SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 13, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5313 The People of the State of New York, Respondent, Ind. 458/09

-against-

Gerrod Nettles,
Defendant-Appellant.

_____

Rothstein Law PLLC, New York (Eric E. Rothstein of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered December 3, 2009, convicting defendant, after a jury trial, of gang assault in the first degree and two counts of assault in the first degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

At the beginning of jury selection, the court offered to speak individually to potential jury members who believed they would have difficulty being fair. The court asked for a show of

hands to see who wanted to speak individually, cautioning that "[b]y not raising your hands now, you're telling me that you will not have anything to divulge to us regarding your qualification." Seven of the 17 panelists who raised work-related or financial concerns were dismissed.

After 12 jurors were sworn, the court began the process of selecting alternate jurors. During a break, the court informed the parties that a juror "has a problem." The juror, who had not spoken up before, entered the courtroom and the court asked the juror what the problem was. The juror replied: "I don't get paid." The court asked the juror what kind of company he works for and how much he earns. The juror explained that he works as an hourly consultant for a private company and that he makes $30,000. After the juror left the courtroom, defense counsel stated that he was concerned that the juror would race through deliberations and that the court had previously excused jurors who gave similar annual income. Counsel, however, never asked the court to pose any additional questions to the juror and the juror remained as part of the sworn jury.

CPL 270.35(1) provides that a sworn juror must be discharged if "the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to

serve in the case." A juror is "grossly unqualified" only "when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict" (*People v Buford*, 69 NY2d 290, 298 [1987] [internal quotation marks and citation omitted]).

Defendant failed to preserve his claim that the court made an insufficient inquiry of the sworn juror, and we decline to reach it in the interest of justice. After the court questioned the juror, counsel raised no complaints about the scope of the court's inquiry. Counsel never asked the court to pose any additional questions, and in particular did not request that the court ask the juror whether his financial concerns would affect his ability to be fair. Nor did counsel seek to question the juror himself about his ability to render an impartial verdict. Thus, defendant's claim that the court failed to make an adequate inquiry of the sworn juror is unpreserved (*see People v Hicks*, 6 NY3d 737, 739 [2005] [the defendant's claim that the court failed to conduct a sufficient inquiry of a juror does not present a preserved question of law "(i)n the absence of a protest to the scope or intensity of the court's inquiry"];

People v Dandridge, 45 AD3d 330, 331 [2007], *lv denied* 9 NY3d 1032 [2008]; *People v Morales*, 36 AD3d 631, 632 [2007], *lv denied* 8 NY3d 925 [2007]).

Based on the juror's brief statement about not being paid, the court properly declined to dismiss the sworn juror. Prior to jury selection, when the court offered to speak with jurors who believed they would have difficulty being fair, this juror did not ask to address the court. Nor did the juror express any concerns about being fair when he belatedly raised the issue of not being paid. Thus, nothing the sworn juror said in any way suggested that he would be incapable of rendering an impartial verdict or that he was otherwise unfit to serve (*see People v Butler*, 281 AD2d 333, 333 [2001], *lv denied* 96 NY2d 899 [2001] [where sworn juror "expressed concern and bitterness about the time and money he was losing," discharge not required where the juror had never expressed any doubt about his ability to render an impartial verdict]; *People v Nocedo*, 161 AD2d 297, 298 [1990] ["(m)ere concern on the part of a juror that his continued service could result in financial hardship is insufficient to warrant his discharge"]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence.

We reject defendant's challenges to the court's evidentiary rulings.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5679 The People of the State of New York, Ind. 132/05
Respondent,

-against-

Anthony Stevens,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered February 10, 2006, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously affirmed.

Defendant's ineffective assistance claims primarily involve matters outside the record concerning counsel's strategic choices (*see People v Love*, 57 NY2d 998 [1982]). Although defendant raised these claims in unsuccessful CPL 440.10 motions, defendant's motions for leave to appeal to this Court were denied (*see* CPL 450.15 [1]; 460.15). Accordingly, our review is limited to the trial record. To the extent the trial record permits review, we conclude that defendant received effective

assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown "the absence of strategic or other legitimate explanations" for the various aspects of counsel's conduct challenged on appeal (*People v Rivera*, 71 NY2d 705, 709 [1988]). Furthermore, given the overwhelming evidence of guilt, defendant has not shown a reasonable probability that any of his attorney's alleged errors or omissions affected the outcome of the trial or undermined confidence in the result.

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5680 The People of the State of New York, Ind. 358N/09
Respondent,

-against-

Christopher Paleo,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Sonberg J.), rendered on or about June 30, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 13, 2011

CLERK

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

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5682 The People of the State of New York, Ind. 4502/06
Respondent,

-against-

Felipe Arroyo,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered April 1, 2008, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress the statement he made to a detective, prior to any *Miranda* warnings, as he was being placed under arrest. During this process of moving defendant from an interview room to a cell, the detective asked defendant an innocuous question about whether he understood what was happening; in context, this question did not reasonably appear to have anything to do with the facts of the case. Thus, the detective's question was not reasonably likely to elicit an incriminating response (*see People v Rivers*, 56 NY2d 476, 480

[1982]; *People v Lynes*, 49 NY2d 286, 294-295 [1980]).

The court properly admitted evidence of defendant's prior bad acts toward the victim. This evidence provided relevant background regarding the events leading up to the murder and the relationship between defendant and the victim (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]). Any error in receiving evidence of defendant's prior abuse of the victim's children was harmless.

The court properly exercised its discretion in admitting graphic photographs, since they were relevant to the issues of intent and identity, and they tended to corroborate the testimony of several witnesses (*see People v Byrd*, 303 AD2d 184 [2003], *lv denied* 100 NY2d 641 [2003]). Among other things, the photos showed that the victim was killed in a manner that precisely matched defendant's threats against her.

After conducting a hearing pursuant to *Massiah v United States* (337 US 201 [1964]), the court properly received evidence of defendant's admissions to a fellow inmate. The witness's involvement in other cases did not make him a government agent in this case (*see People v Fernandez*, 23 AD3d 317 [2005], *lv denied* 6 NY3d 812 [2006]).

Defendant's remaining contentions are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5684 The People of the State of New York, Ind. 1863/08
Respondent,

-against-

Ferdree Osorio,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Robert Seewald, J.), rendered on or about July 2, 2008, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5685 The People of the State of New York, Ind. 523/09
Respondent,

-against-

Michael Boone,
Defendant-Appellant.

