SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 27, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7134 Piotr Wroble, et al., Index 652382/15
Plaintiffs-Respondents,

-against-

Shaw Environmental & Infrastructure Engineering of New York, P.C., et al.,
Defendants,

SLSCO, L.P. doing business as Sullivan Land Services, Ltd.,
Defendant-Appellant.

_____

Rich, Intelisano & Katz, LLP, New York (Robert J. Howard of counsel), for appellant.

Virginia & Ambinder, LLP, New York (James E. Murphy of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered May 10, 2017, which denied the motion of defendant SLSCO, L.P. to dismiss the amended complaint as against it, unanimously affirmed, without costs.

Defendant SLSCO is a general contractor that entered into a public works contract with the New York City Department of Environmental Protection (DEP) for the repair and restoration of

private homes and multiple dwellings damaged by Hurricane Sandy. SLSCO hired subcontractors, including defendant PMJ Electrical Corp. (PMJ) to perform the work required under the prime contract. SLSCO agreed in the prime contract with the DEP that workers, laborers and mechanics employed on the project by the general contractor, or by a subcontractor or other person, shall be paid prevailing wages common with the respective trades in the locality and would comply with the provisions of Labor Law § 220 concerning the payment of prevailing wages. SLSCO also inserted a clause in the prime contract prohibiting third parties from bringing any "new right of action" under the contract.

Plaintiffs are employees of PMJ. They commenced this action for breach of contract against PMJ and SLSCO, predicated upon a third-party contract beneficiary theory, alleging that PMJ failed to pay them prevailing wages as required by the terms of the prime contract (*see Cox v NAP Constr. Co., Inc.* 10 NY3d 592 [2008]). SLSCO moved to dismiss the cause of action against it, arguing that the express prohibition against third-party beneficiary rights relieved it of any liability, as plaintiffs were not SLSCO employees, and that either PMJ or another company would be liable for paying plaintiffs prevailing wages. This motion was denied.

Labor Law § 220(3) provides, in pertinent part, that wages paid to laborers, workers, or mechanics on a public works project shall be the prevailing rate of wages in that locality, and that the public works contracts, including subcontracts thereunder "shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work shall be paid the wages herein". This statute "has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate" and "must be construed with the liberality needed to carry out its beneficent purposes" (*Wright v Wright Stucco,* 72 AD2d 959, 960 [4th Dept 1979, Cardamone, J., dissenting], *revd for reasons stated in dissenting memorandum*, 50 NY2d 837, 839 [1980]) (quoting *Bucci v Village of Port Chester*, 22 NY2d 195, 201 [1968]). In keeping with this liberal reading of the statute, the courts of this state have consistently held that, in public works contracts, a subcontractor's employees have both an administrative remedy under the statute as well as a third-party right to make a breach of contract claim for underpayment against the general contractor (*Cox,* 10 NY3d at 601-604; *see also Wright* at 910; *Fata v S.A. Healy Co.*, 289 NY 401 [1943]; *Strong v American Fence Constr. Co.*, 245 NY 48, 53

[1927]). Given these precedents, the contract clause prohibiting third-party actions for violation of prevailing wage payments would be void as against public policy (*see e.g. Cox, supra; City of New York v 17 Vista Assoc.*, 84 NY2d 299, 306 [1994]).

SLSCO's argument that Labor Law § 220(3) has no application to the type of services to be provided under the prime contract, is admittedly unpreserved. Were we to reach it, we would find the record is inadequate to make a determination as to whether plaintiffs had a claim of right to prevailing wages for the work they performed (*see De La Cruz v Caddell Dry Dock & Repair Co. Inc.*, 21 NY3d 530, 538 [2013]; *U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 146 AD3d 603 [1st Dept 2017]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Gische, Mazzarelli, Kern, Moulton, JJ.

7160 In re Geronimo Almanzar, et al., Index 100355/16
Petitioners-Appellants,

-against-

City of New York City Civil Service Commission, et al.,
Respondents-Respondents.

_____

Koehler & Isaacs LLP, New York (Liam S. Castro of counsel), for appellants.

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

_____

Judgment (denominated decision and order), Supreme Court, New York County (James E. d'Auguste, J.), entered June 29, 2017, to the extent appealed from, denying the petition to annul a determination of respondent City of New York City Civil Service Commission (CSC), dated November 10, 2015, which terminated petitioners' employment with the New York City Department of Correction (DOC), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The underlying disciplinary proceeding arose out of a physical confrontation between petitioners, who are correction officers, and Robert Hinton, an inmate, inside Hinton's Rikers Island cell. It was not disputed at the hearing that the

officers used significant force against Hinton, causing him to sustain injuries including nasal and spinal fractures. The question was whether the force was excessive and, more precisely, whether Hinton was handcuffed at the time, such that petitioners' allegations that he attacked them and placed one of them in a chokehold, lacked credibility.

DOC called 13 witnesses to testify, and all six of the officers involved in the incident testified on their own behalf. Furthermore, the ALJ personally visited the facility and viewed surveillance video (although there was no video taken inside the cell). Hinton was one of the witnesses presented by DOC. However, petitioners moved for a mistrial, or, alternatively, to strike Hinton's testimony. This was based on the fact that DOC's counsel in the proceeding was replaced mid-hearing because he had provided confidential information to an attorney who was representing Hinton in an action for damages against the City arising from the same incident.[1] The ALJ refused to declare a mistrial, but did strike Hinton's testimony "to rid this proceeding of any taint." Nevertheless, the ALJ considered Hinton's written statement, which was given hours after the

[1] The DOC attorney's employment was later terminated based on his misconduct in this and other matters.

incident in question, and which the ALJ characterized as "generally consistent" with his stricken testimony.

The ALJ also considered statements by seven other inmates who claimed to have been near the cell at the time of the altercation and had an opportunity to see or hear either the incident itself or the aftermath. Only one of the inmates stated that he was able to see directly into Hinton's cell at the time of the confrontation (which the ALJ confirmed after conducting a site visit), and he largely supported Hinton's version of events. None gave a version of events directly supportive of petitioners. Finally, the record reviewed by the ALJ also included a letter from an associate medical examiner in the New York City Office of the Chief Medical Examiner. The examiner stated that he was generally "unable to shed much light on the events" and that he could not "make an assessment . . . whether or not [Hinton] was bound at the time of injury with a reasonable degree of medical certainty."

The ALJ found that the officers were not credible, in part because the injuries they testified about were inconsistent with those recorded in medical reports created after the incident. In contrast, the ALJ found that several of the inmates' statements were credible, while disregarding the other inmates' statements

as, while not lacking credibility, being nonprobative. With respect to the inmate who asserted that he could see into Hinton's cell and saw him being beaten with handcuffs on, the ALJ "found [the] statement credible and accorded it significant weight."

Petitioners appealed to CSC. In a 2-1 decision, insofar as relevant on appeal, CSC affirmed the ALJ's findings and recommendations. The majority declined to consider Hinton's written statement or testimony, in light of the prosecutorial misconduct noted above; however, the majority found the remaining evidence, including the written inmate statements, sufficient to support the ALJ's findings. The dissenting member of CSC found that, inter alia, petitioners were deprived of due process insofar as they were unable to confront their accusers.

Petitioners brought this article 78 proceeding seeking, among other things, to annul the determination, reinstate their employment with full back pay and benefits, and remand the disciplinary matter for a new hearing. Respondents cross-moved to dismiss the petitions. As is relevant to this appeal, the court granted respondents' cross motion, denied the petitions, and dismissed the proceeding. The court rejected petitioners' argument that by relying on the inmates' unchallenged statements,

and declining to assign any error to the ALJ, CSC deprived them of their due process rights to fairly confront their accusers, finding that there was sufficient additional evidence in the record to support CSC's determination.

Civil Service Law § 76(1) permits a person whose civil service employment has been terminated to "appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with [article 78]." If the former option is chosen, "[t]he decision of such civil service commission shall be final and conclusive, and not subject to further review in any court" (Civil Service Law § 76[3]). The Court of Appeals has clarified that, despite the plain language in the statute, judicial review is not completely foreclosed (*Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Commn.*, 78 NY2d 318, 323 [1991]). Rather, the article 78 court, instead of being guided by the substantial evidence or arbitrary and capricious standards of review, is limited to reviewing whether "the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction" (*Matter of Griffin v New York City Dept. of Correction*, 179 AD2d 585 [1st Dept 1992]).

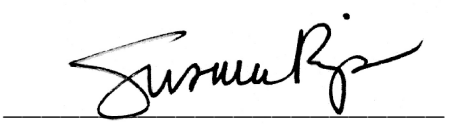
Petitioners argue that CSC acted unconstitutionally because

it relied on the statements of the inmates, who never testified, thus depriving petitioners of any chance to cross-examine them. However, this point is unpreserved. Petitioners fail to point to anything in the record showing that they ever sought to cross-examine or call the inmates and were denied that opportunity. More importantly, they never protested that their constitutional rights were being violated. This Court has "no discretionary authority" to "reach[] an unpreserved issue in the interest of justice" in an article 78 proceeding challenging an administrative determination (*Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001] [internal quotation marks omitted]), including issues touching on due process (*Green v New York City Police Dept.*, 34 AD3d 262, 263 [1st Dept 2006]) and evidentiary challenges (*Matter of Gibbs v New York State Dept. of Motor Vehs.*, 156 AD3d 505 [1st Dept 2017]).

Accordingly, the petition was properly dismissed.

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

ENTERED: NOVEMBER 27, 2018



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

7193 Altagracia Morillo, etc., Index 309649/09
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation, et al.,
Defendants-Respondents.

