SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 22, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7392 Walter Vargas, Index 150556/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

- - - - -

The Legal Aid Society, Bronx Defenders, Brooklyn Defender Services, Community Service Society of New York, Center on the Administration of Criminal Law at New York University School of Law, Center on Race, Law and Justice at Fordham University Law School, Katal Center for Health, Equity, and Justice, and Brooklyn Community Bail Fund,
Amici Curiae.

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Lincoln Square Legal Services, Inc., New York (Martha Rayner of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Claude Platton of counsel), for respondent.

The Legal Aid Society, New York (Zohra Ahmed of counsel), for amici curiae.

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Order, Supreme Court, New York County (James E. d'Auguste, J.), entered April 17, 2017, which denied plaintiff's motion for

summary judgment and for a declaration that the New York Police Department's policy and practice of stops of subway passengers who commit transit infractions for the purpose of conducting "transit recidivist" checks violates the New York State Constitution's prohibition against unreasonable search and seizure, and granted defendant's cross motion for summary judgment dismissing the first amended complaint, affirmed, without costs.

The police officers had probable cause to arrest plaintiff based on their observation that he committed the transit offense of passing between two subway cars on a moving train (*see* 21 NYCRR §§ 1050.9[d], 1050.10[a]; CPL 140.10 [1][a]; Penal Law § 10[1]). Although we have concerns about the information in the transit database, we do not reach this issue in light of our holding on probable cause. Once plaintiff was arrested, the officers were permitted to conduct a search incident to arrest (*see People v Rodriguez*, 84 AD3d 500, 501 [1st Dept 2011], *lv denied* 17 NY3d 861 [2011]).

All concur except Manzanet-Daniels, J. who concurs in a separate memorandum as follows:

MANZANET-DANIELS, J. (concurring)

I agree with the majority that the police officers had probable cause to arrest plaintiff based on their observation that he committed the transit offense of passing between two subway cars on a moving train (*see* 21 NYCRR §§ 1050.9[d], 1050.10[a]; CPL 140.10 [1][a]; Penal Law § 10[1]). I also agree with the majority that plaintiff's attempt to conceal a marijuana cigarette from the officers gave them probable cause to believe plaintiff had committed a crime, i.e., felony tampering with physical evidence (PL 215.40[2]), and misdemeanor criminal possession of marijuana (PL 221.10[1]).

It must be said that plaintiff's designation as a transit recidivist did not give the officers a separate basis to arrest plaintiff (*see People v Smith*, 44 NY2d 613, 622 [1978]). The definition of "transit recidivist" at the time of plaintiff's arrest encompassed not only persons convicted of crimes, but those with prior arrests in the transit system or prior felony arrests within New York City.[1] This overbroad classification subverted the presumption of innocence and likely violated state

[1]The policy has since been amended and no longer applies to those with prior arrests.

sealing laws.[2]

As amici note, the database was likely contaminated by sealed arrests and summons histories and, as such, ran afoul of provisions of the Criminal Procedure Law that require that the records of any criminal prosecution terminating in a person's favor or by way of noncriminal conviction be sealed (*see* CPL §§ 160.50. 160.55, 170.55, 170.56). Statistics cited by the amici indicate that in 2016 alone, over 50% of all criminal cases arraigned in New York City Criminal Court were terminated in favor of the accused, and accordingly entitled to sealing.[3] From 2007 through 2015 an average of 23% of all criminal summonses were dismissed for facial insufficiency.[4] Unless otherwise permitted by law, no one, including a private or public agency, can access a sealed record, except with a court order upon a showing that justice so requires.

The presence of arrest and summons data in the database also

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[2]It is unclear from the record why, precisely, plaintiff was deemed a transit recidivist under the policy in effect at the time of his arrest in 2010.

[3]*See* Criminal Court of the State of New York Annual Report 2016, at 17.

[4]*See* Stipulation and Proposed Preliminary Approval Order at ¶ 5, *Stinson v City of New York*, 282 FDR 360 [SD NY 2012]).

undercut the presumption of innocence insofar as persons were threatened with punishment on account of allegations that may have been unsubstantiated or dismissed.

It bears noting that this is not the first NYPD database to have included unlawfully broad data. NYPD previously recorded the name of every individual stopped and frisked as recently as 2010, until forced by a federal lawsuit to discontinue the practice.

Finally, there is little doubt that the "transit recidivist" database had a disproportionately negative effect on black and Hispanic communities, perpetuating this City's history of overpolicing communities of color.

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

ENTERED: JANUARY 22, 2019

CLERK

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

7450 The People of the State of New York, Ind. 1108/15
Respondent,

-against-

Levi Mitchell,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (David Crow of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Kathrina Szymborski of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Anthony Ferrara, J.), rendered November 30, 2015, convicting defendant, after a jury trial, of criminal possession of a forged instrument in the first degree, and sentencing him, as a second felony offender, to a term of 4 to 8 years, modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to 3 to 6 years, and otherwise affirmed.

Defendant, a homeless 53 year-old, entered a pharmacy and attempted to pay for a tube of toothpaste using a counterfeit $20 bill. The bill was rejected by the cashier, and defendant left the store without completing the transaction. Shortly thereafter, defendant was observed by the police, where he was

attempting to purchase food with a counterfeit $20 bill. The restaurant cashier refused to accept the bill. Defendant was stopped by the police in front of yet another fast-food restaurant. Five counterfeit $20 bills were recovered from him upon arrest.

Despite being charged with five counts of possession of a forged instrument, the jury only convicted him of a single count and acquitted him of the remaining charges. Defendant was sentenced to an indeterminate period of incarceration of 4 to 8 years. We reduce this sentence, in the interest of justice, to an indeterminate period of incarceration of 3 to 6 years.

The Appellate Division has "broad plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range" (*People v Delgado*, 80 NY2d 781, 783 [1992]). A trial court need not abuse its discretion for the Appellate Division to substitute its own discretion (*People v Edwards*, 37 AD3d 289, 290 [1st Dept 2007], *lv denied* 9 NY3d 843 [2007]). We may "reduce a sentence in the interests of justice, taking into account factors such as defendant's age, physical and mental health, and remorse" (*People v Walsh*, 101 AD3d 614 [1st Dept 2012]; *see People v Ehrlich*, 176 AD2d 203 [1st Dept 1991]).

The immediate object of defendant's crime was to purchase basic human necessities, including food and toothpaste. In consideration of the fact that he was a 53 year-old, unemployed homeless man, with longstanding medical and substance abuse issues, a reduction of his sentence to 3 to 6 years is appropriate.

Defendant's extensive criminal history does not preclude a determination that his sentence is excessive (*Walsh,* 101 AD3d at 614). Defendant's most recent felony, forming the basis for his predicate felony adjudication, occurred 9 years prior to the instant offense, and was nonviolent. His most recent violent felony convictions occurred in 1991 and 1995, 20 and 24 years, respectively before the instant offense. The reduced sentence, which is the minimum permissible legal sentence, reflects an enhancement for the predicate nonviolent felony. His more recent convictions have all been nonviolent misdemeanors, and they are mostly related to his longtime drug addiction. Notwithstanding the People's contention that defendant's sentence is justified, in part, because he was involved in a scheme to launder money, there was no evidence presented at trial to that effect. In fact, the jury acquitted the defendant of the majority of counts regarding forged instruments, and defendant's sentence should not

in any way be based on crimes for which he was acquitted (*People v Grant*, 191 AD2d 297 [1st Dept 1993], *lv denied* 82 NY2d 719 [1993]).

All concur except Tom, J. who dissents in a memorandum as follows:

TOM, J. (dissenting)

Defendant was convicted, after a jury trial, of criminal possession of a forged instrument in the first degree, and sentenced, as a second felony offender, to a prison term of 4 to 8 years. In light of defendant's long criminal history, his receipt of a sentence on the low end of the sentencing range, and the lack of extraordinary mitigating circumstances, I disagree with the majority's decision to reduce the sentence to 3 to 6 years. Accordingly, I respectfully dissent.

On March 18, 2015, defendant was arrested while attempting to use counterfeit currency to make purchases in two different stores. The police recovered five counterfeit $20 bills from his pocket. On March 30, 2015, defendant was charged with five counts of criminal possession of a forged instrument in the first degree.

Following the jury trial, defendant was convicted of first-degree criminal possession of a forged instrument, a Class C felony. As a second felony offender convicted of a Class C felony, defendant faced a minimum sentence of 3 to 6 years, and a maximum of 7½ to 15 years (*see* Penal Law §§ 70.06 [3][c], [4][b]). Further, since this was defendant's sixth felony conviction, the trial court, in its discretion, could have

sentenced him as a persistent felony offender, and he would have been faced with a minimum indeterminate term of 15 years to life (Penal Law § 70.10[2]; CPL 400.20[1]).

Notably, although defendant was only convicted of a single count of first-degree possession of a forged instrument, the underlying facts include that the police recovered five counterfeit $20 bills from his pocket. This indicates that defendant was actively engaged in a counterfeiting scheme in which he sought to obtain genuine currency as change for small dollar transactions. In other words, he was not merely using a single counterfeit bill to purchase "human necessities" as the majority characterizes it. Rather, it appears he was part of a counterfeiting scheme to change counterfeit bills for real currency.

Significantly, leading back to 1981 defendant has at least 30 prior criminal convictions, including 5 felonies and 25 misdemeanors. Most of these prior convictions are recent. Specifically, since defendant's 2006 conviction of attempted robbery in the third degree, he has been convicted of 21 separate misdemeanors, including a conviction just one month before his arrest in this case. Those 21 misdemeanors include 12 convictions for petit larceny, and also convictions for menacing,

criminal possession of a weapon, attempted petit larceny, and drug possession.

In addition, defendant's criminal history includes serious felony convictions for attempted rape in the first degree, attempted robbery in the first degree, attempted criminal possession of a weapon in the third degree, and grand larceny in the third degree.

Moreover, defendant has a history of violating parole, failing to register under SORA, having orders of protection issued against him, having bench warrants issued for his arrest, and he even has criminal convictions from South Carolina.

At sentencing, the People recommended a sentence of 5 to 10 years based on defendant's criminal history, the seriousness of the crime, and the fact that defendant had many opportunities to stay out of trouble over the years but failed to do so. The court heard from defense counsel about defendant's age and medical issues with his knee and shoulder, and it was reminded that this was a nonviolent offense and that defendant had made all court appearances in this case. Taking all this into consideration, the Court issued a sentence of 4 to 8 years, a sentence that was between what the People recommended and the minimum of 3 to 6 requested by defendant. The court's sentence

was fair and proper considering all the relevant factors in this case including defendant's extensive criminal history.

