SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**JANUARY 28, 2020**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Kapnick, Mazzarelli, JJ.

10494 & M-7807 M-7828 M-7949 — In re Spectrum News NY1, Petitioner-Appellant, -against- New York City Police Department, et al., Respondents-Respondents. — Index 150305/16

- - - - -

Reporters Committee for Freedom of the Press, ABC, Inc., The Associated Press, Association of Alternative Newsmedia, Atlantic Media, Inc., Brechner Center for Freedom of Information, Cable News Network, Inc., CBS Broadcasting Inc. on behalf of CBS News and WCBS-TV, Daily News, LP, The E.W. Scripps Company, First Look Media Works, Inc., Gannet Co., Inc., Hearst Corporation, Investigative Reporting Workshop at American University, Investigative Studios, The Marshall Project, MPA - The Association of Magazine Media, National Newspaper Association, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, NBCUniversal Media, LLC, New York Public Radio, The New York Times Company, The News Leader Association, Online News Association, POLITICO LLC, ProPublica, Radio Television Digital News Association, Society of Professional Journalists, Univision Communications Inc., VICE Media, WNET and Center for Constitutional Rights.
Amici Curiae.

_____

Patterson Belknap Webb & Tyler LLP, New York (Saul B. Shapiro of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondents.

Ballard Spahr LLP, New York (Thomas B. Sullivan of counsel), for Reporters Committee for Freedom of the Press and ABC, Inc., The Associated Press, Association of Alternative Newsmedia, Atlantic Media, Inc., Brechner Center for Freedom of Information, Cable News Network, Inc., CBS Broadcasting Inc. on behalf of CBS News and WCBS-TV, Daily News, LP, The E.W. Scripps Company, First Look Media Works, Inc., Gannet Co., Inc., Hearst Corporation, Investigative Reporting Workshop at American University, Investigative Studios, The Marshall Project, MPA - The Association of Magazine Media, National Newspaper Association, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, NBCUniversal Media, LLC, New York Public Radio, The New York Times Company, The News Leader Association, Online News Association, POLITICO LLC, ProPublica, Radio Television Digital News Association, Society of Professional Journalists, Univision Communications Inc., VICE Media, and WNET, amicus curiae.

Darius Charney, New York, for Center for Constitutional Rights, amicus curiae.

---

Appeal from purported order (denominated an interim decision), Supreme Court, New York County (Kathryn E. Freed, J.), entered January 30, 2019, which, insofar as appealed from as limited by the briefs, denied the petition brought pursuant to CPLR article 78 to direct respondents to disclose, pursuant to the Freedom of Information Law (FOIL) (Public Officers Law §§ 84-90), video footage from body cameras worn by officers of respondent New York City Police Department (NYPD), to the extent

of permitting respondents to redact the faces of persons other than officers from any video footage recorded by the body-worn cameras and to redact certain communications between officers, and directed the parties to submit letters in preparation for a hearing on NYPD's ability to redact the records without unreasonable difficulty, unanimously dismissed, without costs, as taken from a nonappealable paper.

This proceeding stems from Spectrum News NY1's (Spectrum) attempts to gain access to video files from the voluntary body camera experiment. Specifically, Spectrum filed a FOIL request for unredacted videos from the NYPD's voluntary body camera program begun in 2014. NYPD denied the request, claiming that unredacted files were exempt from disclosure under FOIL. Spectrum then commenced this article 78 proceeding seeking a judgment compelling respondent NYPD to comply with its request. In a previous interim order, which is not the subject of this appeal, Supreme Court found that the article 78 petition and answer raise questions of fact as to whether complying with the request for unredacted videos would be unduly burdensome on respondent NYPD, necessitating a hearing on that issue.

Prior to the hearing, the parties stipulated that out of a disputed 328 videos, only 30 would be the subject of the hearing.

Supreme Court then issued "an interim decision," which was not the product of a motion for relief. Instead, the "interim decision," among other things, permitted respondents to redact the faces of persons other than officers from any video footage recorded by the body cameras and to redact certain communications between officers, and directed the parties to submit letters in preparation for a hearing on NYPD's ability to redact the records without unreasonable difficulty. Then, rather than conducting the hearing, Supreme Court granted petitioner leave to appeal from the "interim decision."

This appeal is thus taken from an "interim decision," which is not an appealable paper. The lack of an appealable paper here deprives the Court of jurisdiction and requires dismissal of Spectrum's appeal, albeit without prejudice. Where, as here, a party brings an appeal from a nonappealable paper, this Court regularly dismisses the appeal for lack of jurisdiction *(see e.g., Matter of Hannah O.*, 159 AD3d 650, 650 [1st Dept 2018[; *Lipin v Danske Bank*, 130 AD3d 470, 471 [1st Dept 2015], appeal dismissed 26 NY3d 992 [2015]; *Clemons v. Schindler El. Corp.*, 87 AD3d 452, 453-454 [1st Dept 2011]). While there are instances where this Court has deemed a paper denominated as a "decision" to nonetheless be appealable because it contained all the

hallmarks of an order (*see e.g. Matter of Samantha F. [Edwin F]*, 169 AD3d 549, 549 [1st Dept 2019]) *appeal dismissed* 33 NY3d 1042 [2019], that is not the situation here. As Supreme Court itself noted, it issued the interim decision without any motion for relief pending. Instead, it appears that the court was limiting the scope of the hearing, and the decision did not result in any "order" being issued.

***In re Spectrum News NY1 v New York City Police Department***

**M-7807 & M-7828** - Motions to file amicus briefs granted, and the briefs deemed filed.

**M-7949** - Motion to file response to amicus briefs granted, and the brief deemed filed.

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

ENTERED: JANUARY 28, 2020

CLERK

Manzanet-Daniels, J.P., Gesmer, Oing, Moulton, González, JJ.

10830 In re Sharon Bannister, Ind. 5306N/16
Petitioner,

-against-

Hon. Maxwell Wiley, etc., et al.,
Respondents.

_____

Janet E. Sabel, The Legal Aid Society, New York (Stephen Pokart of counsel), for petitioner.

Bridget G. Brennan, Special Narcotics Prosecutor, New York (Brooke Verdiglione of counsel), for Cyrus R. Vance, Jr. and Bridget G. Brennan, respondents.

_____

Petition pursuant to CPLR article 78 for a writ of prohibition barring petitioner's retrial upon New York County indictment 5306N-16, after her first trial ended with the trial court's sua sponte declaration of a mistrial without petitioner's consent, unanimously granted, without costs, and the indictment dismissed.

The trial court was not compelled by manifest necessity to declare a mistrial and terminate the proceedings (*see Matter of Capellan v Stone*, 49 AD3d 121 [1st Dept 2008], *lv denied* 10 NY3d 716 [2008]), and accordingly, retrial is barred under the Double Jeopardy Clauses of the Federal and New York State Constitutions (US Const 5th Amend; NY Const, art I, § 6; *see also People v*

*Michael*, 48 NY2d 1, 7 [1979]). It was an abuse of discretion to declare a mistrial in order to accommodate a juror's weekend travel plans, including a Friday, which she belatedly informed the court about during deliberations, where the court, as requested by defendant, reasonably could have directed the juror to report for deliberations the following day, and the court also failed to confirm that the jury was hopelessly deadlocked at the time (*see Matter of Colcloughley v Johnson*, 115 AD2d 58, 62 [1st Dept 1986], *lv denied* 68 NY2d 604 [1986]).

Justice Maxwell Wiley has elected, pursuant to CPLR 7804 (i), not to appear in this proceeding.

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10873-
10873A &
M-65 The People of the State of New York,
Respondent,

Ind. 1347/09

-against-

Rasheen J. Gamble also known as Sheenie,
Defendant-Appellant.

_____

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

Rasheen Gamble, appellant pro se.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret Clancy, J.), rendered November 13, 2013, convicting defendant, after a jury trial, of murder in the second degree and attempted assault in the second degree, and sentencing him to an aggregate term of 26⅓ years to life, and order, same court and Justice, entered on or about December 20, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The court properly denied, without a hearing, defendant pro se's CPL 440.10 motion and appellate counsel's supplemental CPL 440.10 motion asserting ineffective assistance of counsel. Defendant argues that there was no legitimate strategic reason

for pretrial counsel's consent, without first consulting defendant, to the People's untimely (*see* CPL 240.90) motion to compel a DNA sample. Assuming that counsel's consent under these circumstances was objectively unreasonable, we find that defendant was not prejudiced under either the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668, 694 [1984]). Independent of any DNA evidence, there was overwhelming evidence of defendant's guilt, including, among many other things, the presence of defendant's fingerprints at a location that unequivocally connected him to the crime (*see People v Lewis*, 44 AD3d 422, 422-23 [1st Dept 2007], *lv denied* 9 NY3d 1035 [2008]). The court also providently exercised its discretion in determining that a hearing would serve no useful purpose, particularly in light of defendant's detailed submissions regarding his interactions with pretrial counsel, who was deceased.