_____

Mark M. Basichas & Associates, P.C., New York (Aleksey Feygin of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered September 24, 2015, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

After undergoing a procedure at defendant Lincoln Hospital Center's (LHC) gastrointestinal clinic, plaintiff's decedent was found crying and saying that he was depressed, and he was transferred to LHC's emergency department for psychiatric evaluation. The decedent was diagnosed with anxiety disorder NOS, prescribed an anti-anxiety medication, given a follow-up appointment, and discharged later the same day. Two days later, he shot and killed himself. Plaintiff alleges that defendants'

decision to discharge, rather than admit, the decedent was the proximate cause of his death.

Defendants established prima facie that they did not depart from good and accepted medical practice in their treatment of the decedent (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]). Their extensive medical records and deposition testimony by the decedent's treating physicians show that, in response to questioning, the decedent consistently denied having suicidal thoughts or ideation and said that his anxiety stemmed in part from an uncomfortable living situation. In addition, defendants' psychiatric expert opined that defendants had complied with the accepted professional standards of psychiatric care, and that it was appropriate for them to discharge the decedent after evaluation, since he had denied on multiple occasions that he had any suicidal or homicidal ideation, he did not present a danger to himself or others, he did not present with a sudden psychiatric condition, he demonstrated good insight and impulse control, and he displayed sincere concern for his own well-being.

In opposition, plaintiff failed to raise an issue of fact, notwithstanding plaintiff's submission of the affidavit of the decedent's girlfriend, who accompanied him to LHC's emergency department and averred that defendants never inquired as to

suicidal ideation. Plaintiff's expert's opinion that, given the circumstances surrounding decedent's presence in LHC's emergency department for psychiatric evaluation, the decision to discharge him led to his death, is speculative (*see Park v Kovachevich*, 116 Ad3d 182, 191 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]).

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: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7689- Ind. 982/10
7690 The People of the State of New York,
Respondent,

-against-

Lawrence Folks,
Defendant-Appellant.

_____

Rosemary Herbert, Office of The Appellate Defender, New York (Anastasia B. Heeger of counsel), for appellant.

Lawrence Folks, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered July 24, 2013, as amended October 24 and 28, 2013, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, and order (same court and Justice), entered on or about August 13, 2015, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The record supports the court's finding, made after conducting a hearing pursuant to *Massiah v United States* (377 US 201 [1964]), that defendant's right to counsel was not violated

by recorded phone calls between defendant and his cousin, a cooperating witness, made while defendant was incarcerated pending trial. The witness was not a government agent, and there was no "knowing exploitation by the State of any opportunity to confront the accused without counsel being present" (*Maine v Moulton*, 474 US 159, 176 [1985]; *see also United States v Henry*, 447 US 264 [1980]). Nothing in the cooperation agreement made the witness an agent of the prosecution; it merely provided that, in return for certain benefits such as assistance with a parole violation, the witness would give truthful testimony about past events. There was not even an implication that collecting new evidence against defendant would benefit the witness in any way. Moreover, the prosecution did nothing to render it likely that the witness would elicit incriminating evidence. Although the prosecutor had asked the witness to record phone calls from persons who had been engaging in possible witness tampering, defendant himself had not spoken to the witness in more than two years, and the prosecutor never suggested or implied that in the event defendant called her she should also record those calls, let alone that she should elicit any evidence. Finally, any error was harmless because the only evidence derived from the calls consisted of minor consciousness-of-guilt evidence that

added little to the People's case.

The court properly declined to submit to the jury the issue of whether the cooperating witness was an accomplice, whose testimony would thus require corroboration (*see* CPL 60.22), because there was no reasonable view of the evidence to support such a charge. Although the witness promoted, and expected to benefit from, a drug transaction between defendant and the victim, who was the witness's boyfriend, defendant's assertion that she may have known that the victim would be robbed or killed is purely speculative (*see e.g. People v Martinez*, 59 AD3d 361 [1st Dept 2009], *lv denied* 12 NY3d 917 [2009]). Furthermore, an accomplice charge was not warranted by the fact that, among other benefits, the cooperation agreement protected the witness from prosecution for the murder. The record does not reveal that any evidence connecting her to that crime ever developed, and that provision of the agreement ultimately proved unnecessary.

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.

We have considered and rejected defendant's pro se ineffective assistance of counsel claim on the merits (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v*

Washington, 466 US 668 [1984]). Defendant's remaining pro se claims are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7691- Index 150914/17
7691A In re Philip Nobile,
Plaintiff-Appellant,

-against-

Board of Education of the City School
District of the City of New York, et al.,
Defendants-Respondents.

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jaminson Michael Isaac Davies of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (W. Franc Perry, J.), entered September 8, 2017, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 12, 2017, which granted defendants' motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, a former tenured teacher employed by the New York City Department of Education (DOE), seeks to rescind a stipulation with DOE settling disciplinary charges brought against him. In the stipulation, DOE agreed to discontinue the disciplinary hearing on the pending misconduct charges and to

take no further disciplinary action against plaintiff, in exchange for which plaintiff agreed "to irrevocably retire from his employment with [DOE], effective close of business January 31, 2017." The agreement was signed by plaintiff, his counsel, and DOE's counsel on October 7, 2016. Annexed to the stipulation was a letter signed by plaintiff and addressed to District Superintendent Karen Watts stating, "I hereby irrevocably retire from [DOE], effective close of business January 31, 2017." The stipulation contained a signature line for Superintendent Watts, who signed it several days later.

Before Superintendent Watts signed the stipulation, plaintiff notified DOE that he had changed his mind and wanted to rescind the stipulation. He argues that the stipulation was unenforceable when he changed his mind because not all the parties had signed it. This argument is unavailing.

Although CPLR 2104 is not applicable to agreements entered into in administrative proceedings, the stipulation signed by plaintiff and counsel acting on behalf of DOE is binding under general contract principles (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Toos v Leggiadro Intl., Inc.*, 114 AD3d 559, 561 [1st Dept 2014]). Plaintiff failed to show the existence of fraud, collusion, mistake or accident, or that counsel lacked

DOE's consent to enter into the stipulation (*see Hallock*, 64 NY2d at 230). Plaintiff's agreement to retire was irrevocable, and plaintiff understood its consequences. His change of mind is not a cause sufficient to set aside his agreement (*see Barclay v Citibank, N.A.*, 136 AD3d 551 [1st Dept 2016], *lv dismissed* 27 NY3d 1077 [2016]). Nor is his parol evidence, offered to show that the parties did not intend to be bound by the stipulation until Superintendent Watts had signed it, admissible to add to or vary the terms of the writing (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7692 In re Natalie A.,
Petitioner-Appellant,

-against-

Chadwick P.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Michael F. Dailey, Bronx, for respondent.

_____

Order, Family Court, New York County (Gail A. Adams, Referee), entered on or about December 5, 2017, which granted respondent's motion to change venue and transferred petitioner mother's family offense and custody petitions to Clinton County, unanimously reversed, on the law, without costs, and the motion denied.

The Family Court improvidently exercised its discretion in granting the motion to change venue to Clinton County, where the parties lived from 2011 to until September 23, 2017, when the mother fled to escape a physical altercation in the home. The mother provided sufficient proof of residency. The Family Court failed to consider the allegations of domestic violence against her by the father in Clinton County, which precipitated her abrupt move to safety in New York County, where her parents live,

and the indicia of her residence in New York City.

In support of her intent to remain in New York County, the mother submitted a sworn affidavit that she had already secured a full-time job, health insurance, and a pediatrician for the child. The allegations of domestic violence and the safety of the mother support keeping New York County as the venue for these proceedings (*see* Family Court Act § 818; *Jeanne E.M. v Lindey M.M.*, 189 Misc 2d 669 [Fam Ct, Albany County, 2011]; *see also Dobbs v Dobbs*, 186 AD2d 455, 456 [1st Dept 1992]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7693 Michael Saginor, Index 152479/13
Plaintiff-Appellant, 595050/14
595114/14

-against-

Friars 50th Street Garage, Inc., et al.,
Defendants-Respondents.

- - - - -

[And Other Actions]

_____

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

Marshall Dennehey Warner Coleman & Goggin, New York (Richard Imbrogno of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered February 6, 2017, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing so much of plaintiff's Labor Law § 241(6) claim as predicated upon Industrial Code §§ 23-1.7(e)(1) and (e)(2), and denied his cross motion for summary judgment on said claim, unanimously affirmed, without costs.

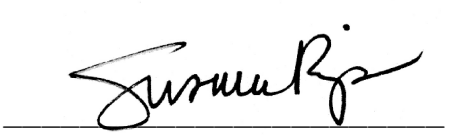
Plaintiff worker's trip and fall, allegedly caused by a violation of Industrial Code §§ 23-1.7(e)(1) and (2), did not support his Labor Law § 241(6) claim, inasmuch as the allegedly hazardous condition was integral to the work plaintiff was to

perform at the time he was injured (*see e.g. O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225 [1st Dept 2006], *affd* 7 NY3d 805 [2006]; *Orlino v 2 Gold, LLC*, 63 AD3d 541 [1st Dept 2009]; *cf. Pereira v New Sch.*, 148 AD3d 410 (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: NOVEMBER 27, 2018



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Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7694 The People of the State of New York, Ind. 2663/13
Respondent,

-against-

Luis Peralta Abreu,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Shera Knight of counsel), for respondent.

_____

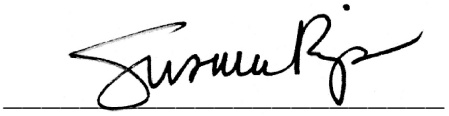
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret Clancy, J.), rendered March 25, 2015,

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

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

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

ENTERED: NOVEMBER 27, 2018



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

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7695 Lastarza Holmes, etc., Index 302482/14
Plaintiff-Appellant,

-against-

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

Luis Caballero,
Defendant.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about March 31, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when, while standing on defendants' bus, the bus stopped suddenly, causing her to fall and strike her leg.

