SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 23, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Manzanet-Daniels, Mazzarelli, Webber, Singh, JJ.

7263-
7264 Index 651829/17

Preecha Nuntnarumit, et al.,
Plaintiffs-Appellants,

-against-

Lyceum Partners LLC, et al.,
Defendants-Respondents.

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Peter Brown & Associates PLLC, New York (Peter Brown of counsel), for appellants.

Rich, Intelisano & Katz, LLP, New York (Joseph A. Gershman of counsel), for Lyceum Partners LLC and Jacob Katsman, respondents.

Davis Polk & Wardwell LLP, New York (Paul Spagnoletti of counsel), for Kramer Levin Naftalis & Frankel LLP, respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 24, 2017, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs allege that defendants Lyceum Partners (Lyceum) and Jacob Katsman (Katsman) engaged in, inter alia, fraud, breach of fiduciary duty, breach of contract, rescission, negligent misrepresentation, and conversion in connection with a

transaction involving their transfer of shares in a Thai company to Lyceum pursuant to Master Repurchase Agreements.

The releases executed by plaintiffs and Lyceum are a complete defense to all claims asserted against Lyceum (*see Booth v 3669 Delaware*, 92 NY2d 934 [1998]; *Skluth v United Merchants & Mfrs.*, 163 AD2d 104, 106 [1st Dept 1990], *appeal withdrawn* 79 NY2d 976 [1992]). Plaintiffs argue that the releases were executed under duress. However, "[t]he threatened exercise of a legal right cannot constitute duress" (*76 Third Ave. LLC v ORIX Capital Mkts., LLC*, 26 AD3d 216, 218 [1st Dept 2006]). Moreover, having accepted the benefit of a settlement of their dispute with Lyceum, plaintiffs cannot attempt to void the settlement on the basis that it was entered into through duress (*Foundry Capital Sarl v International Value Advisors, LLC*, 96 AD3d 620, 621 [1st Dept 2012]; *Liberty Marble v Elite Stone Setting Corp.*, 248 AD2d 302, 304 [1st Dept 1998]).

The individual claims against Katsman for fraud, unjust enrichment and conversion were properly dismissed. The complaint does not state factual allegations that Katsman acted other than in his corporate capacity as a principal of Lyceum. The unjust enrichment claim fails as plaintiffs have not sufficiently alleged that Katsman stood to gain personally from the

transaction (*see Ishin v QRT Mgt., LLC*, 133 AD3d 449, 450 [1st Dept 2015], *lv denied* 27 NY3d 907 [2016]; *Hakim v Hakim*, 99 AD3d 498, 502 [1st Dept 2012]). The conversion claim fails because plaintiffs did not have a possessory right to the shares, as title passed to Lyceum upon delivery.

Plaintiffs assert claims against defendant Kramer Levin Naftalis & Frankel LLP for fraudulent inducement, aiding and abetting fraud and aiding and abetting breach of fiduciary duty. The allegations that Kramer Levin drafted documents favorable to Lyceum do not establish fraud or aiding and abetting fraud because the law firm was merely performing work within the scope of its duties (*see Mendoza v Akerman Senterfitt LLP*, 128 AD3d 480, 483 [1st Dept 2015]; *Gregor v Rossi*, 120 AD3d 447, 449 [1st Dept 2014]). The aiding and abetting breach of fiduciary duty claim cannot be established because, as sophisticated parties to an arms-length transaction, plaintiffs and Lyceum had no fiduciary duty to each other (*see Sebastian Holdings, Inc. v Deutsche Bank AG.*, 78 AD3d 446 [1st Dept 2010]; *Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]).

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: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7407 The People of the State of New York, SCI 5206/12
Respondent,

-against-

Jackie Barcliff,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Lawrence T. Hausman of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Thomas A. Quinn of counsel), for appellant.

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

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Order, Supreme Court, New York County (Eduardo Padró, J.), entered on or about April 16, 2015, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court correctly assessed 20 points under the risk factor for relationship (i.e. stranger) with the victim, because clear and convincing evidence established that defendant and the victim were strangers within the meaning of the Guidelines, having only met within 24 hours of the crime (*see People v Pollack*, 159 AD3d 435 [1st Dept 2018], *lv denied* 31 NY3d 909 [2018]; *People v Corn*, 128 AD3d 436, 437 [1st Dept 2015]), particularly where, at the

time of the crime, defendant was 44 years old and the victim was 14.

We also find that there was no overassessment of points for defendant's prior record, and that the court providently exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument, or were outweighed by the seriousness of the underlying offense.

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7408 In re Franklin R. C.,
Petitioner-Appellant,

-against-

Yoeli M. A.,
Respondent-Respondent.

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

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

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Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about December 1, 2016, which, to the extent appealed from as limited by the briefs, after a fact-finding hearing in a proceeding brought pursuant to Article 8 of the Family Court Act, dismissed the petition seeking an order of protection against respondent for failure to establish a prima facie case, unanimously affirmed, without costs.

Viewing petitioner's testimony in a light most favorable to him, and accepting that testimony as true, we conclude that the testimony failed to establish a prima facie case that respondent's actions constituted the family offense of harassment in the second degree (*see Matter of Fatima V. v Ramon V.*, 100 AD3d 509 [1st Dept 2012]. Petitioner also failed to establish

that respondent's actions during the August 28, 2016 incident constituted the family offense of harassment in the second degree under Penal Law § 240.26(2), because his testimony established that the incident occurred in the privacy of their own home.

Respondent's actions during the August 2016 incident could not support a finding that she had committed a family offense because the petition contained no facts regarding that incident (*see Matter of Kim Yvette W. v Leola Patricia W.*, 140 AD3d 495 [1st Dept 2016]).

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7409 Fatouma Bokum, Index 300083/16
Plaintiff-Respondent,

-against-

Sera Security Services, LLC, et al.,
Defendants-Appellants.

_____

Rubin, Fiorella & Friedman LLP, New York (Leila Cardo of counsel), for appellants.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about October 13, 2017, which granted plaintiff's motion for summary judgment on liability, and dismissed defendants' affirmative defense of comparative negligence, unanimously affirmed, without costs.

The court properly granted plaintiff's motion for summary judgment on the issue of defendants' liability. Plaintiff's affidavit indicated that she was crossing the street in the crosswalk with a green light, when she was struck by defendants' vehicle. The defendant driver's affidavit did not dispute these facts, and the police accident report stated that the driver mistakenly believed that he had the right of way. This evidence

demonstrated defendants' negligence as a matter of law.

Defendants' argument that there is an issue of fact as to plaintiff's comparative negligence goes to damages and is not a defense to plaintiff's prima facie case (*see Rodriguez v City of New York*, 31 NY3d 312, 317-319 [2018]). In any event, defendants failed to raise a triable issue of fact regarding plaintiff's comparative negligence as to damages.

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

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7410-
7411 Index 158162/12

Peter Castellotti,
Plaintiff-Appellant,

-against-

Lisa Free,
Defendant-Respondent,

John R. Blasi, et al.,
Defendants.

_____

J. Kaplan & Associates, PLLC, New York (Jeffrey A. Kaplan of counsel), for appellant.

Reed Smith LLP, New York (Steven Cooper of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 7, 2017, which, to the extent appealed from as limited by the briefs, held, sua sponte, that a prior order of this Court, entered March 8, 2016, limited plaintiff's recovery under his promissory estoppel claim to the amount plaintiff paid for his mother's estate tax, and dismissed plaintiff's claim for a constructive trust, unanimously reversed, on the law, without costs, and the order vacated. Appeal from order, same court and Justice, entered October 20, 2017, which denied plaintiff's motion seeking an appealable version of the court's June 7, 2017 order, unanimously dismissed, without costs, as academic, in

light of this Court's order, entered December 14, 2017, granting leave to appeal from the June 7, 2017 order.

