SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 15, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9959 In re New York City Asbestos Litigation — Index 190240/17

— — — — —

Russell Leavitt, et al.,
Plaintiffs-Respondents,

-against-

A.O. Smith Water Products Co., et al.,
Defendants,

Rogers Corporation,
Defendant-Appellant.

_____

Goldberg Segalla, LLP, New York (Andrew J. Scholz of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Jason P. Weinstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered February 22, 2019, which, to the extent appealed from, denied defendant Rogers Corporation's (Rogers) motion to dismiss for lack of jurisdiction or, alternatively, for summary judgment dismissing the complaint, unanimously modified, on the law, to the extent of granting plaintiffs jurisdictional discovery, and otherwise affirmed, without costs.

Although the record before the court was not sufficient to warrant a finding of personal jurisdiction over defendant (*cf. Mischel v Safe Haven Enters.*, LLC, 161 AD3d 696, 697 [1st Dept 2018]), plaintiffs made a "sufficient start" in demonstrating such jurisdiction, and accordingly, jurisdictional discovery is warranted with respect to Rogers (*see Avilon Auto. Group v Leontiev*, 168 AD3d 78, 89 [1st Dept 2019]; *Robins v Procure Treatment Ctrs., Inc.*, 157 AD3d 606, 607 [1st Dept 2018]).

Additionally, Rogers failed to make a prima facie showing that its product could not have contributed to the causation of plaintiff's injury (*see Matter of New York City Asbestos Litig.*, 123 AD3d 498, 499 [1st Dept 2014]). Accordingly, that branch of its motion which was for summary judgment dismissing the complaint was properly denied, without regard to the sufficiency of plaintiffs' papers in opposition (*see Pullman v Silverman*, 28 NY3d 1060, 1063 [2016], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

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

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

ENTERED: OCTOBER 15, 2019

CLERK

Friedman, J.P., Tom, Webber, Gesmer, Oing, JJ.

9978 Chelsea Piers L.P., et al., Index 150402/17
Plaintiffs-Respondents,

-against-

Colony Insurance Company, et al.,
Defendants-Appellants,

EPS Iron Works, Inc.,
Defendant.

_____

Melito & Adolfsen, P.C., New York (Michael F. Panayotou of counsel), for Colony Insurance Company, appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Craig Rokuson of counsel), for Endurance America Specialty Insurance Company, appellant.

Monteiro & Fishman LLP, Hempstead (Michael Fishman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered December 4, 2018, which to the extent appealed from as limited by the briefs, denied defendant Colony's motion for summary judgment, denied defendant Endurance's motion to the extent it sought a declaration that it is not obligated to indemnify in the underlying action, and granted the motion of plaintiffs, Chelsea Piers L.P. and Chelsea Piers Management Inc. (collectively, Chelsea), for summary judgment to the extent they sought a declaration that Colony is obligated to provide a defense in the underlying action and to reimburse Chelsea for

past defense costs, unanimously affirmed, with costs.

The language of the purchase order between EPS, the defendant in the underlying action, and Chelsea made explicit reference to Chelsea and required EPS to add Chelsea as an additional insured on its respective policies by virtue of language stating that contractor EPS's "general liability insurance shall apply on a primary and non-contributing basis with respect to all protection provided to Chelsea Piers thereunder" (*see Christ the King Regional High School v Zurich Ins. Co. of N. Am.*, 91 AD3d 806, 807 [2d Dept 2012]; *cf. M&M Realty of N.Y., LLC v Burlington Ins. Co.*, 170 AD3d 407, 407 [1st Dept 2019]; *Clavin v CAP Equip. Leasing Corp.*, 156 AD3d 404, 405 [1st Dept 2017]; *Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2d Dept 2003]). To find otherwise "renders a portion of the contract meaningless and fails to read all contractual clauses together contextually" (*Nova Cas. v Harleysville Worchester Ins. Co.*, 146 AD3d 428, 428 [1st Dept 2017]).

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10073 Grace Miller, etc., Index 805263/14
Plaintiff-Appellant,

-against-

Michael E. Ford, M.D., et al.,
Defendants-Respondents,

John Does 1-10,
Defendants.

_____

Nagel Rice, LLP, New York (Bruce Nagel of counsel), for appellant.