There is nothing in the record to warrant a reduction in sentence. While this Court has plenary power to modify a sentence which is unduly harsh (*see People v Delgado*, 80 NY2d 780, 783 [1992]), it has nonetheless recognized that the sentencing judge is in the "most advantageous position to determine the proper sentence" (*People v Junco*, 43 AD2d 266, 268 [1st Dept 1974], *affd* 35 NY2d 419 [1974], *cert denied* 421 US 951 [1975]). And, although the majority notes we may reduce a sentence that is within the permissible statutory range (*see People v Delgado*, 80 NY2d at 783), "our intrusion into [that] discretionary area ... should rarely be exercised" (*People v Sheppard*, 273 AD2d 498, 500 [3d Dept 2000], *lv denied* 95 NY2d 908 [2000]). In general, the imposition of a sentence rests "within the sound discretion of the trial court" and "should not be reduced on appeal unless there was a clear abuse of discretion" (*People v Junco*, 43 AD2d at 268), or unless a defendant has demonstrated "extraordinary" or "special" circumstances warranting such relief (*see People v Fair*, 33 AD3d 558, 558 [1st Dept 2006], *lv denied* 8 NY3d 945 [2007]; *People v Chambers*, 123 AD2d 270, 270 [1st Dept 1986]). Defendant has not demonstrated

any circumstances — extraordinary or otherwise — that would justify reducing his sentence on appeal.

The sentencing minutes demonstrate that the court heard the parties' positions, considered various factors, including defendant's significant criminal history, and issued a reasonable sentence given the circumstances. In sum, it is clear the sentencing court did not abuse its discretion in this case and that all the factors, such as defendant's age, physical and mental health and remorse were taken into account by the sentencing court. The majority's sentence reduction under the circumstances sends a wrong and confusing message to our trial courts, which have been following our precedential guidelines.

Defendant is not entitled to a sentence reduction because his crime was nonviolent. Indeed, that fact has been taken into account by the relevant statutory provisions; a Class C violent felony carries a minimum sentence of 5 years.

Nor do defendant's age, homelessness, underemployment or physical health issues warrant a reduction. These circumstances do not excuse defendant's criminal conduct. There is no evidence that defendant's crime was connected to a drug or other addiction, and his presentencing report is unclear regarding any substance abuse issues defendant may have been experiencing at

the time of his arrest.

Further, defendant's criminal history establishes that, contrary to his claim, he is not making strides towards rehabilitation or trending away from criminality. In fact, he denied guilt for this crime in his interview with the Department of Probation, and he has failed to take any responsibility for his actions. The majority appears to give less consideration to our sentencing criteria including criminal history, the lack of remorse and responsibility, and instead focuses primarily on sympathy, not the appropriate factors.

Contrary to the majority's implication, there is nothing in the record to suggest that defendant's sentence was based on crimes for which he was acquitted. Nor do I suggest his sentence should be based on those charged crimes. Rather, the court properly sentenced defendant based on the crime he committed, his serious criminal history with at least 30 criminal convictions most of which were recent, and his failure to take responsibility for his actions, among other factors.

Moreover, defendant's sentence was clearly not "unduly harsh or severe," which is the standard, as urged by the majority, for this Court to exercise its broad plenary power to reduce a sentence. Here, defendant faced a maximum sentence of 7½ to 15

years. He received a sentence well within that range and much closer to the minimum permissible sentence. Since this was defendant's sixth felony conviction, he could have received sentence of 15 to life had he been adjudicated a persistent felony offender. Here, his sentence range of 4 to 8 years was one year above the minimum permissible legal sentence for this crime. This is not the type of case where we should exercise our discretionary power to reduce a sentence that was proper and fair.

In sum, "rather than being extraordinary, the circumstances relied on by the majority to support the reduction in sentence are, tragically, all too ordinary: an individual suffers personal and financial reverses, begins to abuse drugs and/or alcohol either before or after these reverses and ends up facing significant jail time as a result of his commission of various crimes" (*People v Walsh*, 101 AD3d 614, 616 [1st Dept 2012][Sweeny, J. dissenting]).

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

ENTERED: JANUARY 22, 2019

CLERK

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

8029 Karam Malik, et al., Index 152317/14
Plaintiffs-Appellants,

-against-

Style Management Co. Inc.,
et al.,
Defendants,

514 West 44th Street, Inc.,
Defendant-Respondent.

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Giordano Law Offices, PLLC, New York (Jack Giordano of counsel), for appellants.

Law Offices of James J. Toomey, New York (Evy L. Kazansky of counsel), for respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered July 11, 2017, which, to the extent appealed from as limited by the briefs, in this action for personal injuries sustained when plaintiff slipped and fell on ice, granted the motion of defendant 514 West 44th Street, Inc. (514 West) for summary judgment dismissing the complaint and all cross claims as against it, reversed, on the law, without costs, the motion denied.

514 West, which owns the building adjacent to the roadway in which plaintiff slipped and fell on ice, failed to make a prima facie showing of its entitlement to summary judgment, since the

evidence it submitted raises genuine issues of fact about whether it created the dangerous condition (*see Peña v Tyrax Realty Mgt., Inc.*, 150 AD3d 440, 440 [1st Dept 2017]). For example, its principal, who is also the principal of codefendant Style Management Co., Inc. (Style), the taxi company housed at the building owned by 514 West, admitted that there is a hose attached to the building, which the independent contractors who work for the taxi company would use to wash the cars. It is water from this hose, which pooled in the street and then froze, that plaintiff allegedly slipped on. "It is . . . a general rule that an abutting owner is liable if, by artificial means . . . water from the property is permitted to flow onto the public sidewalk where it freezes" (*Roark v Hunting*, 24 NY2d 470, 475 [1969]). 514 West asserts that Style operated the hose, not it, thus absolving it of liability. However, 514 West fails to establish that it is an out-of-possession landlord; indeed, given the very close connection between 514 West and Style, which, again, have the same principal, it is not possible on this record to determine, as a matter of law, that the former is without liability as a landowner.

All concur except Tom, J. who dissents in a memorandum as follows:

TOM, J. (dissenting)

Plaintiff commenced this action to recover for injuries he sustained when he slipped and fell on a patch of ice on the roadway between 514 and 518 West 44th Street. I would find that Supreme Court properly granted the motion for summary judgment dismissing the complaint as against defendant 514 West 44th Street, Inc (514). 514 established that the accident did not occur on its property, that it did not create the condition, and that it did not employ or direct the person who created the icy condition by using its hose to wash taxis owned by defendant Style Management Co. Inc, and plaintiff failed to raise a triable issue of fact (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]). Accordingly, I dissent.

The accident occurred on the roadway between 514 West 44th Street, owned by defendant 514, and 518 West 44th Street, owned by codefendant AR Real Estate Management, Inc. At the time of the accident, plaintiff was a taxi driver and worked as an independent contractor for codefendant Style Management Co. Inc., which operated a taxi business located at 514 West 44th Street. Codefendant I Rosenberg Auto Repairs, Inc. maintained and repaired the taxicabs, which were leased out to drivers by codefendant Style Management. Nonparty Andrew Rosenberg owned

defendant and all codefendants on the day of the accident.

On the day of the accident, before he slipped and fell, plaintiff observed two taxis being washed in front of the premises. He saw ice on the roadway after he fell.

Andrew Rosenberg testified that each of the defendants is its own entity and maintained a separate identification. 514 did not have a bank account or any employees. Taxis leased by Style Management are washed near 514/518 West 44th Street. The hose used to wash taxis is connected to a faucet affixed within 514.

Steven Rosenberg, Style Management's manager, testified that he and other managers would tell employees to spread salt when icy conditions made it necessary. Byron Omar Murillo testified that he was a general assistant for Style Management, and his responsibilities included washing and/or parking taxis. All the workers, including Murillo, were required to spread salt and sand when necessary due to icy conditions. Murillo was working on the day of plaintiff's accident, and saw plaintiff after he fell. He did not recall leaving a hose running after he washed a taxi that morning or whether he spread salt on the roadway either before or after plaintiff's accident.

Style Management provided Murillo with the equipment and hose needed to wash taxis, all of which was stored at the garage

located at 514 West 44th Street. Murillo had never heard of defendant 514.

After viewing surveillance footage from the morning of the accident, Murillo testified that it appeared to show him washing taxis in front of 514-18 West 44th Street; he acknowledged that he sometimes forgot to turn off the hose while he moved a taxi after washing it.

514 met its prima facie burden by demonstrating that it did not cause, create or have actual or constructive notice of the complained of defect (*see Kogan v North St. Community, LLC*, 81 AD3d 429, 430 [1st Dept 2011]). The evidence demonstrated that there were issues of fact as to whether Style Management's employee negligently left the water running thereby creating an icy condition. However, 514 did not employ, control or direct the employees of Style Management.

Further, 514 showed that the accident did not occur on its property, and that while all the defendants are owned and controlled by Andrew Rosenberg, they are separate corporate entities with separate books and records and are organized differently for distinct purposes. There was no factual or legal basis to pierce the separate identities of the defendants (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*,

16 NY3d 775, 776 [2011]).

Plaintiff failed to raise a triable issue of fact as to whether 514 created the condition or had actual or constructive notice of the condition. The mere fact that 514 allowed Style Management to use its hose and water source, without more, does not establish its liability for plaintiff's alleged injuries. There is nothing in the record to show that 514 had actual or constructive notice that Style Management's employee was using its hose to discharge water onto the unsalted roadway before the accident while the temperature was below freezing (*see Smith v Costco Wholesale Corp.*, 50 AD3d at 500).

The majority misplaces reliance on *Roark v Hunting* (24 NY2d 470 [1969]) to hold that because it was water from the hose connected to 514 West 44th Street, that 514, as the landowner, may be liable for letting water from its property flow onto the street where it froze. In order for such liability to attach, it is necessary for the property to have a negligent design so as to conduct water onto a public street (*see Patterson v New York City Tr. Auth.*, 5 AD3d 454 [2d Dept 2004]), or for the owner to have actual or constructive notice of a defect causing a water discharge and icy condition on public property (*see Griffin v 19-20 Indus. City Assoc., LLC*, 37 AD3d 412, 412-413 [2d Dept

2007]). Here, there are no issues of fact as to whether the alleged condition was caused by the negligence of 514 or whether 514 had actual or constructive notice of a defect which caused the condition. Nor is there evidence that the hose was negligently installed or maintained.

Further, the icy condition which caused plaintiff's fall in the present case was created by employees of a separate entity, and on the roadway, not on 514's property, clear distinctions.

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8142 Christopher Giancola, et al., Index 153082/13
Plaintiffs,

-against-

The Yale Club of New York City,
Defendant.

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The Yale Club of New York City,
Third-Party Plaintiff-Appellant,

-against-

P.S. Marcato Elevator Co., Inc.,
Third-Party Defendant-Respondent,

Scottsdale Insurance Company,
Third-Party Defendant.

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Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for appellant.

Gottlieb Siegel & Schwartz, LLP, New York (Stuart D. Schwartz of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered on or about July 11, 2017, which, to the extent appealed from as limited by the briefs, granted conditional summary judgment to third-party plaintiff the Yale Club (Yale Club) on its contractual indemnification claim against third-party defendant P.S. Marcato Elevator Co., Inc., unanimously affirmed, without costs.