The court providently exercised its discretion in precluding defendant from cross-examining a witness about an arrest that had resulted in a dismissal, because trial counsel had insufficient information to demonstrate that the charges were not dismissed on the merits, and thus failed to demonstrate a good faith basis for

the inquiry (*see People v Padilla*, 28 AD3d 365 [1st Dept 2006], *lv denied* 7 NY3d 792 [2006]). Counsel presented only unsupported speculation that the charges were dismissed on speedy trial grounds. Moreover, based on information that the trial prosecutor received from the prosecutor who had handled the witness's case, it appeared that the dismissal may have been on the merits. In any event, any error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). We also find no violation of defendant's right to cross-examine witnesses (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

The challenged portions of the prosecutor's summation do not warrant reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). Although the prosecutor's comments on the lack of an "innocent explanation" for certain evidence tended to shift the burden of proof, the court's curative instructions were sufficient to prevent any prejudice. However, the prosecutor's arguments about defendant's failure to make a 911 call at the time of the incident, or to assert his innocence during a call to his mother after his flight, were inappropriate under the facts of the case, and the court should not have permitted the jury to consider them. Nevertheless, these errors were harmless in light of the

overwhelming evidence.

The court providently exercised its discretion in denying an adverse inference instruction regarding evidence rendered unavailable by the flooding of a storage facility by Hurricane Sandy (*see e.g. People v Daly*, 140 AD3d 593, 594 [1st Dept 2016]), and defendant's arguments to the contrary are unavailing.

We perceive no basis for reducing the sentence.

We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental brief.

**M—65 - *People v Gamble***

Motion for an adjournment and permission to file a pro se supplemental reply brief, denied.

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10874 In re Veronica D., Dkt. V-07722-15/18Q
Petitioner-Appellant,

-against-

Loreni S.,
Respondent-Respondent.

_____

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

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

Janet Neustaetter, The Children's Law Center, Brooklyn (Louise Feld of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Sue Levy, Referee), entered on or about March 18, 2019, which dismissed, without prejudice, the petition of the grandmother Veronica D. for the enforcement of an order of visitation, unanimously affirmed, without costs.

An evidentiary hearing on a petition is not required where the court has sufficient information to "make an informed [] determination regarding the best interests of the child" (*Matter of Law v Gray*, 116 AD3d 699, 700 [2d Dept 2014]; *see also Matter of Reynaldo M. v Violet F.*, 88 AD3d 531 [1st Dept 2011]). This was undoubtedly the case here.

Referee Levy not only issued the initial custody/visitation order in 2015, but also modified that arrangement in the February 2018 custody and visitation order the grandmother seeks to enforce through this petition. She has also presided over the parties' contentious family offense, enforcement and modification petitions, and is fully familiar with the facts and the relevant parties in this case. The petition's allegations – namely, that the child wished to visit with the grandmother and was being denied that right – have been refuted by the child directly. The child's adamant refusal to see the grandmother and desire to "take a break" from her was also evident through the child's own words and expressed to the court through other related petitions presented to it. With this history, the Referee was in a position to render a fully-informed decision, even without the benefit of a full evidentiary hearing on this petition (*Law* at 699).

Further, as the mother points out, a reversal of the order appealed from would have no practical effect. A hearing is ongoing in the Family Court with respect to the mother's petition to modify the custody and visitation order and her attempts to terminate the grandmother's visits entirely. At the conclusion of that hearing the Family Court will decide whether to modify or

to continue the February 2018 custody and visitation order. It is also noted that the order appealed from dismissed the petition "without prejudice," and thus the grandmother will be permitted to re-file the petition in the event that the Family Court decides to keep the custody and visitation order in place.

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 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10875 Jose Figueroa, Index 300844/14
Plaintiff-Appellant,

-against-

Ved Parkash,
Defendant-Respondent.

_____

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

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about November 8, 2018, dismissing the complaint pursuant to an order, same court and Justice, entered on or about June 21, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action where plaintiff alleges that he was injured as a result of a fire in his apartment due to defendant building owner's negligent failure to provide an operable smoke detector, defendant demonstrated prima facie that he satisfied his statutory duty to provide a functional smoke detector in the apartment, and accordingly, the obligation to maintain the smoke

detector was assumed by plaintiff (*see* Administrative Code of City of NY § 27-2045[a][1], [b][1], [2]).

Plaintiff's argument that defendant voluntarily assumed a duty to ensure his smoke detector was in good working condition by regularly inspecting tenants' smoke detectors, is unavailing. "Liability under this theory may be imposed only if defendant's conduct placed plaintiff in a more vulnerable position than he would have been in had defendant done nothing" (*Poree v New York City Hous. Auth.*, 139 AD3d 528, 529 [1st Dept 2016]*; see Heard v City of New York*, 82 NY2d 66, 72 [1993]). Here, however, plaintiff provided no evidence that he relied on defendant's inspection of his smoke detector to ensure its functionality, and instead testified that he never saw the building superintendent inspect his smoke detector.

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

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10876 Robert Hornsby, Index 157233/17
Plaintiff-Respondent,

-against-

Cathedral Parkway Apartments Corp., et al.,
Defendants-Appellants.

_____

Mischel & Horn, P.C., New York (Christen Giannaros of counsel), for appellants.

Rheingold Giuffra Ruffo & Plotkin LLP, New York (Jeremy A. Hellman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered July 16, 2019, which, in this personal injury action, denied defendants' motion for summary judgment dismissing the complaint on the ground that their motion papers exceeded the court's page limit, unanimously affirmed, without costs.

The motion court did not improvidently exercise its discretion in denying defendants' summary judgment motion on the ground that their affirmation in support far exceeded the motion

court's page limitation rules (*see* 22 NYCRR 9.1; *compare Matter of East 91st St. Crane Collapse Litig.*, 119 AD3d 437, 438 [1st Dept 2014]; *Macias v City of Yonkers*, 65 AD3d 1298, 1299 [2d Dept 2009]). If we were to reach the merits, we would find that summary judgment should also be denied in light of the conflicting expert opinions.

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10877 Anthony Wells, as President of Social Service Employees Union Local 371,
Plaintiff-Appellant,

-against-

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

Index 156834/14

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kreisberg of counsel), for appellant.

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

Order, Supreme Court, New York County (James E. d'Auguste, J.), entered on or about June 14, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff seeks, inter alia, a declaration that defendants' failure to consider and appoint female persons on the eligible list established from civil service examination number 3000 for the civil service position of juvenile counselor in defendant New York City Administration for Children's Services (ACS) in January 2014 and March 2014 violated the State and City Human Rights Laws (Executive Law § 296[1][a]; Administrative Code of City of NY § 8-107[1][a]).

Defendants established prima facie that their selective hiring of male applicants as juvenile counselors did not violate the Human Rights law because, pursuant to the Prison Rape Elimination Act (PREA) (34 USC §§ 30301-09) and industry best practices, sex is a bona fide occupational qualification (BFOQ) for juvenile counselors, and no reasonable alternatives to the preferential hiring of male counselors existed to protect the privacy interests of male juvenile detainees (*see Jennings v New York State Off. of Mental Health*, 786 F Supp 376, 380-381, 387 [SD NY 1992] ["The gender-based assignment policy strikes a balance between the patients' privacy interests and the right of SHTAs (Security Hospital Treatment Assistants) to bid for position. Thus, we find that the requirement that at least one SHTA of the same gender as the patients be assigned to the ward is permissible under Title VII (federal antidiscrimination law)"], *affd* 977 F2d 731 [2d Cir 1992]; *State Div. of Human Rights v Oneida County Sheriff's Dept.*, 119 AD2d 1006, 1006-1007 [4th Dept 1986] ["The uncontradicted testimony of the Sheriff was that sergeants are required to conduct daily announced and unannounced inspections of cellblock areas to monitor security and sanitation conditions and, since inmates' toilet and shower facilities are in open view to personnel walking by the cells, it

would be a violation of the male inmates' right to privacy to have a woman monitoring their activities"], *affd* 70 NY2d 974, 976 [1988]).

In opposition, plaintiff failed to raise an issue of fact as to the existence of reasonable alternatives to preferential male hiring. Plaintiff contends that the objective of the January 2014 and March 2014 selective hiring was to save overtime compensation, which is not sufficient to justify gender-based hiring discrimination. However, the record demonstrates that even the massive amounts of mandatory overtime imposed on male counselors did not constitute a reasonable alternative to selective hiring, because the shortages of male counselors still at times forced ACS to assign female counselors to male residence halls, without the required male counterparts, which resulted in female counselors performing pat searches, in violation of the PREA and best practices. Moreover, the mandatory overtime contributed to a 65% attrition rate among male counselors during the two years preceding the preferential hiring, which, combined with the overtime, worsened morale and affected performance among all counselors. Moreover, plaintiff failed to substantiate his assertion that better scheduling of staff could have obviated the

need for huge amounts of mandatory overtime, and the record belies his assertion that better recruitment could have solved the problem of critical shortages of male counselors.

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10878 The People of the State of New York, Ind. 216/16
Respondent,

-against-

Toni Denise Green,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered August 30, 2016, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10880 The People of the State of New York, Ind. 826/18
Respondent,

-against-

Daniel Ayala,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (George R. Villegas, J.), rendered September 19, 2018, as amended September 24, 2018, convicting defendant, upon his plea of guilty, of criminal tampering in the first degree, and sentencing him to a term of nine months, unanimously affirmed.