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Martin Shulman, J.), entered April 3, 2018, dismissing the complaint with prejudice, unanimously affirmed, without costs.

Plaintiff alleges that defendant Michael E. Ford, M.D., was negligent in failing to timely diagnose the decedent's metastatic melanoma because he did not order a computed tomography (CT) scan of a right groin lesion observed in February 2012 and did not properly follow up to ensure that the decedent obtained the scan.

Contrary to plaintiff's contention, Dr. Ford's contemporaneous records demonstrate that he ordered and prescribed a CT scan on February 1, 2012. Plaintiff failed to raise an issue of fact through her testimony that the decedent

did not mention a CT scan to her and that, if it had been ordered, he would have gotten it done, as she lacks personal knowledge of what Dr. Ford did or did not tell the decedent (*cf. Dallas-Stephenson v Waisman*, 39 AD3d 303 [1st Dept 2007] [issue of fact whether the defendant referred the plaintiffs to a surgeon was raised by the plaintiffs' own testimony that he did not]).

Defendants also established, through the opinion of their internal medicine expert, that on February 3, 2012, Dr. Ford sufficiently followed up to ensure that the CT scan was performed. Plaintiff failed to raise an issue of fact, as her internal medicine expert misstated the record with respect to the follow-up that was performed and cited no basis for the seemingly arbitrary rule he recited.

Because the record demonstrates as a matter of law that Dr. Ford did not depart from accepted standards in his treatment of the decedent, the medical malpractice claim was correctly dismissed, and we need not reach the issue of whether Dr. Ford's alleged departures proximately caused the decedent to be injured.

Absent a viable underlying medical malpractice claim, plaintiff's remaining claims, including the ones derivative in nature, were also correctly dismissed.

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10074-
10074A In re A'Nyia P.G.,

A Child Under Eighteen Years
of Age etc.,

Qubilah C.T.G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Diaz & Moskowitz, PLLC, New York (Hani M. Moskowitz of counsel), for appellant.

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

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

_____

Order of disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about June 14, 2018, to the extent it brings up for review an order, same court and Judge, entered on or about June 14, 2018, which granted petitioner agency's motion for summary judgment on its petition alleging that respondent mother derivatively neglected the subject child, unanimously affirmed, without costs. Appeal from order granting motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The three prior court orders finding that respondent

neglected and derivatively neglected the subject child's five older siblings are sufficiently proximate in time to the instant proceeding to permit the presumption that the conditions that formed the basis for the prior findings continue to exist (*see Matter of Noah Jeremiah J. [Kimberly J.]*, 81 AD3d 37, 42 [1st Dept 2010]; *see also e.g. Matter of Jayden C. [Luisanny A.]*, 126 AD3d 433 [1st Dept 2015] [sufficient proximity where petition was filed less than two years after findings of abuse were made]; *Matter of Darren Desmond W. [Nirandah W.]*, 121 AD3d 573, 574 [1st Dept 2014] [sufficient proximity where petition was filed less than a year and a half after suspended judgment terminated parental rights]). The derivative neglect findings entered in April and October 2016 were based on respondent's failure to comply with her court-ordered service plan, and none of the siblings who are the subjects of those findings have been returned to respondent's care (*see Matter of Tradale CC.*, 52 AD3d 900, 902 [3d Dept 2008]).

Respondent failed to raise an issue of fact as to whether the conditions that led to the siblings being placed in foster care can reasonably be expected to exist currently or in the foreseeable future (*see Matter of Cruz*, 121 AD2d 901, 903-904

[1st Dept 1986]). The affidavit in which she averred that she completed some therapeutic services does not suffice (*see Matter of Xiomara D. [Madelyn D.]*, 96 AD3d 1239, 1240-1241 [3d Dept 2012]).

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10075-
10076 Index 650705/15

A.E.C. Consulting & Expediting, Inc., now known as A.E.C. Consulting & Equity Inc., also known as Mohamed Azadi & Ronny A. Livian,
Plaintiff-Respondent,

-against-

Zachary Vella,
Defendant-Appellant,

949 Park Development, LLC, et al.,
Defendants.

- - - - -

A.E.C. Consulting & Expediting, Inc., now known as A.E.C. Consulting & Equity Inc., also known as Mohamed Azadi & Ronny A. Livian,
Plaintiff-Respondent,

-against

949 Park Development, LLC, et al.,
Defendants-Appellants,

Benjamin Soleimani,
Defendant.