Because the Yale Club failed to demonstrate that it was free from negligence in connection with plaintiff's fall through the cover of an escape hatch on its elevator, where plaintiff was working, the court correctly limited relief to conditional summary judgment on the Yale Club's claim for contractual indemnification (*see Antoniak v P.S. Marcato El. Co., Inc.*, 144 AD3d 407, 408 [1st Dept 2016]; *Auliano v 145 E. 15th St. Tenants Corp.*, 129 AD3d 469, 470 [1st Dept 2015]; General Obligations Law § 5-322.1).

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8143-
8143A-
8149B-
8149C-
8149D-
8149E-
8149F-
8149G-
8149H-
8149I In re Frank Enrique S., And Others,

Dependent Children Under Eighteen Years, etc.,

Karina Elizabeth F.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent,

Mike G., Sr.,
Respondent.

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

Magovern & Sclafani, Mineola (Joanna M. Roberson 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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Orders of disposition, Family Court, New York County (Karen I. Lupuloff, J.), entered on or about July 28, 2017, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the children Michael G. and Gabrielle G., and

transferred custody of the children to petitioner agency and the Commissioner of Social Services for purposes of adoption, unanimously affirmed, without costs. Appeals from orders, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about January 30, 2012 and on or about July 26, 2012; same court (Stewart H. Weinstein, J.), entered on or about July 9, 2014 and on or about October 9, 2014; same court (Emily H. Olshansky, J.), entered on or about March 9, 2015 and on or about August 13, 2015; and same court (Karen I. Lupuloff, J.), entered on or about April 24, 2017 and on or about July 10, 2017, unanimously dismissed, without costs, as moot.

With respect to the finding that respondent mother permanently neglected the children Gabrielle and Michael, petitioner demonstrated by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen the parental relationship by referring respondent for mental health services, providing guidance as to addressing home health hazards, and scheduling visitation between respondent and the children (*see Matter of Tion Lavon J. [Saadiasha J.]*, 159 AD3d 579 [1st Dept 2018]; *Matter of Cerenithy B. [Ecksthine B.]*, 149 AD3d 637, 637 [1st Dept 2017], *lv denied* 29 NY3d 1106 [2017]). Despite the agency's diligent efforts, respondent, who

acknowledged that she was diagnosed with schizoaffective disorder and did not take any medication, failed to plan for the children, in particular, by refusing to attend court-ordered therapy, although her failure to address her mental health problems was a key component of the reason that the children were removed from her and placed in foster care in the first place (*see Matter of Adaliz Marie R. [Natividad G.]*, 78 AD3d 409 [1st Dept 2010]; *Matter of Ibrahim B.*, 57 AD3d 382 [1st Dept 2008]).

The court's determination that terminating respondent's parental rights and freeing Gabrielle and Michael for adoption by their respective foster parents is in the children's best interests is supported by a preponderance of the evidence showing that the children have lived with the foster parents their entire lives and have thrived in their care (*see Matter of Ariana S.S. [Antoinette S.]*, 148 AD3d 581 [1st Dept 2017]; *Matter of Arianna-Samantha Lady Melissa S. [Carissa S.]*, 134 AD3d 582, 583 [1st Dept 2015], *lv dismissed in part, denied in part* 27 NY3d 952 [2016]).

To the extent respondent purports to appeal from an order that terminated her parental rights as to the child Frank Enrique S., Jr., we dismissed that appeal by order entered February 13, 2018 and denied respondent's motion for reconsideration on May 10, 2018, and we decline to consider the matter further.

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8145-
8146 Paula DeFreitas, et al.,
Plaintiffs-Respondents,

-against-

The Bronx Lebanon Hospital Center,
Defendant-Appellant.

Index 307223/09

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Celena R. Mayo of counsel), for appellant.

Echtman & Etkind, LLP, New York (David Etkind of counsel), for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about December 20, 2017, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Order, same court (George J. Silver, J.), entered on or about May 31, 2018, which denied defendant's motion pursuant to CPLR 603 to sever the trial of plaintiff Sinclair's claims from that of plaintiffs DeFreitas and Walker, unanimously affirmed, without costs.

In opposition to defendant's motion for summary judgment dismissing the complaint alleging age discrimination in employment, plaintiffs met their burden under the New York State Human Rights Law (Executive Law § 296[1][a]) of showing that a

material issue of fact exists as to whether defendant's stated reason for terminating DeFreitas's and Walker's employment is false or unworthy of belief and that more likely than not their age was the real reason (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 630 [1997]).

While defendant claims budgetary reasons for terminating DeFreitas and Walker, who were patient care managers (PCMs), there is evidence that off-shift PCMs did not experience a reduction in force (RIF) and that new, younger individuals were hired. An issue of fact exists as to whether the new employees replaced plaintiffs (*see e.g. Ashker v International Bus. Machs. Corp.*, 168 AD2d 724 [3d Dept 1990]). Defendant relies on a chart prepared by Dr. Jeanine Frumenti, vice president of the nursing department, showing that plaintiffs' positions were eliminated (*see Bailey v New York Westchester Sq. Med. Ctr.*, 38 AD3d 119, 124 [1st Dept 2007]). However, Frumenti prepared the chart after her deposition, and the chart does not indicate the source of the information.

Issues of fact also exist as to the performance evaluation forms on which defendant relies and as to the way the RIF was conducted. Cindy Elliott's testimony echoes DeFreitas's claim that Elliott was an unsuitable evaluator of her work, and

Prissana Alston, who evaluated Walker, could name no employee other than Walker whose evaluation, during the period 2008 to 2010, was revised by Frumenti. As to the RIF, there is evidence that, after DeFreitas and Walker were terminated, significantly younger probationary employees remained employed (*cf. Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 77 [1st Dept 2017] [employees retained while plaintiff's contract was not renewed were "essentially the same age as plaintiff"]).

Plaintiff Sinclair was terminated after being granted a requested transfer from the night shift to the day shift and a different department, where she received poor performance evaluations. In a departure from defendant's internal procedures, upon termination, Sinclair was not considered for return to her original position. Defendant failed to demonstrate as a matter of law that this departure from procedure was solely for nondiscriminatory reasons. Moreover, Sinclair testified that Monica Chambers, who evaluated her, made negative comments related to age and Chambers did not refute having made them.

In view of the foregoing, plaintiffs also raised issues of fact sufficient to defeat summary judgment under the more lenient "mixed motive" standard applicable to their claims under the New York City Human Rights Law (Administrative Code of City of NY §

8-107[1][a]) (*see Hamburg*, 155 AD3d at 72-73).

Defendant failed to show that severance of Sinclair's trial from that of the other plaintiffs would be "[i]n furtherance of convenience" (CPLR 603). Although DeFreitas's and Walker's circumstances are not identical to Sinclair's, the common elements outweigh the differences, and trial of the claims will entail much of the same evidence and many of the same witnesses. Defendant also failed to show that the prejudice it will suffer if all claims are tried together outweighs the prejudice to plaintiffs, i.e., delays and higher litigation costs, resulting from severance.

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

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8147 The People of the State of New York, Ind. 7180/96
Respondent,

-against-

Antonio Mallet,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (April A. Newbauer, J.), entered on or about April 2, 2015, which denied defendant's pro se motion to vacate a judgment of conviction rendered September 23, 1999, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to vacate his conviction based on newly discovered evidence or actual innocence. Both claims failed because they were not supported by any sworn, nonhearsay allegations by the source of the proffered new evidence, who was the sole eyewitness who testified at trial (*see People v Jimenez*, 142 AD3d 149, 156 [1st Dept 2016]; *see also* CPL 440.30[1][a]). In addition, the motion was not made with due diligence. Although there was already a pending motion to vacate the instant

judgment, it was filed years after the discovery of the alleged new evidence without any valid excuse for this delay (*see e.g. People v Friedgood*, 58 NY2d 467, 470-71 [1983]; *People v Stuart*, 123 AD2d 46, 54 [1986]; *see also* CPL 440.10[1][g]). In any event, the witness's statements did not establish that the alleged new evidence "will probably change the result if a new trial is granted" (*People v Salemi*, 309 NY 208, 216 [1955], *cert denied* 350 US 950 [1956]), or that defendant is actually innocent (*see generally Jimenez*, 142 AD3d at 155).

The court also providently exercised its discretion in declining to hold a hearing on the motion to vacate, because the motion was not supported by "sworn allegations substantiating or tending to substantiate all the essential facts" (CPL 440.30[4][b]), and defendant otherwise failed to present any grounds warranting a hearing (CPL 440.30[4][a]).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8148 Herman C. Franco, Index 102021/08
Plaintiff-Appellant,

-against-

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

_____

Bisogno & Meyerson, LLP, Brooklyn (Elizabeth Mark Meyerson of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Max McCann of counsel), for respondents.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered October 23, 2017, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established entitlement to judgment as a matter of law in this action where he was injured when defendants' tow truck was left unattended by its driver, defendant Millar, and rolled backwards into plaintiff's car, which was stopped behind the tow truck. When a driver fails to secure an unattended vehicle sufficiently to prevent it from starting to move on its own, the driver is negligent (*see Spence v Lake Serv. Sta., Inc.*, 13 AD3d 276, 278 [1st Dept 2004]; *see also Schiffer v Sunrise Removal, Inc.*, 62 AD3d 776, 780 [2d Dept 2009]).

In opposition, defendants did not raise a triable issue of fact as they failed to offer a non-negligent explanation for the collision (*see Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). Defendants' speculation that, even though Millar left the gear in "park" before exiting the tow truck, the gear must have slipped into reverse on its own due to some mechanical failure is insufficient to raise an issue of fact (*see Flood v Travelers Vil. Garage*, 66 AD2d 726, 727 [1st Dept 1978]). Defendants present no evidence of any type of mechanical failure or defect in the tow truck, which Millar was able to drive back to the depot after the accident without incident.

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8150 16 West 8th LLC, Index 162163/14
Plaintiff-Respondent,

-against-

Thomas Gluckman, et al.,
Defendants-Appellants.

_____

Moritt Hock & Hamroff LLP, New York (Bruce A. Schoenberg of counsel), for appellants.

Morrison Cohen LLP, New York (David J. Kanfer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 21, 2017, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the second cause of action and on their counterclaims, unanimously affirmed, with costs.

The second cause of action alleges that defendants breached the indenture that created the so-called Emergency Egress Easement. It is undisputed that an extension to defendants' building blocks the emergency exit door of plaintiff's building. However, there is an issue of fact as to whether this extension "interferes" with the easement as contemplated by the indenture.