Defendant's claim that his counsel rendered ineffective assistance by failing to make certain motions addressed to the indictment is unreviewable on direct appeal because it involves 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]), with particular reference to the strategic considerations involved in counsel's obtaining from the court a favorable disposition of the charges without making the motions

at issue. Furthermore, aside from the issue of the reasonableness of counsel's conduct, the existing record does not establish the prejudice prong of either a state or federal ineffectiveness claim, because there is no indication that the ultimate disposition would have been more favorable had counsel made the pretrial motions at issue. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10882 In re Jadelyn T. R., Dkt. NA-20021/18

A Child Under Eighteen Years of Age, etc.,

Terry O.,
Respondent-Appellant,

Administration of Children's Services,
Petitioner-Respondent,

Elizabeth R.,
Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

James E. Johnson, Corporation Counsel, New York (Julia Bedell of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the child.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about April 10, 2019, which, inter alia, after a hearing, found that respondent was a person legally responsible for the subject child and that he sexually abused the child, unanimously affirmed, without costs.

Respondent's argument that he was not a person legally responsible for the child is unpreserved and, in any event, is

unavailing (*see Matter of Alijah S. [Daniel S.]*, 133 AD3d 555, 556 [1st Dept 2015], *lv denied* 26 NY3d 917 [2016]; Family Ct Act § 1012[g]).

The finding of sexual abuse was supported by a preponderance of the evidence (*see Matter of N.D. [G.D.]*, 165 AD3d 416 [1st Dept 2018]). There exists no basis to disturb the court's credibility determinations. Contrary to respondent's argument, the child's testimony did not require corroboration (*see Matter of Kayla S. [Eddie S.]*, 146 AD3d 648 [1st Dept 2017]) and was in fact consistent with the statements she made to the police and the caseworker (*see id.*).

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10883 The People of the State of New York, Ind. 2865/16
Respondent,

-against-

Louis Thomas,
Defendant-Appellant.

_____

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

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

_____

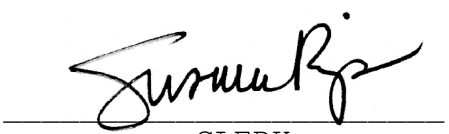
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Curtis J. Farber, J.), rendered October 5, 2018,

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 28, 2020



CLERK

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

Kapnick, J.P., Gesmer, Oing, Singh, JJ.

10885 Thomas J. Cinquemani, et al., Index 150507/13
Plaintiffs-Appellants,

-against-

Otis Elevator Company, et al.,
Defendants-Respondents,

Boca Group East, LLC,
Defendant.

_____

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

Wiggin and Dana LLP, New York (Jonathan M. Freiman, Jr. of the bar of the State of Connecticut, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered February 26, 2018, which granted the motion of defendants Otis Elevator Company and HLT NY Waldorf, LLC for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established their prima facie entitlement to judgment as a matter of law in this action where plaintiff Thomas Cinquemani alleges that he was injured when an elevator in the Waldorf Astoria, where he worked, suddenly started jumping and then free fell from the 42nd floor to the 3rd floor. Defendants submitted evidence, including an expert affidavit and deposition

testimony of Otis's elevator mechanic, demonstrating that plaintiff's account of how the elevator incident occurred was electrically and mechanically impossible (*see Espinal v Trezechahn 1065 Ave. of the Ams., LLC*, 94 AD3d 611, 613 [1st Dept 2012]; *Hardy v Lojan Realty Corp.*, 303 AD2d 457 [2d Dept 2003]; *compare Miller v Schindler El. Corp.*, 308 AD2d 312, 313 [1st Dept 2003]). Defendants also demonstrated lack of notice of any defect that could have caused the incident, and that what had occurred was an appropriate system activated shutdown.

In opposition, plaintiffs failed to raise a triable issue of fact. Their expert's statements that defendants were negligent were conclusory and failed to rebut defendants' showing that it was impossible for the incident to have occurred in the manner plaintiffs allege (*see Forde v Vornado Realty Trust*, 89 AD3d 678, 679 [2d Dept 2011]; *compare Colon v New York City Hous. Auth.*, 156 AD3d 406, 407 [1st Dept 2017]). Nor can plaintiffs rely on the doctrine of res ipsa loquitur, as they failed to demonstrate that the elevator stoppage in this case was the type of event that would not ordinarily occur in the absence of negligence (*see Espinal* at 614; *Hardy* at 457).

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

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10886 The People of the State of New York, SCI 24/17
Respondent,

-against-

Sunita Ramnath,
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 (Felicia A. Yancey of counsel), for respondent.

_____

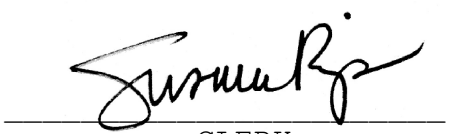
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Mary V. Rosado, J. at plea; Julio Rodriguez III, J. at sentencing), rendered March 27, 2017,

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 28, 2020



CLERK

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

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10887 In re Former Police Officer Richard DePamphilis, Petitioner-Appellant, Index 100604/18

-against-

James P. O'Neill, as Police Commissioner of the City of New York, et al., Respondents-Respondents.

_____

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

James E. Johnson, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered January 24, 2019, denying the petition to annul respondents' determination, dated February 1, 2018, which denied petitioner's application for reinstatement to respondent New York City Police Department (NYPD), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner pleaded guilty on March 12, 2010 to offering a false instrument for filing in the second degree (Penal Law § 175.30). Because it involves willful deceit, this offense constitutes a violation of the oath of office, and, pursuant to Public Officers Law § 30, petitioner's office was vacated

automatically upon his conviction (*see Matter of Depamphilis v Kelly*, 107 AD3d 611 [1st Dept 2013]). Although his conviction was vacated on September 29, 2017, petitioner did not automatically regain the right to serve as a New York City police officer (Public Officers Law § 30[1][e]). There is no right to reinstatement; the decision to reinstate is within the sole discretion of the Commissioner (*see Matter of Hayes v Nigro*, 165 AD3d 1134, 1135 [2d Dept 2018]).

Respondent Commissioner's approval of the recommendation of the Assistant Deputy Commissioner of Trials (ADCT) that petitioner's application for reinstatement be denied has a rational basis in the record (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]). Notwithstanding the vacatur of petitioner's plea, the ADCT separately found that the hearing record established that petitioner "engaged in conduct that was so egregious as to militate against his reinstatement."

Petitioner's reliance on Administrative Code of City of NY § 13-256.1 is misplaced, as that section was not yet in effect when petitioner's employment with NYPD was terminated.

Contrary to petitioner's argument, the hearing officer considered his sympathetic circumstances, including his good work and his financial hardship, but concluded that these factors did not overcome the severity of his misconduct, i.e., an oath of office offense (*compare e.g. Matter of Vecchio v Kelly*, 94 AD3d 545, 546 [1st Dept 2012] [matter remanded for determination of new penalty, where police officer's taking of nude photos of an arrestee and rape victim, though "unseemly," was aberration from otherwise exemplary career, and termination would work extreme hardship on family], *lv denied* 20 NY3d 855 [2013]; *Matter of McDougall v Scoppetta*, 76 AD3d 338 [2d Dept 2010] [remanding for lesser penalty, where firefighter with otherwise unblemished career tested positive, once, for cocaine; penalty of loss of pension and retirement benefits shocked sense of fairness], *appeal withdrawn* 17 NY3d 902 [2011]).

Petitioner's argument that the Commissioner should be equitably estopped to deny his reinstatement is unavailing (*compare Matter of Sicignano v Cassano*, 43 Misc 3d 1229[A], 2014 NY Slip OP 50730[U] [Sup Ct, Kings County 2014]). In *Sicignano*, a firefighter with post-traumatic stress disorder facing disciplinary charges after being found to have used cocaine was restored to full duty and, while out on a call, sustained

injuries for which he likely would have been awarded a disability retirement pension. The court ruled that he justifiably relied on the fire department medical office's determination of his duty status, and that to deprive him of pension rights for a disability resulting from his performance while on full duty status would be manifestly unjust. In the instant matter, there are no analogous circumstances mitigating against the denial of reinstatement.

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

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10889 In re Khadija Maatouk, et al., Index 152978/18
Petitioners,

-against-

New York State Department of Motor Vehicles
Safety and Business Hearing Bureau,
Respondent.

_____

Law Offices of Andrew J. Spinnell, LLC, New York (Andrew J. Spinnell of counsel), for petitioners.

Letitia James, Attorney General, New York (Mark S. Grube of counsel), for respondent.

_____

Determination of respondent, dated November 28, 2017, which, after a hearing, revoked petitioners' authorization to be a driving school instructor and operate a driving school, respectively, including under the Department of Motor Vehicles' (DMV) Point and Insurance Reduction Program (PIRP), unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Eileen A. Rakower, J.], entered December 11, 2018) dismissed, without costs.

Petitioners were cited for violations of the Vehicle and Traffic Law (VTL) and DMV regulations after an undercover monitor registered for a six-hour PIRP course at their school, was not

provided instruction, and received a certificate of completing the course. Petitioners submitted verification to their sponsoring agency that the monitor completed the course.