_____

Steven Landy & Associates, PLLC, New York (David A. Wolf of counsel), of counsel), for appellants.

Sullivan PC, New York (Peter Sullivan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Melissa A. Crane, J.), entered October 22, 2018, which, upon plaintiffs' motion to

strike defendants 949 Park Development, LLC, and Zachary Vella's answer, directed defendants to produce within two weeks all "back up to its 'recap,'" including tax returns for the entire life of the company, bank records, and mortgage statements, and ordered that failure to comply would result in the issuance of an adverse inference, and, upon a further showing by plaintiffs, the striking of the answer, unanimously affirmed, with costs. Order, Supreme Court, New York County (Melissa A. Crane, J.), entered July 3, 2018, which, to the extent appealed from, denied defendant Zachary Vella's motion to dismiss the breach of contract cause of action, unanimously affirmed, with costs.

The record supports the court's conclusion that defendants failed to produce available documents relevant to a determination of whether 949 Park earned a profit and made a distribution to its members. Defendants also failed to identify the specific documents that were destroyed in the flood and to show that they had made a reasonable search for the records requested by plaintiff. The court providently exercised its discretion in relieving plaintiff of the obligation to provide an affirmation of good faith and the amended discovery demands, given its familiarity with the dispute from plaintiff's prior motion to compel. Plaintiffs were not obligated to move to compel a second time.

Plaintiff has standing to sue for breach of contract, because it demonstrated that the substitution of "Equity" for "Expediting" in its name on the contracts was a scrivener's error (*see Harris v Uhlendorf*, 24 NY2d 463, 467 [1969]), that the parties to the contracts were aware that the services were performed by Expediting, and that defendants paid Expediting, not Equity, $40,000 pursuant to the contracts. Defendants presented no evidence that Equity performed any services for them or that such an entity even existed.

Neither of the doctrines of collateral estoppel and law of the case bars plaintiff from suing on the contracts. The court granted defendants' motion to dismiss the prior action as against them on the ground that Equity, not Expediting, was the party to those contracts, and denied plaintiff's request to amend the complaint because there was no proposed pleading before it. However, the court pointed out that the statute of limitations had not yet run, and subsequently consolidated the instant action, which employs the correct nomenclature, with the remainder of the prior action.

Defendants contend that documentary evidence demonstrated that Vella could not be liable under the contracts because he was not responsible for paying the zoning fee. The court correctly concluded that, as a direct party to the contracts, Vella had an

implied duty of good faith and fair dealing and was required to cause 949 Park, of which he was the managing member, to fulfill its contractual obligations (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]).

The complaint states a cause of action for breach of contract by alleging that Vella was required under one of the contracts to cause 949 Park to make required payments and that those payments were not made. The complaint also states a cause of action for breach of the duty of good faith and fair dealing.

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: OCTOBER 15, 2019

CLERK

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

10077 In re Sabina Lim, M.D., etc., Index 530067/17
Petitioner-Respondent,

-against-

R.T.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane Goldstein Temkin of counsel), for appellant.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, Lake Success (Eric Broutman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 30, 2019, which granted the petition to the extent of directing an assisted outpatient treatment (AOT) plan for respondent for a six month period, unanimously affirmed, without costs.

The requirement of Mental Hygiene Law § 9.60 that the examining physician testify in person can be waived by respondent (*see generally People v Seaberg*, 74 NY2d 1, 7 [1989]). Here, respondent's waiver, which was made by counsel on the record after conferring with respondent, was not made under "duress" and was effective (*see id.*).

Petitioner's evidence, which consisted of the medical charts

and notes, and expert testimony, was sufficient to meet the burden on each of the contested statutory criteria for an AOT plan (*see* Mental Hygiene Law § 9.60).

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10078 The People of the State of New York, Dkt. 30025/11
Respondent,

-against-

Joaquin Mejia,
Defendant-Appellant.

_____

Justine M. Luongo, The Legal Aid Society, New York (Whitney A. Robinson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered June 13, 2012, convicting defendant, after a jury trial, of two counts of driving while intoxicated, and sentencing him to a term of three years' probation, unanimously affirmed.