The first counterclaim is primarily mandatory in nature as it requires plaintiff to accept a substitute means of emergency

egress, and the factual issue precludes granting defendants the relief requested. The second counterclaim seeks specific performance of a contract whereby plaintiff allegedly agreed that defendants would relocate plaintiff's emergency exit door at their expense. Given the affidavit submitted by the in-house counsel of plaintiff's managing agent, who was involved in the negotiations, there is a question of fact as to whether the parties ever reached an agreement. Thus, the court properly denied this branch of defendants' motion (*see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

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

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8151 The People of the State of New York, Ind. 4094/13
Respondent,

-against-

Henry Acevedo,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Valerie Figueredo 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 (Michael J. Obus, J.), rendered March 26, 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: JANUARY 22, 2019

CLERK

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

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8152 In re Michael T.J.K.,

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

Alicia R.,
Respondent Appellant,

Sheltering Arms Children & Family Services,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for appellant.

Dawn M. Shammas, New York, for respondent.

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

_____

Order of disposition, Family Court, Bronx County (Linda Tally, J.), entered on or about June 13, 2017, which, upon a finding of abandonment, terminated respondent mother's parental rights to the subject child and transferred custody of the child to the Commissioner of Social Services for purposes of adoption, unanimously affirmed, without costs.

Clear and convincing evidence that respondent had no contact with the child or the agency during the six months preceding the filing of the petition raised a presumption that she had abandoned the child, which she failed to rebut (Social Services

Law § 384-b[5][a]; *Matter of Julius P.*, 63 NY2d 477, 481 [1984]). Respondent's assertions that she did not know the child's whereabouts, and her single attempt to contact a prior agency involved in the child's case, were insufficient to establish diligent efforts to locate the child, and there is no evidence that the agency discouraged or prevented her from making contact with her son (*Matter of Stefanie Judith N.*, 27 AD3d 403, 403 [1st Dept 2006]; *see Matter of Anthony M.*, 195 AD2d 315, 316 [1st Dept 1993]).

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

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8153 The People of the State of New York, Ind. 2035/16
Respondent,

-against-

Corey Green,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan 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 (Ellen Biben, J.), rendered November 29, 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: JANUARY 22, 2019

CLERK

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

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8154-
8155 The People of the State of New York, Respondent,

-against-

John Hamlett,
Defendant-Appellant.

Ind. 293/06
5050/07

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

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

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered January 22, 2008, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of six years, unanimously affirmed. Judgment, same court (Maxwell Wiley, J. at colloquies on substitution of counsel; Arlene D. Goldberg, J. at jury trial and sentencing), rendered July 22, 2008, convicting defendant of three counts of assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, consecutive to the plea conviction, unanimously affirmed.

As to the January 22, 2008 plea conviction, the court

providently exercised its discretion in denying defendant's motion to withdraw the plea. "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]). Here, permitting defendant to set forth his claims in detail constituted a suitable inquiry under the circumstances. The record on its face shows that defendant's guilty plea was made knowingly, intelligently, and voluntarily, and his claims of coercion and innocence were contradicted by the statements he made during the plea colloquy. Defendant pleaded guilty after the victim and other witnesses testified during a trial, at which defendant represented himself and was assisted by an attorney acting as his legal advisor. Defendant's claims of ineffective assistance by the legal advisor were unsupported or contradicted by the record, and the plea court, which had presided over the trial, was familiar with all the relevant circumstances. The plea was plainly not the product of the legal advisor's alleged misadvice about the opportunity to recall a witness, or any other purported defects in the uncompleted trial or in the advisor's performance. Instead, it clearly resulted

from the strength of the People's case, which included evidence that defendant phoned the victim to admit his guilt and apologize for the crime. Defendant's remaining challenges to the plea are likewise meritless.

As to the July 22, 2008 trial conviction, the court providently exercised its discretion in denying the request for substitution of counsel made by defendant and the attorney who had been defendant's legal advisor in the case that resulted in a guilty plea. Nothing in the record indicates that defense counsel had a genuine conflict of interest with defendant or that counsel was in any way deficient in representing him (*see People v Sides*, 75 NY2d 822, 824 [1990]; *People v Medina*, 44 NY2d 199, 207 [1978]). Defendant's claim that the attorney rendered ineffective assistance in his role as legal advisor in the plea case was baseless, for the reasons stated above. Although the attorney himself asserted that defendant's allegations against him resulted in a conflict, these allegations created, at most, an "artificial conflict" (*People v Davis*, 226 AD2d 125, 126 [1st Dept 1996], *lv denied* 88 NY2d 1020 [1996]). Courts have recognized that an attorney should not be relieved on the basis of a manufactured conflict (*see People v Linares*, 2 NY3d 507, 512 [2004][violent threat against attorney]; *People v Vasquez*, 287

AD2d 334 [1st Dept 2001] [meritless disciplinary complaint against attorney], *lv denied* 97 NY2d 709 [2002]; *Davis*, 226 AD2d at 126 [meritless lawsuit against attorney]; *see also Mathis v Hood*, 937 F2d 790, 796 [2d Cir 1991]). In any event, defendant once again proceeded to trial pro se, with the same legal advisor, and the record as a whole casts doubt on his claim that he represented himself only on constraint of the court's refusal to relieve the attorney.

The trial court properly rejected defendant's proposed response to a jury note on the issue of causation. Defendant did not preserve his challenges to the court's ultimate response to that note, to the court's response to another note, or to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find that the court provided meaningful responses to each of the jury inquiries (*see People v Almodovar*, 62 NY2d 126, 131 [1982]; *People v Malloy*, 55 NY2d 296, 301 [1982], *cert denied* 459 US 847 [1982]), and that nothing in the summation warrants reversal (*see People v*

Overlee, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8156 The People of the State of New York, Ind. 2332/15
Respondent,

-against-

Manuel Pacheco,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein 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 (Marc J. Whiten, J.), rendered December 15, 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: JANUARY 22, 2019

CLERK

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

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8157 Universe Antiques Inc., et al., Index 601008/10
Plaintiffs-Appellants-Respondents,

-against-

Joan M. Gralla,
Defendant-Respondent-Appellant.

_____

Fischman & Fischman, New York (Doreen J. Fischman of counsel), for appellants-respondents.

Jeremy Gutman, New York, for respondent-appellant.

_____

Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered February 11, 2016, which, after a nonjury trial on damages, awarded plaintiffs damages jointly and severally, and directed the entry of judgment against defendant in the principal amount of $125,000, without prejudgment interest, unanimously modified, to direct the entry of judgment against defendant in the principal amount of $225,000, and otherwise affirmed, without costs.

In a decision in a prior action between the parties, Justice Jane Solomon found that defendant had wired $100,000 to Alexander, the original owner of the sculpture, on February 18, 2005 to facilitate a contract between Doyle, her boyfriend, and Alexander. That decision was not appealed. Consequently,

Supreme Court was barred by res judicata from finding that defendant did not benefit from those funds. Therefore, Supreme Court's decision that it would be inequitable to award plaintiffs the $100,000 that defendant paid to Alexander cannot be reached under a fair interpretation of the evidence (*Rigopoulos v State of New York*, 236 AD2d 459, 460 [2d Dept 1997]; *see also Watts v State of New York*, 25 AD3d 324 [1st Dept 2006]; *Warm v State of New York*, 308 AD2d 534, 536 [2d Dept 2003]). However, the court did not improvidently exercise its discretion in declining to award plaintiffs prejudgment interest (*see* CPLR 5001[a]; *John Hancock Life Ins. Co. of N.Y. v Hirsch*, 77 AD3d 710, 711 [2d Dept 2010]; *Margo Props. v Nelson*, 99 AD2d 1029, 1030 [1st Dept 1984]).

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

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8159 The People of the State of New York, Ind. 4884/12
Respondent,

-against-

Duval Simmons,
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 (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 (Patricia Nuñez, J.), rendered March 31, 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: JANUARY 22, 2019

CLERK

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

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8160-
8161 The People of the State of New York,
Respondent,

-against-

Mekhi Muhammad,
Defendant-Appellant.

Ind. 2764/14

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (April A. Newbauer, J.), rendered May 26, 2016, as amended November 14, 2017, convicting defendant, upon his plea of guilty, of attempted murder in the second degree and attempted robbery in the first degree, and sentencing him, as a second felony offender, to concurrent terms of eight years, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and remanding for resentencing.

The court properly denied defendant's motion to suppress identification testimony. The record, including lineup photographs, supports the hearing court's finding that the lineups were not unduly suggestive. Discrepancies regarding skin

tone and apparent age were not so pronounced as to create a "substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

Defendant was incorrectly adjudicated a second felony offender based on his previous conviction under Fla Stat Ann § 893.13(1)(a), because that conviction was not the equivalent of a New York felony. The knowledge element of the Florida statute at the time of defendant's Florida offense was that a defendant "knew of the illicit nature of the items in his possession" (*Chicone v Florida*, 684 So 2d 736, 744 [Fla 1996]; *see also Garcia v Florida*, 901 So 2d 788, 793 [Fla 2005]). This was broader than the knowledge requirement under Penal Law § 220.16, which demands proof of "knowledge that the item at issue was, in fact, the controlled substance the defendant is charged with selling or possessing" (*People v Ramos*, 145 AD3d 432, 433 [1st Dept 2016]). Contrary to the trial court's analysis, the dispositive difference between the knowledge requirements of the Florida and New York statutes was in place at the time of defendant's 1998 Florida conviction. Florida's alteration of its knowledge requirement in 2002 (*see* Fla Stat Ann § 893.101) has no bearing on our analysis.

In light of this determination, we find it unnecessary to reach defendant's claim that his Florida conviction fails, in various other respects, to qualify as a predicate felony.

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8164N Cinthia Alcantara-Pena, Index 302075/12
Plaintiff-Respondent,

-against-

Christine Shanahan,
Defendant,

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

_____

London Fischer LLP, New York (Amy M. Kramer of counsel), for appellants.

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about October 27, 2017, which denied defendants The City of New York and Welsbach Electric Corp.'s motion to preclude plaintiff Cinthia Alcantara-Pena from offering expert testimony, or alternatively, compelling her to submit to a vocational rehabilitation examination and exchange her vocational expert's reports, notes and records, and granted plaintiff's cross motion to quash defendants' subpoena dues tecum dated July 20, 2017, and for sanctions to the extent of quashing defendants' subpoena, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in

denying defendants' motion. Plaintiff's CPLR 3101(d) notice provides enough detail regarding the substance of her economists' expected testimony (*see* CPLR 3101[d][1][i]).

Defendants' claim that the bill of particulars did not indicate that plaintiff's loss was continuing lacks merit, because the bill of particulars states that plaintiff's "disability is of a continuing permanent and partial nature and will continue for an indefinite period of time into the future." The bill and supplemental bill of particulars also state that plaintiff was reserving the right to submit additional medical bills and lost wage earnings as they were received because she continued to incur expenses. Given the aforementioned language of the bill and supplemental bill of particulars, the economists' assumption that plaintiff is unable to work is "fairly inferable from the record" (*Banks v City of New York*, 92 AD3d 591, 591 [1st Dept 2012]).

