cannot show a "change of circumstances" because many of the conditions he relies upon existed at the time the parties entered into the settlement agreement. It is evident that the mother's allegations and false claims against the father became more serious and persistent as time went on, and thus what may have been a minor concern to the court in the underlying matrimonial proceeding has evolved into serious issues that it properly addressed to account for the child's best interests. A "change

of circumstances" is also evident through the mother's failure to move to a "Qualified Residence" by the agreed-upon deadline in the settlement agreement, which the parties agreed was a material provision and the breach of which was contrary to the child's best interests.

The IAS court's award of attorney's fees to the father in connection with Motion Sequences 9 and 10 was within its discretion and supported by the plain terms of the parties' settlement agreement.

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

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

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5940 In re Alquidamia E. R.,
Petitioner-Respondent,

-against-

Luis A.,
Respondent-Appellant.

_____

Andrew J. Baer, New York, for appellant.

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

_____

Order, Family Court, Bronx County (John J. Kelley, J.), entered on or about October 29, 2015, which, upon a fact-finding determination that respondent committed the family offense of harassment in the second degree, granted the petition for a two-year order of protection in favor of petitioner and her minor son, unanimously modified, on the law and the facts, to remove reference to petitioner's son from the order of protection, and otherwise affirmed, without costs.

The Family Court properly granted the petition, as petitioner established by a preponderance of the evidence that respondent, her husband, committed the act of harassment in the second degree by physically shoving her and making threats of physical violence toward her while having the requisite intent to harass, annoy or alarm her (*see* Penal Law § 240.26[1]).

Family Court's determination regarding the credibility of petitioner's testimony is entitled to great deference, and there is no basis to disturb its findings (*Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]; *see also Andrews v Mouzon*, 80 AD3d 761, 763 [2d Dept 2011]).

The order of protection should be modified to the extent indicated as there is no evidence in the record to support extending the order to petitioner's son. Although the order of protection has expired, modification is warranted as there may be additional consequences for respondent as a result of the order (*see Matter of Veronica P. v Radcliff A.* (24 NY3d 668 [2015]).

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

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5943 Monsour Al-Kabyalle, Index 20222/15E
Plaintiff-Respondent,

-against-

Hamad Ali,
Defendant-Appellant,

New Brothers Realty Corp., et al.,
Defendants.

_____

Christopher Lynn, New York, for appellant.

Sibilla Alessi Pantano Gupta LLC, New York (Vyacheslav (Steve) Polyakov of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered August 25, 2017, which denied the motion of defendant Hamad Ali for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On a prior motion, plaintiff submitted an affidavit stating that his signature on a Unanimous Written Consent of the Directors of New Brothers Realty Corp. had been forged. On the instant motion, defendant Ali submitted the affidavit of a handwriting expert, who said he was virtually certain that the signature on the consent was by the same person who signed seven exemplars. However, the expert did not describe the exemplars, nor are they in the record. Under these circumstances, Ali failed to show that

plaintiff's signature was genuine (*see e.g.* CPLR 4536; *Kanterakis v Minos Realty I, LLC*, 151 AD3d 950, 952 [2d Dept 2017]).

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

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5944 The People of the State of New York, Ind. 2912/16
Respondent,

-against-

Mark Chimelis,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin 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 (Shari Michels, J.), rendered October 24, 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: MARCH 8, 2018

CLERK

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

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5945- Index 106717/11
5945A Deidre Holmes Clark,
Plaintiff-Appellant,

-against-

Allen & Overy, LLP,
Defendant-Respondent.

_____

Deidre Holmes Clark, appellant pro se.

Proskauer Rose LLP, New York (Rachel S. Fischer of counsel), for respondent.

_____

Orders, Supreme Court, New York County (Kathryn E. Freed, J.), entered August 19, 2016, which, inter alia, denied plaintiff's motion to renew defendant's motion to place the file under seal, denied as moot plaintiff's motion to reargue a September 29, 2015 compliance conference order setting forth "Additional Directives," and granted defendant's motions to dismiss the complaint pursuant to CPLR 3126 and for sanctions, and directed plaintiff to pay $5,000 to the Lawyers' Fund for Client Protection pursuant to 22 NYCRR 130-1.1.(a) and to pay defendant its costs and attorneys' fees incurred in bringing the motion for sanctions, unanimously affirmed, without costs, as to plaintiff's motion to renew and defendant's motions, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Contrary to plaintiff's contention, she failed to comply with a court order that she undergo an independent medical examination (IME order). Plaintiff appealed from the IME order, and this Court affirmed (*see Clark v Allen & Overy, LLP*, 125 AD3d 497 [1st Dept 2015], *lv dismissed* 25 NY3d 1015 [2015], *cert denied* ___ US ___, 136 S Ct 553 [2015]). Nevertheless, plaintiff continued to refuse to schedule or sit for the IME. At a compliance conference held on September 29, 2015, the court ordered plaintiff to undergo an audiotaped IME on November 11, 2015, or face sanctions, including the dismissal of the complaint. On November 11, 2105, plaintiff appeared at the examiner's office. However, she refused to take the microphone to be audiotaped, and she informed the examiner that she would go to the police and charge him with false imprisonment and assault if he proceeded with the examination without her consent. The examiner stopped the examination. Under the circumstances, the court properly dismissed the complaint for noncompliance pursuant to CPLR 3126 (*see generally Muboyayi v Quintero*, 136 AD3d 497 [1st Dept 2016], *lv dismissed in part, denied in part* 27 NY3d 1046 [2016]).