_____

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

Michael Boone, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Charles H. Solomon, J. at suppression decision and dismissal motion; Maxwell Wiley, J. at plea and sentencing), rendered January 6, 2010, convicting defendant of criminal possession of a weapon in the third degree and resisting arrest, and sentencing him to an aggregate term of 1 year, unanimously affirmed.

By pleading guilty, defendant forfeited appellate review of his claim that he was entitled to dismissal of the indictment on the ground that the People introduced allegedly improper evidence before the grand jury (*see People v Hansen*, 95 NY2d 227 [2000]; *People v Cuoco*, 69 AD3d 468, 468 [2010] *lv denied* 14 NY3d 839

[2010]). There is no basis for applying the limited exception set forth in *People v Pelchat* (62 NY2d 97 [1984]).

The court properly denied defendant's suppression motion. There is no basis for disturbing the credibility determinations made by the Judicial Hearing Officer and adopted by the court.

The record, taken as a whole (*see People v Providence*, 2 NY3d 579, 583 [2004]), establishes that, after a brief but sufficient colloquy, defendant made a knowing and intelligent waiver of his right to counsel at the suppression hearing.

Since defendant did not move to withdraw his guilty plea, he did not preserve his claim that the plea court was obligated to ask defendant if he understood he was giving up an intoxication defense. This case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), because there was nothing in the plea allocution that cast doubt on defendant's guilt or raised any defense. Accordingly, this claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The record establishes that defendant's plea was knowing, intelligent and voluntary. Nothing occurred at the plea proceeding that would trigger a duty to inquire about a

waiver of an intoxication defense (*see e.g. People v Fiallo*, 6 AD3d 176, 177 [2004], *lv denied* 3 NY3d 640 [2004]).

We have considered and rejected the claims contained in defendant's pro se supplemental brief.

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5686 Carlos Vega, Index 112548/05
Plaintiff-Respondent

-against-

The City of New York
Defendant-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

_____

Order, Supreme Court, New York County (Salliann Scarpulla, J.), entered October 21, 2009, which, insofar as appealed from, in this action for personal injuries, denied defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when, while riding his bicycle, he struck a pothole, causing him to fall to the ground. It is uncontroverted that defendant did not receive prior written notice of the defect pursuant to the "Pothole Law" (*see* Administrative Code of City of New York § 7-201[c][2]). Accordingly, the burden shifted to plaintiff to demonstrate the applicability of one of the exceptions to the rule, which bars

municipal liability absent prior written notice in conformance with the statute (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). The only possible exception applicable to the facts of this case is the affirmative creation exception, which imposes liability if defendant created the defect through an affirmative act of negligence that resulted in an immediately dangerous condition (*id; see Oboler v City of New York*, 8 NY3d 888, 889 [2007]).

Here, the motion court erred in finding that triable issues of fact exist as to whether defendant's actions in effectuating a temporary repair approximately five months before plaintiff's accident created a defective condition within the meaning of the exception. Even assuming that the pothole that defendant repaired is the same defect that caused plaintiff's accident, there is nothing in the record indicating that defendant performed that repair negligently or that it resulted in an immediately dangerous condition. Furthermore, plaintiff's contention that defendant's failure to perform a subsequent permanent repair constituted an affirmative act of negligence, is unavailing. As a failure to act is not an affirmative act, "such

conduct amounts to nonfeasance, rather than affirmative negligence" (*Boice v City of Kingston*, 60 AD3d 1140, 1142 [2009]).

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5687 The People of the State of New York, Ind. 1529/08
Respondent,

-against-

Carlos Cruz,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered April 5, 2010, convicting defendant, upon his plea of guilty, of murder in the first degree, and sentencing him to a term of life without parole, unanimously affirmed.

The sentencing court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea, after affording him a full opportunity to present his claims (*see People v Frederick*, 45 NY2d 520, 525 [1978]). "When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Brown*, 14 NY3d 113, 116 [2010] [internal quotation marks omitted]).

After defendant made a conclusory pro se motion to withdraw his plea, the court appointed a new attorney, who made a more detailed motion. However, the attorney's allegations did not warrant vacatur of the plea. In essence, the allegedly coercive conduct on the part of the prior attorney was simply sound advice to take what would have been a lenient disposition, had defendant complied with its conditions (*see e.g. People v Chimilio*, 83 AD3d 537 [2011]). At sentencing, neither defendant nor the new attorney elaborated on their original claims.

The record demonstrates that defendant's plea was knowing, intelligent and voluntary. Defendant clearly understood he was admitting that he hired another man to kill defendant's wife. Defendant also clearly understood that he would receive a lenient sentence if he complied with certain conditions, including giving truthful testimony against the killer, but that he could receive a sentence of life without parole if he failed to comply.

Defendant made a valid waiver of his right to appeal

precludes review of his excessive sentence claim (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]). As an alternative holding, we perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5689 The People of the State of New York, Docket 62055C/07
Respondent,

-against-

Augustin Norales,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Ellen Dille of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (David Stadtmauer, J.), rendered February 11, 2009, convicting defendant, after a nonjury trial, of criminal trespass in the third degree, and sentencing him to a conditional discharge and a $150 fine, unanimously affirmed.

The misdemeanor information sufficiently alleged that defendant knowingly and unlawfully entered a nonpublic area of a building. There is no material distinction between the allegations of this information and those upheld in *People v Maresca* (19 Misc 3d 133[A], 2008 NY Slip Op 50663[U] [App Term, 1st Dept 2008]) and *People v Quinones* (2002 NY Slip Op 50091[U] [App Term, 1st Dept 2002], *lv denied* 98 NY2d 680 [2002]). The allegations plainly indicate that defendant entered a nonpublic

lobby, and not merely a public vestibule. The factual allegations of an information are to be "given a fair and not overly restrictive or technical reading," and are sufficient so long as they "give an accused notice sufficient to prepare a defense and are adequately detailed to prevent a defendant from being tried twice for the same offense" (*People v Casey*, 95 NY2d 353, 360 [2000]).

The information was also sufficient to allege that defendant knowingly entered the lobby unlawfully. The allegations that defendant entered the lobby through a locked door, notwithstanding a conspicuous no-trespassing sign, and when questioned did not claim to be a resident or invited guest, satisfied the knowledge element of trespass (*see e.g. People v Flores*, 21 Misc 3d 141[A], 2008 NY Slip Op 52371[U] [App Term 2d Dept 2008]).