In addition, we find that Supreme Court providently exercised its discretion in denying the motion to compel plaintiff to submit to a vocational rehabilitation examination post-note of issue. That plaintiff noticed a vocational rehabilitation expert after the filing of the note of issue does not constitute an unusual or unanticipated circumstance, because

there is no evidence that she is asserting a new theory of liability and there is no indication in the record that the disclosure was served on the eve of trial (*see Ramsen A. v New York City Hous. Auth.*, 112 AD3d 439, 439-440 [1st Dept 2013]). Furthermore, defendants do not allege that plaintiff is asserting new or additional injuries or that the nature and extent of her existing injuries have changed dramatically (*see Rebollo v Nicholas Cab Corp.*, 125 AD3d 452 [1st Dept 2015]; *Silverberg v Guzman*, 61 AD3d 955, 956 [2d Dept 2009]; *Schenk v Maloney*, 266 AD2d 199, 200 [2d Dept 1999]). Lastly, the complaint, the bill of particulars, the supplemental bill of particulars and plaintiff's deposition testimony establish that defendants were on notice long before the note of issue was filed that plaintiff is claiming that she has been unable to work as a result of injuries sustained in the accident.

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

ENTERED: JANUARY 22, 2019

CLERK

Friedman, J.P., Kapnick, Gesmer, Oing, Moulton, JJ.

8165N Jean Hopkins, Index 102479/11
Plaintiff-Appellant,

-against-

City of New York,
Defendant-Respondent,

New York Downtown Hospital,
Defendant.

- - - - -

[And a Third-Party Action]

_____

Robert G. Spevack, New York, for appellant.

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

_____

Order, Supreme Court, New York County (Alexander M. Tisch, J.), entered April 12, 2018, which, to the extent appealed from, denied plaintiff's motion to strike defendant City of New York's answer, unanimously affirmed, without costs.

The parties suspended scheduling of the deposition of the City's witness on January 14, 2014 when plaintiff withdrew its request for an EBT while other discovery disputes were resolved. Thus, the court orders prior to January 14, 2014 do not support the imposition of sanctions. We agree with Supreme Court that the City's noncompliance with subsequent disclosure orders did not give rise to an inference of willful and contumacious

conduct. Given that there does not appear to be an actual prejudice to plaintiff, the court was within its discretion to provide defendant with one additional opportunity to submit to depositions before striking its answer (*Figueroa v City of New York*, 129 AD3d 596, 597 [1st Dept 2015]).

We further note that at the time this motion was pending, the City offered to produce the witness at issue.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8166 The People of the State of New York, Ind. 4927/09
Respondent,

-against-

Phillip Carr,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J. at witnesses' guilty pleas; Ann M. Donnelly, J. at jury trial and sentencing), rendered July 20, 2012, convicting defendant of murder in the second degree, attempted murder in the second degree, assault in the first and second degrees and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

Defendant did not preserve his claim that the trial court erred in admitting the unredacted plea minutes of two cooperating witnesses, and we decline to review it in the interest of justice. As an alternative holding, we find any error to be harmless. The witnesses' plea colloquies were received at defendant's trial for the legitimate purpose of setting forth the

cooperation agreements under which they testified against defendant in return for lenient treatment on their own cases (unrelated to the instant case). However, as the People concede, remarks by the plea court that could be viewed as expressing an opinion on this defendant's guilt and the dangers of testifying against him should have been redacted. Nevertheless, the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming evidence of defendant's guilt, even without considering any of the evidence claimed by defendant to be inadmissible hearsay, as discussed below. Eyewitness identifications by the two cooperating witnesses and the mother of one of these witnesses were corroborated by strong circumstantial evidence.

The court providently exercised its discretion in admitting an officer's testimony that immediately after the shooting, an unidentified woman in a minivan, who was "hysterical," leaned out of the window and screamed, "That's him with the black hoody running. He was shooting over there," pointing in the direction of the shooting. As the People argued, and as the court implicitly ruled (*see People v Nicholson*, 26 NY3d 813, 825 [2016]), this was admissible, as evidence in chief, as an excited utterance (*see People v Johnson*, 1 NY3d 302, 306 [2003]). There

were surrounding circumstances, including the time factors and the declarant's direction of travel, "from which a reasonable trier of fact could infer that the declarant personally observed the incident" (*People v Cummings*, 31 NY3d 204, 211 [2018]), and that she was not passing along information from someone else.

Defendant did not preserve his claims that the court improperly received implied or nonverbal hearsay from two other declarants, that certain limiting instructions should have been given, or that the evidence relating to all three declarants violated his right of confrontation, and we decline to review them in the interest of justice. As an alternative holding, we find that the evidence relating to the two additional declarants (as well as the evidence alternatively admissible as an excited utterance) was admissible, not for its truth, but for legitimate nonhearsay explanatory purposes that outweighed any prejudicial effect (*see People v Johnson*, 117 AD3d 637, 639 [1st Dept 2014], *lv denied* 26 NY3d 930 [2015]), that all of defendant's Confrontation Clause claims are without merit, and that, in any event, any constitutional or nonconstitutional error relating to alleged hearsay evidence was harmless, for the reasons already stated.

Defendant's claim under *People v O'Rama* (78 NY2d 270 [1991])

is unpreserved and without merit. The jury note in question was an unambiguous, ministerial request for exhibits that the parties had agreed could be given to the jury without notice to counsel.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. Although trial counsel is deceased, defendant could have made a 440.10 motion at any time after the sentencing, which occurred long before counsel's death. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case. Specifically, defendant has not shown that the verdict would have

been different even if counsel had made all the objections defendant now faults him for failing to make, and if all of those objections had been successful.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8167 Andrew Gillis, Index 21466/17E
Plaintiff-Appellant,

-against-

Timothy Dwyer,
Defendant-Respondent.

_____

Law Office of Michael H. Joseph, P.L.L.C., White Plains (Michael H. Joseph of counsel), for appellant.

O'Connor, McGuinness, Conte, Doyle, Olson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donald Miles, J.), entered April 2, 2018, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff was allegedly injured while riding his bicycle. Plaintiff stated that defendant's vehicle made a sudden left turn into plaintiff's lane causing the collision. Defendant states that plaintiff's bicycle struck his stopped vehicle after he made a slow left turn into a driveway. The parties' conflicting

versions as to how the accident occurred raise triable issues of fact (*see e.g. Jarrett v Claro*, 161 AD3d 639 [1st Dept 2018]; *Ramos v Rojas*, 37 AD3d 291, 292 [1st Dept 2007]).

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

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8168 In re Chance R., And Others,

Children Under Eighteen Years
of Age, etc.,

Andre W.,
Respondent-Appellant,

Commissioner of the Administration for
Children's Services,
Petitioner-Respondent,

Taiesha R.,
Respondent.

_____

Bruce A. Young, 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.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about March 3, 2017, which, inter alia, found that respondent neglected the subject child Christopher H. and derivatively neglected the other children, unanimously affirmed, without costs.

The evidence supports the finding that respondent, who had a three-year relationship with the children's mother, was a person legally responsible for the children within the meaning of Family

Ct Act § 1012(g). He dropped off and picked them up from school and disciplined them when they were disrespectful to the mother. Although he only admitted to occasionally staying overnight at the mother's apartment, and claimed to have another primary residence, there was evidence that he actually lived in the apartment with the mother and the two children who resided with her. The children who did not live full time with their mother all reported that respondent was there whenever they were present and that he and the mother were always together. Furthermore, respondent was the biological father of the mother's newborn child and was present daily, for at least the first month of this child's life, assisting the mother in caring for the newborn, as well as all the other children (*see Matter of Keoni Daquan A. [Brandon W.-April A.]*, 91 AD3d 414 [1st Dept 2012]; *Matter of Christopher W.*, 299 AD2d 268 [1st Dept 2002]). There exists no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

The court's finding of neglect as against respondent based on his infliction of excessive corporal punishment on Christopher is supported by a preponderance of the evidence, including the children's out-of-court statements, medical records and the caseworker's observations (*see Matter of Tiara G. [Cheryl R.]*,

102 AD3d 611 [1st Dept 2013], *lv denied* 21 NY3d 855 [2013]; *Matter of Deivi R. [Marcos R.]*, 68 AD3d 498 [1st Dept 2009]). Neglect findings have been upheld based on a single instance of improper supervision in the form of excessive corporal punishment (*see e.g. Matter of Joshua R.*, 47 AD3d 465, 466 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]).

The finding of neglect warranted the finding of derivative neglect as to the other children (*see Matter of Jasmine B.*, 66 AD3d 420 [1st Dept 2009]).

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8169 In re Marisol Caminero, Index 153740/17
Petitioner-Appellant,

-against-

Metropolitan Transportation Authority,
Respondent-Respondent.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Bee Ready Fishbein Hatter & Donovan, LLP, Mineola (Andrew K. Preston of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Erika M. Edwards, J.), entered on or about September 12, 2017, denying the petition to annul respondent's determination, dated January 30, 2017, which denied petitioner's application for accidental disability retirement, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The petition was properly denied because the determination was not arbitrary and capricious, in violation of lawful procedure, or affected by error of law (*see* CPLR 7803[3]-[4]; *Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 351 [1983]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester*

County, 34 NY2d 222, 230-231 [1974]).

Petitioner claims that her disabling lower-back condition was caused by two on-the-job accidents: a September 15, 2000 incident in which a battery charger fell from a locker and struck her, and a January 12, 2002 incident in which the golf cart she was driving malfunctioned. However, it is undisputed that petitioner had a preexisting lower back injury and that she had degenerative disc disease by late September 2000 - within weeks after the 2000 incident and well before the 2002 incident.

To the extent the 2000 or 2002 incidents aggravated petitioner's preexisting condition, they may still have proximately caused her current disability (*see Matter of Tobin v Steisel*, 64 NY2d 254, 259 [1985]; *Matter of King v DiNapoli*, 75 AD3d 793, 795 [3d Dept 2010]; *Matter of Sanchez v New York State & Local Police & Fire Retirement Sys.*, 208 AD2d 1027, 1028 [3d Dept 1994]). However, respondent could reasonably have concluded, based on the evidence in the record, that neither incident did so (*see Matter of Stewart v New York State & Local Employees' Retirement Sys.*, 27 AD3d 975, 976 [3d Dept 2006], *lv denied* 7 NY3d 718 [2006]).

Contemporaneous records indicate that the 2000 incident did not result in an injury to petitioner's back, but to her head.

Although petitioner began to experience back pain shortly thereafter, she attributed that pain to wearing a heavy equipment belt at work.

As to the 2002 incident, there is nothing to corroborate petitioner's account of a golf cart malfunction. Although the cart was sent for inspection, the results of that inspection are not in the record, despite respondent's repeated requests.

The recitations in subsequent medical evaluations that petitioner's condition resulted from the 2002 incident are of little probative value, as they merely reiterate petitioner's own account to the doctors.