The court properly imposed financial sanctions on plaintiff for frivolous conduct pursuant to 22 NYCRR 130-1.1. Defendant submitted evidence that plaintiff violated the court's sealing

orders by posting about the case to her social media networks in an effort to "harass or maliciously injure [defendant]" (22 NYCRR 130-1.1[c][2]). Moreover, in her opposition to defendant's motion to strike the note of issue, plaintiff falsely represented that she had not refused to sit for the IME and that discovery had been waived (*see* 22 NYCRR 130-1[c][3]).

The denial of a motion for reargument is not appealable (*Sicoli v Riverside Ctr. Parcel 2 Bit Assoc., LLC*, 150 AD3d 607 [1st Dept 2017]).

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

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

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5946 The People of the State of New York, Ind. 1107/14
Respondent,

-against-

Luis Robles,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Conrad Johnson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered May 8, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the fifth degree and criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to concurrent terms of three years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis to disturb the jury's credibility determinations.

The court providently exercised its discretion in admitting evidence showing that the prescription pill bottle recovered from defendant contained only 24 pills, while bearing a label indicating that he had filled a prescription for 60 pills the day

before his arrest and containing instructions to take one tablet twice a day. Although this evidence permitted an inference that defendant had made uncharged sales, it tended to establish intent to sell, an element of the possession charge (*see People v Alvino*, 71 NY2d 233, 245 [1987]), and its probative value was not outweighed by any prejudicial effect.

The absence of a hearing under *People v Ventimiglia* (52 NY2d 350 [1981]) was harmless because this evidence was plainly admissible and the lack of an advance ruling could not have caused any prejudice (*see People v Sibadan*, 240 AD2d 30, 37 [1st Dept 1998], *lv denied* 92 NY2d 861 [1998]).

To the extent that, after the People's opening statement, defendant raised the issue of a limiting jury instruction regarding this evidence, he abandoned any such request under the circumstances of the trial (*see People v Cobos*, 57 NY2d 798, 802 [1982]), and we decline to review it in the interest of justice.

As an alternative holding, we find that the absence of such an instruction was also harmless (*see People v Williams*, 50 NY2d 996 [1980]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5948 Index 301249/13
83905/13

Atley Gomes,
Plaintiff-Respondent,

-against-

Pearson Capital Partners LLC,
et al.,
Defendants-Appellants,

CRV Construction, et al.,
Defendants.

- - - - -

[And a Third-Party Action]

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas Hurzeler of counsel), for appellants.

Pollack, Pollack, Isaac & Decicco, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered February 8, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim with respect to the December 24, 2012 accident, and which denied the cross motion of defendants Pearson Capital Partners LLC and Congress Builders LLC for summary judgment dismissing the Labor Law § 241(6) claim with respect to the December 24th accident insofar as predicated on Industrial Code (12 NYCRR) § 23-5.1(j), unanimously affirmed, without costs.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim, insofar as related to the December 24th accident. It is undisputed that the subject scaffold did not have railings, toe boards, or cross-bracing, and there was no place for plaintiff to tie off his safety harness. As such, plaintiff established a violation of the statute. Moreover, plaintiff testified that the accident occurred when he was on the scaffold, tripped on a block, and fell backward, off the scaffold to the ground, and his worker's compensation claim also provides that he slipped and fell while on the scaffold. This is sufficient to establish that the violation was a proximate cause of the injury (*see Barreto v Metropolitan Transp. Auth.*, 25 NY3d 426, 433 [2015]; *Wilk v Columbia Univ.*, 150 AD3d 502, 503 [1st Dept 2017]; *Ying Choy Chong v 457 W. 22nd St. Tenants Corp.*, 144 AD3d 591 [1st Dept 2016]).

In opposition, defendant failed to raise a triable issue of fact. We will not consider defendants' hearsay exception arguments, which are raised for the first time on appeal (*see e.g. Gonzalez v New York City Health & Hosps. Corp.*, 29 AD3d 369, 370 [1st Dept 2006]), to raise an issue of fact as to whether plaintiff was the sole proximate cause of the accident. Even if we were to consider such arguments, they are unavailing. The

business record exception is inapplicable, since defendants have not submitted the incident report for the December 24, 2012 accident. The present sense impression exception is also inapplicable, since the out-of-court statement from plaintiff to the foreman that he fell while climbing up the scaffold is not corroborated by independent evidence (*see People v Cantave*, 21 NY3d 374, 382 [2013]). The excited utterance exception does not apply, since defendants have not provided sufficient evidence of plaintiff's mental state or established that he made the hearsay statement to the foreman under the stress of excitement (*see People v Johnson*, 1 NY3d 302, 306 [2003]; *cf. Heer v North Moore St. Devs., LLC*, 61 AD3d 617, 618 [1st Dept 2009]). Furthermore, plaintiff's statement to the foreman does not fall within the declaration against interest exception because plaintiff was available to, and did, testify as a witness; there is no evidence that plaintiff knew the statement was adverse to his interests when it was made; and the supporting circumstances do not attest to its trustworthiness or reliability (*see People v Soto*, 26 NY3d 455, 460-461 [2015]).