In this action, plaintiff and defendant are brother and sister. Plaintiff alleged that, as a result of his impending divorce from his former wife, his mother removed him from the will so that his former wife could not obtain any part of the mother's estate. The amended complaint alleges that, both before the mother's death and subsequent to it, plaintiff and defendant entered into an oral agreement whereby, essentially, defendant would be the sole heir to the estate, and would, among other things, give plaintiff his 50% share after completion of plaintiff's divorce, and, until the final transfer of his share of the estate, defendant would maintain a life insurance policy of at least $5 million, with plaintiff as the sole beneficiary. Giving the complaint "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), it may be inferred that this oral agreement was in furtherance of the mother's wishes, as her decision to remove plaintiff from the will was for the sole purpose of denying the former wife any access to the estate, and not an affirmative wish to disinherit plaintiff. In furtherance of the oral agreement, following the mother's death, plaintiff paid the estate tax from his share of

the mother's life insurance policy.

This Court's prior determination (*Castellotti v Free*, 138 AD3d 198 [1st Dept 2016]), while finding that the oral agreement was unenforceable under the statute of frauds (General Obligations Law § 5-701), did not conclude that plaintiff's damages under his promissory estoppel claim were limited to reimbursement of the amount he paid in the estate taxes. As stated by the Court of Appeals: "where the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds would be unconscionable, the promisor should be estopped from reliance on the statute of frauds" (*Matter of Hennel*, 29 NY3d 487, 494 [2017]). On the prior appeal, this Court found that "triable issues of fact exist as to whether [plaintiff] has suffered the requisite unconscionable injury" (138 AD3d at 205), citing *Ackerman v Landes* (112 AD2d 1081 [2d Dept 1985]), in which that court held, *inter alia*: "[Whether] the circumstances are so egregious as to render it unconscionable to permit the defendant to invoke the Statute of Frauds are questions that should not be determined on the pleadings, but should await a full determination of the facts upon the trial" (*id.* at 1083-1084).

Plaintiff here has also sufficiently alleged the elements of his constructive trust claim (*see Panetta v Kelly*, 17 AD3d 163, 165 [1st Dept 2005], *lv dismissed* 5 NY3d 783 [2005]; *Bontecou v Goldman*, 103 AD2d 732, 733 [2d Dept 1984]), including the requisite confidential relationship (see *Gaddi v Gaddi*, 108 AD3d 430, 431 [1st Dept 2013]; *Thomas v Thomas*, 70 AD3d 588, 591-592 [1st Dept 2010]).

We have examined defendant's remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7412 The People of the State of New York, Ind. 1738/11
Respondent,

-against-

James Wright,
Defendant-Appellant.

_____

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

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

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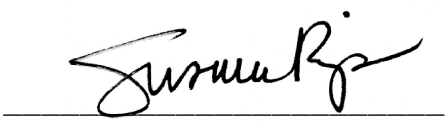
Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about October 26, 2015, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law Art 6-C), unanimously affirmed, without costs.

We find that the correct total of points to be assessed against defendant is 85. Regardless of whether defendant's correct point score is 85, or 75 as he claims, he remains a level two offender, and we find no basis for a discretionary downward departure in light of, among other things, the egregiousness of

the underlying crime (*see generally People v Gillotti*, 23 NY3d 841 [2014]).

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

ENTERED: OCTOBER 23, 2018



CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7413 The People of the State of New York, Ind. 2466/06
Respondent,

-against-

Lina Sinha,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Melissa C. Jackson, J.), entered on or about March 6, 2017, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors advanced by defendant were taken into account by the risk assessment instrument, and did not outweigh the seriousness of the underlying sex crimes against defendant's student over the course of many years, her retaliatory conduct when her victim ended the

sexual relationship, and her abuse of her position as an administrator and teacher at the victim's school.

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7414 Wansdown Properties Corporation, N.V., Plaintiff-Respondent, Index 151406/17

-against-

Azadeh Nasser Azari, Defendant-Appellant.

_____

Beys Liston & Mobargha LLP, New York (Nader Mobargha of counsel), for appellant.

Blank Rome LLP, New York (Martin S. Krezalek of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered October 24, 2017, which denied defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action, plaintiff – the defendant in a previous action – seeks to vacate the prior judgment against it. That judgment was based on an affidavit of confession of judgment executed on plaintiff's behalf by Gholam Reza Golsorkhi, its president managing director. Plaintiff alleges that Golsorkhi lacked authority to execute that affidavit; it also seeks to vacate the prior judgment based on defendant's alleged misconduct

(*see* CPLR 5015[a][3]).

Defendant contends that plaintiff may not claim that the affidavit was not "executed by" it (CPLR 3218[a]), because it is the judgment debtor from the prior action, as opposed to a third-party creditor. While there is authority supporting defendant's position (*see e.g. Giryluk v Giryluk*, 30 AD2d 22, 25 [1st Dept 1968], *affd* 23 NY2d 894 [1969]), there is also authority supporting plaintiff's position that a plenary action to vacate a judgment entered on an affidavit of confession of judgment can be based on the argument that the person executing the affidavit lacked authority (*see L.R. Dean, Inc. v International Energy Resources*, 213 AD2d 455, 456 [2d Dept 1995]). In any event, courts have "inherent discretionary power" to vacate judgments, even on a ground not mentioned in CPLR 5015(a) (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]).

The documentary evidence refutes plaintiff's claim that Golsorkhi lacked authority. Plaintiff alleges that it was managed and controlled by its sole shareholder. However, its articles of incorporation say, "The company [i.e., plaintiff] shall be managed by a *Management Board* consisting of two or more managing directors" (emphasis added). The managing directors are not the same as the shareholder; the articles say, "The managing

directors shall be appointed by the general meeting of shareholders." Finally, the articles say that "if one of the directors is appointed as president managing director, the company may ... be represented by the president alone." The documentary evidence submitted by defendant shows that Golsorkhi was plaintiff's president managing director.

Plaintiff contends that, pursuant to the internal affairs doctrine, the issue of Golsorkhi's authority should be governed by the law of the Netherlands Antilles because plaintiff was incorporated under that law. Plaintiff presented no proof of Netherlands Antilles law so as to make possible a determination whether there is an actual conflict between that law and New York law (the law of the forum) (*see Matter of Allstate Ins. Co. [Stolarz New Jersey Mfrs. Ins. Co.]*, 81 NY2d 219, 223 [1993]), and absent proof that Netherlands Antilles law conflicts with New York law, we apply New York law (*Gangel v DeGroot*, 41 NY2d 840, 842 [1977]).

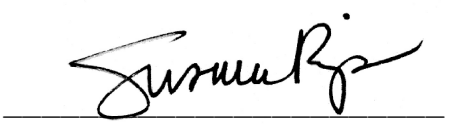
Under New York law, "[t]he president or other general officer of a corporation has power, prima facie, to do any act which the directors could authorize or ratify" (*Odell v 704 Broadway Condominium*, 284 AD2d 52, 56 [1st Dept 2001] [internal quotation marks omitted]). Plaintiff's reliance on *Cooper*,

Selvin & Strassberg v Soda Dispensing Sys. (212 AD2d 498 [2d Dept 1995]) and *Craven v Gazza* (36 Misc 2d 493, 496 [Sup Ct, Queens County 1962], *mod on other grounds* 19 AD2d 646 [2d Dept 1963]) for the proposition that "the president of a corporation has no power, merely by virtue of his or her office, to confess judgment against the corporation" (*Cooper*, 212 AD2d at 499) is misplaced. In both those cases, the corporations' governing documents showed that the president lacked the power to confess judgment in the amounts at issue (*see* 212 AD2d at 499; 36 Misc 2d at 496). By contrast, plaintiff points to no limiting language in its articles of incorporation.