In view of the foregoing, we need not reach the issue of whether the petition should be dismissed on the basis that petitioner failed to join a necessary party.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8170 The People of the State of New York, Ind. 90071/05
Respondent,

-against-

Robert Rivera,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Marianne Stracquadanio of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered April 7, 2011, convicting defendant, after a jury trial, of two counts of burglary in the first degree and three counts of robbery in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 35 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). With regard to the burglary convictions, the evidence supports the inference that defendant had no license or privilege to enter the premises at issue. Defendant's challenges to certain robbery convictions are likewise unavailing.

The court properly denied defendant's application pursuant

to *Batson v Kentucky* (476 US 79 [1986]). The record supports the court's finding that the nondiscriminatory reason provided by the prosecutor for the challenge in question was not pretextual. This finding, based primarily on the court's assessment of the challenging attorney's credibility, is entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). When the prosecutor stated that the panelist at issue appeared to be favorably disposed toward one of the defense attorneys, the court expressly credited this statement, noting that the prosecutor's seating position allowed him to closely observe the panelist.

The court properly denied defendant's motions for severance of his trial from that of his codefendants (*see People v Mahboubian*, 74 NY2d 174 [1989]). The defenses were not so irreconcilable as to require separate trials, and the court's

jury instructions and other curative actions were sufficient to prevent the various forms of prejudice that defendant claims he was subjected to by the joint trial.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8171- Ind. 542/16
8171A The People of the State of New York, 2461/16
Respondent,

-against-

Vladimir Sanchez,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Steven Barrett, J.), rendered December 15, 2016, and from a judgment of resentence, same court and Justice, rendered December 16, 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: JANUARY 22, 2019

CLERK

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

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8173 Telx-New York, LLC, Index 650440/17
Plaintiff-Respondent,

-against-

60 Hudson Owner, LLC,
Defendant-Appellant.

_____

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Dean G. Yuzek of counsel), for appellant.

Coblentz Patch Duffy & Bass LLP, San Francisco, CA (Richard R. Patch of the bar of the State of California, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about May 29, 2018, which denied defendant's CPLR 3211(a) motion to dismiss the first cause of action, alleging breach of contract, and granted plaintiff's cross motion to consolidate defendant's civil court non-payment proceeding with this action, without the conditions sought by defendant, unanimously modified, on the law, to grant defendant's motion, and otherwise affirmed, without costs.

In this action by a commercial tenant alleging electrical overcharges collected by defendant landlord, the clear and unambiguous terms of the lease provision governing the tenant's obligation for electrical costs was susceptible of only one

meaning (*see White v Continental Cas. Co.*, 9 NY3d 264,267-268 [2007]), which duly authorized the disputed charges sought by the landlord (*see generally Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404-406 [2009]).

The court, in granting consolidation, properly balanced the equities and, in a provident exercise of discretion, declined to condition such order on the monetary security conditions sought by defendant.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh JJ.

8174 Mt. Hawley Insurance Company, et al., Plaintiffs-Respondents, Index 156663/14

-against-

American States Insurance Company, Defendant-Appellant,

J&R Glassworks, Inc., Defendant.

_____

Jaffe & Asher LLP, White Plains (Marshall T. Potashner of counsel), for appellant.

Cascone & Kluepfel, LLP, Garden City (James K. O'Sullivan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered December 20, 2017, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment declaring that defendant American States Insurance Company (American) is required to defend and indemnify plaintiffs 537 West 27th Street Owners LLC (West 27th) and Chatsworth Builders, LLC (Chatsworth) in an underlying action, and denied defendant American's cross motion for summary judgment, unanimously modified, on the law, to deny plaintiffs' motion to the extent it seeks a declaration that American has a duty to indemnify West 27th and Chatsworth, and otherwise affirmed,

without costs.

In an underlying personal injury action, the injured plaintiff asserted negligence and Labor Law claims from injuries he sustained while he was working at a construction site owned by West 27th and for which Chatsworth was the general contractor. Chatsworth and West 27th commenced a third-party action against the subcontractor, J&R Glassworks, Inc. a/k/a Walsh Glass & Metal Inc. (J&R), alleging negligence and seeking indemnification and contribution.

West 27th and Chatsworth tendered coverage to defendant American pursuant to a policy issued to J&R as named insured, claiming they were additional insureds under the policy. Because there was a reasonable possibility of coverage, and the underlying personal injury action was filed while the American policy was in effect, American has a duty to defend West 27th and Chatsworth as additional insureds, and is legally obligated at this time to pay West 27th and Chatsworth's defense costs in the underlying action (*see Indian Harbor Ins. Co. v Alma Towers, LLC*, 165 AD3d 549 [1st Dept 2018]).

While the duty to defend is clear, issues of fact as to liability in the underlying personal injury action render premature the conclusion that American has a duty to indemnify

West 27th and Chatsworth (*Chunn v New York City Hous. Auth.*, 55 AD3d 437 [1st Dept 2008]; *see North Riv. Ins. Co. v ECA Warehouse Corp.*, 172 AD2d 225 [1st Dept 1991]).

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

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8175 In re Carmela M.K.,
Petitioner-Appellant,

-against-

Michael E.M.,
Respondent-Respondent.

_____

Carmela M.K., appellant pro se.

_____

Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about December 5, 2017, which denied petitioner mother's objection to an order of the same court (Harold E. Bahr III, Support Magistrate), entered on or about October 11, 2017, dismissing her support violation petition, unanimously affirmed, without costs.

Family Court properly denied the mother's objection to the order dismissing her petition, since the support obligation she sought to enforce had, with the youngest child's attainment of age 21, expired by the terms of the parties' stipulation and by operation of law (*see* Family Ct Act § 413; *Matter of Thomas B. v Lydia D.*, 69 AD3d 24 [1st Dept 2009]). The mother's objection failed to show how this conclusion was incorrect or why her petition should have otherwise been allowed to proceed, as she did not show how any order was violated by respondent father.

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: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8176 The People of the State of New York, Ind. 4176/16
Respondent,

-against-

Corvall Hampton,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ellen N. Biben, J. at request for new counsel; Anthony J. Ferrara, J. at plea and sentencing), rendered September 15, 2017, convicting defendant of murder in the second degree, attempted murder in the second degree and criminal possession of a weapon in the second degree (two counts), and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

A court's duty to consider a request for new counsel is invoked when a defendant makes a "seemingly serious request[ ]" (*People v Sides*, 75 NY2d 822, 824 [1990]). If a defendant makes specific factual allegations of serious complaints about counsel, the court must make at least a minimal inquiry about the nature of the conflict or its potential for resolution (*see People v*

Porto, 16 NY3d 93, 100 [2010]; *Sides*, 75 NY2d at 825). "Upon such a review, counsel may be substituted only where 'good cause' is shown" (*Porto*, 16 NY3d at 100).

Here, the record reflects that the court provided defendant an adequate opportunity to state his reasons for substitution, and then providently exercised its discretion in denying defendant's request for reassignment of counsel after conducting the required inquiry (*see Porto*, 16 NY3d at 99; *People v Rahman*, 129 AD3d 553 [1st Dept 2015], *lv denied* 26 NY3d 933 [2015]).

Just prior to trial, at a hearing on August 1, 2017, defense counsel informed the court that defendant wanted new counsel. The court asked defendant "if he wanted to be heard on [the substitution]." When defendant expressed that he did not feel like his attorney was "fighting for a defense for [him]," the court reviewed the proceedings to demonstrate to defendant the work his counsel had done on his behalf. Defendant responded by again requesting a new attorney, as he felt he was not adequately informed by his attorney about the proceedings. The court then assured defendant that his attorney would communicate with him, and directed defense counsel to ensure adequate communication.

Defendant's allegations regarding the deterioration of his relationship with counsel, and defense counsel's contention that

the relationship was "almost adversarial," did not compel the court to substitute counsel (*see People v Rodriguez*, 161 AD3d 513 [1st Dept 2018], *lv denied* 32 NY3d 941 [2018]), as "vague conclusory allegation[s] of 'frustration' . . . certainly d[o] not warrant" a substitution (*Porto*, 16 NY3d 93, 101 [2010] [citing *People v Medina*, 44 NY2d 199, 208 [1978] ["tensions between client and counsel" are not good cause]).

Lastly, we note that approximately two weeks later, at the plea hearing held on August 14, 2017, defendant was asked by the court if he was "satisfied with the services [he] received from [defense counsel]" and if defense counsel "answered all of [his] questions to [his] satisfaction." Defendant answered both in the affirmative, further indicating that the August 1, 2017 colloquy had resolved any conflict between defendant and his assigned counsel, and accepted the plea (*see Rahman*, 129 AD3d at 554; *see also People v Kates*, 162 AD3d 1627, 1629 [4th Dept 2018] [by

deciding to plead guilty while still being represented by the same attorney, defendant "abandoned his request for new counsel"]).

Defendant's remaining contentions are without merit.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8177 The People of the State of New York, Ind. 542/16
Respondent,

-against-

Erick Cruz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo 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 (Juan Merchan, J.), rendered August 10, 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: JANUARY 22, 2019

CLERK

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

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8178- Index 651360/15
8179-
8180 Waterscape Resort LLC,
Plaintiff-Respondent,

-against-

Pavarini McGovern, LLC,
Defendant-Appellant.

- - - - -

Waterscape Resort LLC,
Plaintiff-Appellant-Respondent,

-against-

Pavarini McGovern, LLC,
Defendant-Respondent-Appellant.

_____

John E. Osborn, P.C., New York (Daniel H. Crow of counsel), for appellant/respondent-appellant.

Lazarus & Lazarus, P.C., New York (Harlan M. Lazarus of counsel), for respondent/appellant-respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 24, 2016, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Judgment, same court and Justice, entered October 20, 2017, dismissing the complaint, unanimously reversed, without costs, and vacated. Appeal from order, same court and Justice, entered October 3, 2017, which granted defendant's motion for summary judgment dismissing the complaint pursuant to the

doctrine of res judicata, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Because plaintiff's contract claim was not ripe when plaintiff moved in the federal adversarial proceeding for leave to assert a counterclaim, the claim is not a compulsory counterclaim pursuant to Federal Rules of Civil Procedure 13(a)(1). Thus, it is not barred in this subsequent action under the doctrine of res judicata (*cf. Paramount Pictures Corp. v Allianz Risk Transfer AG*, 141 AD3d 464, 467-468 [1st Dept 2016], *affd* 31 NY3d 64 [2018]).

The dispute resolution provisions in the parties' agreement are ambiguous as a matter of law (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569-570 [2002]).

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8181 The People of the State of New York, Ind. 3304/10
Respondent,

-against-

Modechai Kobbah,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Julia Chariott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered March 18, 2013, convicting defendant, after a jury trial, of attempted assault in the third degree, and sentencing him to a term of 90 days, unanimously affirmed.

Defense counsel failed to provide details to support the claim that the police may have rendered defendant's own lineup suggestive by using the same set of fillers that had been used in the uncharged suspect's lineup the day before. Accordingly, the court providently exercised its discretion in denying disclosure of the lineup photo and related relief.