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5690 The People of the State of New York, Respondent, Ind. 3674/09

-against-

Devar Hurd, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered February 18, 2010, convicting defendant, after a jury trial, of stalking in the third degree, two counts of stalking in the fourth degree, and sixteen counts of aggravated harassment in the second degree, and sentencing him to an aggregate term of 2 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The jury could have reasonably concluded that defendant acted with the mental state required for each crime.

The court provided a meaningful response to a jury note. Viewing the record as a whole, we find no reasonable possibility that the jury could have been misled into thinking that the

particular mental state for fourth-degree stalking applied to the other crimes (*see People v Simmons*, 15 NY3d 728, 729 [2010]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not fully developed in the record concerning counsel's trial preparation and choice of trial tactics (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it 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]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5691-
5692 Herminia Narvaez, Index 22424/06
Plaintiff-Respondent, 85860/07

-against-

2914 Third Avenue Bronx, LLC, et al.,
Defendants-Appellants,

KK&J, LLC,
Defendant.
- - - - -
2914 Third Avenue Bronx, LLC, et al.,
Third-Party Plaintiffs-
Appellants-Respondents,

-against-

2914 Sportswear Realty Corp.,
Third-Party Defendant-
Respondent-Appellant.

_____

Harrington, Ocko & Monk, LLP, White Plains (Dawn M. Foster of counsel), for appellants/appellants-respondents.

Burke, Lipton & Gordon, White Plains (Ashley E. Sproat of counsel), for respondent-appellant.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 27, 2009, which denied defendants/third-party plaintiffs' motion for summary judgment dismissing the complaint or, in the alternative, for conditional summary judgment against third-party

defendant on their indemnification claims, and denied third-party defendant's cross motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

On August 11, 2005, plaintiff tripped and fell on an alleged defective sidewalk condition in front of the building located on 2914 Third Avenue in the Bronx. The premises were owned and managed by defendants/third-party plaintiffs 2914 Third Avenue Bronx LLC and Thor Equities LLC, respectively (collectively "Thor"), and leased to third-party defendant 2914 Sportswear Realty Corp pursuant to an agreement dated July 18, 2005. Plaintiff commenced this action against Thor, alleging negligence, and Thor commenced a third-party action against 2914 Sportswear, seeking, among other things, common law and contractual indemnification.

The court properly denied Thor's motion for summary judgment dismissing the complaint, and 2914 Sportswear's cross motion for summary judgment dismissing the third-party complaint. Neither Thor nor 2914 Sportswear made a prima facie showing that plaintiff did not trip and fall on a sidewalk defect in front of their building. Although plaintiff, an elderly woman with a second-grade education, had difficulty articulating her thoughts during her deposition, her testimony as a whole is consistent

with her claim that she tripped and fell on a raised sidewalk flag in front of 2914 Third Avenue. The maps submitted by Thor further support plaintiff's claim as to the location of the accident. Any discrepancies in her testimony raise credibility issues for the trier of fact (*see Francis v New York City Tr. Auth.*, 295 AD2d 164 [2002]).

Thor and 2914 Sportswear also failed to establish lack of notice, since they submitted no evidence demonstrating that they regularly inspected the sidewalk prior to the accident (*see Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 567 [2011]).

The report and affidavit of plaintiff's expert witness stating that the defect constitutes a tripping hazard, as well as plaintiff's deposition testimony that she tripped as she was walking, looking straight ahead, with many people around, raise factual questions as to whether the defect was trivial (*see Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [2000]; *see also Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *George v New York City Tr. Auth.*, 306 AD2d 160 [2003]; *Pizzurro v Kranzco Realty*, 288 AD2d 4 [2001]).

Because Thor did not demonstrate clear entitlement under the lease, and factual issues still exist as to Thor's and 2914 Sportswear's negligence and respective fault with respect to the

sidewalk condition, a conditional judgment would have been premature (*see Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808-809 [2009]; *Corrales v Reckson Assoc. Realty Corp.*, 55 AD3d 469 [2008]; *cf. Masciotta v Morse-Diesel Intl.*, 303 AD2d 309 [2003]).

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5693 In re Sabrina D.,

A Dependent Child Under the
Age of Eighteen Years, etc.,
- - - - -
Nicolas D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Jay A. Maller, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Francis F. Caputo of counsel), for respondent.

Law Offices of Randall S. Carmel, P.C., Syosset (Randall S. Carmel of counsel), attorney for the child.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about October 15, 2009, which, upon a fact-finding determination that respondent father neglected the subject child, placed the child in the custody of the Commissioner of Social Services pending the completion of the next permanency hearing, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Court Act §§ 1012[f][i][B]; 1046[b][i]), including respondent's testimony that he threw a glass vase or

fish bowl at the child's mother, causing it to shatter near the child, and that he permitted the child to be alone with her mother despite his knowledge that the mother was abusing heroin and crack cocaine (*see Matter of Stephanie S. [Ruben S.]*, 70 AD3d 519 [2010]).

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

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5694 The People of the State of New York, Ind. 5603/09
Respondent,

-against-

Thomas Garner,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about June 10, 2010, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5695 The People of the State of New York, Respondent, Ind. 9753/98 9753A/98

-against-

Trevor Timber, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about August 3, 2010, which denied, on grounds of ineligibility, defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings on the motion.

Defendant is eligible for consideration for resentencing even though he had been released from custody on his drug

conviction but reincarcerated for a parole violation (*see People v Paulin*, 17 NY3d 238 [2011]), and even though he was again released while his resentencing motion was pending (*see People v Santiago*, 17 NY3d 246 [2011]).

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5696 The People of the State of New York, Ind. 2519/09
Respondent,

-against-

Martin Johnson,
Defendant-Appellant.

_____

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered December 7, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender, to concurrent terms of 3 years, unanimously affirmed.

The People made a sufficiently particularized showing of an overriding interest justifying closure of the courtroom during the undercover officers' testimony, which included evidence that the officers expected to return to the vicinity of defendant's arrest for further undercover operations, that unapprehended subjects of investigations remained at large, that the officers had been threatened in other undercover investigations, and that

the officers took precautions to conceal their identity (*see e.g. People v Ramos*, 90 NY2d 490 [1997], *cert denied sub nom. Ayala v New York*, 522 US 1002 [1997]). Instead of ordering a complete closure of the courtroom during the testimony of these officers, the Court permitted defendant's family to attend. Since defendant only challenged the sufficiency of the People's showing, he did not preserve his remaining arguments concerning the court's closure ruling (*see e.g. People v Manning*, 78 AD3d 585, 585-586 [2010], *lv denied* 16 NY3d 861 [2011]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits (*see id.*; *see also People v Mickens*, 82 AD3d 430 [2011], *lv denied* 17 NY3d 798 [2011]).