Defendants submitted evidence showing that the bus was not operated in a negligent manner. A surveillance video taken of the bus's interior depicts plaintiff slipping and falling while

the bus gradually slows down.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's expert's opinion is without probative value, as it is based upon purported facts flatly contradicted by the evidence of record (*see Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 n2 [1991]). Moreover, plaintiff's allegation that the bus "stopped short," failed to provide "objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant" (*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7696 JP Morgan Chase Bank, etc., Index 35786/15
Plaintiff-Respondent,

-against-

Cauline Dennis, etc.,
Defendant-Appellant,

Simone Dennis, etc., et al.,
Defendants.

_____

Cauline Dennis, appellant pro se.

Shapiro, DiCaro & Barak, LLC, Rochester (Austin T. Shufelt of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered October 18, 2017, which denied defendant Cauline Dennis's motion to vacate the June 12, 2017 judgment of foreclosure and sale, unanimously affirmed, without costs.

The affidavit of service filed by plaintiff was prima facie evidence that defendant was properly served with the summons and complaint pursuant to CPLR 308(2) (*see NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). On August 20, 2015, process was delivered to defendant at the mortgaged location. The deponent described the individual served as a brown skinned female with black hair, approximately 40 years old, five feet five inches in height, and 220 pounds. To rebut

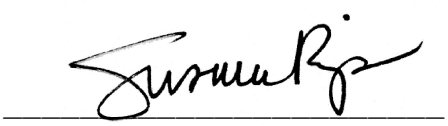
this prima facie showing, defendant was required to submit a sworn, nonconclusory denial of service or swear to specific facts to rebut the statements in the process server's affidavit (*see id.; Avis Rent A Car Sys., LLC v Scaramellino*, 161 AD3d 572 [1st Dept 2018]). Defendant's assertion that she was never served with the summons and complaint, and that the description of the person served "does not match the description of defendant" is insufficient to rebut the presumption (*Wells Fargo Bank, N.A. v Tricarico*, 139 AD3d 722, 723 [2d Dept 2016]).

Since defendant has not established a reasonable excuse for her default, she has waived her standing defense (*see Bank of Am., N.A. v Brannon*, 156 AD3d 1, 7 [1st Dept 2017] [citations omitted]), as well as any defense resulting from plaintiff's alleged failure to comply with RPAPL 1304 (*see Deutsche Bank Natl. Trust Co. v Lopez*, 148 AD3d 475, 475-476 [1st Dept 2017] [citation omitted]).

Defendant has provided no "newly discovered" evidence that was not previously discoverable or material to her appeal.

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

ENTERED: NOVEMBER 27, 2018



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Friedman, J.P., Mazzarelli, Kern, Oing, JJ.

7697 In re Judith Clark, Index 160965/17
Petitioner-Respondent,

-against-

New York State Board of Parole,
Respondent-Appellant.

_____

Barbara D. Underwood, Attorney General, New York (Steven C. Wu of counsel), for appellant.

Proskauer Rose LLP, New York (Michael A. Cardozo of counsel), for respondent.

_____

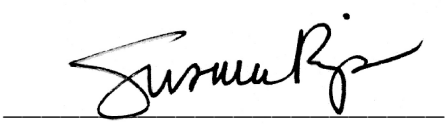
Order, Supreme Court, New York County (John J. Kelley, J.), entered April 27, 2018, which, in this proceeding brought pursuant to CPLR article 78, granted the petition to annul the determination of the Commissioners of the New York State Department of Parole (Board), dated November 29, 2017, affirming the determination of a panel of the Board, dated April 20, 2017, denying petitioner parole, and remanded the matter for a new interview before a new panel of the Board within 60 days of the date of the court's decision, unanimously modified, on the law, to reinstate the panel's denial of parole and to remand the matter to the Commissioners of the Board for a new administrative appeal of that action, and otherwise affirmed, without costs.

Supreme Court correctly determined that the administrative

appeal of the Board's denial of parole was marred by a procedural error. Specifically, while, in the initial consideration of petitioner's request for parole, the Board permissibly considered letters in opposition to the parole application submitted by public officials and members of the community, the Board admitted that its refusal to provide petitioner with access to any of the those letters in connection with her administrative appeal was improper. The correct remedy for this procedural error in the conduct of the administrative appeal, however, is the annulment of the result of that appeal and remand for new administrative appellate proceedings, in which the Board should turn over the requested material, with any necessary redactions (*see* Executive Law § 259-i[2][c][B]; 9 NYCRR 8000.5[c]) to petitioner, not annulment of the initial denial of parole by the panel, which must still undergo proper administrative review. Accordingly, we modify the order appealed from as indicated.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7699 The People of the State of New York, Ind. 700/15
Respondent,

-against-

Clete Birkett,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Sarah L. Rosenbluth 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 (James M. Burke, J.), rendered November 2, 2016, convicting defendant, after a jury trial, of three counts of burglary in the first degree, two counts of robbery in the first degree and two counts of robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 22 years, unanimously affirmed.

Under the circumstances, defendant did not have the right to be present at a colloquy on his counsel's motion for recusal of the trial court, which involved the court's alleged involvement with defendant during the Judge's former employment as a prosecutor, and which was conducted in camera for valid security reasons regarding the identity of an informant (*see People v*

Baker, 139 AD3d 591, 591 [1st Dept 2016], *lv denied* 28 NY3d 1025 [2016]). Defendant has not shown that he could have provided any input, because the record, developed at an earlier proceeding at which defendant was present, demonstrates that defendant had no prior interactions with the trial court. Therefore, defendant would have had no way of knowing whether the court knew anything prejudicial about him that would allegedly warrant recusal.

The court providently exercised its discretion in denying the recusal motion (*see People v Moreno*, 70 NY2d 403, 405 [1987]). The court informed the parties that, 24 years earlier, while a prosecutor, he had some knowledge of defendant, by way of an informant, and that defendant had a case that was being prosecuted by a colleague in the District Attorney's Office. The court's prior knowledge of, or involvement with, defendant was minimal, at best. There is no indication that the court was actually biased against defendant or that the denial of the recusal motion deprived defendant of a fair trial.

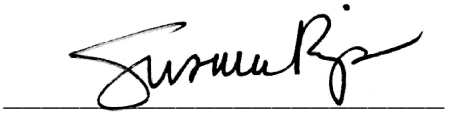
The court providently exercised its discretion in admitting a black nine millimeter pistol, the same type of weapon that, according to other evidence, was used in the crime. The pistol was recovered, pursuant to a search warrant, from defendant's girlfriend's apartment three months after the commission of the

crime, and the evidence showed that defendant resided in that apartment. This evidence was relevant to show that defendant had access to that type of weapon, and it thus tended to establish his involvement in the charged crimes (*see People v Del Vermo*, 192 NY 470, 478-482 [1908]; *People v Bailey*, 14 AD3d 362, 363 [1st Dept 2005], *lv denied* 4 NY3d 856 [2005]; *People v Marte*, 7 AD3d 405, 407 [1st Dept 2004], *lv denied* 3 NY3d 677 [2004]). The jury could have drawn a reasonable inference that the weapon was in defendant's possession at the time of the crime, and the availability of other inferences went to weight rather than admissibility. Furthermore, the probative value of this evidence, which the court carefully limited, outweighed any prejudicial effect.

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7700-
7700A In re Destiny M.,

A Dependent Child under the
Age of Eighteen Years, etc.,

Phillip F., et al.,
Respondents-Appellants,

Cardinal McCloskey Community Services, et al.,
Petitioners-Respondents.

_____

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

Law and Mediation Office of Helene Bernstein, PLLC, Brooklyn (Helene Bernstein of counsel), for Kristina M., appellant.

Geoffrey P. Berman, Larchmont, for respondent.

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

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about January 9, 2015, which determined that respondent father's consent for the adoption of the subject child was not required, and order of fact-finding and disposition, same court (Emily Olshansky, J.), entered on or about June 16, 2017, which, after a hearing, determined that respondent mother permanently neglected the subject child, terminated her parental rights and transferred custody and guardianship of the child to

petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

The father's failure to show that he paid fair and reasonable support for the child according to his means is fatal to his claim that his consent is required for the child's adoption (*see* Domestic Relations Law § 111[1][d]; *Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473 [1st Dept 2013], *lv denied* 22 NY3d 864 [2014]).

The finding of permanent neglect against the mother is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]; [3][g][i]) establishing that the agency made diligent efforts to encourage and strengthen the parental relationship, including formulating a service plan, making referrals for services, and facilitating visitation, and that, despite these efforts, the mother failed to plan for the child's future (see Social Services Law § 384-b[7][f]; *see e.g. Matter of Isaac A.F. [Crystal F.]*, 133 AD3d 515 [1st Dept 2015], *lv denied* 27 NY3d 901 [2016]). Indeed, in around 2013, the mother advised the agency that she no longer wished to plan for the child's return to her care (*see Matter of Byron Christopher Malik J.*, 309 AD2d 669 [1st Dept 2003]), and that she wished the child to be cared for by the father, whom the child had never met and who was

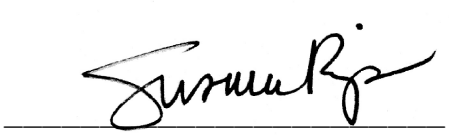
unknown to the agency.