The verdict convicting defendant of both driving while intoxicated per se (Vehicle and Traffic Law § 1192[2]) and common-law driving while intoxicated (§ 1192[3]) was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence adduced at trial did not cast any doubt on the accuracy of defendant's breathalyzer test result, which showed a blood alcohol content of .16. In addition, there was police testimony about defendant's condition at the time of his arrest. There is no basis for disturbing the jury's credibility

determinations, and its assessment of the extent to which a video recorded two hours after defendant's arrest reflected his condition at the time he was driving (*see People v Taylor*, 104 AD3d 603 [1st Dept 2013], *lv denied* 21 NY3d 947 [2013]).

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10079 Aleida E. Casanas, Index 153156/16
Plaintiff-Appellant,

-against-

The Carlei Group, LLC, et al.,
Defendants-Respondents.

_____

Aleida E. Casanas, appellant pro se.

Rosenberg & Estis, P.C., New York (Alexander Lycoyannis of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered January 17, 2018, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment declaring, upon the second and third counterclaims, that the leases submitted by plaintiff are invalid and unenforceable and that plaintiff has no possessory interest in the apartments arising from the leases, dismissing the cause of action for a declaration that the leases are valid, and dismissing without prejudice the causes of action for a declaration that the individual parties' father's estate was distributed improperly and an accounting, and declared in defendants' favor, unanimously modified, on the law, to deny defendants' motion as to the first cause of action and the second and third counterclaims and to vacate the declarations, and otherwise affirmed, without costs.

The motion court correctly dismissed the cause of action relating to the individual parties' father's estate without prejudice to refiling in Surrogate's Court, the proper forum for such claims (SCPA 201[3]). The court also correctly dismissed without prejudice the cause of action seeking an accounting, as the individual parties' sibling relationship, standing alone, is insufficient to establish a fiduciary duty that would entitle plaintiff to an accounting in this case (*see Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016]).

Defendants failed to establish prima facie that the two purported leases are invalid and unenforceable. Issues of fact exist as to whether the parties' course of conduct demonstrates that the consideration for the waiver of rent in each lease, i.e., 20 hours of "work" per week, is sufficiently definite to satisfy the statute of frauds (General Obligations Law § 5-703[2]) (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 244 [1st Dept 2013]; *see also generally William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). Issues of fact also exist as to defendants' claim that the individual defendant, plaintiff's brother, lacked knowledge of the purported leases and that therefore plaintiff was a mere licensee. There is evidence that plaintiff had sublet the two units for several years under written subleases naming

her "Overtenant," and her brother did not deny that plaintiff had sublet one of the apartments to him for several years (*see Provident Bay Rd., LLC v NYSARC, Inc.*, 117 AD3d 1356, 1358 [3d Dept 2014]).

Defendants also failed to establish that the leases were not validly executed.

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10081-
10081A-
10081B

Index 651219/14

Entech Engineering, P.C.,
Plaintiff-Respondent,

-against-

Leon D. DeMatteis Construction Corp.,
Defendant-Appellant,

Travelers Casualty and Surety
Company of America, et al.,
Defendants.

_____

Westermann Sheehy Keenan Samaan & Aydelott, LLP, East Meadow (Christopher J. Sheehy of counsel), for appellant.

Nicoletti Gonson Spinner Ryan Gulino Pinter LLP, New York (Benjamin N. Gonson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (David B. Cohen, J.), entered July 6, 2018, to the extent appealed from as limited by the briefs, in favor of plaintiff as against defendant Leon D. DeMatteis Construction Corp., unanimously affirmed, without costs. Appeal from order, same court and Justice, entered March 29, 2018, which, inter alia, granted plaintiff's motion for summary judgment on its breach of contract claim against DeMatteis and denied DeMatteis's motion for summary judgment dismissing that claim, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered October 31, 2018, to the extent it denied

DeMatteis's motion for leave to renew, unanimously affirmed, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

Defendant New York City School Construction Authority (SCA) contracted with defendant DeMatteis, a general contractor, which contracted with plaintiff for safety management services. Unbeknownst to DeMatteis, plaintiff contracted with a sub-subcontractor to perform the safety services, at an agreed hourly rate lower than its own rate under the subcontract. The subcontract provides that payment by DeMatteis to plaintiff is "'Reimbursable' by SCA Change Order." SCA discovered that the safety services had been performed by a sub-subcontractor when the services were complete and it was calculating the final sum owed to DeMatteis. Because the general contract provides that SCA will pay the general contractor only for labor "directly employed at the Site," SCA paid DeMatteis for plaintiff's invoices at the sub-subcontractor's hourly rate. Plaintiff seeks payment of the difference.