Defendant's challenges to the prosecutor's summation and the court's charge do not warrant reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5697 Rebecca Anderson, etc., et al., Index 100934/05
Plaintiffs-Respondents,

-against-

Sergio Zapata,
Defendant-Appellant.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellant.

Law Offices of Eric H. Green and Associates, New York (Hiram A. Raldiris of counsel), for respondents.

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Order, Supreme Court, Bronx County (George J. Silver, J.), entered December 7, 2010, which denied defendant's motion for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

Defendant's orthopedist found no limitations of motion regarding plaintiff Rebecca Anderson. Although defendant's neurologist found that she had limitations in 2010, there is no objective evidence to support a cervical injury (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). Any alleged injuries to her knees were shown to be the result of a preexisting

degenerative condition, which was confirmed, rather than refuted, by her radiologist (*see Valentin v Pomilla*, 59 AD3d 184 [2009]). Moreover, the failure to perform any range of motion testing contemporaneous with the accident eight years earlier renders any attempt to connect her present day injuries to the 2002 accident speculative (*see Batts v Medical Express Ambulance Corp.*, 49 AD3d 294, 295 [2008]).

Defendant satisfied his initial burden of establishing, prima facie, the absence of any triable questions of fact so as to entitle him to judgment as a matter of law as to plaintiffs Strawberry and Mychal Isaac by submitting the affirmed reports of an orthopedic surgeon and a neurologist (*see DeJesus v Paulino*, 61 AD3d 605 [2009]). The differences between the standards for normal ranges of motion cited by defendant's orthopedic and neurologic reports are not significant. Both doctors concluded that plaintiffs Strawberry and Mychal Isaac had normal ranges of motion, and the minor differences in what they regarded as normal

ranges do not affect defendant's entitlement to summary judgment (*see Feliz v Fragosa*, 85 AD3d 417 [2011]).

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

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5698 The People of the State of New York, Ind. 3566/08
Respondent,

-against-

John Hood,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered on or about October 7, 2008, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5699N Reginald Antoine Mabry, Index 301303/11
Plaintiff-Appellant,

-against-

Neighborhood Defender Service, Inc., et al.,
Defendants-Respondents.

_____

Reginald Antoine Mabry, appellant pro se.

McLaughlin & Stern, LLP, New York (Jacqueline C. Gerrald of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered February 28, 2011, which denied plaintiff's motion for a temporary restraining order to stay the termination of his employment, unanimously affirmed, without costs.

Plaintiff failed to show that he was likely to succeed on the merits, that he would suffer an irreparable and imminent injury if the injunction were withheld, and that the equities balanced in his favor (*see Doe v Axelrod*, 73 NY2d 748 [1988]). The record is devoid of any specific factual allegations or evidence to support plaintiff's claims of employment discrimination based on age and disability. Moreover, defendant Neighborhood Defender Service (NDS) demonstrated a legitimate nondiscriminatory reason for plaintiff's termination: an overall

cost-cutting reorganization during which his entire department was eliminated and replaced by an outside vendor (*see Cuccia v Martinez & Ritorto, P.C.*, 61 AD3d 609, 610 [2009], *lv denied* 13 NY3d 708 [2009]).

Nor does the record support plaintiff's claim that his discharge was retaliatory because it occurred on the same day as the filing of his complaint. To the contrary, plaintiff remained employed with NDS despite having filed claims with the Equal Employment Opportunity Commission and in federal court approximately two years before bringing this action (*see Allen v St. Cabrini Nursing Home, Inc.*, 198 F Supp 2d 442, 450 [SD NY 2002], *affd* 64 Fed Appx 836 [2d Cir 2003], *cert denied* 540 US 1154 [2004]).

Plaintiff has not shown irreparable harm, since he will be entitled to reinstatement and back pay if he prevails on the merits and his termination is annulled (*see Matter of Valentine v Schembri*, 212 AD2d 371 [1995]). Moreover, absent extraordinary circumstances, feelings of degradation and humiliation and damage to reputation and self-esteem do not constitute irreparable harm for the purposes of injunctive relief (*see Stewart v United States Immigration and Naturalization Serv.*, 762 F2d 193, 199-200 [1985]).

Plaintiff has not shown that the equities balance in his favor. If the injunction is withheld and plaintiff ultimately succeeds on the merits, he can be fully compensated for his loss. However, if NDS is forced to pay both plaintiff's salary and the aforementioned outside vendor's fees and then prevails on the merits, it is unlikely to be able to obtain compensation for its loss (*see Winkler v Kingston Hous. Auth.*, 238 AD2d 711, 713 [1997]).

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: OCTOBER 13, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5700 & [M-3695] In re Ronald A. Nimkoff, Petitioner, Index 350768/02

-against-

Hon. Laura E. Drager, etc., et al., Respondents.

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The Nimkoff Firm, New York (Ronald A. Nimkoff of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michael J. Siudzinski of counsel), for Hon. Laura E. Drager, respondent.

Katsky Korins LLP, New York (Sharon T. Hoskins of counsel), for Nancy Waldbaum-Nimkoff, respondent.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: OCTOBER 13, 2011

CLERK

Saxe, J.P., Friedman, Abdus-Salaam, Román, JJ.

4012-
4012A Yoda, LLC, et al., Index 115498/06
Plaintiffs-Respondents-Appellants,

-against-

National Union Fire Insurance
Company of Pittsburgh, PA,
Defendant-Appellant-Respondent,

Han Soo Lee, et al.,
Defendants-Respondents.

_____

Sedgwick Detert Moran & Arnold LLP, New York (J. Gregory Lahr of counsel), for appellant-respondent.

Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (Michael A. Miranda of counsel), for respondents-appellants.

Law Offices of Kenneth A. Wilhelm, New York (Barry Liebman of counsel), for respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 8, 2010, which, denied defendant National Union's motion for summary judgment and plaintiffs' cross motion for summary judgment, unanimously modified, on the law, to grant the cross motion to the extent of declaring, on the fourth cause of action, that National Union is equitably estopped from denying plaintiffs Yoda and Riverhead excess coverage in the underlying personal injury action, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered September 15,

2010, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

Plaintiffs Yoda and Riverhead, the general contractor and owner of a construction site, seek coverage under an excess insurance policy issued by defendant National Union to their subcontractor, Queens Stainless, with respect to the underlying Labor Law action. Their insurer, plaintiff United National, seeks a declaration that its coverage follows that of National Union.