The determination that the child's best interests require termination of the mother's parental rights is supported by the record (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The foster home is the only home the child has known. She is loved and well-cared for and wishes to remain there. Under the circumstances, the child deserves permanency (*see Matter of Charles Jahmel M. [Charles E. M.]*, 124 AD3d 496, 497 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]). To the extent the mother seeks a suspended judgment so that the agency can plan for the child's discharge to the father, the record fails to suggest that the father, who has never participated in the child's care, plans to do so. A suspended judgment would serve only to prolong the child's lack of permanency (*see Matter of Matthew Louis S. [Raymond R.]*, 150 AD3d 430, 431 [1st Dept 2017], *lv denied* 29 NY3d 913 [2017]).

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

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

ENTERED: NOVEMBER 27, 2018



CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7701 The People of the State of New York, Ind. 1485N/12
Respondent,

-against-

Alston R. James, also known as
Alston Ramardo James,
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 (Michael J. Yetter of counsel), for respondent.

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Judgment, Supreme Court, New York County (Richard M. Weinberg, J.), rendered August 23, 2012, 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 one year, unanimously affirmed.

Defendant has failed to establish an ineffective assistance of counsel claim. Even assuming that defendant has established that his counsel's performance regarding immigration advice was deficient, he has not shown that prejudice resulted from counsel's deficient performance. The People stated that defendant's guilty plea "definitely will result in his deportation," the court then declared that "the plea [defendant]

entered . . . subject[ed] him to deportation" and defendant confirmed that he understood that consequence of his plea.

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7702 The People of the State of New York, Ind. 1898/15
Respondent,

-against-

Robert Lurch,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

_____

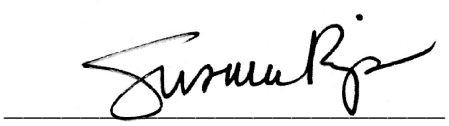
Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Roger S. Hayes, J. at plea and sentencing), rendered June 2, 2016, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's motion to suppress a pistol that the police saw in his waistband. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]), including its resolution of alleged inconsistencies. The officer's account of the events

leading up to defendant's arrest was not so implausible as to require a different conclusion.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, JJ.

7703 Getty Properties Corp., et al., Index 651762/12
Plaintiffs-Appellants,

-against-

Getty Petroleum Marketing, Inc., et al.,
Defendants-Respondents.

_____

Rosenberg & Estis, P.C., New York (Howard W. Kingsley of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered December 13, 2017, which, to the extent appealed from as limited by the briefs, denied that part of plaintiffs' motion for prejudgment interest on the award of attorneys' fees, unanimously reversed, on the law, with costs, and the motion granted.

Plaintiffs are correct that our affirmance of the prior judgment awarding prejudgment interest on attorneys' fees, *Getty Props. Corp. v Getty Petroleum Mktg. Inc.* (150 AD3d 541 [1st Dept 2017], *lv dismissed* 30 NY3d 1083 [2018], *lv dismissed sub nom. One Pleasantville Rd. LLC v Getty Props. Corp.*, 30 NY3d 1084 [2018]) constitutes the law of the case. As such, the IAS court

should not have deviated from it (*see Massey v Byrne*, 164 AD3d 416 [1st Dept 2018]). Plaintiffs are also correct that the prior order of this Court forecloses any additional challenge on the issue by defendants (*see Brodsky v New York City Campaign Fin. Bd.*, 107 AD3d 544, 545–546 [1st Dept 2013]).

Were we to reach the merits, we would affirm. As the IAS court previously found (in an order previously affirmed), one basis for awarding attorneys' fees was that the subleases at issue incorporated and were subject to the master lease. The master lease contained an attorneys' fee provision for fees arising from breaches of the various leases and related leases. This clause is within the ambit of CPLR 5001.

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7704 The People of the State of New York, Respondent, Ind. 1383/11

-against-

Orlando Velasquez, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about February 4, 2014, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors argued by defendant were adequately considered by the court, were outweighed by the danger of future recidivism, and do not warrant a downward departure from defendant's presumptive risk level.

With regard to the reliability of the risk assessment instrument, we reject defendant's challenge to "the choice of

risk factors made by the Legislature and the Board of Examiners of Sex Offenders" (*People v Bailey*, 52 AD3d 336, 336 [1st Dept 2008], *lv denied* 11 NY3d 707 [2008]), and note that the risk level designated in the instrument is "merely presumptive, and a court may depart from it as a matter of discretion" (*People v Ferrer*, 69 AD3d 513, 514 [1st Dept 2010], *lv denied* 14 NY3d 709 [2010]). However, as noted, this case does not call for a discretionary departure.

To the extent that defendant is challenging the legal or factual correctness of the court's assessment of points under the risk factor relating to multiple victims, that claim is unpreserved and without merit.

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7705 The People of the State of New York, Ind. 1983/00
Respondent,

-against-

Devrol Palmer,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about January 27, 2016, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were outweighed by the seriousness of the continuing offense against a young child over the course of years (*see e.g. People v Lopez*, 146 AD3d 477 [1st Dept 2017], *lv denied* 29 NY3d 904 [2017]). Defendant's favorable prison disciplinary record and completion of sex offender treatment were adequately taken into account by

the risk assessment instrument's assessment of zero points for conduct while confined (*see People v Watson*, 112 AD3d 501, 503 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]) and acceptance of responsibility (*see People v McNeely*, 124 AD3d 433 [1st Dept 2015], *lv denied* 25 NY3d 908 [2015]). We reject defendant's argument that his deportation to Jamaica minimized the risk of reoffense (*see e.g. People v Zepeda*, 124 AD3d 417 [1st Dept 2015], *lv denied* 25 NY3d 902 [2015]). Defendant has not established that his score on the Static-99R warranted a downward departure (*see People v Roldan*, 140 AD3d 411, 412 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]).

Defendant failed to preserve his contention that the requirement of in-person reporting is inapplicable to him because of his deportation, and we decline to review it in the interest of justice. In any event, that argument is based on hypothetical future events, and it is not cognizable on this appeal.

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7706 The People of the State of New York, Index 101286/16
Respondent,

-against-

John Horn,
Defendant,

Financial Casualty & Surety, Inc.,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Daniel B. Fix and John B. Martin of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about March 23, 2017, which denied defendant Financial Casualty & Surety, Inc.'s (Surety) motion for an order vacating the bail forfeiture judgment pursuant to CPLR 5015 and granting remission of the forfeiture of bail pursuant to CPL 540.30, unanimously affirmed, without costs.

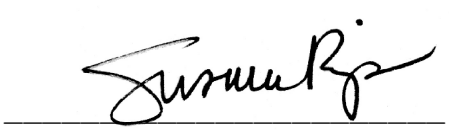
A valid forfeiture existed on December 17, 2015, when the court issued an order directing forfeiture, based upon its finding that the criminal defendant's absence was without sufficient excuse, as reflected in the minutes of the August 4, 2015 proceeding (*see* CPL 540.10[1]; *People v Nicholas*, 97 NY2d

24, 29 [2001]).

Accordingly, Surety's motion for remission, which was made within a year of December 17, 2015, was timely (CPL 540.30[2]). However, there is no basis to grant remission or to vacate the judgment, as the arguments Surety makes in support of the motion lack merit. As noted, there was a valid forfeiture. Further, the People's filing of the forfeiture order on February 17, 2016 was timely, as it was made within 120 days of December 17, 2015 (CPL 540.10[2]; *see Nicholas*, 97 NY2d at 29). Moreover, the bail was not exonerated on July 23, 2015, as sentence was not pronounced that day (*People v Public Serv. Mut. Ins. Co.*, 49 Misc 2d 875 [Sup Ct, New York County 1966]). Rather, after the defendant pleaded guilty, sentence was adjourned pursuant to his plea agreement to afford him an opportunity to complete a drug treatment program, which would determine the sentence to be later imposed. The court merely pronounced the possible sentencing alternatives that could later be imposed, not the sentence.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7707 The People of the State of New York, Ind. 1068/16
Respondent,

-against-

Peter Hickey,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (David A. Slott of counsel), for respondent.

_____

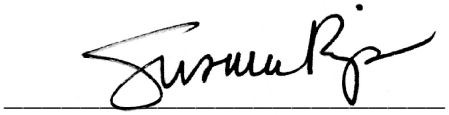
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (George Villegas, J.), rendered May 12, 2016,

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: NOVEMBER 27, 2018



CLERK

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

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7708 The People of the State of New York, Ind. 3924N/13
Respondent,

-against-

Danilo Concepcion,
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 (Hope Korenstein of counsel), for respondent.

_____

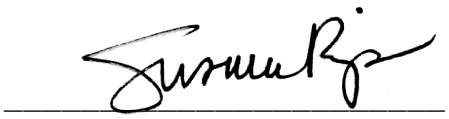
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Neil Ross, J.), rendered April 27, 2015,

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

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

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

ENTERED: NOVEMBER 27, 2018



CLERK

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

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7709 The People of the State of New York, Ind. 4872/15
Respondent,

-against-

Jonathan Munoz,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 6, 2017, convicting defendant, after a jury trial, of offering a false instrument for filing in the first degree (two counts), official misconduct (two counts) and making a punishable false written statement, and sentencing him to a conditional discharge for a period of three years, unanimously affirmed.

The verdict is 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.

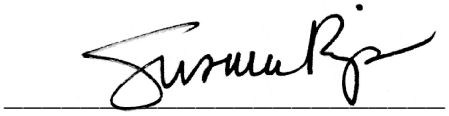
As to the false instrument convictions, a surveillance videotape of the search and arrest of two people overwhelmingly established that defendant, a police officer, knowingly made

false statements in an arrest report and criminal complaint regarding the sequence of events leading to the arrest. The video plainly shows that defendant suddenly lunged towards one of the arrestees in an attempt to grab that person's cell phone. This was in stark contrast to the arrest report and criminal complaint, where defendant alleged that the arrestee was the aggressor. Given the glaring and significant discrepancies, the jury could have reasonably inferred from the video that defendant knowingly misrepresented the sequence of events in the documents, and it appropriately rejected defendant's self-serving claims that this discrepancy was merely a mistake.