The testimony of the monitor and the documentary evidence submitted at the hearing constitute substantial evidence to support the finding that petitioners engaged in "fraud or fraudulent practices in relation to the business conducted under the license" (VTL 394[5][d]; VTL 394[8][b][5]; *see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). There exists no basis to disturb the ALJ's decision to credit the monitor's testimony over the testimony presented by petitioners (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

Under the circumstances, the penalty imposed does not shock one's sense of fairness (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]). A driving school license and an instructor's certificate may be revoked where there is proven fraud (VTL 394[5][b], [8][b][5]), and where a PIRP delivery agency's approval is "suspended or revoked . . ., all instructors and classroom operations of the delivery agency will also be suspended or revoked" (15 NYCRR

138.9[c]). "[E]vidence of fraudulent conduct, standing alone, is sufficient to uphold the penalty of revocation" (*Matter of Kulik v Zucker*, 144 AD3d 1217, 1218 [3d Dept 2016] [internal quotation marks omitted]).

Petitioners' remaining contentions were not raised in the administrative appeal and are unpreserved (*see Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]).

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10890 Condor Capital Corp., Index 652700/17
Plaintiff-Appellant,

-against-

CALS Investors, LLC,
Defendant-Respondent,

XYZ Corp. 1-10,
Defendants.

_____

Kirsch & Niehaus PLLC, New York (Paul R. Niehaus of counsel), for appellant.

Sidley Austin LLP, New York (Daniel Gimmel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on June 8, 2018, which, inter alia, granted the motion of defendant CALS Investors, LLC (defendant) to dismiss, pursuant to CPLR 3211(a)(1) and (7), so much of the first cause of action as alleged that defendant had breached the parties' contract by failing to properly calculate the MOIC Target, unanimously affirmed, with costs.

The parties' contract defines MOIC Target as 115% of the Target. In turn, Target is defined as the Closing Cash Purchase Price; the parties agree that the Closing Cash Purchase Price was $64,464,497.

Plaintiff contends that the MOIC Target should be 115% of $20,389,153.90 because that is the amount defendant actually invested, and MOIC means multiple of *invested capital*. However, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 245 [2014] [internal quotation marks omitted]). The definition of "MOIC Target" is unambiguous. Contrary to plaintiff's contention, enforcing the definition as written does not "produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties" (*Matter of Lipper Holdings v Trident Holdings*, 1 AD3d 170, 171 [1st Dept 2003] [internal citations omitted]).

The IAS court providently exercised its discretion by not converting defendant's motion into a summary judgment motion (*see Lerner v Prince*, 119 AD3d 122, 131 [1st Dept 2014]). "Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract" (*Ellington*, 24 NY3d at 244). Discovery is unnecessary because "[a]ny such discovery would simply be an opportunity for

plaintiff to uncover parol evidence to attempt to create an ambiguity in an otherwise clear and unambiguous agreement" (*RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 437 [1st Dept 2009] [emphasis omitted]).

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

ENTERED: JANUARY 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10891N Charles Cusumano, et al., Index 100948/13
Plaintiffs-Respondents,

-against-

Riley Land Surveyors, LLP, et al.,
Defendants,

Northwoods Abstract, Ltd.,
Defendant-Appellant.

_____

The Katsorhis Law Firm, P.C., Flushing (Jeffrey P. Brodsky of counsel), for appellant.

The Law Office of Joshua D. Spitalnik, P.C., Roslyn (Joshua D. Spitalnik of counsel), for respondents.

_____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered May 9, 2018, which granted plaintiff's motion to confirm the report and recommendation of the Special Referee finding, after a traverse hearing, that service of process commencing the action was properly made, and denied defendant Northwoods Abstract Ltd.'s motions to reject the Special Referee's report and recommendation and to vacate the default judgment entered against it, unanimously affirmed, without costs.

The summons with notice served on defendant met the requirements of CPLR 305(b) by stating that the action sought "to recover damages for contract damages and fraud" and that in the

event of default a money judgment would be entered against defendant in the amount of $750,000 (*see U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 147 AD3d 79, 88 [1st Dept 2016], *appeal withdrawn* 32 NY3d 1123 [2018]; *see also Rowell v Gould, Inc.*, 124 AD2d 995, 996 [4th Dept 1986]).

Defendant's argument that the summons is unclear as to whether the claims are asserted by one or both plaintiffs is unaccompanied by an explanation of the obstacle this presents to its preparing a defense, and is therefore unavailing. Also unavailing is defendant's argument that the transcript of the inquest throws the nature of plaintiffs' claims into confusion. The very brief discussion of the nature of the issues reflected in the transcript does not conflict with the statement in the summons with notice of the nature of the action and the relief sought.

Defendant is correct that non-attorney plaintiff Cusumano's appearance on behalf of plaintiff Soares (his significant other) as well as himself could be construed as the unauthorized practice of law (*see e.g. People ex rel. Field v Cronshaw*, 138 AD2d 765 [2d Dept 1988], *appeal dismissed* 72 NY2d 872 [1988]; *Blunt v Northern Oneida County Landfill [NOCO]*, 145 AD2d 913, 914 [4th Dept 1988]). However, defendant failed to establish that

this is a basis for disturbing the order on appeal, since, as defendant notes, the only action Cusumano took in the guise of acting as Soares's attorney was to sign the summons with notice; thereafter, he and Soares retained counsel.

Defendant failed to demonstrate a reasonable excuse for its default (*see* CPLR 5015[a][1]). Even assuming a misunderstanding between counsel and defendant's president Agruso as to who was handling the litigation, Agruso's failure to follow up with counsel in any respect, or to ensure that counsel received the email he claims to have sent in 2014 (of which there is no proof in the record) informing him that the insurer had declined to take the case, is not reasonable. Nor is defendant's failure to appear at the inquest reasonable. Although plaintiffs' counsel would not agree to an adjournment, defendant could have requested relief from the court, rather than wait until the conclusion of proceedings to seek to undo them.

In the absence of a reasonable excuse for the default, we need not determine whether defendant demonstrated a meritorious defense (*Galaxy Gen. Contr. Corp v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]). Were we to do so, we would find that defendant failed to demonstrate a meritorious defense. Defendant argues that it lacked a contractual relationship with

plaintiffs, and the record is unclear as to the scope of its obligations to plaintiffs. However, defendant does not deny that it was retained to perform services by plaintiffs' counsel, that, at closing, plaintiffs paid it $22,282 and that, in keeping with its role as liaison between plaintiffs and the surveyor, it remitted $1,485 of that amount to the surveyor.

Defendant failed to demonstrate that the default judgment should be vacated on the grounds of fraud, misrepresentation, or other misconduct, pursuant to CPLR 5015(a)(3).

To the extent defendant's arguments for rejecting the Special Referee's report and recommendation are directed to the Special Referee's credibility findings, we defer to those findings (*see Terrastone Audubon, L.P. v Blair Ventures, LLC*, 160 AD3d 526, 527-528 [1st Dept 2018]).

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 28, 2020

CLERK

Kapnick, J.P., Oing, Singh, Moulton, JJ.

10892N- Index 650205/11
10892NA- 950354/13
10892NB Rosemarie A. Herman, etc., et al.,
Plaintiffs-Respondents,

-against-

Julian Maurice Herman, et al.,
Defendants-Appellants.

Michael Offit, et al.,
Defendants.

- - - - -

[And a Third Party-Action]

_____

Boies Schiller Flexner LLP, Armonk (Nicholas Gravante, Jr. of counsel), for appellants.

Jaspan Schlesinger LLP, Garden City (Steven R. Schlesinger of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Jennifer G. Schecter, J.), entered August 31, 2018, on or about October 16, 2018, and on or about November 20, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' motion pursuant to CPLR 5015(a)(2) to vacate a judgment, granted plaintiffs' motion to appoint a receiver, and directed the receiver to execute a deed transferring defendant Julian Maurice Herman's (Maurice) interest in the subject property to the trust

created by plaintiff Rosemarie Herman (Rosemarie) in 1991, unanimously affirmed, with costs.

In support of their motion to vacate the judgment under CPLR 5015(a)(2), defendants failed to demonstrate that their newly discovered evidence (i.e., an affidavit from the parties' uncle) could not have been found earlier with due diligence, was material, and would probably have produced a different result (*see Olwine, Connelly, Chase, O'Donnell & Weyher v Valsan, Inc.*, 226 AD2d 102, 103 [1st Dept 1996]), since Maurice's answer, including his statute of limitations defense, had previously been stricken due to his repeated discovery violations and misconduct (*see Herman v Herman*, 134 AD3d 442 [1st Dept 2015].

The court also properly exercised its discretion in appointing a receiver to transfer Maurice's interest in the property at issue to the trust created by Rosemarie in 1991 to at least partially satisfy the outstanding judgment of over $100,000,000 (*see* CPLR 5228(a); *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 317 [2010]).

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 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10893 The People of the State of New York, Ind. 1204/17
Respondent,

-against-

Robert Schuman,
Defendant-Appellant.