The National Union excess policy follows the form of a commercial general liability policy, issued by First Specialty to Queens Stainless, that provides coverage to its insured for damages arising from bodily injury, and excludes coverage for liability arising from a contractual "agreement," except if the insured has assumed liability for such damages under an "insured contract," such as the subcontract between Yoda and Queens Stainless. The First Specialty policy also provides that its employer's liability exclusion "does not apply to liability assumed by the insured under an 'insured contract,'" and requires the insurer to defend an indemnitee of the insured in certain circumstances.

In 2003, Yoda tendered the defense and indemnity in the

underlying action to Queens Stainless and its insurers, and First Specialty accepted the tender, although no action for indemnification had been commenced against Queens Stainless. National Union actively participated in and monitored the litigation for the next three years, without issuing any disclaimer. In 2006, it accepted First Specialty's tender of its policy in connection with a court-ordered mediation, and attended the mediation with authority to settle the underlying action. Only after partial summary judgment was awarded in favor of the plaintiffs in the underlying action, and the damages trial was scheduled to begin, did National Union disclaim coverage, asserting that it had just "discovered" that the certificate of insurance provided to it by Yoda, which names Yoda and Riverhead as additional insureds, was false.

National Union's failure to timely disclaim coverage after tender was made by a party claiming indemnification from its insured, as required by Insurance Law § 3420(d), precludes it from disclaiming based on the employer's liability exclusion. However, the failure to disclaim "does not create coverage which the policy was not written to provide" (*Zappone v Home Ins. Co.*, 55 NY2d 131, 134 [1982]; *National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571 [2006]).

The First Specialty policy does not provide automatic additional insured coverage for parties indemnified under an "insured contract" (*compare Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595 [2009]). However, in convoluted fashion, it provides "insured contract" coverage to the named insured through an exception to an exclusion (*see* 17A Couch on Insurance 3d § 254:13). Even were we to find that the policy is ambiguous, the issue of the parties' intent is one of fact not resolved by the extrinsic evidence in this record (*see Katz v American Mayflower Life Ins. Co. of N.Y.*, 14 AD3d 195, 207-208 [2004], *affd* 5 NY3d 561 [2005]).

Although Insurance Law § 3420(d) does not create coverage, an insurance company may be estopped "from denying or disclaiming coverage where the proper defending party relied to its detriment on that coverage and was prejudiced by the delay of the insurance company in denying or disclaiming coverage based on the loss of the right to control its own defense" (*Liberty Ins. Underwriters, Inc. v Arch Ins. Co.*, 61 AD3d 482 [2009] [internal quotation marks and citation omitted]; *Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 38 [2006]). The doctrine may be applied in disputes between insurers (*see Liberty Ins. Underwriters*, 61 AD3d at 482). However, "[p]rejudice is

established only where the insurer's control of the defense is such that the character and strategy of the lawsuit can no longer be altered" (*Federated Dept. Stores*, 28 AD3d at 39).

In support of their motion for summary judgment, plaintiffs submitted evidence that National Union acknowledged coverage in correspondence and actively participated in the defense, culminating in its lead role in the mediation, and that plaintiffs had been prejudiced in the defense of the underlying action. If National Union had disputed coverage in a reasonably timely manner, plaintiffs could have impleaded Queens Stainless, thereby triggering insured contract coverage or, at least, timely resolution of any disclaimer. Plaintiff United National asserts that it relied on National Union's conduct and allowed its file to become inactive, believing that the matter would settle within the limits of the insurance provided by Queens Stainless's insurers. In opposition, National Union claimed that it had been misled by Yoda's tender of a certificate of insurance showing coverage. However, there is no evidence that Yoda acted in bad faith, and nothing prevented National Union from obtaining a copy of the primary policy during the three years following the tender (*see Utica Mut. Ins. Co. v 215 W. 91st St. Corp.*, 283 AD2d 421 [2001]; *compare Federated Dept. Stores*, 28 AD3d at 34-35

[purported insured failed to comply with insurer's requests for a copy of its contract with the insured, which would trigger "insured contract" coverage]). In the absence of any material issues of fact, National Union is estopped from denying that it provides excess coverage for Yoda and Riverhead in the underlying action. However, United National is not entitled to summary judgment against National Union on the issue of priority of coverage inasmuch as issues of fact exist as to whether United National reasonably relied to its detriment on National Union's conduct.

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

ENTERED: OCTOBER 13, 2011

CLERK

Saxe, J.P., Acosta, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

5330 The People of the State of New York, Ind. 3127/95
Respondent,

-against-

Malcolm Madison,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered May 28, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, and the matter remanded to Supreme Court for further proceedings.

Pursuant to the Court of Appeals' recent decision in *People v Paulin* (17 NY3d 238 [2011]), defendant's reincarceration for a parole violation after his release on parole for his drug

conviction does not render him ineligible for resentencing under the 2009 Drug Law Reform Act (L 2009, ch 56). Accordingly, defendant's motion for resentencing was improperly denied.

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

ENTERED: OCTOBER 13, 2011

CLERK

Tom, J.P., Friedman, Acosta, Renwick, DeGrasse, JJ.

5397 The People of the State of New York, Ind. 9513/97
Respondent,

-against-

Michael Dalton, also known as
Michael Walton,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about May 17, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded to Supreme Court for further proceedings consistent herewith.

Defendant is eligible to be resentenced under the 2009 Drug Law Reform Act (L 2009, ch 56), even though he was released on parole from custody on his drug conviction, but reincarcerated for a parole violation (*see People v Paulin*, 17 NY3d 238 [2011]). Moreover, this appeal was not rendered moot by the fact that

defendant was again paroled during its pendency (*see People v Santiago*, 17 NY3d 246 [2011]). We therefore remand this matter to Supreme Court for further consideration of the underlying motion.

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

ENTERED: OCTOBER 13, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam, JJ.

5447 & M-2623 GS Plasticos Limitada, Plaintiff-Appellant, Index 650242/09

-against-

Bureau Veritas, Defendant,

Bureau Veritas Consumer Products Services, Inc., Defendant-Respondent.

_____

Abduljaami, PLLC, New York (Saboor H. Abduljaami of counsel), for appellant.