The weight of the evidence also supported the misdemeanor convictions. We have considered and rejected defendant's remaining arguments.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7710N Iris Otero, Index 302011/14
Plaintiff-Appellant,

-against-

Walton Avenue Associates LLC, et al.,
Defendants-Respondents.

Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP, New York (Howard Schatz of counsel), for appellant.

Lesch & Lesch, P.C., Smithtown (Beth S. Gereg of counsel), for respondents.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about October 31, 2017, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to amend the complaint and bill of particulars, unanimously affirmed, without costs.

Plaintiff alleges that she slipped and fell on rainwater that came in through negligently maintained windows in the hallway of defendants' building. In support of her motion to amend, plaintiff stated that she originally alleged that the accident occurred on October 13, 2012, but that after reviewing her medical records she realized that she was mistaken and that the accident actually occurred on August 15, 2012, the day before

she sought treatment at the hospital.

The motion court providently exercised its discretion in denying plaintiff's motion, as defendants demonstrated that the delay in notifying them that plaintiff had incorrectly identified the date of the accident prejudiced their ability to investigate the incident and to defend the action using surveillance videotapes of the hallway (*see Garguilo v Port Auth. of N.Y. & N.J.*, 137 AD3d 708, 709 [1st Dept 2016], *lv denied* 28 NY3d 905 [2016]; *Davis v New York City Tr. Auth.*, 234 AD2d 153 [1st Dept 1996]; CPLR 3025[b]). Defendants showed that, after learning of plaintiff's claim, they retrieved surveillance tapes of the alleged accident date of October 13th, which showed that no accident occurred on that date, but that they were no longer able to retrieve videotapes from August 2012 by the time plaintiff informed them of the claimed error in the pleadings. Furthermore, the August 2012 hospital record plaintiff relies upon reflects that she sought treatment from a podiatrist for an unrelated foot condition, and does not reference any fall the

previous day (*compare Dockery v UPACA Site 7 Assoc., LP*, 148 AD3d 580 [1st Dept 2017]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Friedman, J.P., Mazzarelli, Kern, Oing, Singh, JJ.

7711N In re Jose R. Dominguez, Index 153458/17
Claimant-Appellant,

-against-

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

_____

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

Dopf, P.C., New York, (Martin B. Adams of counsel), for respondents.

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered June 5, 2017, which denied petitioner's motion to deem the notice of claim served upon respondents timely filed, nunc pro tunc, unanimously modified, on the law, the facts and in the exercise of discretion, to grant petitioner's motion as against respondent City University Construction Fund (CUCF), and otherwise affirmed, without costs.

"[I]n determining whether to grant an extension of time to serve a notice of claim, a court shall consider, in particular, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the 90-day period specified in [General Municipal Law] section 50-e(1) or within a reasonable time thereafter" (*Matter of Thomas v City of New York*,

118 AD3d 537, 537 [1st Dept 2014] [internal quotation marks omitted]). "Further, under the statute, the court must take into account all other relevant facts and circumstances, including, among other things, whether the petitioner offered a reasonable excuse for the late notice and whether the delay substantially prejudiced the respondent's defense on the merits" (*id.*).

Petitioner's motion to deem the notice of claim served upon CUCF timely filed, nunc pro tunc, should have been granted. CUCF acquired actual notice of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day statute of limitations period due to the fact that petitioner filed his notice of claim only one day late, on the 91st day after the accident occurred. Moreover, the notice of claim provides the essential facts constituting the claim and further describes CUCF's alleged negligence and alleged violations of Labor Law §§ 240(1), 241(6) and 200, and certain Industrial Code provisions.

Additionally, petitioner has demonstrated that his one-day delay in serving the notice of claim on CUCF did not substantially prejudice CUCF's defense on the merits. CUCF had actual knowledge of the facts constituting petitioner's claim only one day after the expiration of the 90-day statutory period

and thus, had ample opportunity to conduct a thorough investigation. CUCF's conclusory statement that it did not have an opportunity to conduct an investigation because it was not able to preserve potential evidence or interview witnesses while their memories and recollections were fresh is insufficient to demonstrate prejudice as CUCF fails to explain how a one-day delay in the filing of the notice of claim, as opposed to a filing on the 90th day, deprived it of the opportunity to investigate. Moreover, in a case where the delay in filing the notice of claim was 30 days, this court held that "[t]his short delay does not prejudice respondents' ability to investigate and defend the claim, as such a short passage of time is unlikely to have affected witnesses' memories of the relevant events" (*Thomas*, 118 AD3d at 538).

Even if petitioner's excuse for the delay in filing the notice of claim, specifically, that such delay was due to a clerical error made by the process server, was unreasonable, "the absence of a reasonable excuse is not, standing alone, fatal to the application," especially in a case such as this one where respondent had actual notice of the essential facts constituting petitioner's claim and where respondent was not prejudiced by the delay (*Matter of Porcaro v City of New York*, 20 AD3d 357, 358

[1st Dept 2005]).

Finally, petitioner's request that we deny the portion of his motion as against respondents City University of New York and Hunter College without prejudice to renew before the Court of Claims is denied. Initially, petitioner failed to preserve the issue by not seeking the requested relief before Supreme Court (*see Pulliam v Deans Mgt. of N.Y., Inc.*, 61 AD3d 519, 520 [1st Dept 2009]). Further, the applicable two-year statute of limitations to seek leave to file a late notice of claim against CUNY or Hunter in the Court of Claims does not expire until January 3, 2019 and there is nothing preventing petitioner from filing such an application in that court.

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7712 The People of the State of New York, Ind. 2200/13
Respondent,

-against-

Kroucher Deleon,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Victorien Wu of counsel), for appellant.

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

_____

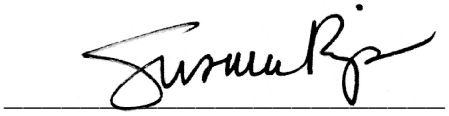
Judgment, Supreme Court, New York County (Patricia M. Nuñez, J.), rendered January 31, 2014, as amended May 1 and 15, 2014, convicting defendant, after a jury trial, of robbery in the third degree and two counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

Defendant's argument that the victim's recorded 911 call contained inadmissible hearsay is unpreserved and expressly waived, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. Counsel never objected to the admission of the 911 call and thus the court was never called upon to make any findings as to its admissibility. In any event, any error in admitting this

recording was harmless in light of the overwhelming evidence of defendant's guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's claim that his conviction of the grand larceny of a credit card was against the weight of the evidence is unavailing. We are "constrained to weigh the evidence in light of the elements of the crime as charged without objection by defendant" (*People v Cooper*, 88 NY2d 1056, 1058 [1996]), and defendant's assertion that this principle applies only where there has been a change in the law pending appeal is without merit (*see e.g. People v Lewis*, 102 AD3d 505, 506 [1st Dept 2013], *affd* 23 NY3d 179 [2014]). Under the court's charge, to which there was no objection, the jury could have reasonably found that defendant stole a "credit card" (Penal Law 155.30[4]). We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7713 Juanita Terry Thompson, Index 23050/12E
Plaintiff-Appellant,

-against-

Bronx Merchant Funding Services, LLC, et al.,
Defendants-Respondents.

_____

Belovin Franzblau & Associates, PC, Bronx (David A. Karlin of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for Bronx Merchant Funding Services, LLC and Shajahan Ali, respondents.

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Jay S. Gunsher of counsel), for Jason Samuels and Edward J. Samuels, respondents.

_____

Order, Supreme Court, Bronx County (Donald Miles, J.), entered on or about July 13, 2017, which granted defendants' motions for summary judgment dismissing the complaint based on plaintiff's inability to establish that she suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleges that she sustained serious injuries as a result of an accident that occurred when she was a seat-belted rear passenger in an access-a-ride van that was hit in the rear by a second vehicle. Specifically, she alleges that her right

knee sustained injuries leading to a total knee replacement, as well as right shoulder impingement and cervical and lumbar spine disc bulges and herniations.

Defendants demonstrated prima facie through expert medical reports that plaintiff's alleged injuries had resolved and were preexisting degenerative conditions (*see Birch v 31 N. Blvd., Inc.*, 139 AD3d 580, 581 [1st Dept 2016]). Their radiologists opined that plaintiff's post-accident MRI films showed osteoarthritis in the knee, osteophyte complex and disc dessication in the spine, and degenerative changes in the shoulder joint (*see Lee v Lippman*, 149 AD3d 411, 412 [1st Dept 2016]). Defendants' neurologist further opined that plaintiff suffered neuropathy related to her diabetes mellitis, not radiculopathy related to any spinal condition.

Defendants also relied on plaintiff's own medical records, which showed that she underwent arthroscopic surgery for her right knee two years before the accident and that her MRI showed "severe osteoarthritis" in that knee. Contrary to plaintiff's argument, defendants were entitled to rely on her unaffirmed medical records produced in discovery (*see Galarza v J.N. Eaglet Publ. Group, Inc.*, 117 AD3d 488, 489 [1st Dept 2014]).