The misconduct alleged in the complaint is not the sort of misconduct that would warrant vacating the prior judgment (*see Giryluk*, 30 AD2d at 23 [a judgment by confession has "all of the qualities, incidents and attributes of a judgment on a verdict, including a presumption as to its validity"]).

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

ENTERED: OCTOBER 23, 2018



CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7415 Dr. Arturo Constantiner, et al., Index 651889/13
Plaintiffs-Respondents,

-against-

The Sovereign Apartments, Inc.,
Defendant,

Alan Kersh, etc., et al.,
Defendants-Appellants.

_____

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Debra M. Schoenberg of counsel), for appellants.

Law Offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered November 1, 2017, which, to the extent appealed from as limited by the briefs, denied defendants Alan Kersh and Candace Kersh's motion to dismiss the causes of action for negligence and injunctive relief as against them, unanimously affirmed, without costs.

Defendants argue that any negligence associated with the reconstruction of the floor in their bedroom was committed by their independent contractor and that therefore they cannot be held liable for the alleged resulting unreasonable amount of sound in plaintiffs' apartment below (*see Saini v Tonju Assoc.*,

299 AD2d 244, 245 [1st Dept 2002]). However, the affidavit by plaintiffs' sound impact expert discussing the contractor's testimony that "one of the most important ... instructions that [he] had from the architect and the Kershes[] [was] to make sure that the level of [the master bedroom] floor corresponds with the adjacent areas" indicates that defendants exercised some control over the contractor's work (*see id.; see also Moore v Maddock*, 224 App Div 401, 404 [1st Dept 1928], *affd* 251 NY 420 [1929]).

Plaintiff argues that the empirical data indicates that the uncarpeted area of defendants' bedroom had a floor impact insulation class rating of 44, which violates the New York City Building Code (*see* Administrative Code of City of NY § 1207.3). This allegation is sufficient to withstand dismissal of the negligence cause of action at this juncture, as a violation of the Administrative Code is some evidence of negligence (*Elliott v City of New York*, 95 NY2d 730, 734 [2001]).

The cause of action for injunctive relief also remains viable; it is drafted in sufficiently general terms not to be limited to the dismissed nuisance cause of action.

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7416 The People of the State of New York, Ind. 4808/07
Respondent,

-against-

Rafael Santiago,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about September 13, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's completion of numerous vocational programs was already taken into account by the risk assessment

instrument, and the other mitigating factors cited by defendant were outweighed by the egregiousness of the underlying crime.

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7417 In re Joshua D.,
A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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

Zachary W. Carter, Corporation Counsel, New York (Rebecca L. Visgaitis of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about May 3, 2017, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fourth degree, and placed him with the Administration for Children's Services' Close to Home program for a period of 12 months, unanimously affirmed, without costs.

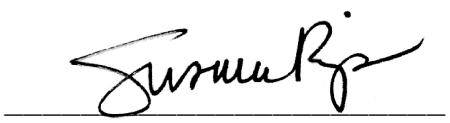
Appellant's suppression motion was properly denied. There is no basis for disturbing the motion court's credibility determinations, which were supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Police officers responding to a report of a robbery encountered appellant and another

person, who matched a joint description (*see e.g. People v Allen*, 280 AD3d 270 [1st Dept 2001], *lv denied* 96 NY2d 797 [2001]) of the two suspects, particularly with regard to the specific combination of colors of the hoodies involved in the description. Given the very close temporal and spatial proximity of this encounter to the reported robbery, and the absence of other pedestrians in the area, the limited description was sufficiently specific to at least permit the officers to conduct a lawful common-law inquiry (*see People v Lacy*, 104 AD3d 422, 423 [1st Dept 2013], *lv denied* 21 NY3d 1005 [2013]; *People v Pitman*, 102 AD3d 595, 596 [1st Dept 2013], *lv denied* 21 NY3d 1018 [2013]). These observations, along with appellant's immediate flight upon being approached by the police and the officers' observation of a large bulge under his hoodie, provided reasonable suspicion to justify the police pursuit, during which appellant discarded a

purse he was carrying (*see e.g. People v Reyes*, 144 AD3d 463, 464 [1st Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Bush*, 129 AD3d 537 [1st Dept 2015]).

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

ENTERED: OCTOBER 23, 2018



CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7418 In re 42/9 Residential LLC, Index 100839/16
Petitioner,

-against-

New York City Environmental
Control Board,
Respondent.

_____

Rose & Rose, New York (Todd Rose of counsel), for petitioner.

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

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Determination of respondent, dated January 28, 2016, which found that petitioner landlord violated Administrative Code of City of NY §§ 28-210.3, 28-202.1, 28-301.1, and 28-204.4, and New York City Building Code § 907.2.8, and imposed an aggregate penalty of $52,100, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order, Supreme Court, New York County [Nancy M. Bannon, J.], entered November 1, 2017), dismissed, without costs.

The determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). Petitioner's knowledge of tenants' undisputedly illegal occupancies established that petitioner

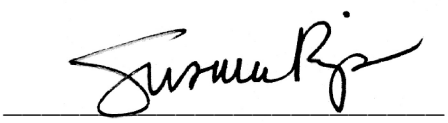
"permit[ted]" the conversion of Group R-2 permanent residential units into Group R-1 transient occupancies (Administrative Code § 28-210.3). Although the notices of violations concerned only 3 of the 264 units in the building, the residential occupancy of the units at issue for periods shorter than 30 days triggered the fire safety requirements applicable to Group R-1 (*see* Building Code §§ 907.2.8.1, 907.5), including the requirement to install sprinklers (Building Code § 907.5[2]).

The penalty is not shockingly disproportionate to the offenses, in light of the seriousness of the offenses and petitioner's prior history of violations (*see e.g. Matter of Konstas v Environmental Control Bd. of City of N.Y.*, 104 AD3d 689 [2d Dept 2013]). The constitutional prohibitions against excessive fines in the Eighth Amendment and the New York Constitution are inapplicable to the fines imposed in this case, which were solely remedial rather than punitive.

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

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

ENTERED: OCTOBER 23, 2018



CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7419 Q Aviation Management, LLC, Index 653910/13
Plaintiff-Appellant,

-against-

Alterna Capital Partners LLC,
Defendant-Respondent.

_____

Wachtell, Lipton, Rosen & Katz, New York (Leelle Bruerea Krompass of counsel), for appellant.

Drinker Biddle & Reath LLP, New York (Andrew P. Foster of counsel), for respondent.

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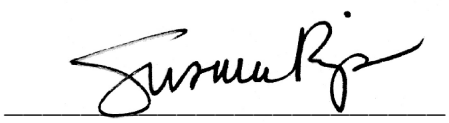
Order, Supreme Court, New York County (Andrea Masley, J.), entered July 31, 2017, which granted defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

The court properly determined that, under the plain language of the parties' agreement, plaintiff was not entitled to commissions (*see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]. The letters of interest plaintiff obtained for defendant's aircraft were non-binding expressions of interest only, not offers or "bona fide offers." The court properly declined to consider extrinsic evidence of the parties' intentions or expert opinion as to the meaning of the unambiguous

terms (*see generally South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]; *see also News Am. Mktg., Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 148 [1st Dept 2005]).