Kilpatrick Townsend & Stockton LLP, New York (Jonathan E. Polonsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about April 7, 2010, which, insofar as appealed from, granted the motion by defendant Bureau Veritas Consumer Products Services, Inc. (BVCPS) to dismiss the negligence and tortious interference with prospective business relations claims, unanimously affirmed, without costs.

Plaintiff's claims stem from BVCPS's issuance of allegedly erroneous laboratory reports regarding the chemical testing of products manufactured by plaintiff. Plaintiff did not engage BVCPS to conduct the testing. Even assuming BVCPS rendered professional services, it is not alleged that plaintiff relied on

the reports or had any dealings with BVCPS. Hence, there is no allegation that the relationship between the parties sufficiently approached privity so as to give rise to a negligence cause of action (*see Credit Alliance Corp. v Arthur Andersen & Co.,* 65 NY2d 536 [1985]).

The claim alleging tortious interference with prospective economic relations fares no better. "To establish such a claim, a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff" (*Snyder v Sony Music Entertainment,* 252 AD2d 294, 299-300 [1999]). Here, it is alleged that but for BVCPS's conduct plaintiff would have entered into agreements with unnamed third parties. Plaintiff alleges that the "wrongful means" employed by BVCPS consisted of the alleged misrepresentations about plaintiff's products. This claim fails because it is not alleged that BVCPS made the misrepresentations to any of the unnamed third parties. Moreover, an implicit element of acting "for the sole purpose of harming the plaintiff" is knowledge of the prospective economic relation (*see Caprer v Nussbaum,* 36 AD3d 176, 204 [2006]). As the court correctly

found, the complaint does not contain allegations from which it can be inferred that BVCPS knew about the prospective agreements.

M-2623 - *GS Plasticos Limitada v Bureau Veritas, et al.*

Motion to strike portions of reply brief and impose sanctions denied.

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5701 The People of the State of New York, Ind. 3002/06
Respondent,

-against-

Alpha Diallo, also known as
Alpha Ismael Diallo,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered October 29, 2009, convicting defendant, upon his plea of guilty, of criminal possession in the fourth degree, and sentencing him to a term of 1 to 3 years, unanimously affirmed.

Defendant claims that, at the time of the plea allocution, the court was obligated to ask defendant if he understood he was giving up any psychiatric defense. Initially we note that defendant has not moved to withdraw his guilty plea. Moreover, this case does not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662 [1988]), because there was nothing in the plea allocution that cast doubt on defendant's guilt or raised any defense,

psychiatric or otherwise. Accordingly, this claim is unpreserved and we decline to review it in the interest of justice.

As an alternative holding, we also reject it on the merits. The record establishes that defendant's plea was knowing, intelligent and voluntary. Defendant's mental capacity to stand trial had already been established in proceedings under CPL 730. Defendant cites to proceedings, before a different Justice, relating to a possible defense of lack of responsibility by reason of mental disease or defect (*see* Penal Law § 40.15). However, nothing occurred at the plea proceeding that would trigger a duty on the court to inquire about a waiver of such a defense (*see e.g. People v Fiallo*, 6 AD3d 176, 177 [2004], *lv denied* 3 NY3d 640 [2004]).

Defendant made a valid waiver of his right to appeal, in a colloquy with the court as well as in writing (*see People v Ramos*, 7 NY3d 737 [2006]; *People v Lopez*, 6 NY3d 248 [2006]). That waiver forecloses review of defendant's contention that the sentence was harsh and excessive. As an alternative holding, we perceive no basis for reducing the sentence.

Defendant's constitutional speedy trial claim survives both his guilty plea and his appeal waiver, but it is nevertheless unreviewable. Defense counsel's speedy trial motion was made

entirely on statutory rather than constitutional grounds (*see People v Jeffries*, 62 AD3d 530 [2009], *lv denied* 13 NY3d 745 [2009]), and defendant abandoned his unresolved pro se motions asserting constitutional speedy trial claims (*see People v Berry*, 15 AD3d 233, 234 [2005], *lv denied* 4 NY3d 883 [2005]). In any event, we find no violation of defendant's constitutional right to a speedy trial (*see People v Taranovich*, 37 NY2d 442 [1975]).

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5703-
5703A

In re Janell J., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Shanequa J.,
Respondent-Appellant,

Cardinal McCloskey Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), attorney for the children.

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Orders of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about September 24, 2010, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (Social Services Law § 384-b[7][a]). The record shows that the agency made diligent efforts to encourage and strengthen respondent's relationship with her children by

referring her to counseling, parenting skills and anger management courses, and by scheduling regular supervised visitation (*see Matter of Jonathan M.*, 19 AD3d 197 [2005], *lv denied* 5 NY3d 798 [2005]). Although respondent completed many of the services to which she was referred, she failed to gain insight into her parenting problems and thus failed to adequately plan for the children's future (*see Matter of Mark Eric R. [Juelle Virginia G.]*, 80 AD3d 518 [2011]).

A preponderance of the evidence supports the finding that it is in the children's best interests to terminate respondent's parental rights and free the children for adoption by their foster mother, with whom they have lived for several years (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the children have bonded with the foster mother, who wishes to adopt them, and have thrived under her

care. By contrast, respondent made no progress in counseling. Under the circumstances, a suspended judgment is not warranted (*see Matter of Juan A. [Nhaima D.R.]*, 72 AD3d 542, 543 [2010]).

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5704 The People of the State of New York, Ind. 1399/09
Respondent,

-against-

Gerald Jones,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Kassandra A. King 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 (Richard D. Carruthers, J.), rendered on or about February 3, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 13, 2011

CLERK

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

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5705-
5706 The People of the State of New York, Ind. 1649/06
Respondent,

-against-

George Martinez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Shearman & Sterling LLP, New York (Brian Polovoy of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Dominic R. Massaro, J.), rendered May 3, 2007, convicting defendant, after a jury trial, of burglary in the second degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 17½ years to life, respectively, and order, same court (David Stadtmauer, J.), entered on or about June 11, 2010, which, after a hearing denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously affirmed.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668

[1984]). We reach this conclusion with respect to both counsel's advice to defendant and counsel's conduct of the trial.

The record supports the hearing court's findings that trial counsel understood his client could be convicted of burglary under an accessorial liability theory even though the indictment did not charge acting in concert, that counsel advised his client accordingly, and that counsel gave proper advice in connection with a plea offer of 5½ to 11 years, which defendant rejected.