In opposition, plaintiff failed to raise an issue of fact as

to whether any of her claimed injuries were causally related to the accident. Her orthopedic surgeon provided only a conclusory opinion that plaintiff's right knee osteoarthritis was aggravated and exacerbated, without addressing her prior surgery, and failed to explain why the preexisting conditions documented in plaintiff's medical records were not the cause of her symptoms or the extent of any exacerbation (*see Auquilla v Singh*, 162 AD3d 463 [1st Dept 2018]; *Farmer v Ventkate Inc.*, 117 AD3d 562 [1st Dept 2014]). Plaintiff submitted unaffirmed MRI reports of her right shoulder and spine, which could not be considered. Her physicians provided conclusory opinions that her claimed injuries in those parts were causally related to the accident, without adequately addressing the degenerative findings by defendants' radiologists and the findings in plaintiff's own MRI reports, including disc desiccation, osteophytes, and cystic structures, or the impact of plaintiff's diabetes (*see Campbell v Drammeh*, 161 AD3d 584, 585 [1st Dept 2018]; *Khanfour v Nayem*, 148 AD3d 426, 427 [1st Dept 2017]).

Furthermore, plaintiff's deposition testimony that she missed only one day of work following the accident and her affidavit in which she said that she missed one week of work

defeat her 90/180-day claim (*see e.g. Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7714 In re Reina C.,
Petitioner-Appellant,

-against-

Yankel F.,
Respondent-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Andrew J. Baer, New York, for respondent.

_____

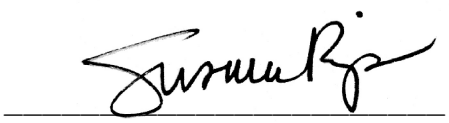
Order, Family Court, New York County (Christopher W. Coffey, Referee), entered on or about January 18, 2018, which dismissed, with prejudice, the petition for an order of protection against respondent due to lack of subject matter jurisdiction, unanimously affirmed, without costs.

It is undisputed that petitioner and respondent are not members of the same family or household, and the Referee properly concluded that an intimate relationship did not exist under any of the other provisions of the statute (*see* Family Ct Act § 812[1]; *Matter of Tyrone T. v Katherine M.*, 78 AD3d 545 [1st Dept

2010]*; compare Matter of Winston v Edwards-Clarke*, 127 AD3d 771 [2d Dept 2015]). Accordingly, the petition was properly dismissed for lack of subject matter jurisdiction.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7719 The People of the State of New York, Respondent, Ind. 5917N/12

-against-

Carlos Ruiz, Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered October 23, 2013, as amended October 30, 2013, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the first degree (two counts), criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree, and sentencing him to an aggregate term of eight years, unanimously affirmed.

The court providently exercised its discretion in permitting an expert to explain coded language in recorded conversations between defendant and a confidential informant. Defendant argues that because the informant testified and could have been asked to define the code words, the expert testimony should have been

excluded as unnecessary. However, it was permissible for the People to employ expert testimony to establish the coded language's "fixed meaning . . . within the narcotics world" (*People v Inoa*, 25 NY3d 466, 474 [2015] [internal quotation marks omitted]), instead of merely relying on what the informant claimed these words to mean. Moreover, while a fact witness may "serve a dual role" by providing an explanation that might otherwise be given by an expert, "it may be preferable for testimony of this nature to come from a source other than a fact witness" (*People v Robinson*, 129 AD3d 550, 551 [1st Dept 2015], *lv denied* 26 NY3d 1010 [2015]; *see also People v Brown*, 97 NY2d 500, 505 [2002]).

Defendant did not preserve his claim that the court's ruling on expert testimony deprived him of his right to cross-examine the informant, and we decline to review it in the interest of justice. As an alternative holding, we find it meritless. Defendant was free to ask the informant about the recorded conversations, and, to the extent the order of testimony allegedly presented a problem, we note that defendant never sought to recall the informant after the conversations went into evidence.

The court properly admitted testimony regarding defendant's

uncharged attempt to sell heroin to the informant before the charged sales. This testimony completed the narrative of the events leading to the three charged sales and provided relevant background information on the developing relationship between defendant and the informant (*see generally People v Till*, 87 NY2d 835, 837 [1995]). Additionally, this testimony was clearly probative of the charged crime of possession with intent to sell, and "the People were not required to rest on the inferences flowing from the charged sale" (*People v Mendoza*, 245 AD2d 177, 177 [1997], *lv denied* 91 NY2d 975 [1998]).

The People sufficiently demonstrated a good faith basis for their cross-examination of defendant's character witnesses about the police closure of a nightclub in which he was a part owner (*see People v Alamo*, 23 NY3d 630, 633-635 [1969], *cert denied* 396 US 879 [1969]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7720 Carole Marko, Index 155609/15
Plaintiff-Appellant,

-against-

Steven R. Korf, et al.,
Defendants-Respondents.

_____

Carole Marko, appellant pro se.

Jackson Lewis P.C., Melville (Roger H. Briton of counsel), for respondents.

_____

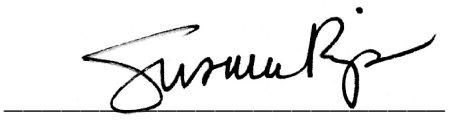
Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered on or about October 18, 2017, which granted defendants' motion to vacate plaintiff's jury demand, unanimously affirmed, without costs.

All of plaintiff's statutory causes of action arose from the same transaction, namely, her employment with defendant Saint Vincent's Catholic Medical Centers of New York. Plaintiff's inclusion of extensive demands for injunctive relief — for reinstatement and orders restraining defendants from any further discrimination — effected a waiver of her right to a jury trial (*see Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846 [1st Dept 1990]; *Kaplan v Long Is. Univ.*, 116 AD2d 508 [1st Dept 1986]).

Plaintiff's reliance on the guarantee to a right to trial by jury under the Seventh Amendment to the United States Constitution is misplaced. The contours of the federal guarantee differ from the protections afforded the right to a jury trial in civil cases in this State (*see Lytle v Household Mfg., Inc.*, 494 US 545, 550 [1990]), and the Seventh Amendment is not applicable to cases tried in state courts (*see McDonald v City of Chicago*, 561 US 742, 765 n 13 [2010]; *Matter of Department of Hous. Preserv. & Dev. of City of N.Y. v Deka Realty Corp.*, 208 AD2d 37, 51 n 6 [2d Dept 1995]).

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

ENTERED: NOVEMBER 27, 2018



CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7721 345 East 50th Street LLC, et al., Index 154185/15
Plaintiffs-Appellants,

-against-

The Board of Managers of M at Beekman Condominium, et al.,
Defendants-Respondents.

_____

Seyfarth Shaw LLP, New York (Jeremy A. Cohen of counsel), for appellants.

Gartner & Bloom PC, New York (William M. Brophy of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered December 20, 2017, which, inter alia, granted the individual defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The court properly dismissed the complaint as against the individual defendants based on the business judgment rule (*see generally Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990]). The record demonstrates that the roof was replaced to further the condominium's interest, even if plaintiffs may have been damaged as a result, and there was no evidence of bad faith (*see 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-736 [1st Dept 2013]).

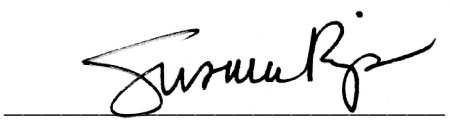
Plaintiffs argue that the individual defendants were not protected by the business judgment rule because they were singled out for disparate treatment, and the individual defendants acted out of self-interest. However, the disparate treatment cited by plaintiffs occurred after the board's determination to replace the roof, which was a proximate cause of plaintiffs' damages. Plaintiffs also failed to provide evidence that the individual defendants were motivated by their self-interest, or obtained any individual benefit from the decision to replace the roof.

Plaintiffs argument that the individual defendants breached their fiduciary duty by failing to inform themselves about the status of plaintiffs' renovations to their unit before considering the roof replacement, is unavailing. The record shows that the board consulted with engineers and building management concerning the necessity to replace the roof and alternative actions to remedy the water infiltration, and that more limited measures were unsuccessful. The status of plaintiffs' renovations was not relevant to the board's interest in maintaining the integrity of the building (*see Messner v 112 E. 83rd St Tenants Corp.*, 42 AD3d 356, 357 [1st Dept 2007], *lv dismissed* 9 NY3d 976 [2007]).

We have considered plaintiffs' remaining contentions, including that the motion should have been denied because discovery was not complete, and find them unavailing.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7722 Eduardo Gelvez, et al., Index 159225/12
Plaintiffs-Appellants.

-against-

Tower 111, LLC, et al.,
Defendants-Respondents,

Pav-Lak Contracting, Inc., et al.,
Defendants.

_____

Lawrence B. Goodman, New York, for appellants.

Morris Duffy Alonso & Faley, New York (Iryna S. Krauchanka of counsel), for respondents.

_____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered January 22, 2018, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff Eduardo Gelvez was injured when a cinder block wall that he was demolishing collapsed onto the scaffold on which he was working, knocking the scaffold over. The bottom of the wall had already been demolished when the accident occurred. Triable issues of fact exist as to whether plaintiff was instructed to demolish the wall from top to bottom, and whether any decision by plaintiff to work from the bottom up, in

contravention of an explicit instruction or in contravention of his training or common knowledge, was the sole proximate cause of the accident (*see Cahill v Triborough Bridge and Tunnel Auth.*, 4 NY3d 35, 39-40 [2004]; *Nalvarte v Long Is. Univ.*, 153 AD3d 712, 713-714 [2d Dept 2015]).

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: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7723 The People of the State of New York, Ind. 5393/14
Respondent,

-against-

James Baker,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Elizabeth McLean 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 (Bonnie G. Wittner, J.), rendered January 5, 2016, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of five 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 for disturbing the jury's credibility determinations, including its resolution of alleged inconsistencies. The

evidence established that defendant threatened to shoot the victim while simulating the presence of a firearm.