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

ENTERED: OCTOBER 23, 2018



CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7421 The People of the State of New York, Respondent, Ind. 2967/14

-against-

Luis Robles, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 30, 2015, unanimously affirmed.

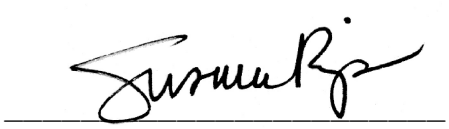
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 23, 2018



CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7422 George Evans, Index 313339/07
Plaintiff-Respondent,

-against-

Maria Gomes Oliveira,
Defendant-Appellant.

_____

Maria Gomes Oliveira, appellant pro se.

Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York (Michael E. Greene of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered March 8, 2017, which denied the mother's motion for an upward modification of the child support provisions contained in the parties' settlement agreement, unanimously affirmed, without costs.

The mother failed to make a prima facie showing that a substantial, unanticipated change in circumstances occurred warranting a modification of the child support agreed to in the parties' May 2010 stipulation of settlement, which was incorporated but not merged into their judgment of divorce (see *Zaratzian v Abadir*, 128 AD3d 953 [2d Dept 2015]). Her failure to find employment commensurate with her training and expertise does not constitute an unanticipated change in circumstances, as the

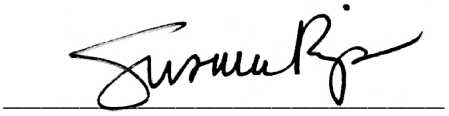
record reveals that she was either unemployed or underemployed at the time the agreement was entered into (*see W.B. v D.B.*, 114 AD3d 551 [1st Dept 2014]). The decrease in the mother's income attributable to the cessation of spousal maintenance was not an unanticipated change, but instead a negotiated consequence of the settlement agreement.

Finally, the alleged increase in the father's income does not constitute an unanticipated change in circumstances warranting an increase in support *(see W.B. v D.B.*, 114 AD3d 551), as the mother has not identified any needs of the child that are not being met (*see Kamerman v Kamerman*, 269 AD2d 165 [1st Dept 2000]).

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: OCTOBER 23, 2018



CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7423 The People of the State of New York, Ind. 3403/14
Respondent,

-against-

Richard Porter,
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 (Dana Poole of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered June 2, 2016, convicting defendant, upon his plea of guilty, of attempted robbery in the first degree and criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to concurrent terms of seven years, unanimously affirmed.

Defendant's claim that his federal conviction was not the equivalent of a New York felony is unpreserved and waived because there was neither a timely objection before the sentencing court nor was the issue raised by a CPL 440.20 motion (*see People v Jurgins*, 26 NY3d 607, 611-612 [2015]). It is also unreviewable on direct appeal because of the insufficiency of the record. We decline to review it in the interest of justice.

As an alternate holding, we find, to the extent the existing record permits review, that defendant was properly adjudicated a second felony offender. Defendant's federal conviction pursuant to 21 USC § 841(a)(1) is the equivalent of a New York felony conviction, and each of defendant's claims to the contrary is without merit (*see People v Reilly*, 273 AD2d 143 [1st Dept 2000], *lv denied* 95 NY2d 937 [2000]). We see no reason to depart from our previous holdings on this subject.

Regardless of whether defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7424 The People of the State of New York, Ind. 933/15
Respondent,

-against-

John Twitty,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 22, 2015, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after

service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 23, 2018

CLERK

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7425 The People of the State of New York, Ind.3241/16
Respondent,

-against-

Erick Moran,
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 (Lee M. Pollack of counsel), for respondent.

_____

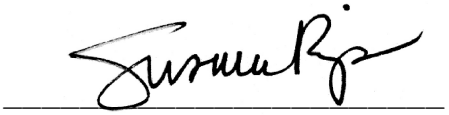
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie Wittner, J.), rendered February 9, 2017 ,

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: OCTOBER 23, 2018



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

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7426 The People of the State of New York, Ind. 2529/16
Respondent,

-against-

Terrell Anthony,
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 (Hope Korenstein of counsel), for respondent.

_____

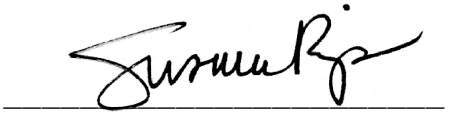
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered February 23, 2017,

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: OCTOBER 23, 2018



CLERK

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

Renwick, J.P., Richter, Kahn, Gesmer, Singh, JJ.

7427N Jason R. Goldy, Index 312210/16
Plaintiff-Appellant,

-against-

Simona Samson,
Defendant-Respondent.

_____

Law Offices of Howard B. Felcher, PLLC, New York (Howard B. Felcher of counsel), for appellant.

Jan Levien, P.C., New York (Jan Levien of counsel), for respondent.

_____

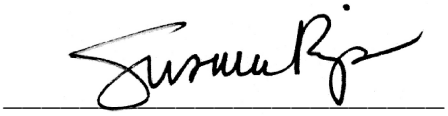
Order, Supreme Court, New York County (Michael L. Katz, J.), entered on or about January 22, 2018, which, insofar as appealed from as limited by the briefs, denied plaintiff father's motion to find defendant mother in contempt, unanimously affirmed, without costs.

The record shows that although the mother improperly suspended the father's visitation after the child sustained an injury while in his care, she immediately resumed visitation upon direction from the court, and the father had already made up the missed visits by the time the court heard oral arguments on the issue. Under such circumstances, it was not an improvident exercise of discretion for the court to decline to hold the mother in contempt (*see Kulhan v Courniotes*, 209 AD2d 383 [2d

Dept 1994]; *see also Rodman v Friedman*, 33 AD3d 400 [1st Dept 2006], *lv dismissed* 8 NY3d 895 [2007]; Judiciary Law §§ 750, 753).

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7428-
7429 The People of the State of New York,
Respondent,

-against-

Luis Rodriguez,
Defendant-Appellant.

Ind. 1580/03

_____

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

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

_____

Appeals from judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered February 26, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, and sentencing him to a term of 15 years to life; and from order, same court and Justice, entered on or about April 29, 2009, which denied defendant's motion for resentencing pursuant to the Drug Law Reform Act of 2004, held in abeyance, and the matters remitted for further proceedings in accordance herewith.

Although defendant did not file a CPL 440.10 motion, the existing record is sufficient to review his ineffective assistance of counsel claim (*see People v Pequero*, 158 AD3d 421

[2018]; *People v Doumbia*, 153 AD3d 1139 [2017]). Defendant was deprived of effective assistance when his counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation, and instead merely advised him that deportation was a possibility (*see id.*).

Defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea (*see id.*), and we hold the appeal in abeyance for that purpose.

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

ENTERED: OCTOBER 23, 2018

CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7430 James Wang, Index 100481/17
Plaintiff-Appellant,

-against-

Simon, Eisenberg & Baum, LLP, et al.,
Defendants-Respondents.

_____

James Wang, appellant pro se.

Abrams Garfinkel Margolis Bergson, LLP, New York (Robert J. Bergson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about January 5, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The court properly concluded that collateral estoppel barred plaintiff from relitigating his claims that defendants improperly translated to and from American Sign Language (ASL) the amount he was willing to accept in settlement and then settled for an amount that was unacceptable to him. The Federal District Court's opinion clearly addressed and rejected these claims, and the Second Circuit properly reviewed the District Court's findings de novo. The allegations of the complaint in this action and in the federal action are the same, although here

plaintiff has asserted legal malpractice, rather than seeking to void the settlement. The fact that the issue arose in the context of a different type of action is not dispositive because the factual findings necessary to support the claims are identical (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]).