DeMatteis relies on Rider C to the subcontract, which incorporates, inter alia, the general contract's requirement that subcontractors be pre-approved by SCA, and the inclusion of the phrase "'Reimbursable' by SCA Change Order" in the subcontract. It contends that work for which SCA would reimburse it was

subject to SCA Change Order requirements and limitations and that it is not obligated to pay plaintiff the difference between payment at plaintiff's rate and payment at the sub-subcontractor's rate, because the sub-subcontractor was not authorized to provide the site safety services.

This argument is unavailing. Rider C to the subcontract, by its terms, applies only to sub-subcontractors, suppliers and vendors, and therefore does not bind plaintiff subcontractor. Nor does the reference to SCA Change Orders in the phrase "'Reimbursable' by SCA Change Order" incorporate into the subcontract the kinds of provisions of a general contract that bind a subcontractor, i.e., those relating to the scope, quality, character and manner of the work to be performed by the subcontractor (*see Naupari v Murray*, 163 AD3d 401, 402 [1st Dept 2018]).

DeMatteis contends that the breach of contract claim is barred by plaintiff's own fraud. However, plaintiff was not obligated to provide a site safety manager directly employed by it. Thus, DeMatteis has not shown that it was injured as a result of a misrepresentation or material omission by plaintiff (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

DeMatteis's motion to renew and reargue was, in substance, a motion to reargue, the denial of which is not appealable (*Forbes*

v Giacomo, 130 AD3d 428 [1st Dept 2015], *lv dismissed in part, denied in part* 26 NY3d 1047 [2015]). In any event, leave to renew was properly denied because DeMatteis's submitted material did not constitute "new facts," and DeMatteis did not offer a reasonable justification for failing to submit the material on the original motion (CPLR 2221[e][2], [3]).

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

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10082 Yolanne Jeanty, Index 101630/10
Plaintiff-Respondent-Appellant,

-against-

The New York City Housing Authority,
Defendant-Appellant-Respondent.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant-respondent.

Ephrem J. Wertenteil, New York, for respondent-appellant.

_____

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered September 11, 2018, which denied defendant's motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on the issue of liability and to strike defendant's first, second, and fifth affirmative defenses, unanimously affirmed, without costs.

Plaintiff alleges that she was injured after the armature of a door, through which she was trying to pass in order to exit defendant's premises, fell and struck her in the head. Triable issues of fact exist as to the applicability of the doctrine of res ipsa loquitur. This theory of liability applies when the injury-causing event (1) is "of a kind which ordinarily does not occur in the absence of someone's negligence"; (2) is "caused by an agency or instrumentality within the exclusive control of the

defendant"; and (3) was not "due to any voluntary action or contribution on the part of the plaintiff" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986] [internal quotation marks omitted]).

Although the first and third elements may be satisfied in plaintiff's favor, a factual issue exists with regard to the second element as to whether defendant had exclusive control over the instrumentality which caused her accident even though defendant did not have sole physical access to the door (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]; *Dawson v National Amusements*, 259 AD2d 329, 330-331 [1st Dept 1999]).

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10083 The People of the State of New York, Ind. 2551/16
Respondent,

-against-

Calvin Spence,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Brian H. Connor 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 (Eugene Oliver, J.), rendered January 18, 2017,

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

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

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

ENTERED: OCTOBER 15, 2019

CLERK

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

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

10084 The People of the State of New York, Ind. 3166/11
Respondent,

-against-

Nehmis Munoz,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson Jr. of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (John George Edward Marck 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 (Joseph A. Santorelli, J.), rendered April 16, 2013,

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

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

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

ENTERED: OCTOBER 15, 2019

CLERK

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

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

10086 The People of the State of New York, Respondent, Ind. 2742/03

-against-

Jose A. Carrasco, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J.), rendered December 18, 2008, as amended March 11, 2009, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him to a term of five years, unanimously reversed, on the law, the plea vacated, and the matter remanded for further proceedings.