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7724 In re Christopher H.,
Petitioner-Respondent,

-against-

Taiesha R.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Laura Solecki of counsel), attorney for the children.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about March 7, 2017, which granted the father's petition for modification of a May 8, 2014 visitation order to the extent of ordering that the mother have therapeutic parenting contact with subject children Mahogany H., Christopher H., Jr., and Skyearra H., unanimously affirmed, without costs.

Modification of custody and visitation must be based on the best interests of the child (*Friederwitzer v Friederwitzer*, 55 NY2d 89, 94 [1982]; *Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]). A court may modify a visitation or custody order based on a change of the parties' circumstances which makes modification necessary to ensure the best interests of the child

(*Matter of Pena v Lopez*, 140 AD3d 967, 968 [2d Dept 2016]). Terms and conditions of visitation are matters entrusted to the sound discretion of the trial court, and, as the determination of such issues largely depends on the court's assessment of the credibility of the witnesses and the character, temperament and sincerity of the parties, such determinations should not be reversed unless they lack a sound and substantial basis in the record (*id.*; *Matter of Gelfarb v Gelfarb*, 133 AD3d 598 [2d Dept 2015]; *Matter of McLennan v Gordon*, 122 AD3d 742, 743 [2d Dept 2014]).

There was a sound and substantial basis in the record for the modification. The mother requested and agreed to the therapeutic visitation she now appeals. The transcript of proceedings, moreover, belies her claim that the record is silent as to the three subject children, as it shows the proceedings addressed the subject children in detail.

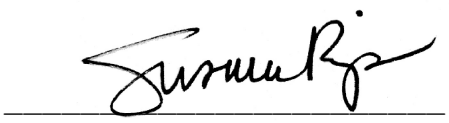
The court appropriately determined the neglect cases constituted a change of circumstances warranting modification. The mother consented to the findings of neglect against her, and the evidence supported the court's findings of neglect against the mother's boyfriend, Mr. Williams, as to Christopher, Jr., and its findings of derivative neglect as to Mahogany H. and

Skyearra H.

The modification is in the children's best interests, and thus was properly ordered, as therapeutic intervention is needed here. (*Matter of Lisa W. v John M.*, 142 AD3d 879, 880 [1st Dept 2016], *lv denied* 28 NY3d 912 [2017]; *State of N.Y. ex rel. Barbara D. v Francis D.*, 58 AD3d 436, 437 [1st Dept 2009], *appeal dismissed* 12 NY3d 872 [2009]),. Additionally, the mother consented to such therapy.

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

ENTERED: NOVEMBER 27, 2018



CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7725 The People of the State of New York, Ind. 4805/14
Respondent,

-against-

Sixtus Udeke,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered March 15, 2015, convicting defendant, upon his plea of guilty, of aggravated family offense, and sentencing him to a term of one year, unanimously affirmed.

Defendant was not deprived of his right to conflict-free counsel as the result of the brief simultaneous representation of defendant and the victim, by different Legal Aid Society attorneys, in unrelated cases. When the People informed the court that the victim in this case had been arrested on shoplifting charges and had been represented at her own arraignment, a few days earlier, by a Legal Aid attorney, the plea court stated that it intended to relieve Legal Aid from the victim's case and assign new counsel that very afternoon.

Before the court could do so, however, defendant accepted a pending plea offer, pleaded guilty, and was immediately sentenced.

On these facts, the record does not establish that any conflict operated to defendant's detriment or had a substantial relation to the conduct of his defense (*see People v Harris*, 99 NY2d 202, 210-211 [2002]; *People v Miller*, 19 AD3d 237 [1st Dept 2005], *lv denied* 5 NY3d 808 [2005]; *People v Hunter*, 283 AD2d 248 [1st Dept 2001], *lv denied* 96 NY2d 919 [2001]). The record fails to support defendant's assertion that as a result of the brief and limited simultaneous representation, defendant's own Legal Aid attorney failed to provide him with effective representation.

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7726 The People of the State of New York, Respondent, Ind. 5451/13

-against-

Emmanuel Gonzalez, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 6, 2015, convicting defendant, after a nonjury trial, of attempted burglary in the third degree, possession of burglar's tools (four counts) and criminal mischief in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The witnesses described a repeated pattern of movements by defendant and another man that supported the court's finding that defendant intended to aid the other man, who was attempting to break into a restaurant after hours, by

acting as a lookout (*see People v Middleton*, 151 AD3d 491 [1st Dept 2017], *lv denied* 29 NY3d 1131 [2017]; *People v Arriaga*, 204 AD2d 96 [1st Dept 1994]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7727 New 110 Cipriani Units, LLC, Index 652595/18
Plaintiff-Appellant,

-against-

Board of Managers of 110 E 42nd Street Condominium, et al.,
Defendants-Respondents.

Ellenoff Grossman & Schole LLP, New York (John Brilling Horgan and Fawn M. Lee of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for respondents.

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered June 26, 2018, denying plaintiff's motion for a stay of arbitration and sua sponte dismissing the complaint, unanimously affirmed, with costs.

The court properly considered plaintiff's motion pursuant to CPLR 6301 for a preliminary injunction as an application pursuant to CPLR 503 to stay arbitration, since plaintiff's primary purpose was to avoid arbitration (*Board of Educ. of City School Dist. of City of Lockport v Lockport Educ. Assn.*, 64 AD2d 1027 [4th Dept 1978]; *see also* CPLR 103[c] ["Improper form"]).

Contrary to plaintiff's contention, its claims fall clearly within the class of claims that the parties agreed to arbitrate

(*see Primavera Labs. v Avon Prods.*, 297 AD2d 505 [1st Dept 2002]). Indeed, plaintiff's claims are actually defenses to the claims asserted by defendants in the arbitration, rather than, as plaintiff contends, threshold claims beyond the scope of the arbitration agreement.

The court had the power to dismiss the complaint upon a search of the record, as on a motion for summary judgment (*see* CPLR 409[b]; *Matter of Friends World Coll. v Nicklin*, 249 AD2d 393 [2d Dept 1998]; CPLR 3212[b]; *Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]). The court having determined that plaintiff's claims fell within the ambit of the arbitration agreement and that plaintiff was not entitled to a stay of the arbitration, the CPLR 7503(b) special proceeding was disposed of; the court had heard a thorough discussion of the issues by the parties that was sufficient to warrant directing judgment in favor of defendants (*see* CPLR 3212[b]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Moulton, JJ.

7728 Mary Ellen Von Ancken, et al., Index 156497/13
Plaintiffs-Appellants,

-against-

7 East 14 L.L.C., et al.,
Defendants-Respondents,

_____

Gordon & Haffner, LLP, Harrison (Steven R. Haffner of counsel), for appellants.

Moses & Singer LLP, New York (Jay R. Fialkoff of counsel), for 7 East 14 L.L.C., respondent.

Law Offices of Solomon J. Jaskiel, Brooklyn (Solomon J. Jaskiel of counsel), for Nest Seekers International LLC and Nest Seekers LLC, respondents.

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Order, Supreme Court, New York County (Debra James, J.), entered February 24, 2017, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs allege that defendants, the sponsor of a cooperative and its listing agent, made a material misrepresentation about the size of the apartment unit, and that they reasonably relied on that misrepresentation in purchasing the apartment.

Specifically, plaintiffs allege that defendants prepared a floor plan, which accompanied the listing for the unit at issue, that stated that the unit was "~1,966" square feet, when it was,

in fact, approximately 1,495 square feet. Plaintiffs contend that the floor plan was incorporated into the offering plan by reference, and the offering plan, in turn, was incorporated into the purchase agreement. They rely on the following language contained in the offering plan:

> "Any floor plan or sketch shown to a prospective purchaser is only an approximation of the dimensions and layout of a typical apartment. The original layout of an apartment may have been altered. All apartments and terraces appurtenant thereto are being offered in their 'as is' condition. Accordingly, each apartment should be inspected prior to purchase to determine its actual dimensions, layout and physical condition."

Based on the alleged misrepresentation incorporated into the purchase agreement, plaintiffs assert claims for breach of contract and express warranty, fraud, aiding and abetting fraud, negligent misrepresentations and violation of General Business Law §§ 349 and 350.

The doctrine of incorporation by reference "is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document 'beyond all reasonable doubt'" (*Shark Information Servs. Corp. v Crum & Forster Commercial Ins.*, 222 AD2d 251, 252 [1st Dept 1995]). Here, the listing is not identified in any of the relevant purchase documents, let alone

beyond all reasonable doubt, and therefore is not incorporated by reference. Thus, any alleged representation in the listing cannot form the basis of a breach of contract claim because it is not a part of the purchase agreement. No express warranty was made in the purchase agreement.

Moreover, any purported representation or warranty is refuted by the clear terms of the purchase agreement, which contains a merger clause, states that no representations are being made by the sponsor, that the unit was being purchased "as is" and that the onus was on the buyer to inspect "to determine the actual dimensions" prior to purchasing (*see Rozina v Casa 74th Dev. LLC,* 115 AD3d 506 [1st Dept 2014], *lv dismissed* 24 NY3d 1097 [2015]; *Plaza PH2001 LLC v Plaza Residential Owner, LP*, 98 AD3d 89 [1st Dept 2012]).

Reasonable reliance is an element of claims for fraud, aiding and abetting fraud and negligent misrepresentation (*see Bernstein v Clermont Co.*, 166 AD2d 247 [1st Dept 1990]; *J.A.O. Acquisition Corp. v Stavitsky,* 8 NY3d 144, 148 [2007]). Plaintiffs cannot as a matter of law establish reasonable reliance on a representation concerning the condition of the apartment since they had the means to ascertain the truth of the condition (*Bernstein* at 248). Since, pursuant to the terms of

the purchase agreement, plaintiffs had the opportunity to inspect and measure the apartment, their fraud and negligent misrepresentation claims were properly dismissed. Consequently, dismissal of the aiding and abetting fraud claim was also proper (*see Kaufman v Cohen*, 307 AD2d 113, 125-126 [1st Dept 2003]).