Issues of fact regarding the actual height of the scaffold

preclude summary judgment in favor of defendants as to the Labor Law § 241(6) claim insofar as predicated on 12 NYCRR 23-5.1(j).

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

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5949 The People of the State of New York, Respondent, Ind. 1385/15

-against-

Virginia Cruz, 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 (Patricia Nunez, J.), rendered December 3, 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: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5951 The People of the State of New York, Ind. 3902/12
Respondent,

-against-

Asinyefigh Papanye,
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 (David M. Cohn of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered November 28, 2012, convicting defendant, upon his plea of guilty, of forgery in the second degree, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including counsel's plea bargaining strategy and evaluation of the likelihood of success of suppression issues (*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 by negotiating a favorable disposition (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant's excessive sentence argument is moot because he has completed the prison and parole components of his sentence (*see People v Alexander*, 148 AD3d 521 [1st Dept 2017]). Even assuming, arguendo, that defendant's request for a reduction of his already-completed sentence to 364 days is not moot because such relief would affect his deportation situation, we perceive no basis for reducing the sentence. Defendant's cruel and unusual punishment argument is unpreserved and without merit.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 8, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Mazzarelli, Oing, Moulton, JJ.

5954-
5955N Index 650841/13

Gem Holdco, LLC, et al.,
Plaintiffs-Respondents,

-against-

Changing World Technologies, L.P., et al.,
Defendants,

CWT Canada II Limited Partnership,
et al.,
Defendants-Respondents,

Ridgeline Energy Services, Inc.,
et al.,
Defendants-Appellants.

_____

Catafago Fini LLP, New York (Jacques Catafago of counsel), for appellants.

Schlam Stone & Dolan LLP, New York (Bradley J. Nash of counsel), for respondents.

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Appeal from order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about June 3, 2016, which granted the motion of defendants (cross claim plaintiffs) CWT Canada II Limited Partnership, Resource Recovery Corporation and Jean Noelting to hold defendants (cross claim defendants) Ridgeline Energy Services, Inc. (now known as RDX Technologies Corporation) and Dennis Danzik (together, appellants) in civil and criminal contempt for violating the court's orders dated March 18, 2015 and May 5, 2015, and appeal from order, same court

and Justice, entered February 9, 2017, which, among other things, granted the motion of CWT Canada and Resource Recovery to confirm the report of the Special Referee, dated December 13, 2016, and directed the Clerk to enter judgment against appellants, jointly and severally, in the amount of $644,179.76, deemed appeal from judgment, same court and Justice, entered March 7, 2017, and so considered, said judgment, unanimously affirmed, without costs.

Although appellants appealed from orders and not the ensuing final judgment, under CPLR 5520(c) this Court has the discretion to deem the notices of appeal as valid and address the merits of the appeals (*see Old Republic Constr. Ins. Agency of N.Y., Inc. v Fairmont Ins. Brokers, Ltd.*, 112 AD3d 456, 456 [1st Dept 2013]; *Robertson v Greenstein*, 308 AD2d 381 [1st Dept 2003], *lv dismissed* 2 NY3d 759 [2004]).

We also decline to bar the appeals based on the fugitive disentitlement doctrine. That doctrine permits a court to dismiss an appeal in civil cases where the party seeking relief is a fugitive evading the law whose absence frustrates the enforcement of a judgment or order (*see People v Edwards*, 117 AD3d 418, 418 [1st Dept 2014]).

The doctrine applies where the fugitive is a former New York resident who changed residency or otherwise fled to another state in a willful and deliberate effort to avoid the jurisdiction of

the New York courts; was a resident of another state present in New York when an arrest warrant was issued who fled the state in order to avoid an arrest warrant; or, as in *Wechsler v Wechsler* (45 AD3d 470 [1st Dept 2007]), was wanted in New York pursuant to a warrant and refused to return to the state for fear of being arrested in defiance of a separate court order directing the fugitive to appear in court. Absent a clear showing that Danzik took improper steps to avoid extradition, the doctrine does not apply where, as here, he never resided in New York, was not present in New York when the arrest warrant was issued, has not appeared in New York to face the arrest warrant, and has not defied a separate order to appear. This more narrow application of the doctrine satisfies all its principal rationales (*see Empire Blue Cross & Blue Shield v Finkelstein*, 111 F3d 278, 280 [2d Cir 1997]). We also note that there is no basis for applying the doctrine to this corporate appellant.

With respect to the merits of the appeal, we find no support in the record for the claim that the motion court deprived appellants of due process by continuing the contempt

hearing after effectively discharging their prior counsel because appellants retained new counsel to represent them at the hearing.

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

ENTERED: MARCH 8, 2018

CLERK