Additionally, plaintiff has not cited new evidence not raised in the federal courts, and he chose not to retain new counsel in the prior action after he discovered the claimed error. He also failed to point to differences in the applicable law in the prior action and here.

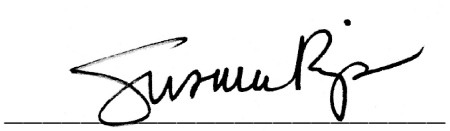
Plaintiff asserts that he did not have a full and fair opportunity to litigate his claims because the federal court did not provide him with an ASL interpreter so that he could make a proper presentation in oral argument. However, he failed to point to any evidence he was unable to present to the federal courts. Moreover, the Second Circuit determined that there was no need to hear oral argument on the issue of whether he instructed his attorney to seek the settlement amount he allegedly sought, and it is unclear how plaintiff's disability interfered with his ability to present his claim in written form or to retain counsel of his choosing. He was also free to hire a

private ASL interpreter to communicate with counsel if he believed that it was necessary.

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

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7431-
7432 In re Erin C.,
Petitioner-Respondent,

-against-

Walid M.,
Respondent-Appellant.

- - - - -

In re Walid M.,
Petitioner-Appellant,

-against-

Erin C.,
Respondent-Respondent.

_____

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

Burger & Green, LLP, New York (Nancy M. Green of counsel), for respondent.

_____

Order, Family Court, New York County (Adetokundo Fasanya, J.), entered on or about May 4, 2017, which, upon a finding that respondent Walid M. (respondent) committed the family offenses of menacing in the third degree (PL § 120.15) and harassment in the second degree (PL § 240.26[3]), granted petitioner Erin C. (petitioner) a six-month order of protection against him, unanimously affirmed, without costs. Order, same court and Judge, entered on or about May 4, 2017, which dismissed

respondent's family offense petition against petitioner, unanimously affirmed, without costs.

Petitioner proved by a fair preponderance of the evidence that respondent committed the aforementioned family offenses against her (*see* Family Ct Act § 832; *Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). The Family Court credited petitioner's testimony, and its determination, including its credibility findings, is entitled to great deference (*Matter of Everett C.*, 61 AD3d at 489).

Petitioner's testimony showed that she arrived home on the evening of February 25, 2016, to find respondent extremely agitated, and he began to "stalk" her around the apartment, screaming insults at her with such intensity that she was forced to lock herself in her bedroom, fearing physical injury [*see e.g. Matter of Orenzo H.*, 33 AD3d 492 [1st Dept 2006]).

Moreover, respondent continued to send petitioner multiple text messages, which were combative and insulting, for no legitimate purpose, through the night and over a period of days, at a time when, by all accounts, he was distraught that the parties, were not reconciling (*see e.g. Matter of Gracie C. v Nelson C.*, 118 AD3d 417 [1st Dept 2014]).

Respondent, for his part, among other things, failed to

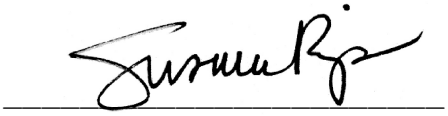
provide any specific details or dates on which any of the events alleged in his petition occurred. Thus, summary dismissal was appropriate (*see Matter of Vasciannio v Nedrick*, 305 AD2d 420 [2d Dept 2003], *lv denied* 100 NY2d 513 [2003]).

Nor was there need for a further hearing as the court already had the opportunity to hear and consider the evidence that would have been submitted at a separate hearing, relevant to respondent's allegations in his family offense petition. Respondent had an opportunity to testify and present evidence during the fact-finding hearing, and did not show that any additional evidence would have been proffered if the court had chosen to conduct a separate hearing (*see Matter of Quintana v Quintana*, 237 AD2d 130, 130 [1st Dept 1997]; *Matter of Anita L. v Damon N.*, 54 AD3d 630, 631 [1st Dept 2008]). The court, having considered the relevant evidence and the type of evidence that would have been considered in a separate hearing, and finding

respondent's testimony to be lacking in credibility, was, therefore, in a position to make an informed determination on the allegations.

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7433 Indian Harbor Insurance Company, Index 159286/14
Plaintiff-Appellant,

-against-

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

Cristobal Tomala-Campoverde,
Defendant.

_____

Kaufman Dolowich Voluck, LLP, Woodbury (Eric B. Stern of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Frank A. Valverde of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 10, 2017, which granted defendants Alma Tower, LLC and Vordonia Contracting & Supplies Corp.'s motion for summary judgment, inter alia, declaring that plaintiff is obligated to defend them in the underlying personal injury action, and denied plaintiff's cross motion for a stay pending resolution of an action seeking rescission of the subject insurance contract, unanimously affirmed, without costs.

Defendants Alma Tower and Vordonia demonstrated that plaintiff had actual knowledge of facts establishing a reasonable possibility of coverage and is therefore obligated to defend them

in the underlying personal injury action (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 67 [1991]). Shortly after the underlying action was commenced, asserting claims of common-law negligence and Labor Law violations against Alma Tower and Vordonia in connection with injuries sustained by the injured party while he was working on the property for subcontractor S&S HVAC Corp., Alma Tower and Vordonia commenced third-party actions against S&S alleging negligence and seeking indemnification and contribution. Alma Tower and Vordonia also wrote to plaintiff seeking coverage pursuant to the insurer's duty to defend. Thus, plaintiff had actual knowledge that S&S may have proximately caused the underlying injury and that therefore Alma Tower and Vordonia may be vicariously liable to the injured party.

Because there is a reasonable possibility that S&S proximately caused the injury, neither *Burlington Ins. Co. v NYC Tr. Auth.* (29 NY3d 313 [2017]) nor *Hanover Ins. Co. v Philadelphia Indem. Ins. Co.* (159 AD3d 587 [1st Dept 2018]) is applicable here.

As the underlying personal injury action was filed when the insurance policy was in effect, and plaintiff has a duty to defend, plaintiff is legally obligated at this time to pay Alma Tower and Vordonia's defense costs in the underlying action.

Once a policy goes into effect and a claim has been made, the status quo is changed, and a defense of recession may not be asserted until there is a judicial determination. The trial court properly denied a stay while plaintiff awaits a judicial determination in the separate recession action (*see Federal Ins. Co. v Kozlowski*, 18 AD3d 33, 39-40 [1st Dept 2005]; *Kiss Constr. NY, Inc. v Rutgers Cas. Ins. Co.*, 61 AD3d 412, 414-415 [1st Dept 2009]).

Supreme Court providently exercised its discretion in considering the sur-reply letters submitted by Alma Tower and Vordonia (*see* CPLR 2214[c]; *U.S. Bank Trust, N.A. v Rudick*, 156 AD3d 841, 842 [2d Dept 2017]).

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

ENTERED: OCTOBER 23, 2018

CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7434 Darlene Miller, Index 21361/16E
Plaintiff,

-against-

Moises Nunes DeSouza,
Defendant-Respondent,

William Rothchild, et al.,
Defendants-Appellants.

_____

Russo & Tambasco, Melville (Yamile R. Al-Sullami of counsel), for appellants.