Although the court erred in failing to give the jury a limiting instruction that the victim's mother's testimony recounting her son's description of her assailant was not

admitted for the truth, the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court providently exercised its discretion in denying defendant's request for an adverse inference instruction regarding an inadvertently destroyed 911 tape. Defendant was not prejudiced, because the Sprint report afforded him sufficient opportunity for impeachment (*see People v Brown*, 92 AD3d 455, 456 [1st Dept 2012] *lv denied* 18 NY3d 955 [2012]).

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8182 The People of the State of New York, Ind. 5554N/14
Respondent,

-against-

Jose Guzman,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Rebecca Hausner 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 (James M. Burke, J.), rendered October 14, 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: JANUARY 22, 2019

CLERK

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

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8183 The People of the State of New York, Ind. 1927/15
Respondent,

-against-

Deshawn Donely,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Taylor L. Napolitano of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered June 21, 2016, convicting defendant, upon his plea of guilty, of two counts of attempted burglary in the third degree, and sentencing him, as a second felony offender, to concurrent terms of 1½ to 3 years, unanimously affirmed.

Defendant claims that his plea was involuntary, but has not shown how the events of his uncompleted first trial impaired the voluntariness of the plea in any way (*see People v Pena*, 7 AD3d 259, 260 [1st Dept 2004], *lv denied* 3 NY3d 645 [2004]).

In any event, the only relief defendant requests is dismissal of the indictment rather than vacatur of the plea, and he expressly requests this Court to affirm the conviction if it does not grant a dismissal. Since we do not find that dismissal

would be appropriate, we affirm on this basis as well (*see e.g. People v Teron*, 139 AD3d 450 [1st Dept 2016]). The fact that defendant has been released on parole is not a sufficient basis for dismissal, especially where defendant is a predicate felon (*see e.g People v Peters*, 157 AD3d 79, 85 [1st Dept 2017], *lv denied* 30 NY3d 1118 [2018]).

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8184 The People of the State of New York, Ind. 611/15
Respondent,

-against-

Yansane Mohamed,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Taylor L. Napolitano of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (James M. Burke, J.), rendered January 5, 2016, convicting defendant, after a jury trial, of burglary in the third degree, grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of three to six 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 evaluation of minor inconsistencies or inaccuracies in testimony.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8185- Index 652296/15
8186 GE Oil & Gas, Inc.,
Plaintiff-Respondent,

-against-

Turbine Generation Services, L.L.C., et al.,
Defendants-Appellants.

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Turbine Generation Services, L.L.C., et al.,
Third-Party Plaintiffs-Appellants,

-against

General Electric Company,
Third-Party Defendant-Respondent.

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Mintz & Gold LLP, New York (Elliot Sagor of counsel), for appellants.

Reed Smith LLP, New York (Casey D. Laffey of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 10, 2017, which, insofar as appealed from as limited by the briefs, granted plaintiff and third-party defendant's (together, the GE Parties) motion to dismiss defendants/third-party plaintiffs' (the TGS Parties) promissory estoppel and fraud claims and granted leave to amend the breach of contract claim (failure to negotiate in good faith) only to Turbine Generation Services, L.L.C. (TGS), unanimously

affirmed, with costs. Order, same court and Justice, entered July 18, 2017, which, insofar as appealed from as limited by the briefs, denied the TGS Parties' motion to replead their promissory estoppel claim, unanimously affirmed, with costs.

The motion court correctly dismissed the TGS Parties' fraud claim, which is premised on the GE Parties' alleged promise that they would provide funding as agreed in the term sheet, because the alleged promise is not a misrepresentation of fact but a nonactionable statement of prediction or expectation (*see Naturopathic Labs. Intl., Inc. v SSL Ams., Inc.*, 18 AD3d 404 [1st Dept 2005]; *see also e.g. Pacnet Network Ltd. v KDDI Corp.*, 78 AD3d 478, 479 [1st Dept 2010]). While the statement would be deemed a material misstatement of fact if the GE Parties knew that it was false (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]), the TGS Parties' claim fails to set forth facts from which the GP Parties' scienter can be inferred (*see Giant Group v Arthur Andersen LLP*, 2 AD3d 189, 190 [1st Dept 2003]).

Even if, arguendo, the fraud claim satisfied the elements of scienter and a misrepresentation of a material existing fact, it would still fail for lack of justifiable or reasonable reliance, because the term sheet explicitly required "definitive

documentation" before it would constitute a contractual commitment (*see StarVest Partners II, L.P. v Emportal, Inc.*, 101 AD3d 610, 613 [1st Dept 2012]; *see also Naturopathic*, 18 AD3d at 405).

For the same reason, the promissory estoppel claim fails for lack of justifiable reliance (*see e.g. Hollinger Digital v LookSmart, Ltd.*, 267 AD2d 77 [1st Dept 1999]; *Prospect St. Ventures I, LLC v Eclipsys Solutions Corp.*, 23 AD3d 213 [1st Dept 2005]; *Jordan Panel Sys. Corp. v Turner Constr. Co.*, 45 AD3d 165, 179-180 [1st Dept 2007]; *Prestige Foods v Whale Sec. Co.*, 243 AD2d 281 [1st Dept 1997]).

The third amended counterclaims and third amended third-party complaint did not remedy the above defect in the promissory estoppel claim. Hence, the motion court providently exercised its discretion in denying the TGS Parties' motion for leave to amend that claim (*see e.g. Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

Moreno is not a party to the term sheet. Thus, the court correctly dismissed his claim for breach of the term sheet and providently exercised its discretion in denying his motion for leave to amend that claim.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, JJ.

8187N Gilbert Lau, Index 101558/16
Plaintiff-Appellant,

-against-

Human Resources Administration,
care of Waverly Center, et al.,
Defendants-Respondents.

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Gilbert Lau, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 1, 2017, which denied plaintiff's motion for leave to submit a third amended complaint, unanimously affirmed, without costs.

The court properly denied plaintiff's motion to submit a third amended complaint, which, like his second amended complaint, sought consequential damages based on the temporary suspension of his Supplemental Nutrition Assistance Program (SNAP) benefits. Plaintiff also asserted a violation of his due process rights based on the alleged failure of defendant Human Resources Administration to mail a March 7, 2016 notice to plaintiff indicating that his benefits would be suspended if he did not submit a recertification application by March 31, 2016.

Because SNAP benefits are a governmental function for the benefit of the general public, with no statute conferring a private right of action upon individuals receiving the government assistance, plaintiff may not seek consequential damages related to the temporary suspension of those benefits. Nor has plaintiff set forth any special relationship, excepting him from the general rule of municipal immunity from tort liability (*see Rodriguez v City of New York*, 20 AD3d 327 [1st Dept 2005], *appeal withdrawn* 7 NY3d 751 [2006]; *Biro v Department of Social Servs./Human Resources Admin.*, 1 AD3d 302 [2d Dept 2003]).

Plaintiff's due process claim also fails, since he sought and was granted a post-deprivation fair hearing, at which the Administrative Law Judge found in his favor, and his benefits were restored, including retroactive payment of the benefits lost during the temporary suspension (*see Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 260 [2010], *cert denied* 562 US 1108 [2010]; *Hook v Mutha*, 168 F Supp 2d 77, 79 [SD NY 2001]).

Accordingly, as plaintiff's claims are not viable, the court properly denied leave to amend the complaint (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *lv dismissed* 12 NY3d 880 [2009]).

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Kern, Singh, Moulton, JJ.

8188N In re Ann C. McCormack by her Special Guardian and Attorney-in-Fact Carol Bamonte, concerning the Estate of Kathleen Durst, Absentee and Alleged Deceased. File 5053D/82

- - - - -

Carol M. Bamonte, as Executor of the Estate of Ann C. McCormack,
Petitioner-Appellant,

-against-

Robert Durst,
Respondent.

- - - - -

Charles Capetanakis,
Nonparty Respondent.

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Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara Wolf & Carone, LLP, New York (Robert Abrams of counsel), for appellant.

Davidoff Hucher & Citron LLP, New York (Charles Capetanakis of counsel), for Charles Capetanakis, nonparty respondent.

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Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about October 4, 2017, insofar as it denied petitioner's application for the recusal of Surrogate Anderson, directed that "Petitioner's Personal Representative" pay the fees of Charles Capetanakis, Esq., the guardian ad litem (GAL), and denied petitioner's application for reimbursement by the GAL of her attorneys' fees and expenses, unanimously modified, on the law, to the extent of remanding the matter to

the Surrogate for an explanation of her reasons for the amount of the GAL fee award and directing that the GAL's fees be paid by the Estate of Kathleen Durst, and otherwise affirmed, without costs.

Petitioner failed to demonstrate that Surrogate Anderson improvidently exercised her discretion in refusing to recuse herself (*see Wong v 2669 Owners Ltd.*, 126 AD3d 451 [1st Dept 2015]). As the Surrogate found, 22 NYCRR 151.1 does not require her recusal based on contributions made by the GAL's wife or law firm to the Surrogate's 2008 campaign. Moreover, there is no evidence that the contributions played any role in her determinations. There is also no evidence that, at the time the GAL was appointed, the Surrogate was aware of the relationship between his firm and the firm of one of respondent's attorneys, Steven I. Holm. In any event, the relationship was too attenuated to demonstrate that the GAL breached his fiduciary duty to Kathleen Durst in connection with the preparation of his report or recommendation regarding the date of her death.

On the current record, we cannot determine whether the amount of the fee the Surrogate awarded to the GAL was "reasonable compensation" (SCPA 405[1]). The Surrogate has the sole discretion to award the GAL "reasonable compensation for his

services" (*Matter of Burk*, 6 AD2d 429, 430 [1st Dept 1958]). This determination is governed by several criteria, including "the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, and the results achieved" (*id.*). The Surrogate "must provide a concise but clear explanation of [her] reasons for the fee award, or lack thereof" (*Matter of Moriarty*, 119 AD3d 445, 445 [1st Dept 2014] [internal quotation marks omitted]; *see also Matter of Hultay [Ronald P.S.]*, 136 AD3d 572, 573 [1st Dept 2016] [holding that "proper appellate review" cannot take place if the court "failed to give a reason" for its fee award]).

Here, the Surrogate failed to provide her reasoning for the amount of the fee she awarded to the GAL. As a result, there is an insufficient record for appellate review. Accordingly, the matter is remanded to the Surrogate for a "concise but clear" explanation of her reasons for the amount of the fee award. The Surrogate's explanation should discuss the factors she considered when determining the amount that she awarded to the GAL.

Finally, without a showing of "good cause," or indeed a discussion of the issue (*see* SCPA 405[1]), the Surrogate improperly directed that the GAL's fee be paid by petitioner's

personal representative, rather than by the Estate of Kathleen Durst, which benefitted from the appointment. The appointment of the GAL did not result from any conduct of petitioner or her personal representative.

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Richter, Tom, Kern, Singh, JJ.

8189N CWCapital Cobalt VR Ltd., Index 653277/18
Plaintiff-Appellant,

-against-

CWCapital Investments LLC, et al.,
Defendants-Respondents,

CWFS-Reds, LLC,
Defendant.