_____

Colson Law PLLC, New York (Deborah A. Colson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Diane Kiesel, J.), rendered February 22, 2019, convicting defendant, after a jury trial, of assault in the second degree and criminally negligent homicide, and sentencing him to an aggregate term of three years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and the evaluation of expert testimony. The evidence, including videotapes and eyewitness testimony, supports

the inference that defendant knew that his vehicle struck a pedestrian, and that the vehicle was dragging the victim as defendant drove away.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10894N Elyass Eshaghian, Index 652577/12
Plaintiff-Respondent,

Baruch LLC,
Plaintiff,

-against-

Asher Roshanzamir,
Defendant-Appellant.

- - - - -

Michael Roshanzamir,
Intervenor-Defendant.

- - - - -

Lawrence A. Mandelker,
Escrow Agent.

_____

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Daniel Tepper of counsel), for appellant.

Wilk Auslander LLP, New York (Stuart M. Riback of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered October 22, 2018, which, to the extent appealed from, directed the parties' escrow agent to distribute the entirety of the remaining escrow funds in the amount of $171,515.00 to plaintiff Elyass Eshaghian, unanimously reversed, on the law, with costs, and the relevant parties directed to return said funds to escrow pending further proceedings.

It is clear from a plain reading of paragraph 9 of the settlement agreement that the holdback provision was intended for the sole purpose of apportioning the building's net income for the three-month period between September 1, 2016 and closing, and nothing more (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The holdback provision is the only provision within paragraph 9 providing for the placement of funds in escrow, as well as the only provision providing that it was to "survive closing." Unlike the net income adjustment, the sole remedy for any claim against Asher Roshanzamir for a reduction of the purchase price based on an alleged mortgage deficiency was to sue him on the settlement agreement (*see e.g. CBS Inc. v Ziff-Davis Publ. Co.*, 75 NY2d 496 [1990]).

The language of paragraph 9(a) also confirms that the settlement agreement should not allow for all post-closing adjustments to be charged against the holdback. Specifically, paragraph 9(a) provides that in the event of a mortgage deficiency there was an adjustment to be made to the "Purchase Price." However, "Purchase Price" and "Additional Consideration" are specifically defined terms, referring to distinct categories of money separate from the holdback. Indeed, Asher Roshanzamir paid Eshaghian the $6 million "Purchase Price" and the $2 million

"Additional Consideration" at closing, net of adjustments. It necessarily follows that ordinary "adjustments" to the "Purchase Price" were not to be made after the closing.

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 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10895 In re Malachi O. B., Dkt. B-2376/17

A Child Under Eighteen Years
of Age, etc.,

Keneta K. B.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

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

Rosin Steinhagen Mendel PLLC, New York (Marion C. Perry of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Purported appeal from a decision, Family Court, New York County (Emily M. Olshansky, J.), entered on or about December 19, 2018, which denied respondent mother's motion to vacate her default, deemed a premature notice of appeal (*see* CPLR 5520[c]; *Matter of Jeremiah D. [Deon D.]*, 155 AD3d 414 [1st Dept 2017]) from the order, same court and Judge, entered on or about January 10, 2019, and, so considered, said order, unanimously affirmed, without costs.

The court properly denied the mother's motion to vacate her default. The mother's assertion that she missed the fact-finding

and dispositional hearings because she did not know when the fact-finding hearing was scheduled to commence was not a reasonable excuse for her failure to appear. There is no dispute that she and her counsel were present when the date for the hearing was selected (*see Matter of Roberto O. [Lakeysha H.]*, 166 AD3d 435, 435-436 [1st Dept 2018]; CPLR 5015[a][1]). Although the mother averred in her affidavit that at some point in mid-September 2018, a caseworker told her that the hearing would begin in November 2018, she does not explain why she did not ascertain or confirm the hearing date by contacting her counsel, the agency or the court (*see Matter of Yadori Marie F. [Osvaldo F.]*, 111 AD3d 418, 419 [1st Dept 2013]).

In light of the mother's failure to establish a reasonable excuse for her nonappearance for the November 8, 2018 hearing, this Court need not determine whether she established a

meritorious defense to the permanent neglect petition (*see Matter of Michael P.*, 165 AD3d 497, 498 [1st Dept 2018], *lv denied* 32 NY3d 1135 [2019]). In any event, the record establishes that she did not set forth a meritorious defense.

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10896 Stanley John, et al., Index 805256/17
Plaintiffs-Appellants,

-against-

Darryl C. De Vivo, M.D., et al.,
Defendants-Respondents,

Moris Angulo, M.D., et al.,
Defendants.

_____

Jonathan C. Reiter Law Firm, PLLC, New York (Jonathan C. Reiter of counsel), for appellants.

Bartlett LLP, Garden City (Robert G. Vizza of counsel), for respondents.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered December 10, 2018, which granted defendants-respondents' motion to dismiss the causes of action asserted on behalf of infant plaintiff A.D.J., unanimously affirmed, without costs.

To the extent the complaint alleges that if plaintiffs had known that their subsequent children would be afflicted with the same condition as the infant A.J., they would not have conceived A.D.J. or would have had A.D.J. genetically screened for abnormalities before he was carried to term, it fails to state a cause of action on behalf of A.D.J. because an impaired infant

has no claim for wrongful life or wrongful birth (*Alquijay v St. Luke's-Roosevelt Hosp. Ctr.*, 63 NY2d 978 [1984]; *B.F. v Reproductive Medicine Assoc. of N.Y., LLP*, 136 AD3d 73, 76 [1st Dept 2015], *affd* 30 NY3d 608 [2017]). To the extent plaintiffs argue that A.D.J.'s causes of action are actually predicated on the theory that the advice that defendants gave to plaintiffs led directly to the delayed diagnosis and treatment of A.D.J.'s condition, and its consequent progression and worsening, the theory does not establish a malpractice cause of action, because defendants did not owe A.D.J. a duty when treating his older brother years before A.D.J. was conceived and born (see *Enright v Eli Lilly & Co.*, 77 NY2d 377, 389 [1991], *cert denied* 502 US 868 [1991], citing *Albala v City of New York*, 54 NY2d 269 [1981]). Under the circumstances, defendants who treated A.D.J.'s older

brother owed no duty of care to A.D.J. (*cf. Tenuto v Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606, 612 [1997] [physician's duty of care expanded to nonpatient father whose infant received live polio vaccine but who was not advised of risks to himself of possible infection from vaccine]).

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10898 The People of the State of New York, Ind. 4441/04
Respondent,

-against-

Juan Taveras,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Rena K. Uviller, J.), entered on or about May 9, 2013, which adjudicated defendant a risk level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 20 points for defendant's unsatisfactory conduct while confined. Based on our own review of the entire record (*see People v Larkin*, 66 AD3d 592, 593 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010], we find that clear and convincing evidence established the underlying facts of the disciplinary infraction at issue.

In any event, regardless of whether defendant's correct point score is 135 or 115 points, he remains a level three

offender, and we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument, or outweighed by the extent and egregiousness of the underlying crimes, which are summarized in the decision on defendant's criminal appeal (*People v Taveras*, 12 NY3d 21, 23-24 [2009]).

We have considered and rejected defendant's remaining arguments, including his request for a remand for further proceedings.

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10899 The People of the State of New York, Ind. 796/13
Respondent,

-against-

Franklin Garrett,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered September 1, 2015, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10900 Abel Sotarriba, Index 113027/11
Plaintiff-Respondent-Appellant,

-against-

346 West 17th Street LLC, et al.,
Defendants-Respondents-Appellants.

- - - - -

346 West 17th Street LLC, et al.,
Third-Party Plaintiffs-Respondents-Appellants,

-against-

Sigma Electric, Inc.,
Third-Party Defendant-Respondent-Appellant

- - - - -

Sigma Electric, Inc.,
Second Third-Party Plaintiff-Respondent-Appellant.

-against-

Technetek Ltd.,
Second Third-Party Defendant-Appellant-Respondent.

_____

Goetz Schenker Blee & Wiederhorn LLP, New York (Lisa De Lindsay of counsel), for appellant-respondent.

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

Ahmuty Demers & McManus, Albertson (Nicholas P. Calabria of counsel), for 346 West 17th Street LLC, Northquay Properties, LLC and McGowan Builders, Inc., respondents-appellants.

Litchfield Cavo LLP, New York (Nadia Del Toro of counsel), for Sigma Electric, Inc., respondent-appellant.

_____

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered March 7, 2019, which granted plaintiff's motion for partial summary judgment on the Labor Law § 240(1) claim, granted defendants' motion for summary judgment dismissing the Labor Law §§ 200 and 241(6) and common-law negligence claims, granted third-party defendant's (Sigma) motion for summary judgment dismissing the third-party complaint, and denied second third-party defendant's (Technetek) motion for summary judgment dismissing the second third-party complaint and all cross claims against it, unanimously modified, on the law, to deny defendants' motion as to the Labor Law § 241(6) claim insofar as it is predicated on Industrial Code § 23-1.7(b)(1) and as to the Labor Law § 200 and common-law negligence claims as against defendant McGowan Builders Inc. (McGowan), and to grant Technetek's motion, and otherwise affirmed, without costs.