Sclar Law Group LLP, Brooklyn (Alan M. Sclar of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered July 19, 2017, which, in this action for personal injuries sustained in a motor vehicle accident, denied the motion of defendants William Rothchild and Sharon Rothchild (Rothchilds) for summary judgment dismissing the complaint and all cross claims as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

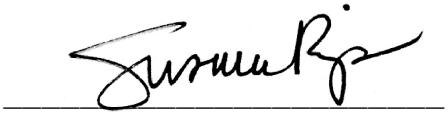
The Rothchilds, in whose vehicle plaintiff was a passenger, established entitlement to judgment as a matter of law by submitting deposition testimony that defendant DeSouza's vehicle

rear-ended their stopped vehicle (*see Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999]). Upon the burden shift, DeSouza failed to offer a nonnegligent explanation for the accident (*see Rodriguez v Garcia*, 154 AD3d 581 [1st Dept 2017]). The record shows that the accident occurred in heavy, stop-and-go traffic, and DeSouza testified to driving three-to-five miles per hour for at least 10 minutes prior to the accident, that he observed cars immediately in front of the Rothchilds' vehicle, and that he did not place his foot on his brake until his moving vehicle was two feet from the Rothchilds' back bumper. A driver is supposed to make reasonable use of his or her senses (*see Martinez v WE Transp. Inc.*, 161 AD3d 458 [1st Dept 2018), drive at a safe rate of speed under existing conditions (*see* Vehicle and Traffic Law § 1180[a]; *Chepel v Meyers*, 306 AD2d 235 [2d Dept 2003]), and

maintain a safe distance from other motor vehicles (*see* Vehicle and Traffic Law § 1129[a]; *Passos v MTA Bus Co.*, 129 AD3d 481 [1st Dept 2015]), which was not done in this case.

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7435-
7436 The People of the State of New York,
Respondent,

-against-

Ronald Sally,
Defendant-Appellant.

Ind. 1791/07

_____

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

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

_____

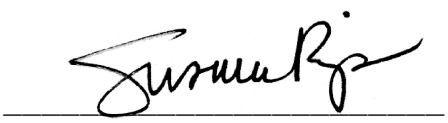
Judgment, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about September 29, 2017, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification, unanimously affirmed, without costs.

Assuming the order is appealable, we find that the court providently exercised its discretion in denying a modification of defendant's level two classification. The mitigating circumstances cited by defendant are outweighed by the seriousness of the underlying sex crime against a child, which demonstrates a grave risk to society (*see e.g. People v Lopez*, 154 AD3d 531 [1st Dept 2017]). Defendant has not provided appropriate documentation of the medical conditions that he

claims would lower his risk of reoffending and warrant a modification.

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7437 The People of the State of New York, Ind. 1058/13
Respondent,

-against-

James Cade,
Defendant-Appellant.

_____

Justin M. Luongo, The Legal Aid Society, New York (Steven R. Berko of counsel), for appellant.

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

_____

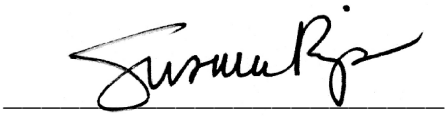
Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered November 13, 2013, convicting defendant, upon his plea of guilty, of operating a motor vehicle while under the influence of alcohol, and sentencing him to a term of 30 days with 5 years' probation and a $1000 fine, unanimously affirmed.

Defendant's claim that the court's explanation of his rights under *Boykin v Alabama* (395 US 238 [1969]) was deficient is unpreserved, and does not fall within the narrow exception to the preservation requirement (*see People v Conceicao*, 26 NY3d 375, 381-382 [2015]). We decline to review this claim in the interest of justice. As an alternative holding, we find that the court correctly stated the *Boykin* rights, and was not obligated to

label them as "constitutional," or to inform defendant that a jury would consist of 12 people.

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

ENTERED: OCTOBER 23, 2018



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Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7438- Index 654589/16
7439-
7440-
7441 In re Jack R. Franco, et al.,
Petitioners-Respondents,

-against-

Murray Dweck, et al.,
Respondents-Appellants.

_____

Wachtel Missry LLP, New York (Howard Kleinhendler of counsel), for appellants.

Oved & Oved LLP, New York (Andrew Urgenson of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered November 9, 2016, upon a partial final arbitration award in petitioners' favor, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered November 4, 2016, which granted the petition to confirm the award and denied respondents' motion to vacate the award, unanimously dismissed, without costs, as subsumed in the appeal from the November 9, 2016 judgment. Judgment, same court and Justice, entered June 21, 2017, upon a final arbitration award of attorneys' fees to petitioners, unanimously affirmed, with costs.

As petitioners correctly argue, respondents' compliance with

the partial final arbitration award's mandatory injunction to consent to refinancing the mortgage on the building, without so much as seeking a stay of its enforcement, renders moot their appeal from that part of the confirmation of the award (*see Garner v Agiovlasitis*, 287 AD2d 387 [1st Dept 2001]).

Were we to reach the issue, we would find that the use of the term "commercially reasonable" in the mandatory injunction does not render the award "so imperfectly executed that a final and definite award upon the subject matter submitted was not made" (CPLR 7511[b][1][iii]). Given that petitioner RJF 110 Realty LLC (the LLC) would have to return to the market to obtain the refinancing and that it was not possible for the arbitrator to know with any certainty the actual terms of any refinancing the LLC might obtain, it was both proper and practical for the arbitrator to describe respondents' obligation under the injunction in these terms (*see Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]).

Respondents also waived their objections to the scope of the arbitration, both by accepting, through their agreements to arbitrate, the rules of the American Arbitration Association (*see Contec Corp. v Remote Solution Co., Ltd.*, 398 F3d 205, 208 [2d Cir 2005]) and by their full participation, through post-hearing

briefing, in the arbitration (see *Lindenhurst Fabricators v Iron Workers Local 580*, 206 AD2d 282, 283 [1st Dept 1994], *lv denied* 84 NY2d 809 [1994]).

Even if not waived, respondents' contention that petitioners failed to comply with a precondition to arbitrability is without merit. The condition relied upon by respondents is in a provision of the agreement dealing with a different type of dispute. Under the LLC's operating agreement, petitioners complied with the necessary preconditions.

Respondents' contention that the arbitrator adjudicated the rights of third parties is also without merit. The arbitrator found that, as expressly stated in each of the corporate agreements, respondents were required to make provision in their wills to transfer their interests to their daughter Laurie, and that respondents were working to thwart this requirement. This was an adjudication of respondents' obligations to petitioners, not of Laurie's rights. Notably, no relief was awarded concerning Laurie.

The arbitrator's refusal to dissolve the corporate entities was not irrational or in manifest disregard of the law (*see Matter of Spear, Leeds & Kellogg v Bullseye Sec.*, 291 AD2d 255, 256 [1st Dept 2002]; *Cheng v Oxford Health Plans, Inc.*, 45 AD3d

356 [1st Dept 2007]). It was based upon a finding that the entities, with the exception of the need to refinance, had operated successfully despite the alleged acrimony for 12 years, and upon a full and careful analysis of the relevant New York law.

Respondents' allegations of the arbitrator's partiality are insufficient to meet the heavy burden of establishing that ground for vacatur, as they consist mainly of assertions that the arbitrator's findings of fact and law were wrong (*see Muriel Siebert & Co. v Ponmany*, 190 AD2d 544 [1st Dept 1993]).

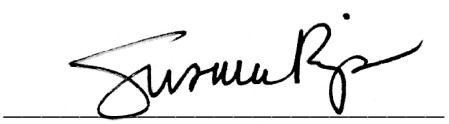
Contrary to respondents' contention, the final award did not run afoul of the doctrine of functus officio, which precludes an arbitrator from altering in substance a prior award (*see Matter of Wolff & Munier [Diesel Constr. Co.]*, 41 AD2d 618 [1st Dept 1973]). As the partial final award expressly reserved the issue of attorneys' fees, it cannot bar a subsequent award of those fees (*see Shimon v Silberman*, 26 Misc 3d 910, 914-915 [Sup Ct, Kings County 2009]). Moreover, there was no conflict between the final award, which provided for fees "incurred" and the partial final award; contrary to respondents' contention, fees are "incurred" when a party becomes liable for them, not when they are actually paid (*see PremiereTrade Forex, LLC v FXDirectDealer,*

LLC, 2013 WL 2111286, *5, 2013 US Dist LEXIS 70241, *15 [SD NY 2013]). Nor did the arbitrator exceed his contractual authority. As indicated, in determining the fees, he properly considered those "incurred," rather than those paid.