There is no basis for disturbing the hearing court's credibility determinations. In particular, where counsel testified about his standard practices, that testimony was more plausible, under the circumstances, than defendant's testimony.

There is no merit to defendant's argument that evidence of confidential communications between himself and a prior attorney was introduced at the hearing in violation of the attorney-client privilege. In any event, the evidence at issue was not crucial to the hearing court's determination.

The trial record, taken together with the submissions and testimony received in connection with the CPL 440.10 motion, establishes that counsel provided effective assistance at trial. Faced with overwhelming evidence of defendant's guilt, counsel

employed a jury nullification strategy (*see Anderson v Calderon*, 232 F3d 1053, 1087, 1089 [9th Cir 2000], *cert denied* 502 US 847 [2001]), seeking to persuade the jury to disregard the law of accessorial liability. This strategy was objectively reasonable under the circumstances (*see e.g. People v Steel*, 207 AD2d 744 [1994], *lv denied* 84 NY2d 1039 [1995]). Those circumstances included, among other things, the fact that defendant had insisted on giving incriminating testimony before the grand jury. In any event, we find that defendant was not prejudiced by counsel's conduct.

We have considered and rejected defendant's remaining claims.

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5709-
5709A In re Virginia C.,

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

Sharri A.,
Respondent-Appellant,

Administration for Children Services,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Frederic P. Schneider, New York, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about April 28, 2010, which, upon a finding that respondent mother derivatively neglected the subject child, placed the child in the custody of the Commissioner of Social Services until the completion of the next permanency hearing, unanimously affirmed, without costs. Appeal from order of protection, same court and Judge, entered on or about April 28, 2010, which directed respondent to stay away from and not communicate with the subject child and her caretaker, except for agency-supervised visits, until April 27, 2011, unanimously

dismissed, without costs, as moot.

Family Court providently exercised its discretion in admitting respondent's testimony on cross-examination that she used cocaine after the petition was filed. Respondent opened the door to such evidence by testifying on direct examination that, prior to the filing of the petition, she had left several drug treatment programs and had not tested positive for drugs, and by falsely testifying on cross-examination that she had never used drugs after completing such a program (*see People v Massie*, 2 NY3d 179, 184-185 [2004]; *Matter of Ashley X.*, 50 AD3d 1194, 1196 [2008]). In any event, even if Family Court improperly admitted the postpetition evidence, such error was harmless. The court based its finding of derivative neglect on respondent's failure to complete a drug treatment program, not her postpetition drug use (*see Matter of Brianna R. [Marisol G.]*, 78 AD3d 437, 438 [2010], *lv denied* 16 NY3d 702 [2011]).

A preponderance of the evidence supports Family Court's finding that respondent derivatively neglected the subject child (*see* Family Court Act § 1046[a][i]). There were two prior orders finding that respondent had neglected her other children, and respondent admitted that she failed to complete a required drug treatment program (*see Matter of Jocelyn S.*, 30 AD3d 273 [2006]).

The appeal from the order of protection is dismissed as moot, because the period it was to be in effect has expired (*see Matter of Deivi R. [Marcos R.]*, 68 AD3d 498, 499 [2009]). However, were that not the case, the order of protection would have to be vacated as having been made without evidentiary basis and without affording respondent an opportunity to be heard.

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

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5712 The People of the State of New York, SCI 2760/96
Respondent,

-against-

Jimmy Cinero, also known as
Roberto Sanchez Garcia,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ellen M. Coin, J.), rendered on or about November 30, 2009, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5713 Lauren Sclafani, Index 115551/08
Plaintiff-Respondent,

-against-

Brother Jimmy's BBQ, Inc., et al.,
Defendants-Respondents,

Bacardi, USA, Inc., et al.,
Defendants-Appellants.

_____

Hunton & Williams LLP, New York (Jeffrey W. Gutchess of counsel), for appellants.

Kramer, Dillof, Livingston & Moore, New York (Matthew Gaier of counsel), for Lauren Sclafani, respondent.

Gallo Vitucci & Klar, LLP, New York (Daniel P. Mevorach of counsel), for Brother Jimmy's BBQ, Inc., Brother Jimmy's NYC Restaurant Holdings, LLC, Brother Jimmy's Franchising, LLC, Josh Lebowitz, Michael DaQuino and Kevin Bulla, respondents.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered May 27, 2010, which, insofar as appealed from, denied the motion of the Bacardi defendants (Bacardi) pursuant to CPLR 3211(a)(7) to dismiss the complaint as against them, unanimously affirmed, with costs.

Plaintiff patron alleges that she was injured when, while at the bar at defendants-respondents' restaurant, the bartender, in a pyrotechnic display, poured Bacardi's high-alcohol content rum onto the surface of the bar and ignited it. At that point, the

flame ignited into the bottle and the flaming contents shot out of the mouth of the bottle. As a result, plaintiff sustained severe burns.

The motion court properly concluded that under the circumstances plaintiff has viable claims for both negligence and strict liability based on defective design. Bacardi has submitted no evidence substantively contradicting the facts set forth in the complaint or in the affidavits of plaintiff's experts (*see generally Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Yun Tung Chow v Reckitt & Colman, Inc.*, 17 NY3d 29, 33-34 [2010]). Although Bacardi included warning labels on the bottle of Bacardi 151 and installed a removable flame arrester, it did so while actively promoting the very pyrotechnic uses that caused plaintiff's injuries.

The court also properly declined to dismiss plaintiff's request for punitive damages. Contrary to Bacardi's contention, punitive damages have been "sanctioned under New York law in actions based on negligence and strict liability" (*see Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 204 [1990] [internal citations omitted]).

We have considered Bacardi's remaining arguments, including the challenges to certain statements made by plaintiff's experts, and find them unavailing.

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5714 The People of the State of New York, Ind. 5903/00
Respondent,

-against-

Joey Riddick,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 17, 2009, resentencing defendant, as a second felony offender, to an aggregate term of 10 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). There is no merit to defendant's argument that a 60-day stay of judgment

issued in defendant's article 78 proceeding against the Department of Correctional Services imposed a deadline on the resentencing court.

We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5715 The People of the State of New York, Docket 57874C/07
Respondent,

-against-

Saneisha Walcott,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and White & Case LLP, New York (Michael Hamburger of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered March 11, 2008, convicting defendant, after a nonjury trial, of attempted petit larceny and attempted criminal possession of stolen property in the fifth degree and sentencing her to a conditional discharge and payment of restitution, unanimously reversed, on the law, the judgment vacated, the accusatory instrument dismissed, and restitution, to the extent paid, remitted.