Plaintiff, an electrical worker on a construction site, sustained serious injuries, including traumatic brain injuries, when he fell through an unprotected stairwell opening from the third floor to the second floor of the building in which he was working and struck the concrete floor.

The court correctly granted plaintiff summary judgment as to liability on the Labor Law § 240(1) claim. Regardless of whether

plaintiff fell off a ladder, as he claims, or lost his balance while climbing over a four-foot-high barricade blocking access to the stairwell, as defendants contend, he was not provided with adequate protection to prevent his fall into the unguarded stairwell opening (*see Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 191 [1st Dept 2011]; *Leconte v 80 E. End Owners Corp.*, 80 AD3d 669, 671 [2d Dept 2011]). Contrary to defendants' contention, plaintiff was not the sole proximate cause of his injuries in their version of the facts. Even if plaintiff were negligent for choosing to climb over the barricade, his negligence would only raise an issue as to comparative negligence, which is not a defense to a Labor Law § 240(1) claim (*Stolt v General Foods Corp.*, 81 NY2d 918 [1993]; *Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015]).

The Labor Law § 241(6) claim should not be dismissed insofar as it is predicated on Industrial Code (12 NYCRR) § 23-1.7(b)(1). The stairwell opening constitutes a "hazardous opening" within the meaning of that regulation (*see Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]). 12 NYCRR 23-1.7(f) is inapplicable because the subject stairway was not being used as a "means of access" to the work areas, and 12 NYCRR 23-1.22(c) is inapplicable because the stairwell was not a platform "used to

transport vehicular and/or pedestrian traffic" (*Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 338 [1st Dept 2006]).

The Labor Law § 200 and common-law negligence claims should not be dismissed against defendant McGowan. Plaintiff's accident was the result of a lack of proper fall protection, i.e., his injuries were caused by the manner and means of the work, and McGowan, the general contractor, is liable for those injuries if it exercised supervisory control over the work (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). While the record demonstrates that McGowan had no authority to exercise supervisory control over plaintiff's use of the ladder, it presents an issue of fact as to whether McGowan had such authority over the proper barricading of the stairwell. The fact that Technetek was charged with installing and maintaining the barricades does not necessarily mean that McGowan lacked that authority (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505-506 [1993]).

The court correctly dismissed defendants' claims for contribution and common-law indemnification against Sigma. Its finding that plaintiff did not sustain a "grave injury" under Workers' Compensation Law § 11 necessarily precludes defendants from arguing at trial that plaintiff sustained "an acquired

injury to the brain caused by an external physical force resulting in permanent total disability" (*id.*). The medical evidence supports the finding that there was no "grave injury," including a "total permanent disability." Indeed, plaintiff's own treating physicians did not find "unemployability in any capacity" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004] [emphasis deleted]).

Technetek is entitled to the summary dismissal of Sigma's claims and defendants' cross claims for contribution and common-law indemnification against it, because there is no basis on which to impose tort liability against it in favor of plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). The record presents no issues of fact as to whether Technetek negligently created or exacerbated a dangerous condition so as to have launched a force or instrument of harm (*see id.* at 141-142). Although Technetek was responsible for the installation and maintenance of barricades, the barricades were meant to serve as a visual warning that the stairwell was off-limits, not as a fall prevention device. Thus, Technetek did what it was contractually required to do by erecting the barricade. Plaintiff's injuring himself while climbing over it does not raise an issue of fact as to whether Technetek caused, created, or exacerbated a dangerous

condition (*see Miller v City of New York*, 100 AD3d 561, 561 [1st Dept 2012]; *Rodriquez v E&P Assoc.*, 71 AD3d 405 [1st Dept 2010]). To the extent plaintiff claims, in his version of the facts, that no barrier was in place at the time of his accident, any failure by Technetek to erect a barrier did not exacerbate a dangerous condition but consisted "merely in withholding a benefit . . . where inaction is at most a refusal to become an instrument for good" (*Church v Callanan Indus.*, 99 NY2d 104, 112 [2002] [internal quotation marks omitted]).

The record also demonstrates that Technetek did not entirely displace defendants' duty to maintain the premises safely (*see Espinal*, 98 NY2d at 141). McGowan's project manager testified that McGowan's superintendents and foreman had the authority to address safety issues, and regularly walked the project site to inspect for safety; he also acknowledged that it was "more likely than not" McGowan that directed that barricades be erected.

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10901 In re Bronx Liquor & Wine Inc., Index 100946/19
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

_____

Mehler & Buscemi, New York (Martin P. Mehler of counsel), for petitioner.

Gary Meyerhoff, New York (Stefan M. Armstrong of counsel), for respondent.

_____

Determination of respondent New York State Liquor Authority (Authority), dated May 29, 2019, after a hearing, finding that petitioner violated Alcoholic Beverage Control Law § 105(12) by selling liquor in case and multi-case lots to a customer despite having only a retail license, and imposing a civil penalty in the amount of $10,000, or in the alternative, cancelling petitioner's off-premises liquor license, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [John J. Kelley, J.]), entered August 1, 2019, dismissed, without costs.

The determination that petitioner violated § 105(12) is supported by substantial evidence, as the record shows that

petitioner had "reasonable cause to believe" that it was selling alcoholic beverages to a reseller (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). There exists no basis to disturb the credibility determinations of the ALJ (*see Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [1st Dept 2007]).

Here, the record, which includes the parties' stipulated facts, as well as the testimony of petitioner's manager and the Authority's investigator, shows that petitioner produced receipts for 140 separate sales to the subject customer, which totaled more than $100,000 over the course of less than one year. Although petitioner's manager stated that the average customer spent $2,000 to $3,000 per month, that it was not unusual for a customer to spend the amount that the subject customer spent in a month and that she did not know that the customer owned a nightclub, the ALJ considered the lack of corroboration, the manager's status as an interested witness, and the lack of record keeping, when rationally inferring that petitioner had "reasonable cause to believe" that the subject customer was acquiring the alcohol for the purpose of reselling it (Alcoholic Beverage Control Law § 105[12]).

Furthermore, based on the stipulated fact that petitioner averaged sales of $1.5 million monthly and $18 million annually, a $10,000 civil penalty does not shock one's sense of fairness (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]; *see* Alcoholic Beverage Control Law § 17[3]).

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

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10902 In re Department of Social Services, etc., Petitioner-Respondent, Dkt. P-6873/17

-against-

Donald A.C., Respondent-Appellant.

_____

The Law Offices of Salihah R. Denman, PLLC, Harrison (Salihah R. Denman of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Bruce A. Young, New York, attorney for the child.

_____

Order, Family Court, New York County (Adam Silvera, J.), entered on or about May 10, 2018, which, after a hearing, estopped respondent from obtaining a genetic markings test, and, by separate order of filiation, adjudged and declared him the father of the subject child, unanimously affirmed, without costs.

Family Court properly determined that equitable estoppel prevented respondent from challenging his paternity of the subject child with DNA testing (*see* Family Court Act § 532[a]). Clear and convincing evidence demonstrates that respondent, who does not deny that he is the biological father of the subject child's older and younger brothers, also held himself out as her

father (*see Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326-327 [2006]). The child calls respondent "Daddy" and has a familial relationship with his parents and relatives. Respondent was present at the hospital shortly after the child was born, attended her birthday parties, and bought her gifts and clothing. Accordingly, even if the parent-child relationship was limited as he claims, it was in the child's best interests to estop respondent from disputing paternity (*Matter of Glenda G. v Mariano M.*, 62 AD3d 536 [1st Dept 2009], *lv denied* 13 NY3d 708 [2009]; *see Matter of Smythe v Worley*, 72 AD3d 977 [2d Dept 2010]). Issues of credibility were for the Family Court to resolve, and there is no basis to disturb its determination to credit the testimony of the mother and reject respondent's testimony as "incredible" (*see Matter of Commissioner of Social Servs. v Dwayne W.*, 146 AD3d 718, 719 [1st Dept 2017]).

To the extent respondent contends that he is not the subject child's biological father, such argument is irrelevant. The court did not rely on evidence relating to biological parenthood, but resolved the petition based on equitable estoppel, which is

made "irrespective of biological fatherhood" in accordance with the legislature's "deliberate policy choice" (*Shondel*, 7 NY3d at 330).

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10903 WG Three Associates, LLC, Index 150739/17
Plaintiff-Appellant,

-against-

Portofino Chelsea, LLC, et al.,
Defendants-Respondents.

_____

Gordon & Gordon, P.C., Brooklyn (Jason S. Matuskiewicz of counsel), for appellant.

Norman A. Olch, New York, for respondents.

_____

Appeal from order, Supreme Court, New York County (Andrew Borrok, J.), entered on or about August 10, 2018, after a nonjury trial, deemed appeal from judgment, same court and Justice, entered August 17, 2018, in defendant's favor, and, so considered, said judgment unanimously affirmed, without costs.

The trial court's determination that plaintiff landlord unreasonably withheld its consent to defendant tenant's proposed assignment of the lease is supported by the evidence that plaintiff offered to lease the premises directly to the proposed assignee at a higher rent. Plaintiff also failed to present evidence substantiating its claim that it rejected the assignment because the proposed assignee was not financially capable of

assuming the lease (*see New Stadium LLC v Greenpoint-Goldman Corp.*, 44 AD3d 449 [1st Dept 2007]).