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Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for appellant.

Venable LLP, New York (Konstantina A. Calabro of counsel), for respondents.

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Order, Supreme Court, New York County (Andrea Masley, J.), entered August 2, 2018, which denied plaintiff's motion for a preliminary injunction to prevent defendants from selling real properties pooled in commercial mortgage-backed securities trusts, unanimously affirmed, without costs.

The court did not abuse its discretion in denying a preliminary injunction (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Plaintiff did not establish a likelihood of success on the merits, because, even without addressing the various questions surrounding plaintiff's authority under the agreements, it did not take the requisite

steps to remove and replace respondents as control class representative and special servicer under the indenture and collateral management agreement (CPLR 6301). Moreover, plaintiff has not shown that it will suffer irreparable harm absent injunctive relief, since the alleged harm would be compensable with monetary damages (*id.*). Finally, a balance of the equities does not weigh in plaintiff's favor (*Nobu* at 839).

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

ENTERED: JANUARY 22, 2019

CLERK

Sweeny, J.P., Tom, Kahn, Oing, Singh, JJ.

8209 Sharie Graham, Index 154712/15
Plaintiff-Respondent,

-against-

420 East 72nd Tenants Corp., et al.,
Defendants-Appellants.

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Milber Makris Plousadis & Seiden, LLP, White Plains (Lorin A. Donnelly of counsel), for appellants.

Kishner Miller Himes P.C., New York (Scott Himes of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about December 22, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant the motion as to the individual defendants, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

Plaintiff presented sufficient evidence to raise a triable issue of fact as to whether defendant cooperative board rejected the offers to purchase the subject unit in bad faith and for purposes of retaliation (*see Pilipovic v Laight Coop. Corp.*, 137 AD3d 710 [1st Dept 2016]; *Louis & Anne Abrons Found. v 29 E. 64th St. Corp.*, 297 AD2d 258 [1st Dept 2002]).

As the complaint does not allege individual wrongdoing by

defendant board members separate and apart from their collective action taken on behalf of the cooperative, no breach of fiduciary duty claim lies against the individual defendants (*Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500 [1st Dept 2018]). Indeed, as the complaint does not specifically allege, and there is no record evidence of, any individual defendant's participation in the board's allegedly wrongful conduct or bad faith motive therefor, none of the claims can be sustained against any of the individual defendants (*see Sayeh v 66 Madison Ave. Apt. Corp.*, 73 AD3d 459 [1st Dept 2010]).

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

ENTERED: JANUARY 22, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Judith J. Gische
Peter Tom, JJ.

7527-7528
Ind. 2975/14

_____x

The People of the State of New York,
Respondent,

-against-

Rickey Alston,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Mark Dwyer, J.), rendered September 8, 2015, convicting him, after a jury trial, of criminal possession of a weapon in the third degree, menacing in the second degree and criminal mischief in the fourth degree, and imposing sentence, and from an order of the same court and Justice, entered on or about May 4, 2017, which denied his CPL 440.20 motion to set aside his sentence.

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

Rickey Alston, appellant pro se.

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

MANZANET-DANIELS, J.

Although the statutory purpose of CPL 200.60 was not satisfied where the court arraigned defendant on a special information prior to jury selection in contravention of the plain wording of the statute, we are nonetheless obliged to affirm as defendant has failed to show any prejudice flowing from the statutory violation.

CPL 200.60(3) mandates that an arraignment on special information occur only "[a]fter commencement of the trial" (*id.*). The Criminal Procedure Law unequivocally holds that "[a] jury trial commences with the selection of the jury" (CPL 1.20[11]); *see also People v Crespo*, 32 NY3d 176 [2018]). Thus, arraignment of defendant on the special information prior to jury selection violated CPL 200.60.

The plain and unambiguous statutory language is "the best evidence of the Legislature's intent" (*People v Andujar*, 30 NY3d 160, 166 [2017] [internal quotation marks omitted]). A court cannot disregard plain statutory language simply because it concludes that an alternate procedure would be consonant with the policy underlying the statute. Courts do not possess the power to ignore the legislature (*see People v O'Doherty*, 70 NY2d 479, 487 [1987] [rejecting the People's argument that failure to adhere to the timing requirements of CPL 710.30 did not warrant

appellate relief because the purpose of the statute was not "frustrated"; noting that such a ruling would "conflict with the plain language of the statute, which reflects a legislative policy determination with which the courts may not interfere"]).[1]

It may well be that the legislature's general purpose in enacting CPL 200.60 was to avoid the prejudicial effect of having the prior offense proven before the jury. However, such a purpose does not support reading the timing requirement out of the statute. Allowing a defendant to wait until after the commencement of the trial ensures that he will have as much information as possible when forced to make the choice of admitting his prior conviction and relieving the People of its burden to prove it beyond a reasonable doubt; or denying the conviction and allowing the jury to learn about it.

Given defendant's repeated expressions of disagreement with the court's attempts to arraign him on the special information prematurely, it is difficult to understand what more he could have done to register his objection. We therefore find the issue

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[1] *O'Doherty* involved a different statute where excusing compliance on the ground of absence of prejudice to the defendant would have the effect of relieving the prosecution of its express burden of proving "good cause." Nonetheless, the case is relevant to the extent it makes patent that a court cannot simply ignore explicit statutory language because it finds the statutory purpose to be effectuated in any given case.

preserved for appeal.

Despite the court's error, however, we are obliged to affirm because defendant has not shown any prejudice arising from the fact that he was required to decide whether to contest the prior conviction earlier than necessary. Defendant does not assert that he would have contested the conviction if he had been asked after jury selection. Thus, defendant's claims of prejudice are speculative.

We disagree with the dissent that the error was harmful such that a reversal is warranted. The dissent offers no authority for departing from harmless error analysis under these circumstances.

The court providently exercised its discretion in admitting a video recording of a restaurant's surveillance videotape, made by a police officer on her cell phone. The restaurant manager's testimony that the video was a fair and accurate depiction of what he had observed inside the restaurant on the night of the incident authenticated the video and laid a proper foundation for its admission (*see People v Patterson*, 93 NY2d 80, 84 [1999]), and no further authentication was necessary. It is of no moment that the cell phone video could be characterized as a videotape of a screen displaying another videotape, because an eyewitness authenticated it to the extent it depicted the relevant events.

Defendant was properly adjudicated a second felony offender based on a Washington D.C. drug conviction, and the court properly denied defendant's CPL 440.20 motion challenging that adjudication. The court properly examined the accusatory instrument because the Washington D.C. statute criminalizes several discrete acts, not all of which would constitute felonies in New York (*see generally People v Jurgins*, 26 NY3d 607, 613-614 [2015]; *People v Muniz*, 74 NY2d 464 [1989]; *People v Gonzalez*, 61 NY2d 586 [1984]). In light of that accusatory instrument, the prior conviction constituted the equivalent of a New York felony.

To the extent defendant raises additional claims in his pro se brief, we find those claims to be unpreserved, unreviewable and without merit.

Accordingly, the judgment of the Supreme Court, New York County (Mark Dwyer, J.), rendered September 8, 2015, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, menacing in the second degree and criminal mischief in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, and

order, same court and Justice, entered on or about May 4, 2017, which denied defendant's CPL 440.20 motion to set aside his sentence, should be affirmed.

All concur except Renwick, J.P. who dissents in part in an Opinion.

RENWICK, J.P. (dissenting in part)

I respectfully dissent from the part of the majority's decision that affirms defendant's conviction of the crime of criminal possession of a weapon in the third degree. I concur with the majority's finding that the court erred in asking defendant before jury selection - instead of after the trial commenced as set forth in CPLR 200.60(3) - whether he wished to admit his prior conviction which would elevate the weapon possession charge to a felony. However, unlike the majority, I would find that the error was inherently harmful and that defendant is therefore entitled to a new trial on the weapon possession conviction.

The majority's application of traditional harmless error analysis, under *People v Crimmns* (36 NY2d 230 [1975]), to the situation here is inappropriate. A nonconstitutional error may also be immune from traditional harmless error analysis. For instance, where a statute contains a legislative mandate, the failure to follow it may not be deemed harmless since a presumption exists that the legislature intended such mandate be followed because the error is inherently harmful. For example, CPL 300.10(2) obligates a trial judge, upon request, to charge a jury not to draw an adverse inference when the defendant does not testify (*People v Britt*, 43 NY2d 111 [1977]; *see also People v*

Wilson, 156 AD2d 743 [2nd Dept 19890 [same]). In addition, CPL 300.10(3) mandates that the trial judge charge the jury, in language prescribed by CPL 300.10 (3)), on the consequences of a verdict of not responsible by reason of insanity (*see e.g. People v Kinitsky*, 119 AD2d 159 [2nd Dept 1986]). The failure to give these charges requires reversal, without traditional harmless error analysis, because of the apparent legislative policy that the error is inherently harmful.

Similarly, here the failure to strictly follow a legislative mandate, pursuant to CPL 200.6, was inherently harmful. Indeed, the majority acknowledges that "allowing a defendant to wait until after the commencement of the trial ensures that he will have as much information as possible when forced to make the choice of admitting his prior conviction and relieving the People of its burden to prove it beyond a reasonable doubt." Hence, the majority is acknowledging that what happens at jury selection can inform a defendant's decision of whether to admit or contest a prior conviction. However, the majority concludes that defendant does not point to anything that occurred during jury selection that would have affected his decision.

What is overlooked is that by forcing a defendant to decide – whether to admit or contest a prior conviction – before jury selection, totally precludes defense counsel from assessing the

prospective jurors on the issue during jury selection. For a defense counsel, jury selection plays an important role. Attorneys invariably desire to select jurors that are open-minded, and not biased or unsympathetic to their client's position. Attorneys are free to ask prospective jurors questions that are relevant to the facts of the case. Therefore, developing a series of questions that are helpful to the attorney, in identifying jurors that are open-minded, not biased or unsympathetic to the client's position in the case, is an essential aspect of voir dire.

Accordingly, where an attorney still has the option to weigh whether to expose a client's conviction to the jury, he would fashion a voir dire to reveal whether prospective jurors would be capable of impartially evaluating a defendant's prior conviction. However, forcing a defendant to decide whether to admit a prior conviction before jury selection begins, eliminates questioning on this issue and deprives the defendant of the right the statute provides. Importantly, whatever voir dire transpires thereafter

is no longer one geared to determine how a jury might respond to learning of a defendant's prior conviction, because forcing defendant to choose prior to voir dire stripped defendant of this opportunity.

Judgment, Supreme Court, New York County (Mark Dwyer, J.), rendered September 8, 2015, and order, same court and Justice, entered on or about May 4, 2017, affirmed.

Opinion by Manzanet-Daniels, J. all concur except Renwick, J.P. who dissents in part in an Opinion.

Renwick, J.P., Richter, Manzanet-Daniels, Gische, Tom, JJ.

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

ENTERED: JANUARY 22, 2019

CLERK