Respondents' attacks on the "reasonableness" of the fee award are unavailing in light of the limited standard of judicial review of arbitral awards (*see Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]). Given the arbitrator's review of the biographies of the lawyers who worked on the matter, their hourly rates, and their time entries, it cannot be said that there was no plausible basis for the award (*see Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368, 372 [1st Dept 2004]). For the same reasons, the final award was not "irrational" (*see Sweeney v Herman Mgt.*, 85 AD2d 34, 38 [1st Dept 1982]).

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

ENTERED: OCTOBER 23, 2018



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Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7442 The People of the State of New York, Ind. 3815/01
Respondent,

-against-

Manuel Dominguez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered June 19, 2002, convicting defendant, after a jury trial, of forgery in the second degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years unanimously affirmed.

Initially, after balancing the relevant factors, we exercise our discretion to hear this appeal despite defendant's long delay in perfecting it.

The court properly declined to suppress any evidence as fruit of an allegedly unlawful seizure. The police had probable cause to arrest defendant based on reliable information from a store employee that defendant had attempted to use a credit card

bearing a different name from the one he had used a few days earlier. The inference of criminal activity was compelling, and it was not rendered equivocal by the fact that innocent, but unlikely, explanations could be imagined (*see generally People v Carrasquillo*, 54 NY2d 248, 254 [1981]; *see also Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]). Moreover, the existing probable cause was reinforced by defendant's flight from the police (*see People v Howard*, 50 NY2d 583, 592 [1980], *cert denied* 449 US 1023 [1980]).

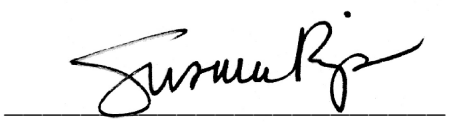
Even assuming that certain statements made by defendant without *Miranda* warnings should have been suppressed because they were elicited by a question that fell outside the pedigree exception, any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

At trial, the court providently exercised its discretion in receiving evidence that defendant made uncharged fraudulent purchases at another store with the same stolen credit card

earlier in the day. The evidence was relevant to the issue of intent, and its probative value outweighed any prejudicial effect (*see People v Arafet*, 13 NY3d 460 [2009]).

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7443 In re Mishelys R., and Others,

Children Under the Age of Eighteen Years, etc.,

Garland R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Deborah E. Wassel of counsel), for respondent.

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

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Order, Family Court, Bronx County (David J. Kaplan, J.), entered on or about December 5, 2017, which denied respondent father's motion to vacate an order of fact-finding and disposition, same court and Judge, entered on or about October 11, 2017, upon respondent's default, determining, inter alia, that the father neglected the subject children, unanimously affirmed, without costs.

The court properly denied the father's motion to vacate, as the record shows that he failed to provide a reasonable excuse for his default in appearing at the fact-finding and

dispositional hearing (*see Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538, 539 [1st Dept 2012]). The father's claim that he could not attend the morning hearing due to a medical appointment scheduled for later in the day is insufficient, since he clearly had ample time to attend both the hearing and the appointment. The father also failed to show that he made any effort to notify his counsel or the court of his inability to attend (*see Matter of Octavia Loretta R. [Randy McN.-Keisha W.]*, 93 AD3d 537 [1st Dept 2012]).

Furthermore, the father did not demonstrate a meritorious defense to the neglect petition (*see* Family Ct Act § 1042), as he relied upon conclusory denials of wrongdoing (*see Matter of Stephanie F. [Francy Javier A.]*, 132 AD3d 611, 611 [1st Dept 2015]; *Matter of Shavenon N. [Miledy L.N.]*, 71 AD3d 401 [1st Dept 2010]). The record further shows that he willfully failed to appear at the hearing (*see* Family Ct Act § 1042). In any event, the evidence at the hearing established that the father engaged in multiple incidents of domestic violence against the mother in the presence of the children, including one in which one of the subject children - Mishelys - sustained bruising and a cut lip.

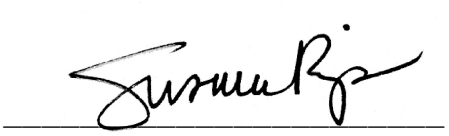
Contrary to the father's contention, his attorney's refusal to participate in the fact-finding hearing in his absence was not

ineffective representation, since his attorney's strategic decision preserved his opportunity to move to open the default (*see Matter of Landyn M. [Laquanna W.]*, 145 AD3d 520 [1st Dept 2016]).

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

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7445 Michelle Sanchez, etc., Index 350487/09
Plaintiff-Respondent,

Glennis Sanchez, etc.,
Plaintiff,

-against-

Morris Ave. Equities Corp.,
Defendant-Appellant,

Raphael Davalos,
Defendant.

_____

Collins, FitzPatrick & Schoene, LLP, New York (Carol R. Finocchio of counsel), for appellant.

Conde & Glaser LLP, New York (Ezra B. Glaser of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Doris Gonzalez, J.), entered on or about January 11, 2018, which, to the extent appealed from, denied defendant Morris Ave. Equities Corp.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The infant plaintiff was assaulted in the gated alleyway leading to the boiler room and the superintendent's apartment in defendant Morris Ave. Equities Corp.'s building, where she resided. Contrary to defendant's contention, the alleyway, in which tenants of the building deposited their trash, was not a

public area where defendant had no duty to maintain minimal security precautions (*see Wong v Riverbay Corp.*, 139 AD3d 440 [1st Dept 2016]). Issues of fact as to the foreseeability of the assault are presented by the record evidence of previous criminal activity in or at the building, including drug dealing, multiple burglaries, including one at gunpoint, and gunshots and the discovery of empty shell casings outside the building (*see Anokye v 240 E. 175th St. Hous. Dev. Fund Corp.*, 16 AD3d 287, 288 [1st Dept 2005]; *see generally Jacqueline S. v City of New York*, 81 NY2d 288 [1993]). Issues of fact exist as to whether the gate to the alleyway was maintained in a closed and locked condition and whether there was sufficient lighting in the alleyway. Issues of fact also exist as to whether the open gate or any insufficiency in the lighting was a proximate cause of the assault (*see Staveris v 125 Holding Co.*, 272 AD2d 185, 186 [1st Dept 2000]). Accordingly, considering the neighborhood's susceptibility to incidents of violent crime, we are unable to hold as a matter of law that defendant upheld its common law duty to maintain the premises in a safe and secure manner.

However, we reject plaintiff's alternative theory that defendant is liable to the extent that it voluntarily provided a locked gate, lighting, or video monitoring for the alleyway, and

then negligently maintained those items. Even were we to conclude that defendant created a duty by introducing such security measures, plaintiff failed to demonstrate that she was lulled into a false sense of security such that she neglected to take precautions that she would have otherwise taken in the absence of those measures (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 522 [1980]).

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

ENTERED: OCTOBER 23, 2018

CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7446 The People of the State of New York, Ind. 1223/11
Respondent,

-against-

Gilroy Johnson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered June 10, 2014, convicting defendant, upon his plea of guilty, of burglary in the first degree and robbery in the first degree, and sentencing him to an aggregate term of six years, held in abeyance and the matter remitted for further proceedings in accordance herewith.