Contrary to plaintiff's contention, defendants are entitled to damages for the amounts paid after plaintiff unreasonably withheld its consent to the assignment (*see Arlu Assoc. v Rosner*, 14 AD2d 272, 275 [1st Dept 1961], *affd* 12 NY2d 693 [1962]; *see also 406 Broome St Rest Inc. v Lafayette Ctr., LLC*, 149 AD3d 598 [1st Dept 2017]).

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 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10904 The People of the State of New York, Ind. 430/15
Respondent,

-against-

Christopher Hinojosa,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered October 11, 2016, unanimously affirmed.

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

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

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

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10905 The People of the State of New York, Ind. 3234/16
Respondent,

-against-

Juan Barreto,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Victoria Muth 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 (Charles H. Solomon, J.), rendered February 21, 2017,

Said appeals 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 28, 2020

CLERK

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

Friedman, J.P., Webber, Kern, González, JJ.

10906 Steven D. Sladkus, Index 151712/16
Plaintiff-Respondent-Appellant,

-against-

Melanie Englese also known as
Melanie Sisskind,
Defendant-Appellant-Respondent.

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Carmen Victoria St. George, J.), entered on or about April 25, 2018,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 7, 2020,

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10907 Mark Joseph Danis, Index 150098/12
Plaintiff-Appellant,

-against-

John C. Food Corp., improperly pleaded
as McDonald's Restaurant, et al.,
Defendants,

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

_____

Law Offices of Rosemarie Arnold, New York (Paige R. Butler of counsel), for appellant.

Lawrence Heisler, New York City Transit Authority, Brooklyn (Harriet Wong of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lisa A. Sokoloff, J.), entered October 1, 2018, which, to the extent appealed from, granted the motion of defendants New York City Transit Authority and Metropolitan Transportation Authority (collectively NYCTA) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff alleges that he consumed contaminated food at defendant John C. Food Corp.'s McDonald's restaurant. Several hours later, he began to feel nauseous and boarded a crowded subway train to head home. While on the train, he felt very sick and decided to get off the train. After exiting the train and

while on the platform, he leaned over a railing so as to take deep breaths, but while doing so, he lost consciousness and fell on his back. When he fell his left leg extended beyond the platform and became caught in the cables linking the subway cars on the train he had just exited. While extricating his leg from the cables, the train was moving and he sustained a fractured left leg.

NYCTA established prima facie entitlement to summary judgment, as it sufficiently showed that it did not breach a duty of care to plaintiff (*see Bethel v New York City Tr. Auth.*, 92 NY2d 348, 356 [1998]). Plaintiff's deposition testimony suggests that the train was already in motion when he fell unconscious. Thus, the train conductor would have had no knowledge of plaintiff's position on the subway platform even after performing a precautionary visual sweep of the platform before signaling for the operator to proceed. Plaintiff's contradictory statements in his affidavit, drafted about four years later, cannot cure defects in his deposition testimony, and are insufficient to raise a triable issue of fact (*see Mermelstein v East Winds Co.*, 136 AD3d 505 [1st Dept 2016]; *see also Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10908 Elayne Zinbarg, Index 653265/16
Plaintiff-Respondent,

-against-

Professional Business College, Inc.
doing business as Professional Business
College Corporation, et al.,
Defendants-Appellants.

_____

Law Office of Z. Tan PLLC, New York (Bingchen Li of counsel), for appellants.

Kousoulas & Associates P.C., New York (Antonia Kousoulas of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered on or about May 10, 2018, which, to the extent appealed from, denied defendants' motion to dismiss the complaint as against defendant Long Island Business Institute, unanimously reversed, on the law, without costs, and the motion granted.

The complaint fails to state a cause of action against defendant Long Island Business Institute (LIBI) for breach of a severance agreement between plaintiff and defendant Professional Business College (PBC), because it does not allege any of the exceptions to the general rule that a corporation that acquires the assets of another corporation is not liable for its

predecessor's breaches of contract (*see Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158 [1st Dept 2005]). The complaint does not allege that LIBI expressly or impliedly assumed PBC's contractual liability under the severance agreement or that LIBI and PBC entered into a merger transaction to fraudulently escape the liability under the severance agreement. It does not expressly allege that LIBI and PBC merged or were consolidated. While it contains some allegations, upon information and belief, about shared location and personnel and PBC's president's potential ownership interest in LIBI, the complaint fails to allege a majority of the "hallmarks" of a de facto merger (*see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574-575 [1st Dept 2001]). It does not allege when and how any purported acquisition by LIBI of PBC or its assets occurred. It does not allege that PBC ceased or planned to cease operations, that LIBI assumed any of PBC's liabilities, or that LIBI and PBC combined most of their assets. Nor does the complaint allege that LIBI is

a mere continuation of PBC (*see Kretzmer*, 24 AD3d at 158), and indeed the documentary evidence shows that LIBI was established decades before any purported merger.

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10909 Gregorio Clotter, Index 304009/13
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Marder, Eskesen & Nass, New York (Joseph B. Parise of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about January 9, 2019, which granted defendant's (NYCHA) motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

NYCHA failed to eliminate an issue of fact as to whether it was "'more likely or more reasonable than not'" that the man who shot plaintiff in the leg in front of his apartment door was an intruder "'who gained access to the premises through a negligently maintained entrance'" (*Torres v New York City Hous. Auth.*, 93 NY2d 828, 830 [1999], quoting *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]). Plaintiff testified that a man spoke to him on the sidewalk just outside the building, asking

where he could find drugs, and that, after plaintiff entered through the unlocked front entrance and walked up the stairs to his floor and along the hall 10 feet to his apartment, he saw the man again when he heard the door to the stairwell open, and the man held him up at gunpoint.

From plaintiff's familiarity with building residents, the history of ongoing criminal activity, and the assailant's failure to conceal his or her identity a jury could reasonably infer "that the assailant was more likely than not an intruder" (*Laniox v City of New York*, 170 AD3d 519, 520 [1st Dept 2019], *affd* 34 NY3d 994 [2019]). Plaintiff informed the police that he could identify the assailant if shown a photograph (*see Patton v New York City Hous. Auth.*, 140 AD3d 659, 660 [1st Dept 2016]; *Esteves v City of New York*, 44 AD3d 538, 539 [1st Dept 2007]). NYCHA's evidence also showed that there was a robbery inside the building about 18 months before plaintiff's incident, requiring repairs to the front door lock, and various shootings on the grounds (*see Jacqueline S. v City of New York*, 81 NY2d 288, 294-295 [1993]).

Contrary to NYCHA's contention, there is enough evidence as to how the assailant gained entry to the building to require consideration of whether NYCHA had actual or constructive notice

of the nonfunctioning door lock (*see Maria S. v Willow Enters.*, 234 AD2d 177, 178 [1st Dept 1996]). A jury could infer from plaintiff's testimony that the assailant entered the building himself and did not need to wait for anyone in the lobby to open the door for him.

Nor does its evidence demonstrate that NYCHA did not have constructive notice of the nonfunctioning door lock, since plaintiff testified that the lock was not functioning the day before and the day of the incident, but the last daily maintenance checklist produced by NYCHA, which included the front door lock, was dated two days before the incident (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10910-
10910A-
10911N-
10911NA

Index 159870/18
100207/08

In re Maria Nazor, et al.,
Petitioners,

-against-

New York City Loft Board, et al.,
Respondents.

- - - - -

Mushlam, Inc.,
Plaintiff-Respondent,

-against-

Maria Nazor, et al.,
Defendants-Appellants.

_____

Warshaw Burstein, LLP, New York (Bruce H. Wiener of counsel), for petitioners/appellants.

Georgia M. Pestana, Acting Corporation Counsel, New York (Zachary S. Shapiro of counsel), for New York City Loft Board, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for Sydney Sol Group, Ltd., and Mushlam, Inc., respondents.

_____

Determinations of respondent New York City Loft Board, dated April 20, 2017, and September 20, 2018, denying petitioner tenants' application for Loft Law coverage for their units under Multiple Dwelling Law (MDL) article 7-C and their application for reconsideration of that determination, unanimously confirmed, the

petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Barbara Jaffe, J.], entered May 16, 2019), dismissed, without costs. Orders, same court and Justice, entered February 23, 2018, and October 18, 2018, which, insofar as appealed from as limited by the briefs, severed the parties' claims and counterclaims related to rent and use and occupancy and referred them for a nonjury trial, and granted plaintiff landlord's motion to renew its motion for summary judgment on its ejectment claim, and, upon renewal, granted the motion for summary judgment, unanimously affirmed, without costs.

The Loft Board's determination in the article 78 proceeding that tenants failed to meet their burden of showing that their units are covered under the Loft Law is supported by substantial evidence that neither petitioner Mickle nor respondent landlord's principal, Shimon Milul, resided in the subject building for 12 consecutive months during the relevant Loft Law "window period" from January 1, 2008, to December 31, 2009 (*see* MDL § 281[5][a]; *see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]; *Matter of Halo v New York City Loft Bd.*, 300 AD2d 77, 77 [1st Dept 2002]). To the extent tenants cite evidence that might have supported a different outcome, we may

not weigh the evidence or reject the credibility determinations of the administrative law judge who presided over the hearing and of the Loft Board (*see Matter of Collins v Codd*, 38 NY2d 269, 270-271 [1976]).