The verdict was based on legally insufficient evidence. In any event, regardless of sufficiency, the verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

This case involves missing cash at a store where defendant and other persons worked as cashiers. The only evidence purporting to show that it was defendant who stole the money was a recording of a 90-second video surveillance. This Court has viewed the tape and finds that it fails to prove beyond a reasonable doubt that defendant committed the crimes charged. It is impossible to determine, circumstantially or otherwise, that the unidentifiable object seen in defendant's hand was a safe-drop envelope containing cash. Furthermore, there was no other evidence to explain how defendant was able to take money out of the cash registers or the safe and move it over to the counter area without being detected by her coworkers or by the store's surveillance system.

We accord great deference to the fact-finder's opportunity to hear testimony and observe demeanor. However, this case presents an issue of competing inferences rather than credibility. The complainant, who was not present at the time of the alleged theft, reviewed the videotape and testified as to inferences he drew from it. However, under the circumstances the

complainant was in no better position to evaluate the tape than anyone else who viewed it.

In light of the foregoing, we do not reach defendant's remaining contention.

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5717 The People of the State of New York, Ind. 2195/09
Respondent,

-against-

Jason E. Norton,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at plea; Edward McLaughlin, J. at sentencing), rendered on or about July 14, 2009, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5718 The People of the State of New York, Ind. 311/09
Respondent,

-against-

Roy Bodden,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 4, 2010, convicting defendant, after a jury trial, of criminal possession of a weapon in the second and third degrees, criminal possession of a controlled substance in the fifth degree and criminally using drug paraphernalia in the second degree, and sentencing him to an aggregate term of 9½ years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term for the second-degree weapon possession conviction to 5½ years, resulting in new an aggregate prison term of 5½ years, and otherwise affirmed.

Defendant did not preserve his claim that his weapon convictions were based on legally insufficient evidence, and we

decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. We also reject defendant's claim that these convictions were against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's defense of temporary lawful possession was based entirely on his own testimony, which the jury was entitled to discredit.

We find the sentence excessive to the extent indicated.

Defendant's constitutional argument is unpreserved (*see People v Ianelli*, 69 NY2d 684 [1986], *cert denied* 482 US 914 [1987]), and we reject defendant's argument to the contrary (*see e.g. People v Rivera*, 33 AD3d 450, 451 [2006], *lv denied* 7 NY3d 928 [2006]). We decline to review this claim in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5721-
5721A-
5721B-
5721C & M-3815 M-3976

Crystal Biton,
Plaintiff-Appellant,

-against-

Joe Turco, et al.,
Defendants-Respondents.

Index 115485/06

_____

Crystal Biton, appellant pro se.

Morgan Melhuish Abrutyn, New York (Douglas S. Langholz of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered February 16, 2011 and on or about December 13, 2010, which denied plaintiff's motion to vacate a prior order that dismissed the action pursuant to 22 NYCRR 202.27(b) for her failure to appear at a preliminary conference, unanimously affirmed, without costs. Orders, same court and Justice, entered January 12, 2010 and January 6, 2010, which denied plaintiff's motion seeking admissions from defendants as to the allegations in the complaint, unanimously affirmed, without costs.

A motion to vacate a dismissal for failure to appear at a scheduled court conference (22 NYCRR 202.27) must be supported by a showing of reasonable excuse for the failure to attend the conference and a meritorious cause of action (*see Donnelly v Treeline Cos.*, 66 AD3d 563 [2009]). The showing of merit necessary to vacate a section 202.27 default is less than what is necessary for opposing a motion for summary judgment (*see Goodwin v New York City Hous. Auth.*, 78 AD3d 550 [2010]).

Here, even assuming plaintiff alleged a reasonable excuse for the failure to appear at the conference based on law office failure, the court did not improvidently exercise its discretion in denying plaintiff's motion to vacate the default on the ground that she failed to show a meritorious cause of action (*see e.g. Chiaramonte v Coppola*, 81 AD3d 426 [2011]; *DeRosario v New York City Health & Hosps. Corp.*, 22 AD3d 270 [2005]; *Fink v Antell*,

19 AD3d 215 [2005]; *Ortiz v Silver Dollar Tr. Inc.*, 10 AD3d 585 [2004]).

M-3815
M-3976 - *Crystal Biton v Joe Turco, et al.*

Motions seeking to vacate and quash orders denied.

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

ENTERED: OCTOBER 13, 2011

CLERK

Catterson, J.P., Richter, Manzanet-Daniels, Román, JJ.

5722N In re State Farm Mutual Automobile Insurance Company, Petitioner-Appellant, -against- Andrew A. Beddini, et al., Respondents-Respondents. Index 110500/10

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for appellant.

Ronemus & Vilensky, LLP, New York (Michael B. Ronemus of counsel), for respondents.

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered February 1, 2011, which denied the petition to permanently stay arbitration of respondents' uninsured motorist claim and dismissed the proceeding, unanimously reversed, on the law, without costs, and the petition granted.

Respondents were traveling on a Vespa motorscooter behind a pickup truck being operated by an unidentified driver. A large, cardboard box measuring approximately five feet by four feet, flew off of the pickup truck and became lodged in the front wheel of the Vespa. This caused respondents to be ejected from the motorcycle and to sustain serious injuries. Respondents filed an uninsured/underinsured motorist claim under respondent Beddini's

automobile insurance policy issued by petitioner and they demanded arbitration of the claim.

In *Matter of Allstate v Killakey* (78 NY2d 325 [1991]), relied upon by the motion court, the claimant was killed when a tire and rim from an unidentified vehicle struck the claimant's vehicle, causing it to crash. The Court of Appeals reversed the stay of arbitration of the uninsured motorist claim, holding that physical contact occurs "when the accident originates in collision with an unidentified vehicle, or an integral part of an unidentified vehicle" (*id.* at 329). The Court implicitly found that the tire and rim that caused the accident were essential to the operation of the truck, and thus, an integral part of it. Here, however, the cardboard box is not an integral part of the pickup truck. Accordingly, respondents' collision with the box does not constitute the type of physical contact required to

impose uninsured motorist coverage (*see e.g. Matter of Smith [Great Am. Ins. Co.]*, 29 NY2d 116 [1971]; *Matter of Insurance Co. of N. Am. [Carrozo]*, 203 AD2d 210 [1994]).

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

ENTERED: OCTOBER 13, 2011

CLERK