Initially, we decline to exercise our discretion (*see People v Perez*, 23 NY3d 89, 101 [2014]) to dismiss this appeal on the ground of "failure of timely prosecution or perfection thereof" (CPL 470.60[1]). The People concede that, if the appeal is not being dismissed, defendant's guilty plea should be vacated because he was not informed at any time before sentencing that if

he violated the conditions of the plea agreement, the enhanced sentence would include postrelease supervision (*see People v McAlpin*, 17 NY3d 936 [2011]). In light of this determination, we find it unnecessary to reach any other issues.

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10087 Rosemary Czulada, etc., Index 190181/17
Plaintiff-Respondent,

-against-

Aerco International, et al.,
Defendants,

Aurora Pump Company,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about February 15, 2019,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated September 4, 2019,

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

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10088 The People of the State of New York, Respondent, Ind. 3001/07

-against-

David Rivera, Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (John S. Moore, J.), entered on or about November 14, 2016, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were adequately taken into account by the risk assessment instrument,

were unpersuasive, or were outweighed by aggravating factors, including the seriousness of the underlying offense against a child and defendant's history of history of felony convictions.

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10090 The People of the State of New York, Ind. 711/15
Respondent,

-against-

Tiara Mars,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Ronald A. Zweibel, J.), rendered August 27, 2015,

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

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

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

ENTERED: OCTOBER 15, 2019

CLERK

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

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

10091 In re Boris K.,
Petitioner-Respondent,

-against-

Maria E.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

_____

Order, Family Court, New York County (Monica D. Shulman, J.), entered on or about February 13, 2017, which, inter alia, after a hearing, awarded petitioner father sole legal and physical custody of the subject child, unanimously affirmed, without costs.

In determining custody, the court appropriately considered the best interests of the child in light of the totality of the circumstances (*see Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). The testimony demonstrates that, except for the first year of the child's life, while respondent was on maternity leave, petitioner has been primarily responsible for the day-to-day care of the child, providing a consistent and stable home for her, and attending to all of her educational needs and extracurricular activities. While petitioner sometimes questioned respondent's role in the child's life, he did not interfere with respondent's exercise of her visitation rights,

and respondent herself sometimes made decisions without consulting petitioner, and failed to comply with the terms of visitation orders. The court's determination is consistent with the recommendation of the attorney for the child and the opinion of the forensic evaluator that the child should have ample time with each of her parents. The child appeared to be thriving in the existing custody arrangement, and respondent has identified no grounds for disturbing the determination.

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

ENTERED: OCTOBER 15, 2019

CLERK

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

10092N In re Talal Bin Sultan Bin Abdul-Aziz Al Saud, Petitioner-Appellant, Index 155151/17

-against-

The New York and Presbyterian Hospital, Respondent-Respondent.

_____

Hughes Hubbard & Reed LLP, New York (Michael E. Salzman of counsel), for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Nancy M. Bannon, J.), entered June 27, 2018, which denied the petition for pre-action disclosure from respondent hospital, unanimously dismissed, without costs, as moot.

The appeal has been rendered moot in light of the recent developments that have granted petitioner the specific relief he was denied in the order appealed from (*see e.g. Matter of Feustel v Rosenblum*, 6 NY3d 885 [2006]). In August 2018, petitioner filed documents with the motion court to show that he recently initiated a proceeding in Lebanon to obtain a declaration of filiation (the Lebanese Action). Following the filing of the Lebanese Action, the court granted petitioner's motion to renew the order appealed from and, upon renewal, directed respondent to

produce the tissue samples to an accredited laboratory for testing. When a motion to renew an order substantially affects an order "in such a way as to remove the grievance that accounts for the appeal," the appeal should be abated (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5517:1; *see Reyes v Sequeira*, 64 AD3d 500, 505-506 [1st Dept 2009]).

Furthermore, the Lebanese Action was dismissed in August 2019, thus removing the prerequisite for any pending action disclosure under CPLR 3102(e). Following dismissal of the Lebanese Action, respondent filed a motion to renew its opposition to the petition on this basis, and this motion remains sub judice. Should the motion court grant respondent's motion to renew its opposition, petitioner will be permitted to appeal from that order on a more complete and accurate record than the one presented here (CPLR 5701(a)(2)(viii). Accordingly, this appeal no longer remains the proper vehicle for deciding the matter.

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

ENTERED: OCTOBER 15, 2019

CLERK