Further, the coverage determination was not affected by an error of law. There is no basis for applying the doctrine of collateral estoppel to preclude landlord from denying that Mickle and Milul resided in the building (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Gilberg v Barbieri*, 53 NY2d 285, 291 [1981]). Supreme Court's statement about Milul's use of a fifth-floor loft space as a pied-a-terre was not necessary to the interim use and occupancy (U&O) issues adjudicated in the court's July 2012 order. Nor, given petitioner Nazor's undisputed residence on the fourth floor, was it strictly necessary for the court to reach the issue of whether Mickle resided there. Moreover, given that Mickle had not yet disclosed the fact that he rented the bedroom in a one-bedroom apartment on 14th Street beginning in about 2004, landlord cannot be said to have had a "full and fair opportunity" to litigate the issue of Mickle's residence in the interim U&O hearing.

There is no basis for applying the doctrine of judicial estoppel to certain other statements, given, among other things,

Mickle's failure to disclose the 14th Street apartment (*see Matter of Charles v Charles*, 296 AD2d 547, 550 [2d Dept 2002]).

Viewed as a whole, the Loft Board's well reasoned coverage determination makes it clear that the Board applied the correct residence standard in assessing whether tenants established coverage. Tenant's argument that either the ALJ or the Loft Board was affected by bias is not supported by the record (*see Matter of Hughes v Suffolk County Dept. of Civ. Serv.*, 74 NY2d 833 [1989]).

The Loft Board providently exercised its discretion in denying tenants' reconsideration application (*see* 29 RCNY 1-07[b]).

The pendency of a number of Loft Law-related coverage applications — including a second reconsideration application made to the Loft Board and a new coverage application made pursuant to the July 2019 Loft Law amendments (*see* MDL § 281[6][c]) — does not render the October 2018 order granting plaintiff summary judgment on its ejection claim premature. Those coverage applications are outside the administrative record before us (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]). Moreover, the instant determination of tenants' rights under the 2010 Loft Law is independent from their application for

coverage under the 2019 Loft Law (*see* L 2019, ch 41, § 10; *Matter of Salvadore v New York City Loft Bd.*, 79 AD3d 488, 489 [1st Dept 2010]).

The defenses raised by tenants do not affect landlord's claim for ejectment and were therefore properly severed and referred for a nonjury trial.

Finally, we find that Supreme Court providently exercised its discretion in entertaining landlord's renewal motion, notwithstanding the lack of strict compliance with CPLR 2214(c) (*see Biscone v JetBlue Airways Corp.*, 103 AD3d 158, 178 [2d Dept 2012], *appeal dismissed* 20 NY3d 1084 [2013]). Tenants failed to show that they were prejudiced by landlord's submission or that the papers were otherwise not sufficient for the court's consideration of the questions involved.

We have considered tenants' remaining contentions, both as to the Loft Board determinations and the severance and ejectment orders, and find them unavailing.

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

ENTERED: JANUARY 28, 2020

CLERK

Friedman, J.P., Webber, Kern, González, JJ.

10912N Manoa Vargas, Index 309300/10
Plaintiff,

-against-

Anthony G. LaMacchia,
Defendant-Respondent,

Walter C. Sevillano,
Defendant-Appellant.

_____

Koors & Jednak, P.C., Bronx (Paul W. Koors of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Donald A. Miles, J.), entered on or about May 13, 2019, which, to the extent appealed from as limited by the briefs, denied defendant Walter C. Sevillano's motion to vacate an order, same court and Justice, dated June 14, 2018, sua sponte declaring a mistrial and setting aside the jury's verdict following a summary jury trial, and setting the matter down for a new jury trial, unanimously reversed, on the law, without costs, the order dated June 14, 2018 vacated, and the jury verdict reinstated.

The parties stipulated to a summary jury trial pursuant to the rules and procedures for Bronx County (*see* The Summary Jury

Trial Process: Bronx Rules and Procedure [as amended Sep. 23, 2008]). "A summary jury trial is a voluntary, innovative and streamlined form of alternative dispute resolution that combines the flexibility and cost-effectiveness of arbitration with the structure of a conventional trial" (*Griffin v Yonkers*, 26 Misc 3d 917, 918-919 [Sup Ct, Bronx County 2009]). "In the absence of agreement of counsel and approval by the trial court, the process provided in the rules of the jurisdiction apply" (*id.* at 919).

The SJT rules to which the parties stipulated provide, among other things, that "[p]arties agree to waive any motions for directed verdicts as well as any motions to set aside the verdict or any judgment rendered by said jury" and that the "Court shall not set side any verdict or any judgment entered thereon, nor shall it direct that judgment be entered in favor [of] a party entitled to judgment as a matter of law, nor shall it order a new trial as to any issues where the verdict is alleged to be contrary to the weight of the evidence" (The Summary Jury Trial Process: Bronx Rules and Procedure [as amended Sep. 23, 2008], at 4 ¶ 13).

The court erred in sua sponte declaring a mistrial and setting aside the verdict. While this was an attempt to correct an admittedly erroneous evidentiary ruling, the parties'

stipulation to a summary jury trial, subject to the applicable rules and procedures for Bronx County, was a legally binding contract (*see Chae Shin Oh v Jeannot*, 160 AD3d 701, 702-703 [2d Dept 2018]; *Bennice v Randall*, 71 AD3d 1454, 1454-1455 [4th Dept 2010]; *Grochowski v Fudella*, 70 AD3d 1407, 1408 [4th Dept 2010]; *see also Acosta v Xinna Lu*, 65 Misc 3d 1224[A], 2019 NY Slip Op 51826[U], *2-3 [Civ Ct, Bronx County 2019]). Since the summary jury trial rules for Bronx County do not provide for any means to correct errors of law committed during trial, the court exceeded the boundaries of the parties' agreement by setting aside the verdict, regardless of whether it in fact did so on its own initiative in the interest of justice (*see* CPLR 4404[a]; *compare Bennice*, 71 AD3d at 1454-1455 [provision in pertinent summary jury trial stipulation permitted appeals only for "'instances in which the rights of a party were significantly prejudiced by . . . an error of law that occurred during the course of the trial'" (omission in original)]; *Grochowski*, 70 AD3d at 1408 [court did not violate terms of parties' summary jury trial stipulation by granting motion to set aside verdict where stipulation was silent as to such motions]).

Contrary to defendant LaMacchia's argument, this holding does not proscribe post-trial motions of any kind in connection

with summary jury trials; rather, it abides by the parties' own proscriptions made at the time that they stipulated to proceed with a summary jury trial. There was nothing barring the parties from stipulating to reserve their right to appeal or move to set aside the verdict on the ground of an error of law.

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

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

ENTERED: JANUARY 28, 2020

CLERK

Gische, J.P., Kapnick, Webber, Moulton, JJ.

11002 Kendall Tracy, Index 304532/15
Plaintiff-Respondent,

-against-

29-33 Convent Avenue Housing
Development Fund Corporation, et al.,
Defendants-Appellants.

_____

Law Office of Brian Rayhill, Elmsford (Renaud T. Bleecker of counsel), for 29-33 Convent Avenue Housing Development Fund Corporation and Midas Management Assoc., Inc, appellants.

Hoffman Roth & Matlin, LLP, New York (Joshua R. Hoffman of counsel), for 33 Convent Laundromat, Inc., appellant.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about April 12, 2019, which, inter alia, in this action for personal injuries sustained when plaintiff slipped and fell on the sidewalk, denied defendants' motions for summary judgment dismissing the complaint and cross claims against them, unanimously affirmed, without costs.

Defendants' submission of climatological records and the affidavit of a meteorologist were not sufficient to conclusively establish that a winter storm was in progress at the time of the accident (*see De Los Santos v 4915 Broadway Realty LLC*, 58 AD3d

465 [1st Dept 2009]). There was no precipitation falling at the time that plaintiff fell, and defendants have not established that there were more than trace amounts of snow falling in the several hours leading up to the fall (*id.*; *Powell v MLG Hillside Assoc.*, 290 AD2d 345, 346 [1st Dept 2002]). Defendants also failed to show that plaintiff's fall was not caused by preexisting ice, which plaintiff observed at the accident location two days before he fell (*see Perez v Raymours Furniture Co., Inc.*, 173 AD3d 597 [1st Dept 2019]).

Factual issues also remain surrounding the cross claims asserted by defendants 29-33 Convent Avenue Housing Development Fund Corporation and Midas Management Assoc., Inc. against defendant laundromat, a commercial tenant, which preclude resolution by summary judgment. While Express claims that Convent and Midas, as owner and managing agent, had the duty to maintain the sidewalk, the lease contained a snow removal provision and employees of both Convent and Express engaged in snow removal efforts in the area. Nor is Midas entitled to summary judgment on its claim that it was not in control of the

premises, as there remain factual issues surrounding its duties as the building's managing agent.

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

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

ENTERED: JANUARY 28, 2020

CLERK