Although defendant did not file a CPL 440.10 motion, the existing record is sufficient to review his ineffective assistance of counsel claim (*see People v Pequero*, 158 AD3d 421 [2018]; *People v Doumbia*, 153 AD3d 1139 [2017]). Defendant was deprived of effective assistance of counsel when his counsel failed to advise him that his guilty plea to an aggravated felony would result in mandatory deportation, and instead merely advised

him that his plea would have "immigration consequences," would "impact his ability to stay in the country" and "will probably very well end up with [defendant] being deported from this country" (*see id.*).

Defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea (*see id.*), and we hold this appeal in abeyance for that purpose.

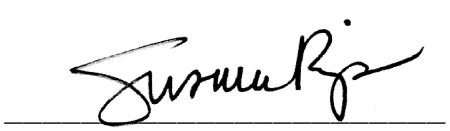
The court properly denied defendant's motion to suppress a lineup identification. The lineup was not unduly suggestive, because defendant and the fillers, who all fit the victim's description of his assailant, were reasonably similar in appearance, and there was no substantial likelihood that

defendant would be singled out (*see People v Jackson*, 98 NY2d 555, 559 [2002]; *People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 23, 2018



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Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7447 The People of the State of New York, Respondent, Ind. 5141/12

-against-

Dorian Johnson, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered September 4, 2013, unanimously affirmed.

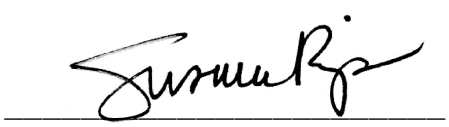
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7448 Zurich American Insurance Company, Index 651579/16
Plaintiff-Respondent,

-against-

ACE American Insurance Company,
Defendant-Appellant,

Progressive Casualty Insurance
Company, et al.,
Defendants.

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Brian J. Whiteman of counsel), for appellant.

Coughlin Duffy LLP, New York (Gabriel E. Darwick of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engeron, J.), entered July 25, 2017, which granted plaintiff insurer's (Zurich) motion for partial summary judgment declaring that the injured claimants qualified as insureds under defendant insurer's (ACE) policy, that ACE had a duty to defend in the underlying action, and that Zurich was entitled to contribution and indemnification from ACE as the coverage provided by ACE's commercial general liability policy was primary to the Zurich automobile policy, unanimously reversed, on the law, with costs, the motion denied, and it is declared that ACE has no duty to reimburse plaintiff's costs in the underlying actions. The Clerk

is directed to enter judgment so declaring.

The duty to defend does not attach where, as a matter of law, there is no basis on which the insurer may be held liable for indemnification (*see Spoor-Lasher Co. v Aetna Cas. & Sur. Co.*, 39 NY2d 875, 876 [1976]). The burden of establishing that a claim falls within a policy's exclusionary provisions rests with the insurer (*see Neuwirth v Blue Cross & Blue Shield of Greater N.Y., Blue Cross Assn.*, 62 NY2d 718, 719 [1984]), Here, the claimants' signed statements and the accident reports are properly considered to clarify ambiguous pleadings and meet ACE's burden that the underlying claims fell within the scope of its automobile exclusion (*see Striker Sheet Metal II Corp. v Harleysville Ins. Co. of New York*, 2018 WL 654445, *9-10 [ED NY 2018]).

The commercial general liability coverage provided by ACE included the following "Aircraft, Auto or Watercraft" exclusion, which excluded:

> "'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto' or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading.'"

Here, as in *Country-Wide Ins. Co. v Excelsior Ins. Co.* (147 AD3d 407, 408 [1st Dept 2017], *lv denied* 30 NY3d 905 [2017]), the

general nature of the operation of unloading the rebar cages, by the necessary step of untying the straps, led to the injuries sustained by the underlying claimants. Although the complaints alleged that the accident happened due to cages that were improperly constructed, improperly placed, improperly operated, improperly maintained, and not properly secured, the assertions nonetheless "arise out of" the loading and unloading of the truck, and the ACE policy's auto exclusion is therefore applicable.

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

ENTERED: OCTOBER 23, 2018

CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7449 Ericka Hernandez, Index 310042/11
Plaintiff-Respondent,

-against-

Catalina Ortiz,
Defendant-Appellant,

The City of New York, et al.,
Defendants.

_____

Law Offices of John Trop, Yonkers (David Holmes of counsel), for appellant.

Ferro, Kuba, Mangano, Sklyar, P.C., New York (Kenneth Mangano of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about July 5, 2017, which denied defendant Catalina Ortiz's motion for summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint against Ortiz.

In this trip and fall case involving an uneven sidewalk, defendant Ortiz's testimony that she lived in a one-family home adjacent to the sidewalk was sufficient competent evidence to make a prima facie showing that she qualified for the exemption provided at Administrative Code of City of NY § 7-210(b) (*see*

Coogan v City of New York, 73 AD3d 613 [1st Dept 2010]; *Miller v City of New York*, 253 AD2d 394, 395 [1st Dept 1998] ["that an affidavit is submitted by a party or other interested person does not detract from its sufficiency as competent evidence"]). In opposition, plaintiff offers no evidence to the contrary, and no authority for her proposition that a party seeking to demonstrate that their home is a one-, two- or three-family home exempt from § 7-210 must produce a deed.

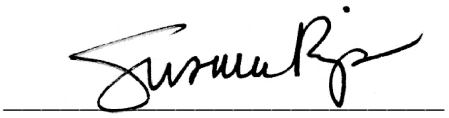
Nor is defendant Ortiz liable based on a theory that her fence, containing a gate, constituted a special-use. "The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others. . . . Special use cases usually involve the installation of some object in the sidewalk or street or some variance in the construction thereof" (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 298 [1st Dept 1988], *lv dismissed, lv denied* 73 NY2d 783 [1988]). There is no evidence in the record that defendant's fence is built on or in the sidewalk. That the gate, which defendant testified is "almost never" used, would permit herself and others to enter her

property does not constitute a special use, as those using it would merely walk across the sidewalk, a use not "unrelated to the public use" (*Poirier v City of Schenectady*, 85 NY2d 310, 315 [1995]). Moreover, as the defect in the sidewalk is adjacent to defendant's gate, not in front of it, it was plaintiff's burden to demonstrate that this alleged "special use" caused or contributed to the defect (*see Marino v Parish of Trinity Church*, 67 AD3d 500, 501 [1st Dept 2009]). Plaintiff offered no such evidence.

We have examined the parties' remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 23, 2018



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Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7451- Ind. 978/14
7451A The People of the State of New York, SCI 1706/15
Respondent,

-against-

Richard Terry,
Defendant-Appellant.

_____

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

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

_____

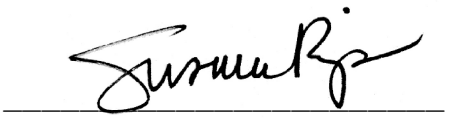
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Laura Ward, J.), rendered July 20, 2015,

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 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: OCTOBER 23, 2018



CLERK

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

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7452 The People of the State of New York, Ind. 2896/11
Respondent,

-against-

Jamel Fielder,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered July 2, 2013, unanimously affirmed.

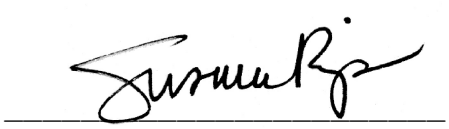
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 23, 2018



CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7453 The People of the State of New York, Ind. 3768/16
Respondent,

-against-

David Trottman,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Philip Morrow 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 (Gilbert Hong, J.), rendered June 1, 2017,

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: OCTOBER 23, 2018

CLERK

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