Finally, plaintiffs' allegations based on purported representations made in the listing fail to set forth a viable claim under General Business Law §§ 349 or 350, as they do not fall within the type of deceptive acts, that, if permitted to continue, would have a broad impact on consumers at large (*see Thompson v Parkchester Apts. Co.*, 271 AD2d 311 [1st Dept 2000], *lv dismissed* 92 NY2d 946 [1998]). This dispute, involving the dimensions of an apartment and representations made regarding the size of that apartment, is unique to the parties to this transaction, and thus, does not fall within the ambit of the statute (*id.*). Additionally, since, pursuant to the Martin Act, the Attorney General has exclusive jurisdiction to prosecute sponsors who make false statements in offering plans filed thereunder, plaintiffs have no standing to pursue the claims to the extent they are based on any representations purportedly incorporated into the offering plan (*id.; 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 285 AD2d 244 [1st Dept 2001], *affd*

in part on other grounds 98 NY2d 144 [2002]; *Merin v Precinct Devs. LLC*, 74 AD3d 688 [1st Dept 2010]).

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

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7729-		Ind. 595/14
7730-		5380/14
7730A	The People of the State of New York, Respondent,	3180/15

-against-

Elijah Barksdale,
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 (Luis Morales 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 (Michael J. Obus, J.), rendered January 7, 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: NOVEMBER 27, 2018

CLERK

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

Renwick, J.P., Tom, Webber, Moulton, JJ.

7731 The People of the State of New York, Ind. 1939/14
Respondent,

-against-

Arturo Ceballos,
Defendant-Appellant.

_____

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

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

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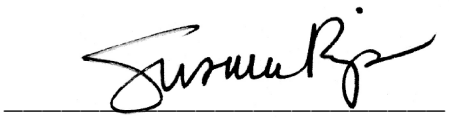
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marcy L. Kahn, J. at plea; Robert Stolz, J. at sentencing), rendered December 3, 2015,

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

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

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

ENTERED: NOVEMBER 27, 2018



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

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7732- Ind. 4799/12
7732A The People of the State of New York, 1602/13
Respondent,

-against-

Michelle Harris,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Justine M. Luongo and Amy Donner of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered April 10, 2013, convicting defendant, upon her plea of guilty, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing her, as a second felony drug offender, to an aggregate term of three years, and judgment, same court (Thomas Farber, J.), rendered July 9, 2013, as amended July 11, 2013, convicting defendant, upon her plea of guilty, of grand larceny in the fourth degree, and sentencing her, as a second felony offender, to a concurrent term of two to four years, unanimously affirmed.

Defendant's challenge to the voluntariness of her plea to

sale of a controlled substance is unpreserved, and we decline to review it in the interest of justice. Because "[d]efendant said nothing [at] the plea colloquy or ... sentencing proceeding that negated an element of the crime or raised the possibility of a . . . defense," the narrow exception to the preservation rule does not apply (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]; *People v Lopez*, 71 NY2d 662, 665 [1988]). The court was not required to make a sua sponte inquiry into defendant's purported assertion of an agency defense in her presentence interview (*see People v Rojas*, 159 AD3d 468 [1st Dept 2018], *lv denied* 31 NY3d 1086 [2018]). In any event, there is no indication in the postplea statements, or elsewhere in the record, to suggest that defendant had a viable agency defense to the drug sale charge (*see generally People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7733 Community Counseling & Mediation Services,
Plaintiff-Appellant,

-against-

Richard Chera, et al.,
Defendants,

Long Island University,
Defendant-Respondent.

Index 603997/06

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Loanzon LLP, New York (Tristan C. Loanzon of counsel), for appellant.

Goldberg Weg & Markus PLLC, New York (Steven A. Weg of counsel), for respondent.

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Judgment, Supreme Court, New York County (Debra A. James, J.), entered May 11, 2017, dismissing the complaint as against defendant Long Island University, unanimously affirmed.

Plaintiff has recovered compensatory damages associated with the installation of wastewater pipes in its leasehold against defendant Next Generation Chera, LLC. It has not demonstrated that the compensatory damages it seeks against defendant Long

Island University would be permitted under the rule against double recovery (*see Derby v Prewitt*, 12 NY2d 100, 107 [1962]).

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

ENTERED: NOVEMBER 27, 2018

CLERK

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7735 The People of the State of New York, Ind. 2873/15
Respondent,

-against-

Pedro Acosta,
Defendant-Appellant.

_____

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

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

_____

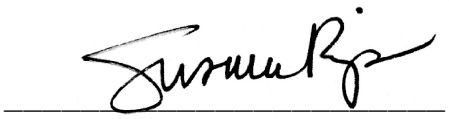
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jill Konviser, J.), rendered March 22, 2016,

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 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: NOVEMBER 27, 2018



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

Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7736N Lisandra Perez, Index 25466/17E
Plaintiff-Appellant,

-against-

Jean-Baptiste Kone, et al.,
Defendants,

Alcira A. Sullivan, et al.,
Defendants-Respondents.

_____

Lever Gottfried Ecker PLLC, New York (Eric J. Gottfried of counsel), for appellant.

Russo & Tambasco, Melville (Susan J. Mitola of counsel), for respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered July 2, 2018, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion to vacate plaintiff's note of issue, unanimously affirmed, without costs.

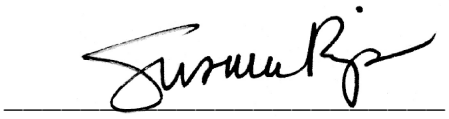
The court properly exercised its discretion to vacate the note of issue as it contained incorrect material in the certificate of readiness, particularly the statements that there remained no outstanding discovery (Uniform Rules for Trial Cts [22 NYCRR] § 202.21[e]). The defendants' de minimis delay in moving to vacate the note of issue did not prejudice plaintiff,

and, as the court noted, "any deficiencies in [defendants'] good faith affirmation are inconsequential, since any effort to resolve the dispute would have been futile given the plaintiff's emphatic insistence that no discovery remains outstanding." Defendants' demands for plaintiff's deposition and physical examination put plaintiff on notice that such examinations remained outstanding, notwithstanding defendants' indication that the time and place of her deposition would be determined at a preliminary conference, and that the physical examination would be scheduled after the depositions and after the exchange of medical records.

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: NOVEMBER 27, 2018



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Renwick, J.P., Tom, Webber, Kahn, Moulton, JJ.

7737N Camila Heredia, etc., et al., Index 350036/16
Plaintiffs-Appellants,

-against-

Uber Technologies, Inc., et al.,
Defendants-Respondents,

Bailo Diallo,
Defendant.

_____

Kent, Beatty & Gordon, LLP, New York (Joshua B. Katz of counsel), for appellants.

Gordon & Rees, LLP, Harrison (Julia E. Braun of counsel), for respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about January 12, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to compel defendants Uber Technologies, Inc. and Schmecken, LLC to comply with court-ordered discovery obligations and certain disclosure notices, except for certain photographs, defendant driver Bailo Diallo's trip log, and opposing party statements and witness information, with leave to file a new motion after deposing Diallo, unanimously modified, on the law, to vacate the requirement to depose Diallo before obtaining disclosure, and to grant the motion to the extent of directing Uber and Schmecken to

exchange, to the extent they have not already done so, all documents and things responsive to (1) the preliminary conference order; (2) all demands in plaintiffs' "Combined Demand and Notice for Discovery and Inspection" dated December 23, 2016, except for demand 8(B), ©, and (D), and demand 9, as to which disclosure shall be limited to those insurance policies, written accident reports, and investigative reports pertinent to this action and the underlying motor vehicle collision (*see* CPLR 3101[f], [g]); (3) demands 1-6, 8, 14-16, and 19-24 in plaintiffs' "Supplemental Notice for Discovery and Inspection" dated March 2, 2017, and (4) all demands in plaintiffs' "Second Supplemental Notice for Discovery and Inspection" dated July 15, 2017, except for demand 2, as to which disclosure shall be limited to contracts and agreements in effect on September 30, 2015 between (a) Uber and Diallo and (b) any Uber-affiliated entities and Diallo; and except for demand 7 which is duplicative, the disclosure directed herein is subject to the court's determination of Uber and Schmecken's cross motion for a protective order for certain confidential and proprietary information, for which the matter is remanded, and otherwise affirmed, without costs.

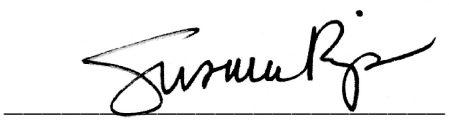
The information sought in the discovery demands to which we direct Uber and Schmecken to respond is material and necessary to

plaintiffs' ability to litigate the causes of action against Uber and Schmecken alleging vicarious liability and negligent hiring and supervision, among other things, as well as to defend against Uber and Schmecken's affirmative defense alleging that defendant Bailo Diallo was an independent contractor.

However, Uber and Schmecken raised legitimate concerns about the confidential nature of their data and about some responsive documents being trade secrets, proprietary data, or subject to a valid privilege. Since it denied most of plaintiffs' discovery motion, the motion court did not decide Uber and Schmecken's cross motion for a protective order. Accordingly, before Uber and Schmecken comply with this order, their cross motion must be decided, relative to what has been ordered herein.

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

ENTERED: NOVEMBER 27, 2018



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